



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4102891/2018**

**Held in Edinburgh on 27, 28, 29, 30, 31 January, 5 and 6 February 2025**

**Members' Meetings held on 20 and 25 February 2025**

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**Employment Judge M Sutherland  
Tribunal Member M Watt  
Tribunal Member S Cardownie**

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**Karen Steedman**

**Claimant  
Represented by  
Mr S Swan, Solicitor**

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**East Lothian Council**

**Respondent  
Represented by  
Mr B Napier, Counsel  
Instructed by  
Harper Macleod**

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## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Tribunal is that:

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1. The complaint of discrimination arising from disability does not succeed and is accordingly dismissed
2. The complaint of unfair dismissal does not succeed and is accordingly dismissed

**E.T. Z4 (WR)**

3. In respect of the prior finding of the Cowen Tribunal on 5 March 2020 that there was a failure to make a reasonable adjustment, the respondent is ordered to pay the claimant compensation in sum of £15,250 plus judicial interest of £10,178.

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## **REASONS**

### **Introduction**

1. The final hearing was held in person. Both parties had the benefit of professional representation.
2. The procedural background to this claim is complicated. The claimant was employed by the respondent for 16 years, latterly as an Employability Support Worker. She was absent from work for 17 months (certified by her GP as being unfit for work because of work related stress) until her dismissal. In February 2018 the claimant lodged a tribunal claim making complaints of harassment related to disability, failure to make reasonable adjustments, discrimination arising from disability and unfair dismissal, which were denied by the respondent. In November 2019, at a hearing on liability, an employment tribunal chaired by EJ Cowen found in favour of the claimant on all counts (the Cowen tribunal). In April 2022 the findings of discrimination arising from disability and unfair dismissal were overturned on appeal by the Employment Appeal Tribunal and remitted to a different tribunal for a re-hearing. (There were originally two complaints of failure to make reasonable adjustments one of which was overturned on appeal but that complaint was withdrawn during the course of this hearing.)
3. At a case management preliminary hearing in July 2022 before EJ d'Inverno the complaints for harassment and failure to make reasonable adjustments were remitted to the Cowen tribunal for a hearing on remedy and the complaints for discrimination arising from disability and unfair dismissal were remitted to a tribunal to be chaired by him (the EJ d'Inverno tribunal) for a hearing on both liability and remedy. In March 2024 the Cowen tribunal issued a remedy judgment in respect of the complaints of harassment related to disability and requested the EJ d'Inverno tribunal to decide remedy on the failure make reasonable adjustments complaint if they had sufficient

information (and if not, to remit back to the Cowen tribunal). An 8-day final hearing before the EJ d'Inverno tribunal was listed for November 2024. It was then postponed and re listed before this tribunal.

4. At this final hearing the claimant gave evidence on her own behalf and called  
5 Dr Alison Harper (Chartered Clinical Psychologist). The respondent called the following witnesses: Professor Mark Taylor (Consultant Psychiatrist), Douglas Proudfoot (ex-Head of Development) (who gave evidence remotely by CVP video), Tom Shearer (ex-Head of Communities), Alison Hood (ex-Team Leader, Employability), Colin Forbes (ex-Business Unit Manager) and Zoe  
10 McFadzean (Team Manager HR).
5. Evidence in chief was given by recourse to witness statements initially prepared for the Cowen tribunal in 2019 and updated for this hearing in 2024. The claimant lodged a witness statement for Steven Owen, and the respondent lodged a witness statement for Keith McLaughlin, neither of whom  
15 was called to give evidence and as agreed with the parties those statements were not relied upon.
6. In advance of and during the final hearing parties engaged in significant co-operation with each other with a view to assisting the tribunal in furtherance of the overriding objective. Parties lodged joint and supplementary bundles to  
20 which documents were added during the hearing (extending to around 3,000 pages). Parties also agreed and lodged a cast list and a chronology of events (7 pages). Parties lodged a joint schedule of loss setting out which losses were agreed and which in dispute (19 pages).
7. Parties were in agreement that the claimant was disabled by reason of a brain  
25 aneurysm, depression and anxiety at the relevant time. The claimant continues to suffer from issues affecting her mental health. It was confirmed that no adjustments were needed beyond breaks as required. The claimant was able to give detailed and articulate answers to questions we did not consider that issues affecting her mental health negatively affected her ability  
30 to fully participate.
8. The parties lodged written submissions which were expanded upon orally.
9. The following initials are used in this judgment by way of abbreviation -

Initials	Name	Job Title
AL	Angela Leitch	Chief Executive
AP	Alexa Paterson	Human Resource Adviser
AH	Alison Hood	Team Leader, Employability
Dr AH	Dr Alison Harper	Chartered Clinical Psychologist
CF	Colin Forbes	Business Unit Manager
DO	Derek Oliver	Service Manager
DP	Douglas Proudfoot	Head of Development
EW	Ester Wilson	Service Manager, Economic Development
JS	Jim Scott	Transition Officer, Employability
Dr JP	Dr John Pollock	Actuary
KS	Karen Steedman	Employability Support Worker (Claimant)
KM	Keith McLaughlin	Senior HR Adviser
Dr MT	Dr Michael Taylor	Consultant Psychiatrist
Prof MT	Professor Mark Taylor	Consultant Psychiatrist and Medical Doctor
MKR	Mary Keenan Ross	Consultant Clinical Psychologist
TS	Tom Shearer	Head of Communities
SN	Sheila Northcott	Team Leader, Employability
SO	Steven Owen	KS's ex-partner
ZM	Zoe McFadzean	Team Manager, HR

### List of Issues

10. The agreed list of issues (amended in light of extensive discussions at the start of the hearing) was as follows –

#### Liability

5 Unfair Dismissal – section 98 of the Employment Rights Act 1996

1. What was the potentially fair reason(s) for the dismissal?

*The Respondent relies on the potentially fair reasons of capability and some other substantial reason.*

*Was the reason for the claimant's dismissal that:*

- 10
- 1. She had been continuously absent from work since May 2016;*
  - 2. She was absent by stated reason of work place stress caused by bullying and harassment but the grievance process has been exhausted*
  - 3. She was unfit for her substantive post and OH were unable to advise when should would be fit; and*

4. She was unwilling to participate in redeployment because it was time limited?

The claimant accepts that this was the reason for the dismissal and that it was potentially fair.

5 2. Was it reasonable for the Respondent to treat that reason(s) as sufficient to justify dismissal, having regard to all the circumstances?

The respondent asserts that claimant's dismissal was fair in summary because:

1. She had been absent from work for 17 months;
2. She had exhausted her entitlement to sick pay;
- 10 3. She had been offered redeployment on 3 occasions but had declined;
4. Ill health retirement was not an option because she was fit for work;
5. They acted in compliance with their managing absence procedure
6. She had relationship difficulties with managers and colleagues

The claimant asserts her dismissal was unfair in summary because:

- 15 1. The respondent previously failed to make the reasonable adjustment set out in the Cowen Judgement (remove JS as manager)
2. The respondent had previously failed to allow her to work from home or a satellite office in her substantive role but reporting to another manager when she was fit to do so;
- 20 3. The respondent failed to redeploy the claimant into an alternative role in another department as an alternative to dismissal.
4. Had failed to consider ill-health retirement

25 The claimant accepts that the Respondent acted in compliance with their absence procedure and does not assert any procedural failings.

Disability status under section 6 of Equality Act 2010

The relevant time is the period from 24 February 2016 (harassment by JS) to 11 October 2017 (dismissal by TS).

Parties are in agreement that:

- 30 1. The claimant was disabled by reason of a brain aneurysm, depression and anxiety at the relevant time.
2. The respondent knew or could reasonably be expected to know that the claimant was disabled by reason of a brain aneurysm, depression and anxiety at the relevant time.

35 Failure to make reasonable adjustments contrary to sections 20, 21 and 22 of the Equality Act 2010

The complaint of a failure to make a reasonable adjustment to the four week time limit in the redeployment policy by removing it or extending it was withdrawn by the claimant and accordingly falls to be dismissed.

40 Discrimination for a reason arising out of disability contrary to section 15 of the Equality Act 2010

1. Was the unfavourable treatment (i.e. the dismissal) because of something arising from the Claimant's disability?

2. If so, can the Respondent show that this was justified (i.e. a proportionate means of achieving the legitimate aims of (1) ensuring that the Respondent provided an effective service to vulnerable adults; and/or (2) minimising the adverse impact KS's long-term and continuing absence was having on the team; and/or (3) making use of the Respondent's resources in a way that demonstrated good value)?

The claimant accepts that these are legitimate aims but does not admit these were the aims of the TS when he dismissed her and in any event her dismissal was not a proportionate means of achieving these aims.

### **Remedy**

The claimant asserts that:

1. she was rendered temporarily unfit for her substantive role in May 2016 because of the harassment by JS on 24 February and 1 March 2016;
2. She was fit for her substantive role after 12 October 2016 and would have returned to it in October or November 2016 had the reasonable adjustment (removing JS as her manager) been implemented;
3. She was rendered unfit for her substantive role after 29 November 2016 by the failure to remove JS as her LM but was fit to perform another role until October 2017;
4. She was rendered permanently unfit for any work in Oct 2017 by the decision to dismiss.

The respondent asserts that:

1. She was rendered unfit for her substantive role in May 2016 because of the disciplinary investigation which commenced in April 2016
2. She was unfit for any work from October 2016 to May 2017
3. She was fit for work in another role from May 2017 to October 2017 but was refusing to participate in the redeployment process
4. She was fit for any work from October 2017 onwards i.e. she is not permanently unfit for any work.

1. What past financial loss (if any) has the Claimant suffered because of any or all of the unlawful acts found? Without prejudice to that generality:

#### **Pre-dismissal loss of earnings**

½ Sick pay entitlement from 2 October 2016 to 1 April 2017 = £[see sch of loss]

No sick pay entitlement from 2 April 2017 to 11 October 2017 = £[see sch of loss]

#### **Post dismissal earnings**

##### **Pension and holiday pay only**

12 months (12 October 2017/2018) of £19,235

12 years and 7 weeks to retirement age (12 October 2017 to 24 November 2029) of £282, 129 (173,050 + 124,253 - £4,756 - 6.5/12 x £19,235)

**Less PILON of £5871.60**

(i) would the Claimant still have been dismissed, but for the unlawful acts?

(ii) are the Claimant's pre-dismissal loss of earnings attributable in whole or in part to the unlawful acts?

(iii) are the Claimant's post-dismissal loss of earnings attributable in whole or in part to the unlawful acts?

2. What future financial loss (i.e. from the date of the remedy hearing) will the Claimant suffer because of any or all of the unlawful acts found?

3. In the event that past or future financial loss is awarded, should the awards be limited in time or subject to a percentage deduction to reflect:

- 5 (i) the possibility that the Claimant's employment may have ended prior to her statutory retirement age (67) due to unconnected ill-health?

The respondent asserts that:

1. She would have remained on sick leave and would have been dismissed within a period of 6 to 12 months of 11 October 2017
- 10 2. She had had periods of long term sick absence in the past

(ii) the possibility that the Claimant's employment may have ended prior to her statutory retirement age (67) for any other reason?

The respondent asserts that:

- 15 1. She would have resigned within 6 months because she had lost all trust in the respondent -
  - a. She had submitted complaints against AH and JS
  - b. She refused to participate in the grievance investigation
  - c. The respondent refused to consider her appeal against the written warning
- 20 2. She would have been dismissed within 6 months because -
  - a. Of poor performance (there was an ongoing performance review and she had a history of intransigence and antagonism towards managers)
  - b. Of SOSR (she was refusing to participate in redeployment and had deteriorating relationships with colleagues)

- 25 (iii) a failure to mitigate?

Respondent asserts that:

1. The Claimant was fit to work from May 2017 and ought reasonably to have secured alternative employment with adjacent local authorities within 12 months i.e. by May 2018

- 30 4. What pension loss has the Claimant suffered because of the unlawful acts found? pension loss since dismissal:

If not fit to work until retirement age, £129,400

If not fit to work for 1 year: 20.9% pension (£4020) or £5,332.03

- 35 5. Should that award be limited in time, subject to a percentage deduction, or otherwise reduced according to the Ogden table to reflect:

(i) the possibility that the Claimant's employment may have ended prior to her statutory retirement age due to unconnected ill-health?

(ii) the possibility that the Claimant's employment may have ended prior to her statutory retirement age for any other reason?

- 40 (iii) any reasonable steps that the Claimant should take to mitigate her pension loss (assuming any are possible)?

6. Injury to feelings – how much should be awarded?

See schedule of loss

- 45 7. Personal injury – how much should be awarded, having regard both to the severity and duration of any injury caused by the unlawful acts?

See schedule of loss

8. Are there any other causes, apart from the unlawful acts which have materially contributed to the Claimant's adverse mental health? If so:

(i) is it possible to apportion the effects attributable to those, as against the unlawful acts?

5 (ii) if (and only if) it is possible, what apportionment should be made?

9. Which elements of loss accrue interest and, in respect of those, what interest is due?

8% from mid-point to calculation date for past financial losses

8% from 12 October 2017 to calculation date for injury to feelings

10 10. Does a requirement for grossing up arise?

Parties agree may be required depending upon the size of the award

Note on Unfair Dismissal (if relevant)

11. Should there be any reduction made to any compensatory award in respect of contributory fault on the part of the Claimant?

15 The respondent asserts she was unreasonably refusing to participate in redeployment

12. In respect of any compensatory award, should there be a Polkey reduction made on the basis that the Claimant would have been fairly dismissed in any event?

Issues of remedy arising from the Cowen Tribunal Judgment

20 Failure to make reasonable adjustments contrary to sections 20, 21 and 22 of the Equality Act 2010

Paragraph 75(a) of the Cowen Tribunal's original judgment of 10 March 2020 is undisturbed. The Tribunal is asked to decide remedy for this issue. If they consider they do not have sufficient information to do so, the Cowen Tribunal has indicated it  
25 will deal with this matter at a further hearing. (Given the significant passage of time both parties were in agreement that this issue should be determined by this tribunal if at all possible.)

This contains the following findings that -

30 1. The Respondent applied a PCP in the form of requiring the whole team to work with JS whose management style and decision making was confrontational and forceful.

35 2. The application of this PCP placed the Claimant, as a disabled person, at a substantial disadvantage in comparison to persons who are not disabled because his management style and decision making caused her to feel anxious giving rise to an increased risk of anxiety and/or depression.

3. The Respondent knew (or reasonably be expected to know) that the Claimant in light of her disability was likely to be placed at the disadvantage referred to above because the claimant had raised a grievance against JS and the issue of her move was raised by SO at the meeting on 12 October 2016.

40 5. It was reasonable for the respondent to take the step of "move her away from the management of JS to another team or a different manager" to avoid this disadvantage. "There seemed to be no reasonable explanation provided by the Respondent as to why the same type of move could not reasonably have occurred in 2016".

45 Harassment related to disability contrary to Section 26 Equality Act 2020

The following acts were found by the Cowen Tribunal to be acts of harassment related to disability by reason of their effect upon her:



1. On 24 February 2016 JS said at meeting with the claimant upon her return to work after a period of sick absence due to back pain "you will probably be off again and I am uncertain about your future".

2. On 1 March 2016 JS shouted at the claimant and tried to get her to sign a stage 2 absence form.

On 6 March 2024 the respondent was ordered to pay the claimant £5,000 including interest in respect of those breaches. The claimant does not assert that the harassment by JS caused or contributed to her permanent unfitness for work. However the failure to make the adjustment of removing him as her manager may have done so.

### **Findings in fact**

11. The Tribunal makes the following findings in fact (the claimant is referred to as 'KS' throughout the findings in fact):

12. The respondent is a local authority which at the relevant time had a budget of around £3M, employed around 4.5k staff and had a dedicated HR department. The claimant, KS commenced employment with the Respondent on 21 August 2001 initially as an Additional Support Needs Auxiliary, progressing to Assistant Behavioural Support Officer, then Pupil Support Officer, and latterly as an Employability Support Officer.

13. KS has a long history of intermittent episodes of anxiety with depression which started prior to her employment with the respondent. She suffered a ruptured brain aneurysm in 1998. She has suffered from occasional panic attacks since around 2008. These episodes of anxiety and depression have been triggered by various personal and work related stressors.

14. KS described good employment relationships until the transfer of her line management to AH in October 2012. Prior to that transfer KS had absences from work related to her mental health.

15. In September 2012 KS's husband passed away which she found very hard.

2014

16. KS worked as a Pupil Support Officer and was line managed by AH. AH reported to CF, Team Manager for East Lothian Works (ELW). CF reported to reported to EW, Service Manager.

17. In May 2014 KS submitted a written grievance alleging bullying and harassment by AH. In January and April 2014 KS had consulted with her GP who noted panic attacks, cannot cope/ clashes with her line manager, work stressful. KS was absent from work with certified stress/ anxiety/ depression from 14 April to 22 June.

18. In June 2014 KS was offered external mediation which she declined. Pending the outcome of the disciplinary investigation, CF offered her a temporary transfer to a vacant post line managed by JS working with adults within ELW which she accepted.

10 *August 2014 – Investigation into allegations of harassment and bullying by AH*

19. In August 2014 a disciplinary investigation was conducted by an external manager into KS's allegations of harassment and bullying by AH. Statements were taken from 9 witnesses including KS. The findings of the investigation report were that: the allegations were unfounded; "the majority of issues raised by KS ... fall into the category of being confused with managing employees...that AH adopts a fair, supportive, relaxed and compassionate style of management towards KS even when faced with situations of a lack of respect for her position"; "it is likely that AH has herself been the victim of bullying but has maintained a professional and supportive manner throughout." The report concluded in summary: "The current relationship between KS, AH and the wider team is unsustainable and given the consistency of commentary from that team, past and present and dating back over ten years, there is a clear need to consider KS's behaviours and performance, possibly to the extent of undertaking a disciplinary investigation into her behaviours but certainly implement a performance management process to support her through to acceptable levels of performance and behaviours. Given the number of references to possible mental health issues quoted in statements taken from the team, it is recommended that health considerations form part of this process."

20. In September 2014 EW advised KS of the outcome of the investigation namely that issues had been identified with her own performance and behaviour, and informal action would be taken. It was agreed that her

temporary transfer would become permanent – KS regarded JS as an excellent manager and she enjoyed working in his team. In October EW met with KS to discuss her performance and behaviour and advised that JS would monitor these issues.

- 5     21. In October 2014 KS sought redeployment because JS and AH work closely together but this was declined. She was offered mediation which she declined.
22. KS was absent from work following brain aneurysm surgery from 28 October 2014 to 3 February 2015.

*2015*

- 10    23. Following a service review of East Lothian Works (ELW) in Aug 2015, KS was matched in to the post of Employability Support Officer reporting to JS.
24. The department structure was then as follows: CF was Team Manager for East Lothian Works ('ELW') which had around 29 staff. (CF himself reported to EW, Service Manager who reported to DP, Head of Development.) CF had
- 15    three direct reports: AH, Team Leader who managed youth employability; SN, Team Leader who managed adult employability; and an administrative lead. KS reported to JS who reported to SN.
25. KS felt she had a good working relationship with JS and his team throughout 2015.

20    *2016*

26. KS was absent with back pain from 29 January to 28 February 2016. On 24 February a return to work meeting was conducted by JS. On 1 March JS held an absence management meeting with KS.
27. On 9 March JS raised with KS the issue of her travelling to Berwick without
- 25    authorisation on 8 March. On 10 March KS consulted with her GP regarding work related stress.
28. The claimant's father died on 28 March and she was absent on bereavement leave from 29 March to 10 April.

29. On 29 April JS and SN held a performance management meeting with KS and her union rep. The claimant and her rep felt that JS had behaved aggressively at that meeting.

30. JS and AH consulted with CF regarding her travel to Berwick on 8 March. CF  
5 felt they were struggling to engage her in any meaningful dialogue about her performance and was frustrated by her lack of respect. CF concluded there required to be a disciplinary investigation. On 28 April CF advised KS that there would be a disciplinary investigation into allegations that she travelled to Berwick without authorisation and this was formally confirmed in writing on  
10 4 May. KS was extremely distressed by this and suffered a panic attack.

*May 2016 –misconduct investigation / absence from work*

31. On 5 May the claimant suffered a significant stress reaction and was absent from work with certified work related stress until her dismissal.

32. On 5 May her GP noted “getting bullied by boss - in trouble for having gone  
15 out to Pease Bay on boss’s orders and then he said she didn’t have his permission for this and now up for disciplinary. Feels persecuted. Not sleeping. Utterly stressed out by situation. Has gone to her union for help.”

33. On 6 May 2016 KS advised CF that she was being bullied and harassed by JS and that she had authorisation for her travel on 8 March.

20 34. On 9 May CF advised KS that SN would support and manage her absence under their attendance policy. The Attendance Policy, agreed in consultation with the recognised trade unions, seeks to maximise attendance at work in the interest of providing efficient and cost-effective services. The policy provided in summary that: “line managers are responsible for maintaining and  
25 applying effective systems to record, report and monitor sickness absence and ensuring employees know what is expected of them in relation to attending work”; in relation to managing long term sickness absence line managers should: keep in touch; hold case management reviews with HR; refer to occupational health; discuss the OH report with the employee; decide on  
30 any reasonable adjustments; “Keep under review the sustainability of the absence taking account of all relevant factors, including the impact on the

service provision, the impact on other work colleagues, the time scales for a return to work, the likelihood of the employee being able to fulfil the duties of their role in the future”.

- 5 35. KS was referred to OH who noted on 18 May: KS “describes her current period of absence as arising from work stress relating to the current disciplinary investigation and her perception of being bullied”; KS was fit to participate in the current disciplinary investigation; “resolution of the current work stress issues would appear likely to dictate KS return to work rather than any further medical intervention being required...Providing a satisfactory resolution can be achieved there is no indication of any chronic medical condition affecting 10 KS ability to meet her full work demands in the longer term. At this time I am unable to provide any adjustment or support measures likely to support a return to work. Management intervention and a swift resolution to the current procedures are advised”.
- 15 36. On 23 May KS consulted with her GP who noted symptoms of recurrent panic attacks and prescribed medication.
37. On 26 May CF met with KS to discuss her informal complaint alleging bullying and harassment by JS, LM. CF wanted to postpone the disciplinary investigation with KS to focus on her complaint against JS but KS wished to 20 await the outcome of disciplinary investigation before pursuing her complaint. CF advised he would support external mediation if this would be helpful.
38. CF took over SN’s disciplinary investigation in view of her absence from work. He held an investigation meeting with KS on 9 June. KS advised CF that she intended to instruct an external company to conduct their own investigation.
- 25 39. On 14 July CF issued his investigation report which noted that there was authorisation to travel to Peasebay but not Coldingham or Berwick.
40. On 4 August KS attended OH who advised: “She continues to have increased anxiety when speaking to her manager or thinking about work and the conclusion of the current disciplinary investigation ...KS would appear fit to 30 meet with management while remaining on sickness absence and a swift resolution is to be encouraged in order to prevent any further deterioration in

her wellbeing.” Sincer her absence was being was managed by CF and she had no contact with JS, the reference to her manager meant CF.

41. On 8 August KS emailed CF advising that he had “ruthlessly initiated an investigation” and she sought to invite CF to an independent third party investigation she would arrange.
42. In early August CF tried to arrange an absence management meeting with KS but she declined in light of the disciplinary investigation.
43. On 11 August EW invited KS to a disciplinary hearing in respect of allegations that on 8 March she travelled to Coldingham and Berwick without authorisation. She was warned of the risk of disciplinary action up to and including dismissal. KS was shocked and upset by this.
44. On 15 August KS advised CF that she will not attend an absence management meeting or discuss the JS allegations, and that “Redeployment looks like the only way forward”.
45. On 18 August DP, Head of Development wrote to KS to advise that he takes allegations of bullying and harassment very seriously and they required to be investigated as a matter of urgency. He appointed an external manager DO to conduct the investigation and he asked KS to complete the incident report form providing details of the allegations. KS replied stating “The disciplinary investigation initiated by CF and then investigated by CF ...is just another way of harassing me and attempting to bully me... CF’s Disciplinary Investigation Report is full of inaccuracies and lies”.
46. KS had consulted with her MSP and on 8 September her MSP noted “her desire to be transferred to another department”.
47. On 28 September KS was referred to OH who noted: “She remains with increased anxiety symptoms which affect her ability to meet some daily demands”; they noted increase use of medication; “with any return to work dependent on a resolution to the current investigations”.
48. On 30 September the disciplinary hearing was chaired by EW. SO attended on behalf of KS.

*October 2016 – KS issued with disciplinary warning*

49. On 6 October EW issued KS with a written warning in light of her travel to Berwick without authorisation in breach of the lone working guidelines and code of conduct to ensure value for money when using resources. It was to remain on her file for 9 months. She was advised of her right of appeal within 10 days. On the same day her son died of a brain aneurysm at the age of 27 and she was devastated by this.
50. At a meeting on 12 October SO sought on behalf of KS “relocation on grounds of ill health” to a job of similar standing and wage structure, he appreciated that this would depend upon what jobs come available and it may take a few months before a suitable job is posted, he thought it would be beneficial for KS to return to work under EW’s supervision working remotely, he suggested that no appeal should be made and the other harassment/ bullying complaint be dropped. SO believed that a “gentleman’s agreement” had been reached to this effect (it was ultimately accepted that this was not the case).
51. On 25 October KS confirmed that she sought redeployment on health grounds. (She did not mention the proposed change of line management to EW or otherwise.) EW advised that this would be progressed by CF in consultation with OH noting that if she saw vacancies on the website she should apply in the routine way.
52. In relation to redeployment the Attendance Policy provides as follows: “Occupational Health may advise, at any point, that an employee is not able to return to their substantive post, but may be able to carry out alternative duties in a different role. In this case, the employee is in a medical redeployment situation and four weeks would be allowed to identify a suitable alternative post. 13.2 If a suitable alternative post is identified, the employee will be offered the post on a trial basis for four weeks” ...” If no suitable alternative post is identified, or a trial period is unsuccessful, the employee will be considered to be at Stage 4 of this Policy and an Attendance Management Report will be submitted to the Head of Service (or nominated officer). This may lead to a decision being made at a Hearing that the individual may be dismissed on the grounds of capability due to ill health”.

53. On 26 October KS consulted with her GP who noted “Hopes to go back to work but maybe not until after Christmas but to new department”.
54. KS was referred to OH who noted on 15 November: “At this time there is no clear timeframe for her returning to work duties in any capacity”.

5 *November 2016 – first offer of redeployment*

55. On 29 November CF met with KS and SO. KS advised a return to her substantive post was not an option and they agreed to progress the redeployment process. In his letter summarising the meeting he explained in detail the redeployment process including the extension of the 4 week period to 19 January, and the 4 week trial period in any new role; he encouraged her to consider the website; he explained that if no suitable alternative post was identified the managing attendance procedures would apply; he explained that there was no gentleman's agreement for them not to investigate her grievance and for her not to appeal; he explained they require to investigate allegations of bullying and harassment but appreciated she may not feel able to participate having been through an extremely difficult time but he would support her if she wished to do so. In recognition of the Christmas break CF extended the standard 4 week redeployment period to ensure that KS would benefit from 4 release dates for new jobs.
56. AP, HR provided KS the redeployment form for completion and return as soon as possible and noted that the redeployment process will continue up to 19 January 2017; once received he would circulate it but she was to contact him if she saw anything of interest.
57. The redeployment form “Personal Profile Form” when completed contains personal details, qualifications/ training, current duties, previous experience, key skills, abilities and knowledge, future areas of work / training / career development of interest. Submission of the form was regarded as consent or agreement to start the redeployment process. The form is then circulated around senior managers to consider and identify a vacancy which they think might be suitable for the individual employee. The employee is also asked to



keep an eye on advertised jobs to see if there are any of interest. If there were, the employee would get priority over other applicants. Furthermore, an employee would not need to be a complete match to the essential criteria of the job outline and instead there would be consideration of whether they would do so within a reasonable timescale including with training.

58. KS was concerned about participating in the redeployment process at a quiet time of year with a restricted number of working days and few positions advertised and that if she couldn't secure a job there was a good chance that she would be dismissed. KS was capable of completing the form but did not do so because she wanted to avoid triggering a process which she feared may result in her dismissal.

59. On 29 November SO on behalf of KS emailed EW stating: there was "an over emphasis on a timeline of 4 weeks for finding redeployment"; "she has not formally started the clock ticking by submitting the form"; no time limit should be put on the redeployment process; and she is interested in an adult support worker job which has been advertised. KS ultimately withdrew her expression of interest when she found out that the relevant line manager was CF's cousin. KS actively considered the list of advertised jobs from November until around mid-April.

60. On 7 December EW replied to SO noting "my role is not to deal in day to day operational management of absence, this is for KS's line manager to deal with". She explained in detail the redeployment process and provided her with a copy of the Attendance Policy and that a period of 4 weeks is standard and applied in all cases. She encouraged her to complete the personal profile form which would then be provided to all service managers to review against any vacancies in their service to assess Karen's qualifications and experience against that required by the post. She explained "if no suitable alternative post is identified, the Council would need to determine whether it could continue for any further period of time with KS's absence and a Capability Hearing may be convened to consider this further. This could lead to a decision to terminate KS's employment with the council."

61. On 8 December SO emailed EW on behalf of KS stating: "given KS's tragic circumstances of late and given the lack of support in the work place, KS would be best to relocate;" she was open to redeployment but not ill health redeployment which could be "a back door method of ending her career"; CF  
5 "manufactured information and evidence" possibly the disciplinary allegations themselves.
62. In early December 2016 DO arranged to hold an investigation meeting with KS regarding her allegations of harassment and bullying by JS. He asked her to complete and bring the incident report form. KS replied advising the  
10 meeting should take place after the holidays.
63. On 13 December OH advised in light of a GP report that "she may be fit to return to work if management issues as known can be addressed"; "KS likely fit to return to work if her perceived work concerns can be successfully addressed". It confirmed that she was fit to participate in meetings with  
15 management.

*2017*

64. On 2 January 2017 KS sought via SO to appeal the written warning - "I demonstrated comprehensively that CF's investigation report was flawed, manufactured and full of inconsistencies... it also raises other questions about  
20 CF and his motivation behind his actions ... It is CF's conduct that is in question". On 17 January DP advised that notwithstanding the significant extenuating circumstances her appeal against the written warning would not be progressed because too much time had elapsed since the issuing of the warning (10 days is ordinarily given and over 3 months had elapsed). He felt  
25 that they needed to move on and get her back to work given OH advice. KS was devastated by this news.
65. In January KS and DO exchanged emails regarding the investigation into the allegations of harassment and bullying by JS. On 16 January KS completed the incident report form. DO then invited KS to an investigation meeting. KS  
30 asked for details of his experience in conducting investigations and a copy of

his report once completed. DO replied explaining that that he had been appointed by DP, HS and because of data protection the report would not be shared with her since she is not the subject of the investigation. He did not provide details of his experience. KS replied stating “your preamble guff is not appreciated”; she repeated her questions and explained she would not participate until the information was supplied otherwise the investigation had the potential to be “underhanded, covert, biased or prejudice[d].” DO replied re-iterating his previous position. KS was suspicious about the impartiality of the process because prior formal investigations had not found in her favour. DP was surprised and disappointed that KS did not raise her questions with him because he had appointed DO an external manager as investigation officer.

66. KS was referred to OH who noted on 30 January: “general improvement in her mood state and functioning ...she has expressed a desire to explore other possible opportunities that may be available to her from an employment perspective which may facilitate her engaging with regular work activity in some capacity pending the conclusion of the outstanding grievance process... On the basis of his current history and health presentation, there may be the possibility of her returning to work duties in some capacity in the near future”.

*February 2017 – second offer of redeployment*

67. On 15 February CF and AP, HR held an absence management meeting with KS accompanied by SO. KS was explicit that she would not be able to return to work in her substantive post because she didn’t trust the management. CF noted “You stated that you had no trust or confidence in me as your manager and it remained up to me as your manager to sort this out...given your rejection of ever returning to your substantive post I proposed to re-offer progressing the formal medical redeployment process again”; they explained the redeployment process and encouraged her to participate. She was asked to complete the personal profile form by 1 March.

68. On 28 February KS emailed CF advising that the 4week time limit is unreasonable, "If you take the last couple of months there hasn't been anything suitable. Which of course would result in putting me in the hands of DP to make a decision on my continued absence from work"; she would only consider a redeployment process that was not time limited. CF relied explaining that it was not possible to initiate an open-ended redeployment process and a capability report on the sustainability of her absence would therefore be prepared for consideration by DP at a capability hearing and a possible outcome could be her dismissal.
69. The Attendance Policy provides in summary that: where a line manager reaches the view that the absence is becoming unsustainable or employee is unable to return to their substantive role, consider whether ill health retirement and/or medical redeployment might be options if relevant/ appropriate. If not prepare a Capability Report and ask Head of Service to consider holding a Capability Hearing which may result in the employee's dismissal.
70. On 28 February DO offered KS a further investigation meeting which KS refused to attend.
71. On 20 March KS emailed CF noting that: "you have not been forth coming, helpful or showed any interest in facilitating my return to work, please indulge me with what your perceived attempts to resolve and help in this situation"; "Having carefully looked over the last couple of months after New year there has not been anything that fits my criteria. Of course, had I taken you up on your offer [5 weeks over Christmas] this would have resulted in ending my career, which of course was your intention" ... "Your disciplinary investigation also played a large part of the bullying and harassing against myself. It was proved beyond any doubt your investigation was brought about falsely, you pursued this at the expense of doing your job as a manager you made evidence fit, fabricated evidence and changed direction many times in an attempt to try and find something to justify your over reaction and negligence in bringing the disciplinary procedure about in the first place. The money, time, and resources wasted is vast, not to mention the personal injury to myself"; "You CF have chosen to hastily proceed down this route as you have no

intention in allowing myself to return work. I am off with work related stress brought on by bullying and harassment, false allegations you brought against me, an unfounded written warning a flawed investigation on my initial complaint re AH... I have thought many times why you never tackled that problem. I hope somewhere in the future we can find out why.”

*March 2017 - Investigation into allegations of harassment and bullying by JS*

72. On 30 March DO concluded his Investigation Report into bullying and harassment allegations against JS which noted: the allegations are as follows: you take every opportunity to try and “trip her up” and make life unpleasant for her; the atmosphere in the office is negative and unhealthy; you have been aggressive on many occasions and have raised your voice; you have employed tactics to flare up and disrupt the office; you have discussed her with other members of staff; you are using Council policies to intimidate her. He took statements from 5 witnesses and noted in detail their evidence regarding these allegations. (In his statement CF referenced KS’s allegations against AH which had resulted in her transfer to JS’s team had not been upheld and that “the description of bullying and harassment as given is not JS. Certainly not the JS I know...JS is placid, caring, quiet and methodical”). DO noted: JS’s history of working with disabled adults and young people; none of the work colleagues or line manager conveyed any evidence of unfair treatment by JS of KS, whilst a union rep stated JS was aggressive at a performance management meeting on 29 April this was contradicted by SN; KS refused to participate in the investigation and her evidence could not therefore be evaluated through interview. DO concluded: “Considering all the information provided and elucidated, whilst contradictory evidence was presented in relation to the occasion [on 29 April], the types of behaviour that KS alleges to be bullying was not more generally substantiated. On the contrary, evidence was presented highlighting KS requiring enhanced management intervention than would otherwise be required of an employee, which may account for the allegations being made”.

73. On 13 April DP and ZM, HR met with KS and SO to discuss the outcome of the investigation into her allegations against JS. DP was surprised that KS did not fully participate with a view to getting a meaningful investigation. He found KS's behaviour at the meeting quite inappropriate, combative and accusatory.
- 5 ZM found their behaviour to be appalling – she felt that they behaved in a rude, disrespectful and argumentative way. ZM, who had not been involved before, was taken aback. KS was very upset that her grievance against JS was not upheld.
74. DP's follow up letter noted that: having considered the investigation report including her submission he did not find substance to her allegations against JS; he had subsequently met with JS who considered her a valuable member of his team and that he would be happy to support her back to work; he was fully satisfied that it was impartial and thorough; she was advised of her right of appeal.
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75. On 28 April KS provided DP with detailed minutes of their meeting on 13 April and a detailed response which noted: "The investigation [by DO] as I have pointed out, was flawed, one sided, biased and incompetent;" "I am left pondering does this bullying and harassment culture climb all the way to the top of the tree". On 5 May DP replied noting: "I am astounded at the misrepresentation and inaccurate reporting of events contained in your documentation". KS in turn replied: "you have staged this feeling of being astounded to deflect from the truth...Your attitude of how dare I question DO's skills, competency and experience at carrying out an investigation is rather arrogant and is a somewhat outdated approach...You appear to be in some ways stuck in an antiquated thought pattern...You arrogantly think you are beyond approach." DP relied noting that he found her emails to be "discourteous and indeed offensive". KS replied on 11 May that she considered his correspondence "disrespectful, unhelpful and harassing"
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76. On 2 May DP invited KS to a Capability Hearing to be chaired by him on 10 May. She was provided with a copy of the Capability Report, advised of her right to be accompanied and warned that the meeting could result in her dismissal. The meeting was then rescheduled because KS was unavailable.
- 30

77. KS was referred to OH who noted on 18 May: “she has achieved continued perceived improvement in her overall wellbeing. She describes a general reduction in prior impactful mood related symptoms with a perceived improvement in mood level and a reduction in overall anxiety and associated prior reported symptoms”; “As previously advised she continues to express a desire to explore other possible opportunities that may be available to her from an employment perspective which may aid a resumption of work”.

*May 2017 – third offer of redeployment*

78. On 24 May DP wrote to KS noting her expressed desire to explore employment opportunities and asking her to consider engaging in the redeployment process. He enclosed a personal profile form to be completed and returned to AP by 2 June. Whilst DP considered he could not offer her an indefinite period of redeployment he felt he could adjust the policy by giving her a further opportunity to participate. He encouraged her to contact AP if she required any further clarification on the process. KS contacted AP to clarify that it was the redeployment process within the attendance policy. KS did not return the form.

*May to August 2017 - appeal against outcome of JS allegations*

79. On 25 May KS is advised that the appeal against her grievance outcome would be heard on 15 June. KS prepared extensively for that hearing and lodged a bundle of papers extending to over 300 pages. She submitted a detailed appeal in summary that: JS screamed and shouted at her; JS admitted to one allegation; CF as her office manager in May 2016 failed to resolve the situation, failed to offer mediation and instead initiated a disciplinary investigation instead of adopting an informal process, “CF chose a path of escalation and not one of a speedy resolve. All the above has had a devastating impact where my doctor signed me off unfit for work”; “JS’s behaviour is condoned by my office manager and senior managers”.

80. On 15 May the appeal was adjourned to 27 July to allow missing papers pertaining to her appeal to be considered.

81. On 27 July her grievance appeal was heard by the Sub Committee and was continued to 24 August. KS and SO presented her appeal. It was apparent to KS that the committee were not interested in whether JS had bullied and harassment her and were only interested in whether the correct procedure had been followed.

82. On 27 July KS consulted her GP who noted: "Still awaiting appeal tribunal but is expecting to get deemed unfit for work and get paid off. Resigned to this." On 30 August KS was advised that her appeal had been unsuccessful.

*August to October 2017 – capability hearing*

83. In August 2017 a capability report was prepared by CF with support from AP. Under the attendance policy it is ordinarily prepared by an employee's line manager. The report set out in detail KS's employment history, her sickness absence record, OH referrals and reports, relevant correspondence, invites and meetings, support offered, consideration of alternatives to dismissal, and the stated impact of her absences on the service. Under service considerations it noted: "KS's role as an Employability Support Officer involved her working with adults with either learning or physical disabilities and supporting them to secure employment. KS's absence has had a negative impact on those service users in terms of reduced capacity to provide adequate levels of support, stability and consistency of relationships... Throughout KS's absence, it has been necessary for the 3 remaining staff members within KS's team to deal with KS's client caseload on top of their own... At the time of most recent OH advice there were no other vacant posts within the East Lothian Works business unit, also KS was insistent that under no circumstances did she ever want to return to her role as Employability Support Officer. KS was invited to participate in the formal process of redeployment in December 2016 and despite first agreeing she then withdrew from the process. A further offer of formal redeployment was offered to KS in January 2017 to which KS again declined... The Service has endeavoured to support KS during this period through various OH appointments, management meetings, investigations into complaints and offers for



redeployment. Despite these measures KS has been unable to return to work within a reasonable time frame”.

- 5 84. Given the difficult exchange of correspondence with KS in May, DP thought it best if TS as an independent manager was appointed to hear the capability hearing. On 31 August KS was invited to attend a capability hearing to be chaired by TS on 26 September; the capability report was enclosed; she was warned of the risk dismissal and advised of her right to be accompanied. She was advised that CF and AP, HR would also be in attendance.
- 10 85. On 13 September KS was referred to OH who noted: that her grievance appeal had not been upheld: “She describes feelings of related disappointment and a perception of feeling generally unsupported in this regard. She advises of an increase in symptoms of lowered mood and anxiety against the background of known work related concerns.... She advises me that she has recently increased her use of medication prescribed to address
- 15 her anxiety...her current period of sickness absence from work remains on going with no date for a resumption of work in place...KS’s previously documented known work related concerns appear to remain unaltered. She also appears to have experienced an increase in physical and psychological symptoms associated with lowered mood and increased anxiety... ...As
- 20 previously advised she continues to express a willingness to explore other possible role opportunities that may be available to her from an employment perspective which may aid a resumption of work... In my view should a mutually acceptable agreement regarding a resumption of work be achieved then such a solution retains the potential to alleviate much of the strain of the
- 25 situation. The provision of future regular and effective service remains difficult to predict at this time and is likely to be influenced by any ongoing symptom profile, response to treatment and outcomes from any further discussions with management”. An updated GP report was to be sought to ensure their understanding was complete.
- 30 86. On 25 September KS provided her submission for the capability hearing in summary that: “The story of bullying and harassment all ties up starting with AH and the first failed investigation then on to JS, CF, EW, right to DP and

many others. A culture of bullying and harassment exists and the only way that senior management deal with it is to deny bullying and harassment exists then cover it up;" "no action was ever take in resolving any issues of bullying and harassment"; "CF has not been supportive in dealing with my complaint and only instigated further harassment"; "He [DP] actually covers up any of this behaviour under his management"; "a gentleman's agreement was reached where SO put forward a solution that would benefit all involved...[this] was not honoured"; " "yet again no meaningful measures/allowances were offered or put in place to accommodate me in returning to work"; the redeployment offer was "disingenuous."

87. On 26 September KS advised HR that she would not be attending the hearing because "I have no faith in the process and believe it to be flawed. I would also not feel most comfortable in entering in to an environment where some who will be attending have played a part in harassing me and or bearing false witness against me. I am of the opinion that there is little chance of anyone at this meeting having an open and honest mind, I believe that they will as always behave and approach things in a pack mentality with only one goal to achieve. My non-attendance is my stance against this culture." She had lost all faith in in the organisation and their ability to manage her because "at every opportunity they had undermined me and found against me despite me presenting evidence that I had been bullied or harassed". TS rescheduled the hearing for 5 October to give KS a further opportunity to attend.

88. On 27 September KS attended her GP who noted "Really struggling with mood. Tearful most of the time. Not sleeping at night. No energy or motivation. Not had a shower or changed out of PJs for three days until today as hasn't left the house. Poor memory and concentration. Aware this is all down to a combination of things – five-year anniversary of husband's death last week, one-year anniversary of son's death in October, going through courts for bullying charge against work and dog was put to sleep two weeks ago. All too much."

89. On 28 September KS wrote to AL, Chief Executive stating: 1. the council had tampered with her evidence and she required an explanation; 2. DP as head

of department concealed the truth about harassment and bullying by his managers, and refused her appeal against a written warning for false allegations. When AL asked for clarification KS replied: "I am not trying to predict your response, but...my money is on you choosing the easy route, and being satisfied by whatever guff is offered up. While replying in the usual rhetoric manner, convincing yourself that you have done your best"; "CF flawed and manufactured and wholly inaccurate investigation, still requires an investigation into its reasons. DP blocked any chance of the truth getting anywhere close to the surface when he did not allow the appeal"; "the root of all this, which was after returning to work from losing my husband, AH a recently appointed manager, decided because she thought she could and because she disliked myself, informed me that she was putting me up for redeployment, and my resistance to this was the start of the bullying and harassment."

90. On 5 October the capability hearing was chaired by TS supported by ZM, HR. KS did not attend. He considered all of the written submissions, including her response to the capability report, and concluded as follows: KS had been continuously absent from work as an Employability Support Worker for 17 months; she cited workplace stress as the cause but the grievance process had been exhausted; she had been referred to OH 8 times and no timescale for a return was given by OH or KS; a GP report had been requested but she had the opportunity to advise OH of any changes to her health; reasonable and appropriate steps were taken to encourage KS to return to work; three sincere attempts were taken to encourage KS to consider possible redeployment which were rejected by KS because it was time limited; the service had fully supported KS through managing attendance meetings; OH advised she was unfit to return to work in the medium term and was unable to advise of any adjustments or support which would enable her to return to work; KS duties involved providing support to vulnerable clients including with learning or physical challenges who were being denied critical support; there was limited capacity within the case load of remaining staff members to cover her duties; there was no prospect of an interim or temporary appointment to

cover her absence; her 17 month absence had a significant impact on the services ability to provide stable and consistent relationships to many vulnerable clients and the client-base had to be reduced; the Attendance Policy had been appropriately applied and fully complied with. TS took into account these conclusions in reaching his decision to dismiss with effect from 11 October 2017.

91. On 9 October KS was provided with a detailed outcome letter which advised of her right of appeal and gave 12 weeks' pay in lieu of notice.

92. On 11 October KS emailed AL, Chief Executive noting that: "I fear that whatever excuse or reasons are offered up at this late date into my missing evidence simply could not be trusted". AL, CE replied advising that prior to the grievance appeal her supporting paperwork had become detached from her written submission due to an administrative error resulting in a postponement for which she apologised.

93. On 18 October KS appealed the decision to dismiss. Following a meeting of the Employee Appeals Sub-Committee on 7 December 2017 KS was advised that her appeal was unsubstantiated and the decision to dismiss was upheld.

### *Remuneration*

94. KS was receipt of full sick pay from 5 May until 1 October 2016 and then half sick pay from 2 October until 1 April 2017. She was not in receipt of any pay from 2 April until the termination of her employment.

95. As at the termination of her employment KS's gross weekly pay entitlement was £490.62 and her net weekly pay entitlement was £369.92. She was also entitled to a pension contribution of 20.9%. She received a payment of lieu of notice upon termination.

96. For the period 25 September to 24 October 2017 KS received Universal Credit of £636 per month. There was no payment in respect of the period 25 October 2017 to 24 November 2017 because she had received notice pay. For the period 25 November 2017 to 24 May 2018 she received Universal Credit of £636 per month. She was assessed by the DWP as having limited capacity for work. She was in receipt of disability benefit from September 2023.

97. In the period since her dismissal a number of job vacancies have arisen in adjacent local authorities for which KS had the requisite skills and qualifications. The claimant has not been fit to apply for that work.

### **The Cowen Tribunal Judgment**

5 98. The prior findings of the Cowen Tribunal judgment on harassment and failure to make reasonable adjustments are relevant to the issues to be determined in this judgment.

99. The Cowen tribunal made the following findings of harassment:

- 10 a. On 24 February 2016 JS said at a meeting with the claimant upon her return to work after a period of sick absence due to back pain “you will probably be off again and I am uncertain about your future”.
- b. On 1 March 2016 JS shouted at the claimant and tried to get her to sign a stage 2 absence form.

15 100. The Cowen tribunal found the following to be a failure to make a reasonable adjustment:

- a. Failure to move the claimant (KS) “away from the management of JS to another team or manager” – “this issue was raised by SO at the meeting on 12 October 2016”. The move was considered reasonable because “a similar type of move had been engineered in 2014” and no reasonable explanation was given as to why the same type of move could not reasonably have occurred in 2016.

101. The Cowen judgment does not specify either the “team or manager” or the date of the failure and it is therefore necessary to determine this by reasonable inference.

25 102. In 2014 CF had arranged a transfer of the claimant’s line management from AH (whose team was responsible for young people) to JS’s team (whose team was responsible for adults). Both AH and JS reported to CF. In 2016 CF continued to manage ELW and whilst AH continued to be responsible for the young person team, SN was now responsible for the adult team. KS reported to JS who now reported SN. SN reported to CF who in turn reported to EW. It was therefore inferred that “a similar type of move” would be a transfer CF

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could effect within the ELW. The claimant submits it was a move to either to SN or another manager. Although the submissions on unfair dismissal reference EW as the other manager, and this was the manager proposed by SO on 12 October, the Cowen judgment does not identify EW as the other manager. A move to EW could not be described as “a similar type of move” given that this would have entailed a transfer by CF to his own line manager who was three levels of management above KS and who did not have any day to day involvement in either team. In the circumstances it was inferred that the adjustment was a move away from JS’s line management to management by SN or CF.

103. The proposal for a change of line management was first made by SO on behalf of KS on 12 October. There was no finding of a deliberate failure to comply and there was no finding of an inconsistent act. By 29 November KS had explicitly stated that she could not return to her substantive post. It was therefore inferred that the adjustment was a transfer within the ELW team in the period between 12 October and 29 November 2016 (being the period in which the adjustment might reasonably have been made).

### **Observations on the evidence**

104. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

### ***Expert medical opinion***

105. Expert medical opinion was provided by Dr MT, MKR, Dr AH and Prof MT. Neither Dr MT nor MKR were called as witnesses and were not therefore cross-examined on their opinions. Of the expert witnesses who were called, Dr AH and Prof MT provided their expert opinion of the effect of events on her mental health arising more than 5 years ago. Given the factual and legal

complexity it would have been preferable had the issues of liability and remedy been determined separately and had a single joint expert been instructed. Instead multiple experts were instructed who expressed conflicting opinions and whose opinions were dependent upon the claimant's description of those events, the findings of the Cowen tribunal but not the findings of this tribunal. It is however appreciated that the preferred approach ran counter to the need for the Cowen tribunal to determine remedy on harassment and the need to avoid further delay in this long standing litigation.

*Fitness to work from May 2016*

106. The claimant (KS) asserted that she was rendered temporarily unfit for her substantive role in May 2016 because of harassment by JS on 24 February and 1 March 2016. The respondent asserted that she was rendered unfit because of the disciplinary investigation which commenced in April 2016.
107. KS was certified by her GP as unfit to work from May 2016 onwards by reason of work related stress.
108. In May 2019 Dr MT, Consult Psychiatrist met with KS and considered her medical records. He opined that she had "been suffering from a generalised anxiety disorder (GAD) which is manifested with chronic and persistent anxiety [including panic attacks] for many years together with recurring episodes of clinical depression and bereavement reactions"
109. In November 2019 MKR, Consultant Clinical Psychologist met with KS, and considered her medical records. She opined that she suffered from PTSD as a result of the "traumatising experience" of receiving an email informing her that she was to be the subject of disciplinary investigation and the onset of the PTSD by June 2016 caused a permanent impairment of occupational functioning.
110. In September 2022, Dr AH Clinical Psychologist met with KS, considered her medical records and the Cowen tribunal judgment. She opined:
- "KS would have been unlikely to have become unfit for work had her line manager, JS, not behaved in the way in which he did between January and April 2016 and had a decision been taken to remove KS from JS's line management".*

*"KS would have remained fit for work had she not been harassed by JS in January and April 2016"*

*"KS's unfitness for work from May 2016 was due to harassment and failure to make reasonable adjustments by her employers"*

5 *"KS is currently suffering from Post-Traumatic Stress Disorder which was triggered as a result of her losing her employment...she has not been fit for work since October 2017"*

10 111. In December 2022, Prof MT met with KS, considered her medical records and the Cowen tribunal judgment. He opined:

15 *"KS has a long history of anxiety with depression (ICD-10 F41) which has most likely been present since early 2000s, with comorbid panic attacks being diagnosed in 2008...these symptoms of anxiety and depression have waxed and waned over the years, dependent on various external stresses... work related stresses in 2016, including the two specific meetings with her line manager in February and March 2016 as well as a subsequent failure to make reasonable adjustments, exacerbated her underlying anxiety with depression (ICD-10 F41). This was recognised contemporaneously by the treating practitioners. However, I cannot ignore the other non-work related stressed during the material period, including the death of the father and the unexpected death of her son both in 2016."*

20 *"Causation here, in my opinion, is multifactorial and includes biological and social determinants of anxiety and depressive as well as external stresses, such as multiple bereavements, significant physical health problems and work-related stresses".*

30 112. Prof MT opined that the exacerbation was temporary and would have resolved within a maximum of 12 months i.e. by May 2017 at the latest.

113. The two acts of harassment occurred on 24 February and 1 March 2016. Neither event prompted an immediate visit to her GP or sick absence. On 9 March JS raised with KS the issue of her travelling outside her assigned area without authorisation. On 10 March KS consulted with her GP regarding work  
35 related stress. KS was absent from work on bereavement leave for two weeks following the death of her father and she returned to work in early April 2016. On 28 April CF advised KS there was to be a disciplinary investigation and she visited her GP that day. On 29 April KS attended a performance management meeting with JS. On 4 May KS received formal written  
40 confirmation of the disciplinary investigation. KS was extremely distressed by this and had a panic attack. (She referred in cross examination to "the trauma



of CF's accusation"). On 5 May 2016 KS consulted her GP who noted: "getting bullied by boss...up for disciplinary. Feels persecuted...Utterly stressed out by situation". She was certified as unfit for work because of work related stress.

5 114. Dr AH opined that "KS would have remained fit for work had she not been harassed by JS in January and April 2016" and her "unfitness for work from May 2016 was due to harassment and failure to make reasonable adjustments by her employers." However, there was no finding of harassment by JS in April 2016 and the failure to make reasonable adjustments did not  
10 occur until October/ November 2016. Prof MT opined that work related stresses, including the two specific meetings with her line manager in February and March 2016 as well as a subsequent failure to make reasonable adjustments, contributed to a temporary exacerbation of her underlying anxiety with depression. He considered the other material factors to be the  
15 death of her father in March and the death of her child in October 2016.

115. According to expert opinion both work related and non-work related stressors caused an exacerbation of her pre-existing anxiety with depression from May 2016. The work related stressors included but were not limited to the two acts of harassment at meetings in February and March 2016 as well as a  
20 subsequent failure to make reasonable adjustments in October 2016. The non-work related stressors included the death of her husband in 2012, her father in March 2016 and her son in October 2016.

116. The harassment was one of multiple stressors which temporarily exacerbated her anxiety with depression from May 2016. It is considered likely that the  
25 temporary exacerbation was the cause of her unfitness for work. Considered in the context of the primary findings of fact it is considered likely that the predominant cause of that temporary exacerbation was the decision to conduct a disciplinary investigation which triggered a panic attack and her immediate absence from work.

30 *Fitness to work from October 2016*

117. The claimant (KS) asserted that she was fit for her substantive role in the period from 12 October to 29 November 2016. The respondent asserted that she was unfit for any work from 6 October 2016 until May 2017.
118. On 6 October 2016 the claimant's son died of a brain aneurysm at the age of 27 and she was understandably devastated by this. Dr AH opined that this would of itself have resulted in her sick absence for 6 to 9 months and in cross examination she said around 4 months having regard to the period of her absence following her husband's death. Prof MT opined around 7 months.
119. On 26 October KS consulted with her GP who noted: "Hopes to go back to work but maybe not until after Christmas." In November 2016 OH noted: "At this time there is no clear timeframe for her returning to work duties in any capacity as far as I am aware". In December 2016 OH noted: "KS likely fit to return to work if her perceived work concerns can be successfully addressed." In January 2017 OH noted: general improvement in her mood state and functioning; "she does not perceive that she would cope from a health perspective with returning to her most recent place of work"; there may be the possibility of her returning to work duties in some capacity in the near future. At an absence management meeting in February 2017 KS advised CF that she had been feeling better with a desire to return to work in some capacity but not to her substantive role. In May 2017 OH noted: "she has achieved continued perceived improvement in her overall wellbeing... she continues to express a desire to explore other possible opportunities that may be available to her from an employment perspective which may aid a resumption of work".
120. Having regard to the contemporaneous medical evidence it is considered likely that following the death of her son in October 2017 KS was not fit for any work for about 4 months i.e. until February 2017.

*Effect of the failure to make the reasonable adjustment*

121. The claimant initially asserted that had the adjustment been implemented she would have returned to her substantive role by 29 November 2016 but this was changed in submissions to February 2017. The claimant asserted that

the failure to make the reasonable adjustment rendered her permanently unfit for her substantive role. The respondent asserted that the failure to make the adjustment was one of multiple causes of a temporary exacerbation of the claimant's anxiety with depression in the period to May 2017 which did not render her permanently unfit for work.

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122. As noted above the adjustment was a transfer of line management from JS to SN or CF in the period between 12 October and 29 November 2016. On 9 May 2016 CF advised KS (the claimant) that SN would support and manage her absence under their attendance policy. KS's prior absences had been managed by JS as her line manager. KS had no contact with JS throughout her absence. It was apparent that SN, and then CF in her absence, acted as her line manager throughout the relevant time and at the time KS expressly described CF as her manager. In these circumstances, the relevant failure was therefore a failure to make the transfer of her line management from JS to SN (or CF in her absence) both explicit and permanent. Whilst the claimant was told of a change in absence management, the change of line management was never formally confirmed.

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123. At the time the claimant's focus was on redeployment to a new department. On 15 August KS advised CF that "Redeployment looks like the only way forward." On 8 September her MSP "expressed her desire to be transferred to another department". On 12 October SO sought on behalf of KS redeployment to an alternative position but appreciated it may take a few months and thought it beneficial for KS to return to work under EW's supervision working remotely. On 25 October KS confirmed that she sought redeployment on health grounds (KS stated in chief "It seemed obvious to me that I couldn't go back to working in that particular department anyway"). KS did not request then, or subsequently, a change of line management to another manager within ELW. On 26 October her GP noted: "Hopes to go back to work but maybe not until after Christmas but to new department." On 15 November OH noted: "I am unable to suggest any specific workplace measures/ allowances/ adjustments which if implemented currently in advance of the above discussions may facilitate her capacity to attend work

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and provide regular and effective service in her current work duties.” On 29 November KS advised a return to her substantive post was not an option. In February 2017 she said under no circumstances would she ever want to return to that role and she wanted to make this clear.

5 124. KS discussed with OH and her GP the need for redeployment but did not discuss a change of line management within ELW. As regards her substantive post, the focus of her evidence was not the failure to change line management but her need to work remotely from the building in a satellite place or at home. There was no evidence from the claimant (KS) that the failure to make the  
10 adjustment regarding a change of line management caused her any upset. This was understandable given that from May 2016 KS had no contact with JS, SN and then CF acted as her line manager, and her long standing desire was redeployment to another department.

125. The need to work remotely was not a finding of the Cowen tribunal and was  
15 not plead as an adjustment. Whilst such an approach would ordinarily have been accommodated (because staff did on occasions work from satellite offices depending upon on the location of clients and an employability support officer had been temporarily permitted to work from a satellite office on health grounds) it would not have been appropriate because KS was engaged in a  
20 performance supervision process. In any event, such an approach was irrelevant because what she sought was a move to working in a different department altogether (“it seemed obvious to me that I couldn’t go back to working in that particular department”).

126. In respect of the period arising after the death of her son in October, Dr AH  
25 opined:

*“Had she no longer been managed by JS at this point and had, instead, experienced a supported working environment, I would have anticipated that she may have managed to return to work, on a phased basis, within the time period between October 2016 and 2017”;*

30 *“Had Mrs Steedman been redeployed or seconded to another department, as had happened when she had complained about Alison Hood, my opinion is that she would have been likely to have made a successful return to work”*

127. As noted above, Prof MT opined that: her underlying anxiety with depression was temporarily exacerbated by work related stresses and by the deaths of her father in March and her son in October; the exacerbation would have ended by May 2017 at the latest; the work related stressors included but were not limited to the two acts of harassment in February and March and the failure to make reasonable adjustments in October/ November (all dates 2016); the death of her son was a significant exacerbating factor and the work related stressors in 2016 contributed somewhere between 30 to 50% of that exacerbation.
128. The contemporaneous evidence indicates an earlier resolution to the temporary exacerbation given that in January 2017 OH considered her possibly fit to work in the near future and in February 2017 KS herself expressed a desire to return to work. It is considered likely that the temporary exacerbation ended in February 2017 when the claimant became fit for other work.
129. Having regard to the primary findings of fact and the claimant's own testimony, it was considered likely the predominant cause of the prolonged exacerbation of her anxiety with depression was the death of her son in October (about which she was devastated) and the disciplinary warning also in October which she was not permitted to appeal (which caused her significant upset). There was no testimony or other direct evidence that the failure to make the adjustment caused her any upset presumably because she was in effect no longer being managed by JS and her long standing desire was redeployment to another department. It was therefore considered likely that the failure was not a predominant cause and made a minimal contribution to the prolonged exacerbation.
130. It was also considered likely that the failure to make the adjustment did not render the claimant permanently unfit for her substantive post. After 12 October 2016 the claimant did not raise the issue of change of line management for her substantive post and her focus was on redeployment to another department. On 29 November the claimant explicitly stated that return to her substantive post was not an option. In December 2016 OH noted that

she was likely fit return to work if her perceived work concerns could be successfully addressed (previously described by OH as her perception of bullying and also the disciplinary process). On 30 January 2017 OH noted she does not perceive that she would cope with returning to her most recent place of work. It was a matter of agreement between the parties that the claimant became fit for other work (i.e. not her substantive post) in 2017.

- 5
131. Having regard to the primary findings of fact it was considered likely that the claimant did not return to her substantive post because of stressors arising in 2017 that rendered her not just unwilling to return to her substantive post but unfit to do so. In January 2017 DP refused her appeal against the written disciplinary warning and she was “devastated by this news”. She refused to meet with the external manager investigating the allegations against JS because his investigation may be “underhanded, covert, biased or prejudice[d]”. By February she had no trust or confidence in CF as her manager who had “ruthlessly initiated” the disciplinary investigation which was “full of inaccuracies lies.” She was so upset when her allegations were not being upheld that this resulted in behaviour which HR considered to be appalling. Her communication with ELW managers became increasingly fractious and heated. It was reasonably apparent that her unwillingness to return to her substantive post translated into a continuing unfitness to do so.
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*Fitness to work from February 2017*

132. Both the claimant and respondent asserted that she was fit to perform another role (i.e. not her substantive post) from February and May 2017 respectively until October 2017.
- 25
133. On 30 August 2017 the claimant was advised of the outcome of the grievance appeal. On 31 August she was invited to the capability hearing and warned of the risk of dismissal. In September 2017 KS was referred to OH who noted: “KS has been advised that her appeal regarding the outcome from a bullying and harassment complaint lodged by her has not been upheld. She describes feelings of related disappointment and a perception of feeling generally unsupported in this regard. She advises of an increase in symptoms of
- 30

lowered mood and anxiety... The provision of future regular and effective service remains difficult to predict at this time.” She also consulted with her GP in September 2017 who noted: “Really struggling with mood. Tearful most of the time. Not sleeping at night. No energy or motivation... Aware this is all down to a combination of things – five-year anniversary of husband's death last week, one-year anniversary of son's death in October, going through courts for bullying charge against work and dog was put to sleep two weeks ago. All too much”.

134. Having regard to the contemporaneous medical evidence, and the primary findings in fact, it is considered likely that whilst the claimant was fit to perform another role from February to August 2017, she was temporarily unfit for any work from September to October 2017 following the outcome of the grievance appeal and given the impending capability hearing.

#### *Mediation*

135. The claimant stated in evidence in chief that “OH repeatedly advised the council that I would be able to return to work if efforts could be made to repair the relationships between myself and management...I am not sure why the council did not try to set up any mediation between myself and Jim Scott”. In respect of her allegations against AH the claimant was twice offered resolution through external third party mediation which she declined. In May 2016 she had been reminded by CF that external mediation was available in respect of her allegations against JS. KS was aware of the possibility of mediation but did not express any interest in it. The only time she raised mediation was on appeal when she asserted “there had been no offer of mediation...as per my emails to CF I requested this on several occasions as I was keen to find a resolve”. KS did not request external mediation; what she sought was an external investigation. From Aug 2016 onwards KS made clear that she sought transfer or redeployment away from JS's team. There was therefore no reasonable basis to conclude that she wished to resolve or repair her relationship with JS through mediation.

*Redeployment*

136. The claimant stated in evidence in chief and repeated in cross-examination that no-one discussed or explained the redeployment process to her. This was either not credible or not reliable because the process had been explained to her in detail at the time of the first offer of redeployment in December 2016 by CF and EW, at the time of the second offer in February 2017 by CF and AP, and at the time of the third offer DP encouraged her to contact AP for clarification about the process which she did. The claimant understood the redeployment process and was entirely capable of completing the personal profile form which would trigger the process. There was no assertion or evidence that her decision not to participate was affected by issues arising from her mental health.
137. The first offer to participate in the redeployment process made in December 2016 was refused by KS because "The problem with a five week redeployment period was that if I couldn't secure a job then there would be a good chance that I would lose my job and that timing was not good for job applications. It's an extremely quiet time of year because of Christmas and New Year and the holidays and very few new positions are advertised...The actual time was 12 working days." Her fears were genuine and understandable in the circumstances.
138. These considerations did not however apply to the second offer to participate in redeployment which was made in February 2017. KS was aware that failure to identify an alternative role within the 4 week period would not result in her immediate dismissal ("would result in putting me in the hands of DP to make a decision on my continued absence from work. Which would result in almost certainly a route to my dismissal"; she had lost faith in DP because he had refused her appeal). The claimant was aware that she could seek to identify alternative roles out with the 4week redeployment process and she endeavoured to do so in the period from January to April 2017 ("If you take the last couple of months there hasn't been anything suitable"). Unlike the first offer, the second offer was not affected by office closures.



139. CF noted in relation to the meeting on 15 February to discuss redeployment:  
"You did not wish to go down the route of redeployment on medical grounds given you did not feel this to be a medical issue but solely due to the bullying and harassment you had been subjected to in your role". On 28 February KS  
5 said: "it [redemption] is an empty gesture because without any meaningful talks and discussions into the reasons I have been absent from work (work related stress) through bullying and harassing where it seems I would just be expected to come back and return to work".
140. In evidence-in-chief she sought to explain: "I was putting a brave face on this.  
10 I was very unwell at this time and my absences were caused by medical conditions". The claimant was fit to perform an alternative role in the period from February to August 2017. She contacted AP only to clarify the type of redeployment she was being offered. It is apparent that the claimant objected to medical redeployment where there had been no acknowledgement of the  
15 bullying and harassment.
141. By the time the third offer to participate in redeployment was made in May 2017 KS had been advised that the grievance investigation by the external manager had not substantiated her allegations of bullying and harassment by JS. She was extremely upset by this and it was apparent that she had lost  
20 faith in management. In cross examination she said she felt by then that all managers in the council were biased. She was becoming openly combative with management. At the meeting to discuss the outcome ZM in evidence described her behaviour as "inappropriate, combative and accusatory." In April KS advised DP: "The culture that exists is part of the problem, and not  
25 part of a solution. The investigation as I have pointed out, was flawed, one sided, biased and incompetent." In May KS advised DP "Your attitude...is rather arrogant", "stuck in antiquated thought pattern", "you arrogantly think you are beyond approach because the investigation, report and finding cannot be challenged." In May she described AP as "young" and "a tad immature"  
30 noting "I am sure your intention is not to harass me." In May she described DP's correspondence as "disrespectful, unhelpful and harassing" and his account of their meeting "at best distorted, misleading and disingenuous".

142. It is considered likely that the claimant did not accept the third offer to participate in redeployment because she had lost faith in management following the outcome of the grievance investigation and wished to await the outcome of her appeal to the sub-committee (“I prepared extensively for the hearing and lodged a bundle of papers that ran to some 302 pages”; “During the [appeal] hearing it became apparent that the committee were not interested in whether or not JS had bullied and harassed me”). As the claimant stated in chief “Throughout the period of my absence I remained firmly of the view that if the council could have acknowledged that I had been mistreated and had been the victim of bullying or harassment I would have been able to return to work”. Without that acknowledgement she was unwilling to return to work but she was also unwilling to participate in an internal investigation.
143. The respondent lodged in evidence a list of Council jobs which had been advertised by them in the period from 5 December 2016 (the first offer of redeployment) to 11 October 2017 (the capability hearing). Despite being called upon to do so, neither the claimant nor the respondent witnesses gave any evidence on whether or not any suitable alternative role in another department arose in that period. On 30 November KS expressed interest in an adult support worker role but then withdrew her expression of interest. In February 2017 KS advised CF in relation to finding a job within the 4 week redeployment period “If you take the last couple of months there hasn't been anything suitable.” The claimant stated in evidence in chief: “They could have moved me back into a school where they are always crying out for support workers, and I had worked previously” and she accepted in cross-examination there were possibly jobs for which she could have applied.
144. It was considered likely given the significant number of posts advertised, the claimant’s employment experience, and the terms of the policy on redeployment (which did not require an exact match to the essential criteria), that there was a reasonable chance that a suitable alternative role may have arisen in that period had the claimant been willing to participate.

145. The claimant asserted that the respondent was under a duty to consider ill health retirement and failed to do so. The attendance policy provides that ill health retirement should be considered if relevant/ appropriate. The claimant did not at any time raise the issue of ill-health retirement. There was no evidence that she was eligible for ill-health retirement. TS gave evidence that ill health retirement was not appropriate because OH had advised that she was fit for alternative work within the council. It was therefore accepted that ill health retirement was not relevant/ appropriate.

*Reason for dismissal*

146. The claimant believed that her managers were privy to a collective plan to remove her from her employment (“the managers had ganged up on me”; “I think ELC wanted rid of me”) but there was no reasonable basis for this belief. When asked in evidence each manager denied the existence of such a plan, there was no other evidence of collusion and no reason to doubt the credibility of their evidence. CF had offered her a transfer from AH to JS. AH was no longer involved in the management of the claimant. CF arranged for her grievance against AH to be investigated by an external manager. SN and then CF managed her absence instead of JS. Both CF and DP repeated the offer of redeployment rather than immediately trigger the capability procedures. DP arranged for her grievance against JS to be investigated by an external manager and confirmed JS was willing to have her back. DP arranged for her capability hearing to be chaired by an external manager, TS.

147. The dismissing officer TS reached the decision to dismiss at a capability hearing “to consider your ongoing absence from work due to ill health” and having regard to a capability report “on the sustainability of her absence”. The decision letter stated: “TS concluded at the Hearing, that with no definitive timescales for a return to work from Occupational Health, or from yourself, your employment with the Council be ended on grounds of capability due to ill health”. In evidence in chief TS stated: “taking account KS’s continuous absence from work for 17 months with no prospect of return and taking

account of the exigencies of the service I decided that KS's employment be terminated on grounds of capability due to ill health".

148. He also stated "On reaching my decision of particular relevance was my accepting that the Council had taken all reasonable and appropriate steps to encourage KS to return to work. Three sincere attempts to encourage KS to consider possible re-deployment were rejected by KS." In relation to her refusal to participate he noted in supplementary evidence: "I thought it was quite a strange position not adopt and this was factored into my decision about her continuing employment with the council".
149. In cross-examination TS noted OH advice was that she was not fit to work in the short or medium term but they were not ruling it out. He accepted that her absence was related to her disability. He did not consider that she was permanently unfit to work in her substantive post. He considered that she may be fit to return to work in her substantive post because the grievance investigation had found that there were no barriers to her return. Her refusal to attend the capability hearing "indicated to me someone who was quite rebellious to the organisation in total". The possible dichotomy in his evidence as to whether she was unable or unwilling to return to her substantive post reflected the tension in the contemporaneous evidence with OH stating that the claimant would be fit to work if internal processes were resolved to her satisfaction. As the claimant stated in chief "during each of these [OH] assessments I indicated that I would be prepared to return to work if my issues with management could be resolved".
150. Whilst her behaviour was a relevant factor (including her refusal to participate in redeployment or to attend the capability hearing), the decision to dismiss was taken at a hearing arranged "to consider your ongoing absence from work due to ill health" in the context of a 17 month absence (certified by her GP as unfitness for work) and which decision expressly stated "I decided that KS's employment be terminated on grounds of capability due to ill health". It was therefore inferred that her ongoing absence due to ill health was the predominant factor in TS reaching the decision to dismiss.

*The effect of the claimant's absence on the service*

151. We accepted as accurate TS's evidence regarding the effect of claimant's absence on the service as set out by TS in his written reasons for dismissal and in his oral testimony.

5 *Fitness to work from October 2017*

152. The claimant (KS) asserted that she was rendered permanently unfit for any work in October 2017 by her dismissal. The respondent asserted that she was not rendered permanently unfit by her dismissal or otherwise.

10 153. In November 2019 MKR, Consultant Clinical Psychologist opined that KS was rendered permanently unfit for work as a consequence of the trauma of being advised of the disciplinary investigation in May 2016.

154. In September 2022 Dr AH, Clinical Psychologist opined:

15 *"Due to her levels of anxiety, depression and Post-Traumatic Stress Disorder, my opinion is that she has not been fit for work since October 2017"*

*"KS described symptoms that would meet the criteria for Post-Traumatic Stress Disorder (PTSD) as defined by DSM-5. These appear to have been triggered by the termination of her employment on 17 October 2017".*

20 155. In oral testimony Dr AH advised that her PTSD symptoms started with being advised she was being investigated for travel to Berwick and that MKR's diagnosis that "this event caused the onset of PTSD by June 2016" was very similar to her own diagnosis and related to the same timescale. She noted  
25 that the prolonged litigation was making matters substantially worse.

156. In December 2022 Prof MT, Consultant Psychiatrist opined that having conducted testing her symptoms did not meet the criteria for PTSD but an exacerbation of pre-existing levels of anxiety:

30 *"Given her attitude and underlying anxiety, in my professional opinion, KS will never work again in East Lothian...With a change of address and psychological therapy in the future it is entirely possible that KS could re-enter paid employment, initially on a part-time basis and possibly on a full-time basis in the future...On the balance of probabilities, in my opinion, the current unfitness to work (due to her*

*generalised anxiety disorder) is due to the protracted and ongoing legal dispute”*

157. In February 2023 he opined she could work for another Council remotely and:

5                   *“I accept that KS is intermittently prone to anxiety, namely generalised anxiety disorder. In my opinion, she is not clinically depressed currently and does not suffer from post-traumatic stress disorder. Again, I would recommend speedy resolution of these legal matters for her better prognosis”.*

10

158. The claimant (KS) was acutely aware of the risk of dismissal prior to the capability hearing. In February 2017 KS emailed CF noting that the 4 week timescale for redeployment was unacceptable because it “would result in almost certainly a route to my dismissal”. In March 2017 she advised: “Of course had I taken you up on your offer [5 weeks over Christmas] this would have resulted in ending my career, which of course was your intention”. In May KS was invited to a capability hearing and warned of the risk of dismissal. In July KS consulted her GP who noted: “expecting to get deemed unfit for work and get paid off. Resigned to this.” In August KS received a detailed capability report recommending a hearing to consider her dismissal. In September KS advised she would not be attending the capability hearing because “I have no faith in the process...I am of the opinion that there is little chance of anyone at this meeting having an open and honest mind.”

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159. The claimant gave evidence that being dismissed caused her to feel “a great sadness and despair my career had ended and I had not fight left in me. My emotions were at an all-time low...I was an emotional wreck by the end of it all. The terrible nightmares started where I would go through everything, the bullying by AH, JS, CF”. She described feeling dizzy, panic attacks, and poor sleep. She initially said in cross examination that her dismissal came as “a bit of a surprise but not a shock” but when reminded she had told Dr AH that it was “cataclysmic” she then said it came as a shock.

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160. The decision to dismiss was intimated on 9 October 2017. She intimated her appeal on 18 October. She commenced tribunal proceedings by engaging in ACAS Early Conciliation from 11 December 2017 to 22 January 2018 and

lodging her ET1 on 19 February 2018 (for which she had legal representation).

161. KS consulted with her GP on 2 February 2018 (4 months after her dismissal) who noted:

5                   *"Stress, panic attacks, depression. Off work for 18 months due to stress. ... Lots of flashbacks of boss shouting at her. Mood low for some time, not on anything regular, has been in the past with good effect... can't sleep. Mum passed away 10 January, funeral 15 January, not coping at all since then. This is actually fourth immediate family bereavement in five years. Husband died of sudden MI, son had ruptured cerebral aneurysm (she also had aneurysms coiled). Dad died a few years ago and now mum".*

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162. On 23 April 2018 KS consulted with her GP who noted: "Still struggling... poor sleep, hates going out, waiting on Employment Tribunal."
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163. On 6 August 2020 KS consulted with her GP who noted: "Feeling low, court case she was going through which she won has been appealed by Council, stressful situation, some suicidal thoughts some days"

164. In the circumstances it is considered likely that the claimant was not rendered permanently unfit for work by her dismissal given that she was fully aware of and acted upon the risk of dismissal from November 2016 onwards, she was temporarily unfit for work for any work following the outcome of her grievance appeal in August and the prospect of the capability hearing in September, she had no faith in the organisation and she was expecting to be dismissed. The claimant's testimony that the dismissal "was a shock" was not considered credible. Her refusal in cross examination to accept that she expected to be dismissed was considered evasive (she replied "at some point" and that her GP's note was wrong.) Having regard to the primary findings of fact it is considered more likely that the effective cause of her continuing unfitness for work was the ongoing tribunal proceedings which commenced in December 2017 and coincided with the death of her mother in January 2018.
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## **Discussion and decision**

### Discrimination arising from disability

- 35   165. Section 15 of the Equality Act 2010 provides:

“(1)A person (A) discriminates against a disabled person (B) if—

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

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

5

*Was the unfavourable treatment because of something arising from the Claimant's disability?*

10 166. The claimant's dismissal amounted to unfavourable treatment. The tribunal must determine what caused her dismissal, and second whether that reason was something which arose in consequence of her disability (*Pnaiser v NHS England and anor 2016 IRLR 170, EAT*).

15 167. What caused her dismissal involves an examination of the putative discriminator's state of mind to determine the conscious or subconscious reason. It is sufficient if the something relied upon was more than a trivial part of the reason (*Sheikholeslami v University of Edinburgh UKEATS/0014/17/JW, EAT*).

20 168. Parties were in agreement that the reason for her dismissal was her absence from work for 17 months by reason of ill-health with no prospect of an imminent return to work.

25 169. Parties were also in agreement that the claimant was disabled by reason of a brain aneurysm, depression and anxiety at the relevant time and the respondent knew or could reasonably be expect to know this. The claimant submitted that her absence arose in consequence of her disability. The respondent submitted that it arose in consequence of her refusal to participate in the redeployment process. Whether the something arose in consequence is an issue of objective fact (*Sheikholeslami*).

30 170. The claimant was not fit for work in the period from May to October 2016 because of a temporary exacerbation of her anxiety with depression which was predominantly caused by the decision to conduct a disciplinary investigation. The claimant was not fit for any work in the period from October 2016 to February 2017 predominantly caused by of the death of her son which



prolonged the temporary exacerbation of her anxiety with depression. From February to August 2017 the claimant was unfit to work in her substantive role but was fit to work in an alternative role. From September to October 2017 she was temporarily unfit for any work because of an episode of anxiety with depression following the outcome of the grievance appeal. As at the date of the capability hearing the claimant was not fit for any work and there was no imminent prospect of a return to work.

171. Some periods of her absence arose as a direct consequence of her anxiety and depression. Whilst there was a period of absence which arose as a consequence of her refusal to participate in redeployment, her need to participate in redeployment arose as a consequence of her unfitness to perform her substantive role which arose in consequence of her anxiety with depression. What is “in consequence of” may entail a looser connection and may involve more than one link in the chain of consequences (*Sheikholeslami*). Her absences were therefore because of something arising in consequence of her disability.
172. The claimant was therefore dismissed because of something arising in consequence of her disability namely her absence from work.

*Was her dismissal objectively justified?*

173. Section 15 of the Equality Act 2010 provides:

*“(1)A person (A) discriminates against a disabled person (B) if—*

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

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

174. The discrimination arising from disability is justified if the respondent can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The onus is upon the respondent to establish justification.

175. The legitimate aim must correspond to a real need on the part of the undertaking. Proportionality entails balancing the effect on the claimant against the needs of the employer.

*Was there a legitimate aim?*

5 176. The respondent submitted that the claimant was dismissed in pursuance of the aims of ensuring that the Respondent provided an effective service to vulnerable adults; minimising the adverse impact her long-term and continuing absence was having on the team; and/or making use of the Respondent's resources in a way that demonstrated good value.

10 177. Those aims represented a real need on the part of the respondent and the claimant accepted that they were legitimate. She did not however accept that those were the aims of the dismissing manager. The test is objective and legitimate aim does not therefore require to consciously and contemporaneously feature in the decision making. In any event, in reaching  
15 the decision to dismiss the dismissing manager expressly took into consideration the needs of the service and the effect on other staff. The attendance policy itself expressly references maximizing attendance at work in the interest of providing efficient, cost-effective services.

*Was her dismissal a proportionate means of achieving those aims?*

20 178. Proportionality entails balancing the effect of the dismissal upon the claimant against the needs of the employer. The means chosen must be both appropriate to achieve the aim and reasonably necessary i.e. that the aim could not be achieved by less discriminatory means. The tribunal must undertake a fair and detailed assessment of the working practices and  
25 business considerations involved (*Ali v Torrosian and ors (t/a Bedford Hill Family Practice)* EAT 0029/18)

179. The claimant's duties involved providing critical support to vulnerable clients including those with learning or physical challenges. There was limited capacity within the case load of remaining staff members to cover her duties.

There was no prospect of an interim or temporary appointment to cover her absence. Her 17 months absence had a significant impact on the ability to provide stable and consistent relationships to many vulnerable clients and the client-base had to be reduced. There was no timescale for her return to work and no prospect of her returning to work in the medium term. The respondent continued to meet the cost of her holiday pay and pension contributions. The termination of her employment would enable the respondent to appoint her replacement in pursuance of providing an effective service to vulnerable adults, reducing the effect on her team and ensuring value for money. Her dismissal was therefore rationally connected to the legitimate aims.

180. Nevertheless, it will be very difficult for an employer to show that the treatment was objectively justified if they have failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment (EHRC Code para 5.21). The claimant submitted that had the respondent made the reasonable adjustment she would have been fit to return to work in her substantive role and not therefore been dismissed and her dismissal was not therefore justifiable.

181. The adjustment was removing JS as her line manager in October/ November 2016. Even if the adjustment had been made, she would still have been absent from work because of the death of her son in October 2016 and she would not have returned to her substantive role thereafter because of the stressors which arose in 2017 which rendered her not just unwilling to return to her substantive role but unfit to do so.

182. The claimant stated that if the council could have acknowledged that she had been the victim of harassment and bullying she could have returned to work. In May 2016 the claimant made an informal complaint of harassment and bullying by JS. CF sought to postpone the disciplinary investigation to enable her to formalize her complaint but she wished to await the outcome. In August 2016 CF sought to progress her complaint but she was unwilling to discuss the allegations with him. DP then appointed an external manager to investigate her complaint. The investigation was hampered by the claimant's refusal to properly participate in the investigation. Whilst she provided written

information she refused to be interviewed by the investigating manager. In the circumstances, the investigation, which concluded in March 2017, did not find evidence of harassment and bullying.

- 5 183. The treatment cannot be justified if there were less discriminatory alternatives to her dismissal. The claimant submitted that at the time of her dismissal she could have worked remotely (from home or a satellite office) in her substantive role reporting to another manager. This conflicted with both OH advice that she was currently unfit for work in her substantive role and also her own explicit position that she was unwilling to return to her substantive role.
- 10 184. The claimant submitted that she should have been transferred into an alternative role in another department as an alternative to dismissal. The claimant did not at any time during her employment, or at this hearing, identify a suitable alternative role. The respondent offered the claimant repeated opportunity to work with them to identify a suitable alternative role by participating in their redeployment process. Had she done so there was a reasonable chance that she would have been transferred into an alternative role. The claimant refused to participate in the redeployment process because she required that process to be without limit of time. This approach would have entailed a significant departure from a policy that was subject to consultation with recognised trade unions, would have entailed treating employees in similar circumstances inconsistently, and would have significant cost and administrative implications. It was therefore not reasonable to expect an employer to maintain redeployment indefinitely and in any event this would have been contrary to their legitimate aims.
- 15 20 25 185. The claimant submitted that the respondent ought to have considered ill health retirement. The claimant did not at any time during her employment, or at this hearing, submit that she was eligible for ill health retirement. Retirement was not relevant or appropriate because OH had advised that she was fit for alternative work within the council.
- 30 186. The claimant accepted that in reaching the decision to dismiss the respondent acted in compliance with its attendance policy and procedure.

187. Dismissal of the claimant as a long serving employee was likely to have a significant financial and psychological effect upon her. Balancing that severe step against the real objective needs of the employer, the treatment was nevertheless appropriate and necessary in order to provide an effective and efficient service to vulnerable adults. The respondent has shown that the dismissal of the claimant was a proportionate means of achieving their legitimate aims.

Unfair dismissal

188. Section 98 of the Employment Rights Act 1996 provides:

*“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

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

*(2) A reason falls within this subsection if it—*

*(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do...*

*(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”*

*What was the reason or principal reason for the dismissal?*

189. It is for the respondent to prove the reason for the claimant's dismissal and that the reason is a potentially fair reason. A reason for dismissal is a set of facts known to the employer, or beliefs held, which cause the employer to dismiss the employee (*Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*). If the reason is in dispute, the Tribunal must either make findings in fact on balance of probabilities as to what conduct caused the employer to dismiss

or find that the employer has failed to discharge the burden of proving the reason. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.

5     190. The respondent asserted and the claimant accepted that the set of facts which caused her dismissal was that: she had been continuously absent from work since May 2016; she was unfit for her substantive role and OH were unable to advise when she would be fit; and she refused to participate in redeployment.

10    191. The respondent asserted and the claimant accepted that the principal reason for her dismissal was capability and/or some other substantial reason (her fitness to work and her refusal to participate in redeployment) and that these are potentially fair reasons for dismissal.

15    192. A dismissal for 'some other substantial reason' must be 'of a kind such as to justify the dismissal of an employee holding the position which the employee held' (Section 98(1)(b)). It must be substantial and not frivolous, trivial or inadmissible (*Willow Oak Developments Ltd v Silverwood* 2006 ICR 1552, CA). Use of the word "other" indicates that it does not include capability, qualifications, conduct, etc but it may substantially overlap with those reasons.

20    193. The "Burchell" test applies to a capability dismissal such that an employer must have a genuine belief in the reason for dismissal, must have reasonable grounds for that belief, and must have conducted a reasonable investigation (*DB Schenker Rail (UK) Ltd v Doolan* EATS 0053/09).

25    194. Whilst the dismissing manager TS had concerns regarding her behaviour (including her refusal to participate in redeployment or to attend the capability hearing) these were adjuncts to his predominant concern which was that she had been absent from work for 17 months due to ill health with no prospect of return. The principal reason for dismissal was therefore her capability. There was a reasonable basis for that belief given that her absences were certified  
30    by her GP and given the terms of the OH reports.

*Was it reasonable for the Respondent to treat that reason(s) as sufficient to justify dismissal, having regard to all the circumstances?*

195. Section 98 of the Employment Rights Act 1996 provides:

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*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

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*(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."*

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196. If the reason for the dismissal is potentially fair, the Tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair. This depends whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant. At this second stage of enquiry the onus of proof is neutral.

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197. In determining whether the respondent acted reasonably or unreasonably, the Tribunal must not "substitute itself for the employer or to act as if it were conducting a rehearing of, or an appeal against, the merits of the employer's decision to dismiss. The employer, not the tribunal, is the proper person to conduct the investigation... The function of the tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the results of that investigation, is a reasonable response" (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 827*) The Tribunal must consider the range of reasonable responses open to an employer acting reasonably in those circumstances (*Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT)*).

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198. The basic question is whether in all the circumstances the employer can be expected to wait any longer and, if so, how much longer? Relevant factors include the duration of the absence and the likelihood of return, the financial and administrative burden, and scope for alternatives to dismissal (*S v Dundee City Council 2014 IRLR 131, Ct Sess*).
199. Determination of objective justification of dismissal under Section 15 EqA is somewhat different to determination of the fairness of the dismissal under Section 98 ERA, given the objective test in one and the application of the band of reasonable responses in the other (*Post Office v Jones 2001 ICR 805, CA*). However the tests ought ordinarily to lead to the same result (*O'Brien v Bolton St Catherine's Academy 2017 ICR 737, CA*).
200. The respondent was and remains a large employer with significant resources and a dedicated HR function. The claimant was a long serving employee with over 16 years of service.
201. The claimant accepted that the respondent acted in compliance with its attendance policy and procedure.
202. A capability report was prepared which described in detail her employment history, her sickness absence record, OH referrals and reports, relevant correspondence, invites and meetings, support offered, consideration of alternatives to dismissal, the impact of her absences on the service, the impact on other work colleagues, the time scales for a return to work, and the likelihood of her being able to fulfil the duties of her role in the future. The claimant was given the opportunity to comment on that report which she did.
203. An up to date occupational report was obtained for the capability hearing which noted her current period of sickness absence from work remained on going with no date for a resumption of work, she continued to express a willingness to explore other possible role opportunities, but the provision of future regular and effective service remained difficult to predict at that time.
204. An independent manager was appointed to chair the capability hearing. The claimant was given 4 weeks' notice of the first hearing which was postponed to allow her a further opportunity to attend. She was advised of her right to be accompanied.



205. In reaching the decision to dismiss the independent manager took in to consideration the capability report and the claimant's response including the following factors: at the time of the capability hearing she had been absent from work for 17 months by reason of work related stress; she had made  
5 allegations of bullying and harassment which had been investigated and not upheld; her absence was managed by CF who held absence management meetings with her; she was referred to OH and the findings were discussed with her; no timescale for a return to work was given by OH or KS; OH were unable to advise of any adjustments or support measures likely to support a  
10 return to work other than to explore redeployment opportunities; she had been offered three separate opportunities to participate in the redeployment process and on each occasion declined it; her continuing absence was unsustainable because of the impact on service provision and colleagues – there was limited capacity within the case load of remaining staff members to  
15 cover her duties; there was no prospect of an interim or temporary appointment to cover her absence; there was a significant impact on the ability to provide stable and consistent relationships to many vulnerable clients and the client-base had to be reduced.
206. A tribunal should not too readily consider that dismissal will be fair where there  
20 are reasonable adjustments which can be made which would facilitate a return to work. The claimant submitted that her dismissal was unfair because had the respondent made the reasonable adjustment she would have been fit to return to work in her substantive role and not therefore been dismissed. The adjustment was removing JS as her line manager in October/ November  
25 2016. Even if the adjustment had been made she would still have been absent from work because of the death of her son in October 2016 and she would not have returned to her substantive role thereafter because of the stressors which arose in 2017.
207. The claimant submitted that her dismissal was unfair because at the time of  
30 her dismissal she could have worked remotely (from home or a satellite office) in her substantive role reporting to another manager. This conflicted with OH

advice that she was currently unfit for work in her substantive role and her explicit position that she was unwilling to return to her substantive role.

208. The claimant submitted that her dismissal was unfair because she should have been transferred into an alternative role in another department as an alternative to dismissal. The claimant did not at any time during her employment, or at this hearing, identify a suitable alternative role. The respondent offered the claimant repeated opportunity to work with them to identify a suitable alternative role by participating in their redeployment process. The claimant refused to participate in the redeployment process because she required that exercise to be without limit of time. This approach would have entailed a significant departure from a policy and would have significant cost and administrative implications. It was not reasonable to expect an employer to offer redeployment indefinitely.

209. The claimant submitted that her dismissal was unfair because the respondent had failed to consider ill health retirement. The attendance policy provides that ill health retirement should be considered if relevant/ appropriate. TS did not consider retirement to be relevant/ appropriate because OH had advised that she was fit for alternative work within the council.

210. In the circumstances (including the size and administrative resources of the employer's undertaking), and determined in accordance with equity and the substantial merits of the case, the employer acted reasonably in treating her ongoing absence as sufficient reason for dismissal. Her dismissal was accordingly fair.

25 Failure to make a reasonable adjustment

211. The Cowen tribunal found there was a failure to make a reasonable adjustment namely to move the claimant "away from the management of JS to another team or manager" and was to be the same type of move which had been made in 2014. For the reasons noted above, the adjustment was a failure to make the change of line management from JS to SN or CF explicit and permanent in period from 12 October to 29 November 2016.

212. This tribunal was to decide remedy on the failure make reasonable adjustments if there was sufficient information to do so. Parties were in agreement that this approach should be taken if at all possible given the protracted litigation and the overlapping factual and legal issues.

5 213. Section 123 of the Equality Act 2010 provides:

*(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*

*(2) The tribunal may—*

10 *(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*

*(b) order the respondent to pay compensation to the complainant;*

*(c) make an appropriate recommendation.*

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*...*

*(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by [the county court] or the sheriff under section 119.*

214. The tribunal has the power to make an award of damages calculated as for damages in reparation proceedings. There is no upper limit on the award which may include compensation for injured feelings and psychiatric injury but double counting/ recovery should be avoided.

215. The claimant must be put in the same position they would have been in had the discrimination not occurred. The tribunal must determine what loss has been caused by the discrimination which may include an exacerbation of pre-existing vulnerabilities.

216. To the extent that reasonable foreseeability applies, it is the nature and not the extent of the injury which requires to be foreseeable and injury to feelings and therefore to mental health are considered to be foreseeable.

30 *Injury to feelings*

217. Awards for injury to feelings are to compensate not punish. Injury to feelings encompasses 'subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on' (*Vento v Chief Constable of West Yorkshire Police (No.2) 2003*

ICR 318, CA). According to the *Vento* bands updated by the Presidential Guidance there are three broad bands of compensation: a lower band for less serious cases, from £1,200 up to £11,700; a middle band for serious cases up to £35,200; a top band up to £58,000 to be applied only in the most serious cases. Awards may be made above those bands in exceptional cases.

218. The onus is upon the claimant to prove injury to her feelings. Discrimination will ordinarily give rise to some injury to feelings and the manner of the discrimination can be a useful guide to inferring this when evidence is otherwise sparse. Frequency, duration, intention and occupational effect may be relevant (*Eddie Stobbs Limited v Caitlin Graham EA-2023-SCO-000073-JP*).

219. KS had no contact with JS throughout her 17 months absence. SN, and then CF in her absence, acted as her line manager throughout that time. Whilst the claimant was told that SN and then CF were managing her absence, she was never explicitly told that her line management had been changed and further this change was never made permanent. Had return to her substantive role ever been a realistic possibility, the claimant might well have been anxious that this would mean a return to line management by JS.

220. There was no finding of a deliberate failure to act. There was no direct evidence that the failure to make the adjustment caused her any upset. Whilst there was frustration that the asserted gentleman's agreement had not been honoured, the focus of that frustration was redeployment and not the adjustment. After 12 October 2016 the claimant pursued redeployment and not a change of line management. By 29 November she did not want to return to her substantive role. Following the death of her son in October 2016, the claimant was not fit for any work until February 2017. The failure was not the cause of her unfitness to work in her substantive role. She was rendered unfit to return to her substantive role because of stressors arising in 2017 including the refusal of her appeal against the written disciplinary warning. There was no reasonable basis upon which to infer that the failure to make the adjustment caused more than minimal injury to her feelings. She is therefore entitled to an award at the low end of *Vento* scale of £1,200.

*Psychiatric Injury*

221. Where the discrimination causes a new psychiatric injury, the discriminator is liable for that injury (whether or not there was a pre-existing vulnerability). However, if the discrimination exacerbates a pre-existing condition (rather than a pre-existing vulnerability) the discriminator is liable only for that exacerbation. Where a single indivisible injury is caused by a combination of discriminatory and non-discriminatory causes, the discriminator(s) are liable for the whole injury. However, if an injury is divisible, the discriminator is liable for the particular part of the injury caused by their discrimination. (The focus is on the divisibility of the injury and not the divisibility of the causative contribution.) An injury is divisible if there is a rational and objective basis upon which to make a broad brush and sensible division (*BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188*).
222. The claimant submitted that: her dismissal was a cataclysmic event which caused PTSD; she was dismissed because of her absences from work; she would not have been absent from work (i.e. would have returned to work) had the reasonable adjustment been made; the failure to make the reasonable adjustment therefore indirectly caused her PTSD; the harm is not divisible and she should therefore be compensated for the whole of a new psychiatric injury. It was however found as a matter of fact that the failure to make the adjustment did not cause or contribute to her continuing unfitness for her substantive role. Furthermore, she was fit to perform an alternative role (which the claimant herself submitted) but she refused to participate in the redeployment process. Had she done so there was a reasonable chance that she would have been transferred into an alternative role.
223. The respondent submitted that the failure to make the adjustment contributed to the exacerbation of her underlying psychiatric condition and that they are liable only for that exacerbation.
224. We concluded that both work related and non-work related stressors caused an exacerbation of her pre-existing anxiety with depression from May 2016 to February 2017 which aligned with her unfitness to perform any work. The

work related stressors included but were not limited to the acts of harassment in February and March 2016 as well the written disciplinary warning in October 2016 and the subsequent failure to make reasonable adjustments. The non-work related stressors included the death of her son in October 2016. Given that the initial exacerbation occurred in May 2016 before the death of her son in October 2016, and given the expert evidence referred to an exacerbated mental state rather than a worsening mental state, it was inferred that the stressors which arose after May had the effect of prolonging the exacerbation rather than making it worse.

225. The work related stressors which arose prior to the initial exacerbation were the acts of harassment in February and March, the performance meeting in April, the disciplinary investigation in May (all dates 2016). The non-work related stressors which arose prior to the initial exacerbation were the deaths of her husband and father. The stressors which arose after the initial exacerbation were the death of her son, the issuing of the disciplinary warning, and the failure to make the adjustment all of which occurred in October/ November 2016. It was accordingly reasonable to conclude that the stressors which arose prior to May caused the initial exacerbation and the stressors which arose in October/ November had the effect of prolonging that exacerbation by 4 months.

226. There was a rational and objective basis upon which to make a broad brush and sensible division and the psychiatric injury was therefore considered divisible. If the psychiatric injury were not divisible it would be necessary to consider the implications of the award of damages already made in respect of harassment which could be viewed as having made an award of compensation for the whole of an invisible injury.

227. Prof MT opined that the work related stressors contributed somewhere between 30% up to a maximum of 50% of the exacerbation of her underlying anxiety with depression and the work related stressors included but were not limited to the failure to remove JS as her line manager in October 2016. Having regard to the facts as found the failure made a minimal (but not insignificant) contribution to the prolonging of the exacerbation of the

psychiatric injury. However, the focus is on the divisibility of the injury and not the causative contribution. There is no rational and objective basis upon which to make a further division in respect of that period of 4 months. Accordingly the Respondent is liable for the whole of exacerbation in that period notwithstanding that the maximal causes were either personal or non-discriminatory.

228. When assessing compensation for psychiatric injury regard should be had to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Claims. The respondent submitted that the relevant guidelines are those which applied at the time of injury namely the 13<sup>th</sup> Edition. The Judicial College Guidelines are updated in line with inflation and accordingly the relevant edition is the one that applies at the time that the award is made and not at the time the injury is sustained. As the guideline note: "these guideline figures should be increased by the appropriate index for inflation between August 2023 and the date of any assessment of damages". The relevant guidelines are therefore the 17<sup>th</sup> Edition.

229. The Guidelines provides that the following factors are relevant: the ability to cope with life and work; the effect on personal relationships; medical advice and the effect of treatment; future vulnerability; prognosis; whether medical help has been sought.

230. The cases are categorized by the Guidelines according to their severity namely: "severe" where the injured person has marked problems and the prognosis is poor; "moderately severe" where there are significant problems but prognosis is more optimistic (e.g. worker-related stress preventing a return to comparable employment); "moderate" where there are some problems but prognosis is good; and "less severe" taking into consideration the length of the disability.

231. The respondent's submission was that the anxiety with depression was moderate prior to exacerbation and moderately severe during exacerbation.

232. Prior to the initial exacerbation the claimant the claimant suffered from anxiety with depression. She was mainly able to cope with life and work although she had prior absences from work with certified stress, anxiety and depression;

she took diazepam intermittently; she maintained her relationship with her partner; she consulted with her GP regarding her mental health intermittently, but there were more frequent consultations in 2014. Having regard to the nature, extent and duration of her psychiatric condition it was considered that the anxiety with depression was of moderate effect prior to the exacerbation.

233. During the 4 month period of prolonged exacerbation the claimant was less able to cope with life and work; she continued to take diazepam; she consulted with her GP on 3 occasions regarding her mental health; she maintained her personal relationship with her partner; she was unfit for any work but the effects were resolved by February 2017 such that she was fit to perform an alternative role. It was therefore considered that the anxiety with depression was of moderately severe effect but was in the lower quartile of the band given the short duration.

234. The moderately severe band is £23,270 to £66,920 and the mid-point of the lower quarter is therefore £28,726. The moderate band is £7,150 to £23,270 and the mid-point is therefore £15,210. The claimant is therefore entitled to compensation for psychiatric injury of £13,516 (£28,726 - £15,210).

235. That figure should be increased by the appropriate index for inflation between August 2023 and the date of any assessment of damages which is an RPI of 4% to £14,050.

236. Regard should be had to the overall size of the total sum awarded for injury to feelings and psychiatric damage to avoid any double counting. It is considered that a total award of £15,250 would not in this case give rise to double counting given that the award for injury to feelings is at the low end of the Vento scale.

237. Under the 1996 Regulations a tribunal may make an award of interest on an award of compensation for discrimination and must consider whether to do so. Judicial interest of 8% applies from the date of the act of complained of the date of calculation (end-November 2016 to end-March 2025). The claimant is therefore entitled to interest in sum of £10,178 (£15,250 x 3045/365 days x 8%).



238. Where the tribunal considers that in the circumstances serious injustice would be caused if interest were to be awarded it may calculate interest, for such different period, as it considers appropriate in the circumstances, having regard to the Regulations. There were no submissions to this effect and notwithstanding the relative size of the award of interest there was no basis upon which to find that it would cause a serious injustice.

*Financial losses*

239. KS was in receipt of full sick pay from 5 May until 1 October 2016 and then half sick pay from 2 October until 1 April 2017. The claimant would been absent for 4 months following the death of her son regardless of the failure to make the adjustment. Furthermore, even if the failure had delayed her return she would still have exhausted her entitlement to sick pay over a 12 month period. Accordingly no financial losses flow from the failure to make the reasonable adjustment.

*Conclusion*

240. The unanimous judgment of the Tribunal is that:

- a. The complaint of discrimination arising from disability does not succeed and is accordingly dismissed
- b. The complaint of unfair dismissal does not succeed and is accordingly dismissed.
- c. In respect of the prior finding of the Cowen Tribunal on 5 March 2020 that there was a failure to make a reasonable adjustment, the respondent is ordered to pay the claimant compensation in sum of £15,250 plus judicial interest of £10,178.