EMPLOYMENT TRIBUNALS

Claimant: Mrs S Yusuf

Respondent: Apple Retail UK Ltd

Heard at: London South (by video)

On: 20, 21, 22, 23, 24, 27 and 28 January 2025

Before: Employment Judge Evans
Mr W Dixon
Mr S Corkerton

Representation
Claimant: Mr Tomison, counsel
Respondent: Ms Reindorf KC

JUDGMENT

The Tribunal's unanimous judgment is that:

1. The complaint of direct sex discrimination is not well-founded and is dismissed.

2. The complaint of harassment related to sex is not well-founded and is dismissed.

3. The complaint of victimisation is not well-founded and is dismissed.

4. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds.

5. The following complaint of failure to make reasonable adjustments for disability is well-founded and succeeds: the failure to offer the claimant a phased return to work. The other complaints of failure to make reasonable adjustments are not well-founded and are dismissed.

6. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

7. If the parties cannot agree remedy within one month of the date this judgment is sent to them, they should apply for a remedy hearing to be listed. Any such application should set out their views on how long a listing will be required.

REASONS

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Preamble

1. The Tribunal reserved judgment after submissions on 27 January 2025. These are our unanimous reasons for our reserved judgment given above.

2. The claim came before Tribunal on 20 January 2025. The parties had agreed a bundle of 2065 pages prior to the final hearing, to which additional pages 2066-2074 were added by consent during the course of the hearing ("the bundle"). In addition, it was agreed that we might wish to consider the contents of a costs bundle containing 73 pages which had been prepared for a previous hearing ("the costs bundle"). All references to page numbers are to the pagination of the bundle unless otherwise stated.

3. The claimant gave evidence by reference to a witness statement. So too did:

   3.1. Ms Robinson, a former employee of the respondent;
   3.2. Mr Simpkin, the claimant's trade union representative and a Regional Organiser of the GMB;
   3.3. Mr Forrester, the Store Leader of the respondent's Bluewater store;

3.4. Mr Kistner-Doe, a Senior Manager at the respondent's Bluewater store. (Mr Kistner-Doe was called Mr Kistner at the time of the events to which this claim relates. That is how he is referred to in the documents contained in the bundle and that is how we refer to him in these reasons).
3.5. Ms Boyd, the respondent's Market Leader for the South West;
3.6. Mr Bever, who performs a projects role within the respondent's International Employee and Labour Relations team;
3.7. Mr Dinnage, the Store Leader of the respondent's Bromley store;
3.8. Ms Parsons, a Flag Leader within the Regent Street store.

4. After the witnesses had given their evidence, we heard the parties' submissions on Monday 27 January 2025. The representatives provided written submissions and also made oral submissions. We then reserved our decision because there was insufficient time for us to deliberate and deliver an oral decision before the end of Tuesday 28 January 2025.

5. The judgment above and these reasons deal with liability only. Remedy will be dealt with at a separate hearing, if the parties are unable to resolve remedy issues between themselves.

The issues

6. The issues arising in the three claims comprising this case had been agreed between the parties shortly before the hearing to be as set out in Appendix One. The respondent clarified its case in two respects during the hearing. Further, in her closing submissions, Ms Reindorf noted that the words "because of her" had been wrongly included before "sex" in issue 4) and should be replaced with the words "related to". In addition, in his closing submissions Mr Tomison stated that the claimant did not rely on the grievance relating to the incidents on 11 and 12 June 2019 as a protected act. Finally, in a brief discussion before closing submissions began it was agreed that the question "Did the Respondent genuinely believe that the Claimant was no longer capable of performing her duties?" formed part of the issue of whether the claimant was dismissed for a fair reason. These clarifications are recorded in italics in Appendix One.

7. It was agreed that all remedy issues would be left until the remedy hearing, if one were necessary. Accordingly, these reasons do not deal with the issue of Polkey.

The Law

The Equality Act 2010 ("the Equality Act")

Introduction

8. In broad terms, the Equality Act prohibits various forms of discrimination by employers against employees with certain protected characteristics. It also prohibits victimisation.

9. The relevant protected characteristics are listed in section 4 of the Equality Act. Sex and disability are both protected characteristics.

Prohibited conduct

10. Section 39(2) of the Equality Act provides that an employer must not discriminate against an employee by, amongst other things, dismissing the employee or by subjecting the employee to any other detriment.

11. Section 39(4) of the Equality Act provides that an employer must not victimise an employee by, amongst other things, dismissing the employee or by subjecting the employee to any other detriment.

12. Section 39(5) of the Equality Act provides that a duty to make reasonable adjustments applies to an employer.

13. Section 40(1) of the Equality Act provides that an employer must not harass an employee.

Direct discrimination

14. One of the forms of discrimination prohibited by the Equality Act is direct discrimination. This occurs where "because of a protected characteristic, A treats B less favourably than A treats or would treat others" (section 13(1) of the Equality Act).

15. The question, therefore, is whether A treated B less favourably than A treated or would treat an actual or hypothetical comparator and whether the less favourable treatment is because of a protected characteristic – in this case sex. On such a comparison, there must be no material difference between the circumstances relating to each case (section 23 of the Equality Act).

16. Section 212 of the Equality Act provides that a detriment does not include conduct which amounts to harassment. Consequently, although direct discrimination and harassment claims may be pursued in the alternative, conduct will either amount to a detriment (for the purposes of a direct discrimination claim) or harassment but not both.

Harassment

17. Harassment is defined in section 26(1) of the Equality Act:

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

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

(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

18. Section 26(4) of the Equality Act deals with matters to be taken into account when deciding whether unwanted conduct had the relevant effect. The Tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect.

19. Whether conduct is "unwanted" is a question of fact which requires the Tribunal to decide whether the conduct was unwanted *by the employee* (Thomas Sanderson Blinds Ltd v Mr S English UKEAT/0316).

20. Turning to the necessary causal connection, "related to" is a broad test requiring an evaluation of the evidence in the round. It is broader than the "because of" formulation in a direct discrimination claim. In deciding whether conduct "related to" a protected characteristic, the Tribunal must apply an objective test and have regard to the context in which the conduct took place (Warby v Winda Group Plc EAT 0434/11). It is not, however, to be reduced to a "but for" test. It is not enough to show the individual has the protected characteristic or that the background related to the protected characteristic.

21. HHJ Auerbach gave useful guidance in relation to the necessary causal connection in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495:

> *20. Some basic points about the architecture of the variation of the definition of harassment found in sub-sections 26(1) and 26(4) are worth restating at the outset. Firstly, as Ms Millns correctly submitted, there are three components, all of which must be satisfied, albeit that the third has within it two alternatives. The conduct must be found to be unwanted; it must be found to relate to the relevant characteristic; and it must have either the proscribed purpose or the proscribed effect, or both. Secondly, the test of whether conduct is related to a protected characteristic is a different test from that of whether conduct is "because of" a protected characteristic, which is the connector used in the definition of direct discrimination found in section 13(1) of the 2010 Act . Put shortly, it is a broader, and, therefore, more easily satisfied test. However, of course, it does have its own limits.*
>
> *21. Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative. These propositions, we think, drive from a pure consideration of the language of the statute, and have been articulated in previous authorities including Hartley, O'Brien, and Nailard.*
>
> *…*
>
> *23. It is important to note that much of the discussion in Nailard concerned whether there was harassment related to sex, by virtue of what is called the*

motivation of the particular individuals concerned, because that was the focus of the particular issue in that case. The Tribunal in that case, it was said, needed to focus on the motivation for the conduct of the employed officials, as opposed to that of the lay officials, about whose alleged conduct complaint had been made to the employed officials.

24. However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.

25. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.

22. Unite the Union v Nailard [2019] ICR 28 was a decision of the Court of Appeal dealing with the meaning of "related to".

23. Whether the impugned conduct is sufficiently serious to "violate" a claimant's dignity is essentially a matter of fact for the Tribunal. However, in Richmond Pharmacology v Dhaliwal [2009] ICR 724 Underhill P said:

Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended.

24. In Betsi Cadwaladr University Health Board v Hughes and others [2013] EAT 0179 Langstaff P affirmed this view, commenting:

…the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

25. Langstaff J said this at [21] of Weeks v Newham College of Further Education UKEAT/0630/11/ZT in relation to "environment":

An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staffroom concerned. We cannot say that the frequency of use of such words is irrelevant.

Victimisation

26. Victimisation is defined in section 27 of the Equality Act:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act. …

27. The causal connection required is the same as in a direct discrimination claim. It is not a "but for" test but an examination of the real reason of for the treatment. As such, it is necessary to consider the employer's motivation (conscious or unconscious).

28. Section 212 of the Equality Act provides that a detriment does not include conduct which amounts to harassment. Consequently, although victimisation and harassment claims may be pursued in the alternative, conduct will either amount to victimisation or harassment but not both.

Discrimination arising from disability

29. Under section 15(1) of the Equality Act, a person (A) discriminates against a disabled person (B) if "A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim".

30. Section 15(2) provides that there will be no such discrimination if "A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

31. "Something arising in consequence of" the disability should be given its ordinary and natural meaning (T-Systems Ltd v Lewis EAT/0042/15). In that case the EAT rejected the submission that the scope of the consequences arising from a disability is confined to things over which the employer has no control or are limited to the effects of the claimant's disability on the disabled person rather than the employer.

32. Mrs Justice Simler considered the causative link required by section 15 in Pnaiser v NHS England and another [2016] IRLR 170 and then again in Shiekholeslami v University of Edinburgh [2018] IRLR 1090. In the latter she stated:

> *On causation, the approach to s.15… is now well established... In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.'*

Duty to make reasonable adjustments

33. The Equality Act imposes a duty on employers - referred to as A - to make reasonable adjustments to premises or working practices to help disabled job applicants and employees (section 20 of the Equality Act). A failure to comply with this duty to make reasonable adjustments is a form of discrimination (section 21 of the Equality Act).

34. The duty can arise in three circumstances. Insofar as relevant for this case it arises:

> *… where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.* (Section 20(3)).

35. Section 20 is supplemented by Schedule 8 to the Equality Act. Paragraph 20 of Schedule 8 provides that the duty to make reasonable adjustments only arises where the employer knows or ought reasonably to know of the disabled person's disability and of the substantial disadvantage at which the person is placed.

The burden of proof

36. Section 136 of the Equality Act 2010 provides for a shifting burden of proof:

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision*.

37. The correct approach to the shifting burden of proof remains that set out in the guidance contained in Barton v Investec Securities ltd [2003] IRLR 332 approved

by the Court of Appeal in Igen Ltd v Wong [2005] IR 931 and further approved recently in Efobi v Royal Mail Group Ltd [201] ICR 1263.The Barton guidance is as set out below.

(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases, the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

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

(5) It is important to note the word "could" in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

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

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

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

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

38. There is therefore a two-stage process to the drawing of inferences of direct discrimination. In the first place, the claimant must prove facts from which the tribunal could conclude in the absence of any other explanation that the respondent had committed an act of discrimination against the complainant. If the burden does shift, then the employer is required to show a non-discriminatory reason for the treatment in question.

39. In Efobi the Supreme Court confirmed the point that a Tribunal cannot conclude that "there are facts from which the court could decide" unless on the balance of probability from the evidence it is more likely than not that those facts are true. All the evidence as to the facts before the Tribunal should be considered, not just that of the claimant.

40. In Madarassy v Nomura International plc [2007] ICR 867 the Court of Appeal stated that "could conclude" must mean "a reasonable Tribunal could properly conclude" from all the evidence before it. However, that does not include evidence of the reason for any less favourable treatment (Efobi). Consequently, a Tribunal may have to draw a distinction between primary facts (which can include facts which might be an alternative reason for the treatment) and evidence about the mental processes of the decision maker (Edwards v Unite the Union [2024] EAT 151).

41. The Court of Appeal in Madarassy also pointed out that the burden of proof does not shift simply on proof of a difference in treatment and the difference in status. This was because it was not sufficient to prove facts from which a Tribunal could conclude that a respondent could have committed an act of discrimination.

42. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that they have relevant circumstances which are the same or not materially different as those of the claimant having regard to section 23 of the Equality Act. Evidence of the treatment of a person whose circumstances

materially differ to those of the claimant is inherently less persuasive than that of a person whose circumstances do not materially differ. If anything, more is required to shift the burden of proof when there is an actual comparator, it will be less than would be the case if a claimant compares their treatment with a person whose circumstances are similar, but materially different, so that there is not an actual comparator.

Burden of proof in claims other than direct discrimination

43. When the claim is not one of direct discrimination, the way in which the shifting burden of proof provision will apply depends upon the provision concerned:

    43.1. In a complaint for reasonable adjustments, the burden of proof shifts when the claimant has proved that there is a PCP which puts them at a substantial disadvantage compared to a non-disabled person and, also, that there are facts from which it could reasonably be inferred in the absence of an explanation that the duty to make reasonable adjustments has been breached. As such there must be some evidence of an apparently reasonable adjustment that could have been made.

    43.2. In a complaint of harassment, the claimant will need to establish on the balance of probabilities that they have been subjected to unwanted conduct which had the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. They will also need to adduce some evidence to suggest that the conduct could be related to a protected characteristic.

    43.3. In a complaint of victimisation, if the claimant proves that they have done a protected act and that they have then suffered a detriment at the hands of the employer, a prima facie case of discrimination which shifts the burden of proof to the employer will be established if there is evidence from which the Tribunal could infer a causal link.

    43.4. In a complaint of discrimination arising from disability, the claimant will need to establish that they have been treated unfavourably and will have to prove that the something upon which they rely arises in consequence of their disability. They will also need to adduce some evidence to suggest that the unfavourable treatment could be because of the something arising.

The Employment Rights Act 1996 ("the 1996 Act") and a claim of unfair dismissal

44. Section 94 of the 1996 Act gives an employee the right not to be unfairly dismissed.

45. Section 98(1) of the 1996 Act provides that, when a Tribunal has to determine whether a dismissal is fair or unfair, it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). The burden of proof to show the reason and that it was a potentially fair reason is on the employer. A reason for dismissal is a set

of facts known to or beliefs held by the employer which cause it to dismiss the employee. “Capability” is a potentially fair reason.

46. If the employer persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

47. In considering this question the Tribunal must not put itself in the position of the employer and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the employer. Rather it must decide whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

Ill-health dismissals

48. The starting point for deciding whether an ill health capability dismissal is fair is Spencer v Paragon Wallpapers Ltd [1977] ICR 301 in which Phillips said:

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

49. He noted that relevant circumstances included:

> *…the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do.*

50. In any case involving long-term absence, the Tribunal will consider the adequacy of the consultation with the employee and the steps taken by the employer to establish the true medical position. The EAT stressed the importance of these matters in East Lindsey District Council v Daubney [1977] ICR 566.

51. Those two rather old authorities were considered and approved relatively recently in BS v Dundee City Council [2014] IRLR 131 CSIH by the Inner House of the Court of Session. At [27] it observed that three important themes emerged from Spencer and Daubney:

> *…First, … it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. … this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and*

> *does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.*

52. Turning to the question of whether dismissal is a fair sanction, a variety of factors may need to be weighed up in considering whether the dismissal if reasonable under section 98(4) of the 1996 Act. These may include:

    52.1. the nature of the illness and the job;
    52.2. the applicability and clarity of an employer ill health policy;
    52.3. the needs and resources of the employer;
    52.4. the effect on other employees;
    52.5. the likely duration of the illness.
    52.6. how the illness was caused.
    52.7. the effect of sick-pay and permanent health insurance schemes;
    52.8. alternative employment; and
    52.9. length of service (provided it is relevant to one or more of the other factors).

Ill health caused or exacerbated by the employer's treatment

53. The leading case in circumstances where the claimant's ill health has been caused by the employer is McAdie v Royal Bank of Scotland [2007] EWCA Civ 806. It is authority for the proposition that if an employee's ill health was caused by the employer that might justify a Tribunal requiring the employer to demonstrate extra concern before implementing a dismissal, but that this remains a question of fact, not a rule of law.

54. The EAT (with whom the Court of Appeal agreed) noted that in such a case:

> *It may, for example, be necessary in such a case to "go the extra mile" in finding alternative employment for such an employee or to put up with a longer period of sickness absence than would otherwise be reasonable.*

55. However, the EAT noted that in the end the question is whether the employer acted reasonably: the fact that an employer has caused the incapacity however culpably cannot preclude it forever from effecting a fair dismissal.

56. In L v M UKEAT/0382/13 (16 May 2015, unreported) the EAT accepted that the McAdie principle applied equally to cases where the employer's conduct had exacerbated (rather than caused) an illness.

Findings of fact

57. These findings of fact do not of necessity refer to all of the evidence that was before the Tribunal. As in many cases, the bundle was of excessive length and contained many irrelevant documents. The Tribunal made plain at the outset that it would not necessarily read pages contained in it that were not referred to in the witness statements or during the course of the hearing.

General background findings

58. The claimant began employment with the respondent in May 2005. She initially worked in the Bluewater store of the respondent and was promoted to the role of Manager there. She was moved to the respondent's store in Bromley on 6 July 2020.

59. Mr Kistner was a Senior Manager in the Bluewater store. Two incidents took place between the claimant and Mr Kistner on 11 and 12 June 2019. We turn to those incidents in more detail below. However, we note that there was some doubt about whether the first incident actually took place on 10 or 11 June 2019. Nothing turns on that and so we refer, as the parties mainly did, to the first incident as having occurred on 11 June 2019.

A brief chronology

60. A brief summary of the chronology of events thereafter reasonably includes the following:

24 July 2019	Claimant presents three grievances (page 352)
7 August 2019	Claimant attends grievance hearing with Ms Boyd (page 585)
23 October 2019	Ms Boyd rejects the claimant's grievances (page 617)
29 October 2019	Claimant appeals the outcome of the grievances (page 632)
9 February 2020	Claimant presents first Tribunal claim
6 February and 10 February 2020	Claimant attends grievance appeal hearing with Mr Bever
26 March 2020	Mr Bever rejects most but not all of the claimant's appeal against the outcome of the grievances (page 691)
6 July 2020	Claimant moves to the respondent's Bromley store.
14 August 2020	Claimant presents second Tribunal claim
13 October 2020	Preliminary hearing in relation to the question of time
30 March 2021	Final hearing in first and second Tribunal claims listed for 17-21 January 2022
10 January 2022	Claimant's period of sickness absence begins

12 January 2022	Tribunal postpones the January 2022 hearing (costs bundle page 70)
10 May 2022	Occupational health appointment (OH report prepared the same day) (page 937)
21 July 2022	Occupational health appointment – did not go ahead (page 953)
29 July 2022	Mr Dinnage says he will shortly invite claimant to an incapacity meeting (page 972)
11 September 2022	Claimant cancels OH appointment scheduled for 19 September (page 1013)
4 October 2022	Claimant attends incapacity meeting with Mr Dinnage (page 1041)
1 October 2022 to 23 November 2022	Claimant on annual leave
23 November 2022	Claimant attends outcome meeting at which she is dismissed (page 1098), dismissal letter dated the same date (page 1093)
28 November 2022	Claimant appeals dismissal (page 1110)
9 February 2023 & 21 February 2023	Hearing of appeal against dismissal (page 1169)
21 February 2023	Claimant presents third Tribunal claim
19 April 2023	Ms Parsons rejects the claimant's appeal against her dismissal (page 1217)

Credibility of the witnesses

61. **The claimant:** The Tribunal finds that the credibility of the claimant was damaged by the following matters:

61.1. Her account of the incidents on 11 and 12 June as set out in written documents which she prepared evolved in a way which damages her credibility. The first time she committed her account to any document included in the bundle was her Exchange Journal entry of 27 June 2019 (page 303). She makes no reference to aggression or being intimidated. She also makes no reference *at all* to the incident of 12 June 2019 in which she ultimately claimed she was prevented from leaving a room. What she in fact records is in effect a complaint about how Mr Kistner gave her feedback on 11 June 2019. She was told to "sssshhhhh" ("shush") and Mr Kistner had used it as "an opportunity to vent his emotion". The description of the 11 June incident is significantly different in the grievance (page 354), with references to aggression and the invasion of personal space appearing, and different again in the witness statement with references to her feeling Mr Kistner's "breath and saliva". Equally, the incident of 12 June, having not been mentioned at all in the Exchange Journal entry, is then described in the grievance as involving Mr Kistner not allowing her to leave the room where they were meeting (page 354). Overall, it is the obvious differences between her account in the Exchange Journal and that set out in later documents and her witness evidence which damage her credibility. First, the account in the later

documents make the alleged incident of 11 June 2019 sound much more serious. Second, the alleged incident of 12 June 2019 is obviously the more serious of the two and yet it was not mentioned at all in the Exchange Journal.

61.2. Further and separately, her oral evidence was marked on a number of occasions by implausibility. For example, her explanation of why she had not recorded the 12 June incident (which she said involved her being prevented from leaving a room) in the Exchange Journal ("I didn't have time");

61.3. Further and separately, her oral evidence was marked on a number of occasions by denying what was obviously true. For example, the notes of a meeting at page 214 record her as having said in January 2018 that "To be honest, because of a previous incident with Damien we have got a broken relationship". It was put to her that those were strong words to use and she replied, "I don't believe they are strong words…". This reflected her general unwillingness to make any concessions when being cross-examined.

61.4. Further and separately, at times she appeared to seek to tailor her case in response to possible evidential difficulties. For example, shortly after saying that the reason she had not recorded the incident of 12 June 2019 in the Exchange Journal was because "I didn't have time", she went on to assert quite improbably that the incident of 12 June 2019 was not relevant to the PTSD she said she had; that, she said, had been caused by the incident on 11 June alone. This was not only apparently inconsistent with what she had said to Mr Dinnage on 4 October 2022 (page 1048) but also improbable, given that her description of the incidents of 11 and 12 June 2019 as set out in her grievance and witness statement suggested that the one on 12 June 2019, when she had been prevented from leaving a room, was the more serious.

62. **Ms Robinson:** we found Ms Robinson to be a largely credible witness. She made sensible concessions about the obvious limitations of her written witness evidence.

63. **Mr Simpkin:** the question of credibility barely arises in relation to the evidence of Mr Simpkin, which was largely opinion evidence – setting out how he, as a union officer, would have expected things to have been done.

64. **Mr Kistner:** we found Mr Kistner to be a largely credible witness. He generally engaged with rather than sought to evade difficult questions, for example he freely accepted that an absence of Ms Blowey resulted from a conversation that he had had with her. However, on occasion his credibility was negatively affected by denying something that was obviously true. For example, he disagreed with the statement that it was "not retaliation" to raise a grievance about things that had been done wrongly.

65. **Ms Boyd:** we found Ms Boyd to be a credible witness. She made sensible concessions – for example, that she *could* have asked Mr Nicholls additional questions about certain matters. Overall, her evidence was considered and generally consistent.

66. **Mr Bever:** we found Mr Bever to be a credible witness. He was careful and measured in his answers and generally very consistent. He made sensible concessions where relevant, for example in relation to whether a particular witness could have been interviewed by video once the Covid pandemic was under way.

67. **Mr Dinnage:** we found Mr Dinnage to be a largely credible witness, because his oral evidence was generally consistent with the documentary evidence and because he made a number of sensible concessions when being cross-examined, for example that the claimant could not be blamed for being thrown by the contents of the occupational health referral when they were read out to her at the appointment in July 2022.

68. **Ms Parsons:** we found Ms Parsons to be a credible witness. This was in particular because she made a number of realistic concessions in her evidence.

Findings in relation to the specific allegations relating to 2019 and 2020

11 June 2019 incident

69. The incident on 11 June 2019 took place because Mr Kistner had decided to give the claimant feedback. The giving of feedback is a significant part of the respondent's corporate culture. The Tribunal finds, however, that Mr Kistner did not choose his time to give the claimant feedback sensibly. She had just told him that she had had a large argument with her husband. The Tribunal finds that Mr Kistner was not an emotionally intelligent manager. 11 June 2019 was not a sensible occasion on which to give the claimant feedback of the kind Mr Kistner intended to give.

70. Equally, however, the Tribunal finds that the claimant did not like to receive feedback and would tend to become argumentative or defensive when she did. We so find because of what a number of the employees interviewed by Ms Boyd during the subsequent grievance investigation said. To pick but one example, amongst a considerable number, Ms Goldsworthy stated (page 484) that:

> *At a later date discussed feedback regarding coaching with her, I shared that I won't always tell you with feedback you [sic] as when I do you go on the defensive, sometimes I will choose to ask questions but I won't wrap it up with can I give you feedback as in past I get confrontation and a defensive nature.*

71. Overall, the Tribunal finds that, when Mr Kistner tried to give the claimant feedback on 11 June 2019, she reacted negatively and did not wish to listen. The Tribunal finds that Mr Kistner was frustrated by this. However, the Tribunal finds that Mr Kistner did not shout at the claimant, was not aggressive towards the claimant and did not shake his finger in her face. We do find, however, that Mr Kistner put his finger to his lips and shushed the claimant several times. The Tribunal makes these findings for the following reasons:

    71.1. In light of our credibility findings above, we generally found Mr Kistner to be a more credible witness than the claimant – this is of particular relevance because there was no eyewitness to the incident.

71.2. We find that if Mr Kistner had acted as the claimant alleges, she would have raised the matter promptly and not simply referred to it as she did in the Exchange Journal two weeks later, before waiting several weeks more before raising a grievance. This is all the more the case given the serious nature of her allegations in relation to 12 June 2019, to which we turn below.

71.3. Whilst we find that there is evidence of Mr Kistner losing his composure on other occasions, we do not find that even now there is any significant evidence of him becoming aggressive and making physically threatening gestures as alleged by the claimant.

71.4. With regard to this point, we note that Ms Blowey (page 773) did not attribute periods of sickness absence due to stress that she had had after interacting with Mr Kistner to aggressive or threatening *behaviour.* Her interview makes plain that she felt threatened by being told that she would be put on a PIP if her performance did not improve. It was (in her words) "the content" of what was said, rather than how it was said. So far as Ms Loi was concerned, in her interview with Mr Bever (page 772) she makes no mention of threatening or aggressive behaviour by Mr Kistner. Consequently, although Mr Kistner accepted in cross-examination that she had taken a period of sick leave due to stress after he had given her feedback about being unapproachable**,** we find that she herself did not regard this as following aggressive or threatening behaviour by Mr Kistner. So far as Ms Robinson is concerned, her evidence in chief went no further than saying that he had made her feel "dismissed and unheard" and that at times his responses felt like "subtle microaggressions" (which she accepted in cross-examination was different to aggressive behaviour, agreeing as she did that micro-aggressions were "almost imperceptible"). Further, her witness statement is generalised with few specifics. Overall, it does not suggest that Mr Kistner behaved in a threatening or aggressive manner towards her. She did not replicate in it the allegations contained in the further and better particulars prepared by the claimant at page 33, despite her witness statement which was professionally prepared being the obvious opportunity to do this. We attach little weight to her belated confirmation at the end of her oral evidence that the allegations set out at page 33 were accurate;

71.5. So far as shouting is concerned, Ms Prestidge in her interview with Ms Boyd believed that she might have heard the claimant, but not Mr Kistner, shout on or around 11 June 2019 (page 557). None of the possible witnesses had heard Mr Kistner shout;

71.6. By contrast, however, there was relevant contemporaneous evidence in relation to whether Mr Kistner had shushed the claimant – in particular the evidence of Mr Forrester (page 453) and Ms Goldsworthy (page 485) during their interviews with Ms Boyd.

71.7. If Mr Kistner had acted as the claimant contends, the Tribunal finds that it is inherently improbable that she would have instigated a meeting with him on the following day in a small room with no windows.

12 June 2019 incident

72. The Tribunal finds that on 12 June 2019 the claimant asked Mr Kistner if she could ask him for some advice. He agreed and they went to speak in a small room with no windows, with Mr Kistner following the claimant.

73. The Tribunal finds that in fact the claimant did not wish to ask Mr Kistner for advice but rather wished to remonstrate with him in relation to the feedback which he had given her on the previous day. We find that this led to frustration on the part of Mr Kistner and an exchange of views.

74. We find, however, that Mr Kistner did not intimidate the claimant with his behaviour by shouting at her, aggressively waving his hands around and refusing to let leave her the room.

75. We prefer the evidence of Mr Kistner to that of the claimant in relation to this incident because, for the reasons given above, we found him to be a more credible witness. Further, we find that it is implausible that the claimant would not have mentioned the fact that Mr Kistner had physically prevented her from leaving the room sooner than she did if that had happened. Objectively speaking, it is the most serious of the allegations made against him.

76. We do not, however, find that the claimant has acted dishonestly in making and maintaining her allegations in respect of 11 and 12 June 2019. We accept that the claimant may well have *subsequently* come to believe that Mr Kistner's behaviour was aggressive and intimidating when in fact, objectively viewed, it was not. Clearly, on both occasions they had a difference of views. Further, there was no dispute that on 12 June 2019 Mr Kistner was sitting closer to the door than the claimant. We can see how their respective physical locations in relation to the door could in the claimant's mind have become Mr Kistner refusing to allow her to leave the room even though that was not in fact the case.

The investigation of the grievances against Mr Kistner

77. We have focused our findings on the criticisms made of the investigation in the claimant's skeleton argument (its [93]).

78. **Failure to interview four women identified by claimant as having received similar treatment from Mr Kistner**: this is a complaint that Ms Boyd failed to interview four women (Ms Blowey, Ms Loi, Ms Robinson and Ms Mirza) who the claimant said had received similar treatment from Mr Kistner. We have concluded that this failure did not make the investigation inadequate for the following reasons:

    78.1. First, the original grievance (page 353) does not refer to sex discrimination (and therefore does not highlight the potential relevance of the treatment of other *women*).

    78.2. Secondly, the women were identified in an amended version of the notes that the claimant had read from at the grievance hearing (page 400) as being

people who had experienced aggression by Mr Kistner. However, the claimant does not place any great emphasis on them being interviewed in her covering email at page 397. She does not identify them by name in the email and says: "please feel free to reach out to these interval individuals as you see fit".

78.3. Thirdly, Miss Boyd's explanation for why she did not interview them was entirely reasonable. She pointed out that she was tasked with investigating three separate grievances covering very considerable factual ground and she had, in principle, chosen to interview employees who were or might be witnesses to the actual events complained of. There was no suggestion that the four employees identified were such witnesses. Rather, the suggestion was in effect that they might be interviewed in order to establish a pattern of behaviour which would have supported the likely truth of the claimant's allegations.

78.4. We do not accept that the inconsistency between paragraph 16 of Ms Boyd's witness statement and her oral evidence is such as to damage her credibility. In paragraph 16 she says:

> *I do not recall [the claimant] asking me to interview Jess Loi, Sarah Blowey or Rushina Robinson during the grievance investigation meeting. I do not believe she mentioned these names to me, I am confident I had not heard them before Julian asked me about them during the appeal process. I do remember that [the claimant] brought up Nyla Mirza's own circumstances.*

78.5. When cross-examined, she accepted that this was wrong because, although she could not recall the claimant mentioning the four women in the grievance meeting, the claimant had mentioned them in the amended notes (page 400) that had been sent to her after the grievance meeting. This is an entirely credible explanation for the inconsistency given that the witness statement was prepared some 2 ½ years after the event and in light of what we have found in [78.2] above.

78.6. Overall, as Ms Boyd put it herself, it was necessary to draw the line somewhere in terms of who was to be interviewed. The process she undertook involved 15 interviews. In all the circumstances, it cannot be said that the failure to interview the four employees in question meant that the investigation was inadequate.

79. **The adequacy of Ms Boyd's notes**: the notes of the grievance meeting between the claimant and Ms Boyd were at page 387. They ran to only seven pages although the meeting had lasted for three and three-quarter hours. They are not an attempt at a verbatim record and do not purport to be. However, they refer regularly and quite specifically to the 50 pages of notes that the claimant took to the meeting and from which she had read during the meeting (for example at page 391 the notes referred to specific sections of the 50 pages of notes). We find that this was a sensible way of incorporating relevant sections of the 50 pages of notes into the notes of the grievance meeting. They would have been little point in Ms Boyd retyping the relevant sections of the 50 pages of notes. We further note that the

claimant was given an opportunity to comment on the accuracy of the minutes and did so (her email of 17 September 2019 at page 593 – "I have read the notes that you sent over and I have made amendments where required (Attached)").

80. The claimant commented in her witness statement on the length of the minutes of her meeting compared to those of other meetings conducted by Ms Boyd during the grievance process. However, this ignores two points. First, Ms Boyd was generally accompanied by a note taker in those other meetings. It is always easier for a full note to be prepared when the notetaker is not one of the main participants. Secondly, Ms Boyd's notes in effect incorporate the additional 50 pages, where relevant, of notes provided by the claimant. In all the circumstances, we find that the notes that Ms Boyd took were not inadequate.

81. **Ms Boyd failing to ask people if they had seen Mr Kistner treat women differently**: we note again that the formal grievance as set out at pages 353 to 354 was not one of sex discrimination, although the claimant went on to raise questions in relation to how Mr Kistner treated women. Ms Boyd interviewed a considerable number of people about the specific factual allegations made by the claimant about her own treatment. In all the circumstances, we find an adequate investigation did not require Ms Boyd to make general enquiries of those she interviewed in relation to whether they believed Mr Kistner treated women differently. We note in this respect that in any event around forty percent of those interviewed were women. It was reasonable for her to simply ask interviewees whether they had seen the incident in question and then to ask open questions about whether they had seen him acting aggressively towards anybody as Ms Boyd did, for example, in her interview with Mr Forrester (page 452), Ms Goldsworthy (pages 484-486), and Ms Farrar (in relation to acting aggressively – page 504).

82. **Ms Boyd allegedly failing to pursue lines of inquiry which indicated that Mr Kistner had been threatening and lost his composure in the past**: we find that an adequate investigation did not require this. Realistically, asking the interviewees whether he had acted aggressively covered the question of whether he had been threatening (which is not a word used in the grievance). There was no dispute that he had lost his composure in the past – he freely admitted this in his own interview with Ms Boyd (page 473).

83. **Ms Boyd allegedly taking too long to investigate:** Ms Boyd took 13.5 weeks to deal with the three grievances. The respondent's policy (page 356) does not set out a detailed timescale but provides that "within a reasonable time following the hearing or investigation, you will receive in writing the outcome of the grievance and any recommendations". She had to investigate three grievances covering substantial factual ground and including serious allegations. She undertook fifteen interviews and the whole process overlapped very substantially with the summer holiday period. She made some attempts to keep the claimant informed of her progress. We find that in all these circumstances Ms Boyd did not take "too long".

84. **Ms Boyd allegedly interviewing irrelevant people who were likely to undermine the claimant's case:** Ms Boyd had not met the claimant prior to hearing the grievance and did not work in the South-East Market ("Market" is the word the respondent uses instead of "region"). We find that her choice of witnesses

was informed above all by her understanding of who might have been witnesses to the various factual incidents that the claimant complained of. We find that she did not interview people who she should have known would be irrelevant or who she thought would undermine the claimant's case.

85. Taking matters in the round, whilst it is always possible to suggest that pursuing or not pursuing certain lines of investigation might improve the quality of an investigation, we find that Ms Boyd approached her task diligently and that the investigation was significantly better than "adequate".

The grievance decision of 23 October 2019

86. The grievance outcome was dated 23 October 2019 (page 617). Ms Boyd did not uphold either of the claimant's grievances relating to Mr Kistner. So far as the grievance concerning inappropriate comments that the claimant said Mr Kistner had made about her skin colour, Ms Boyd concluded:

> *I do not uphold this part of the grievance as there is no evidence to suggest inappropriate comments were made as you described.*

87. So far as the grievance concerning the events of 11 and 12 June 2019 were concerned, Ms Boyd concluded:

> *I can conclude that there is no evidence to suggest that Damian was aggressive towards you or towards women therefore I do not uphold this part of the grievance, however I do have recommendations from the findings that will support improving the relationship moving forward.*

88. This conclusion relates mainly to the 11 June 2019 incident. The grievance outcome did not include an express finding about whether Mr Kistner had shushed the claimant.

89. So far as 12 June 2019 is concerned, Ms Boyd concluded:

> *I do not uphold this part of the grievance as it is clear from my findings that Damien did not block the door, was not aggressive and that you have had very little time with Damien since returning from holiday.*

The investigation of the claimant's appeal of 29 October 2019 against the grievance outcome

90. The claimant appealed the grievance outcome on 29 October 2019 (page 632). She provided further details of her grounds of appeal on 11 November 2019 (page 635).

91. The criticisms of the claimant in relation to the grievance investigation are at paragraph 98 of the claimant's skeleton argument. Again, we focus our findings on the specific criticisms made.

92. **Failure to investigate the issues with the notes of the Claimant's grievance hearing**: in light of our findings above in relation to the lack of merit of this point, we find that Mr Bever dealt with it adequately and this is reflected in his express finding in relation to the issue under the heading "Process" in his decision (page 699).

93. Failure to interview all of the four people mentioned by the Claimant: Mr Bever interviewed Ms Loi (page 772) and Ms Blowey (page 773). He had not been given specific incidents to put to either of them. He asked them both: "Have you ever experienced a member of the team at Bluewater losing their composure and making either yourself or others feel uncomfortable or threatened". The evidence of Ms Loi was that she had not but had witnessed a heated conversation between the claimant and a "genius" (a term used for a colleague performing a particular role). Ms Blowey, as we have found above, described an incident when Mr Kistner had told her that she would be put on a PIP and said that this "made me feel I was being threatened…". She said this played on her mind and she ended up being signed off with stress and anxiety. When asked "why did you feel threatened" she answered "It was the content, my nature is to worry, it was if this doesn't change we do the PIP etc. It felt like it was being used a threat".

94. We find that Mr Bever had intended to interview the other two employees named by the claimant: Ms Robinson and Ms Mirza. We find that one of them was off work sick and that he did not interview the other because the respondent closed its stores because of the pandemic and so no face-to-face interview was possible.

95. In all the circumstances, we find that the failure to interview Ms Robinson and Ms Mirza did not result in the appeal investigation being inadequate for the following reasons. First, the claimant had provided very little information to Mr Bever about the details of the evidence that the four witnesses might provide (page 635) beyond that he had allegedly been aggressive to them. However, the two that Mr Bever had interviewed (Ms Loi and Ms Blowey) had provided no such evidence. Secondly, because of the very limited information that the claimant had provided, there were not matters in relation to Ms Robinson and Ms Mirza which it was obviously important for Mr Bever to put to them in light of the contents of the grievance. Thirdly, the claimant had already at the very least hinted that her grievance was taking too long (her email of 29 October 2019 at page 632). Fourthly, the explanations provided for not interviewing the two witnesses were, given these matters, reasonable: waiting to interview an ill employee could have caused significant delay and, at the beginning of the covid era, it was simply not the norm to consider (as it is now) whether a face-to-face interview can be replaced by a video call.

96. **Failure to ask appropriate questions when interviewing two of those people**: we find that asking the open question set out above was not inappropriate when Mr Bever had no detailed allegation of misbehaviour to put to the interviewees for them to comment on. Or, to put it differently, the question asked could reasonably have been expected to elicit an account of any occasion on which they, as women, had been treated aggressively or otherwise inappropriately by Mr Kistner.

97. **Asking different questions to different people, knowing what response he was likely to receive**: we find that Mr Bever did not do this. We find he tailored his questions appropriately. The weakness of the criticism was illustrated by Mr Bever's reply when asked why he had identified Mr Kistner when asking Mr Forrester "have you seen Damien ever demonstrate aggressive behaviour". It was suggested that he had identified Mr Kistner because he knew that if he did this Mr Forrester would answer "no". Mr Bever explained, convincingly, that he had in fact named Mr Kistner because Mr Forrester was sufficiently involved in the process to know that it was Mr Kistner's conduct that was being investigated.

98. Ignoring the evidence which supported the Claimant's grievance: we find that Mr Bever did not ignore the evidence that supported the claimant's grievance. For example, he clearly wrestled with the question of the PIP (concluding that there was "not enough clarify on how these competency opportunities manifest as a performance gap" (page 695)) and, indeed, he upheld part of the grievance relating to the PIP (page 700). Equally, he also paid careful attention to the evidence concerning 11 June, making an express finding (which Ms Boyd had not) that Mr Kistner had shushed the claimant (page 699). The decision simply does not support the contention that Mr Bever ignored evidence supporting the claimant's grievance.

99. The investigation took too long: the detailed grounds of appeal were provided on 6 November 2019 (page 634). Mr Bever conducted an 8-hour meeting with the claimant spread over two days and interviewed a number of additional witnesses before sending the claimant a detailed 10-page decision on 26 March 2020. As such it took just over 3.5 months for the appeal to be completed. We find that this was not "too long" in light of the contents of the respondent's relevant procedure and all the circumstances of the case: it was a complex appeal raising numerous issues.

100. Overall, we conclude that the investigation that Mr Bever carried out was a significantly more than adequate investigation in all the circumstances.

The decision of 26 March 2020 not to uphold the appeal against the grievance outcome

101. Mr Bever rejected the claimant's appeal against the outcome of her grievances, except in relation to the Warn PIP process. In relation to that point, he concluded:

> *I am upholding your grievance that this Warn PIP was not of the quality you should reasonably expect in order to support your success in improving your performance. I recommend the current Warn PIP is withdrawn, and you are given a clear articulation of all the current performance concerns including a clear and specific articulation of the performance gap.*

102. As noted above, he also made a finding that the claimant had been shushed but did not uphold the part of her grievance appeal in relation to 11 June 2019.

The events in 2022 and 2023 ending with the claimant's dismissal

July 2020 to January 2022 and Mr Dinnage's knowledge of the claimant's first and second claims

103. As noted above, the claimant was transferred from the respondent's Bluewater store to its Bromley store in July 2020 and her employment proceeded without great incident until January 2022. She had some periods of sickness, but these were largely due to Covid. There was, as such, a period of nearly 18 months when the claimant's employment continued without any significant day-to-day difficulties.

104. We find that Mr Dinnage, the Store Leader of the Bromley store, knew that the claimant had brought a Tribunal claim against the respondent arising out of her employment at the Bluewater store, but we accept his evidence that he did not have any details of it because a decision had been taken that the less he knew about it the better. We find, again in accordance with his evidence, that he understood it to be a race discrimination claim by late 2020 following other employees at the Bromley store finding a copy of the judgment relating to the preliminary hearing on time limits in late 2020.

January to April 2022

105. The final hearing of the first and second claims was due to take place in January 2022 but was postponed on 12 January 2022 following a successful application for reconsideration by the respondent of the Tribunal's previous refusal of an application to postpone. In broad terms, in its successful application for a reconsideration the respondent set out circumstances explaining why Mr Kistner had not been informed of the final date of the hearing at an earlier stage and so had booked a holiday during it (page 70 of the costs bundle). No detailed reasons were provided by the Tribunal for its decision.

106. We find that the claimant was very upset indeed by the postponement of the final hearing. We find that this upset was a factor in the period of sick leave which began on around 10 January 2022, and which continued, more or less uninterrupted, until 30 September 2022. She was signed off with "anxiety disorder, stress and truma" [sic] for 6 weeks from 14 January 2022 (page 899), then again for the same reasons from 25 February to 22 April 2022 (page 912), then again for the same reasons from 6 May 2022 to 17 June 2022 (page 936), then again for the same reasons from 17 June to 27 July 2022 (page 941) and finally, again for the same reasons, from 28 July 2022 to 30 September 2022 (page 954). The claimant was particularly unwell in January 2022 and was for a short period an inpatient at The Priory. During this period the claimant was also diagnosed as having fibroids which necessitated an operation on 13 June 2022.

107. During the initial period of sickness absence beginning in January 2022 Mr Dinnage maintained contact with the claimant and on 23 March 2022 asked for her consent for a referral to Occupational Health. The claimant gave this consent 19 April 2022 (page 926).

108. The claimant attempted to return to work on 27 April 2022. Mr Dinnage met her in a café near the Bromley store and they had a lengthy conversation. We find that during this conversation the claimant made substantial criticisms of how Mr

Dinnage had managed her well-being during her absence. We find that the claimant became very upset during the conversation and described her recent mental health in terms that alarmed Mr Dinnage. We find that the claimant and Mr Dinnage were both of the view in light of the conversation they had had that the claimant was not well enough to return to work. We find that during this conversation Mr Dinnage understood that the claimant's concerns in relation to how she had been treated by the respondent were no longer limited to the treatment that she alleged she had suffered at the hands of Mr Kistner at the Bluewater store. We find that he understood the claimant to be expressing a wider dissatisfaction with how she had been treated by the respondent, including by Mr Dinnage, not only during her employment at the Bluewater store but more recently during her employment at the Bromley store. To the extent that this requires us to prefer the evidence of Mr Dinnage to that of the claimant, we do so because in light of our findings above in relation to credibility, we found him overall to be a more credible witness. Further, it is clear that the claimant was extremely upset on 27 April 2022 and this is likely to have affected the clarity of her recollection of what exactly she said.

109. Part of the reason for the claimant attempting to return to work in April 2022 was an understanding gained from Mr Dinnage that her sick pay was about to expire. However, on further investigation, this was established not to be the case and Mr Coombs, another Senior Manager at the Bromley store, told the claimant this in a meeting on 2 May 2022. The claimant "opened up to him" about her mental health (her witness statement [28]).

110. In the event, the claimant did not return to work in April or May 2022

The May and July 2022 occupational health referral

111. The claimant attended an occupational health appointment on 10 May 2022 and a report was prepared that same day (page 937). The contents of the report included the following:

> *Whilst I am hopeful that the ongoing therapy will help to promote her recovery, I think it unlikely that she will make a full recovery until her work-related concerns have been addressed to her satisfaction. However, at the present time I do not believe she is sufficiently emotionally robust to engage with the business to try to resolve the situation.*
>
> *I advise management to maintain contact with her in accordance with the business attendance policy and to refer her for further Occupational Health advice in approximately 8 weeks to allow time for her to respond to the ongoing therapy and for some improvement in her psychological well-being. I am hopeful that at this point she may be sufficiently well to enable her to engage with the business to try to resolve her concerns and facilitate a return to work.*

112. In response to the question "what are the medical recommendations regarding her phased return and ongoing working based on her conditions" the report stated:

Having assessed her today, I am of the opinion that she is experiencing significant symptoms of Anxiety and Depression which would be a barrier to her being able to return to work in any capacity at present time. There are no steps that I can suggest that would currently expedite a return to work.

113. Mr Dinnage made a further occupational health referral in July 2022 (page 1308). In the section headed "Please give further details of reason for referral" he wrote:

[The claimant] has been absent from work for over seven months with a brief spell on a phased return prior to that which was preceded [sic] another spell of absence of two months. [The claimant] has had high levels of absence across the past five years, largely due to stress, anxiety and PTSD.…

114. The claimant says that this was inaccurate because she had had two absences for mental health; the rest were mostly Covid related. The claimant's absence record was at page 1524. We find that, whilst the section quoted is perhaps carelessly drafted, it is for the purposes of the referral not materially inaccurate. By any sensible measure, the claimant's absence level over the previous five years was high. Further, the longest and most recent absences had been described in the fit notes as being due to "stress, anxiety and trauma" (see [106] above). Consequently, whilst the section could have been more forensically drafted, we find that it was not materially inaccurate or misleading.

115. In the section inviting him to ask additional questions, Mr Dinnage included the following:

… Is there anything else we could do to support [the claimant] in returning and sustaining a return to work? [The claimant] has cited previously that Apple itself is a trigger for her mental health, how do you envisage we can support her to work through this to allow her to work at Apple again? Are you able to advise on how best to support a return to work for the EE, as it is unavoidable to mention or acknowledge Apple in EE's day-to-day role as they work in an Apple Store.

116. The claimant contends that this is inaccurate because she had never said "Apple is a trigger for her mental health" to Mr Dinnage or anyone else. We set out some of the correspondence between the claimant and Mr Dinnage in relation to this matter below. We find that whilst the claimant may never have intended to communicate to Mr Dinnage that Apple itself was a trigger for her mental health in the way that Mr Dinnage suggests in the referral ("it is unavoidable to mention or acknowledge Apple…"), Mr Dinnage had thought that the claimant's issues with the respondent were far wider than issues arising with Mr Kistner as a result of the June 2019 incidents. We refer to our findings at [108] in this respect. We find that Mr Dinnage believed that Apple itself had become a trigger for her mental health.

117. The same section continues in a rather stream of consciousness style to ask a whole series of further questions.

118. The occupational health appointment took place on 21 July 2022 and Dr Rashid, the Occupational Health Physician with whom the claimant had spoken, wrote to Mr Dinnage on the same day (page 953). Their letter explains that the claimant had been unaware "of the context and specific concerns" mentioned in the referral and went on:

> *She also mentioned that there are several inaccuracies in the referral. In the course of the subsequent conversation with her it was evident that – whatever engagement she and management may have had that thus far – she had not had adequate time to prepare for the consultation, or be in a position to meaningfully consent and engage with it.*
>
> *It is good medical practice for the employee to be aware of the contents of the referral letter prior to undertaking an occupational health assessment. I have said to [the claimant] that it will be important that she and management engage one another in the first instance about the management concerns indicated in your referral. If after that she and you feel that further attempt at an occupational health assessment would be helpful, then we would be delighted to organise a further appointment for her at that stage.*

The occupational health process after 21 July 2022

119. After the aborted occupational health appointment of 21 July 2022 there followed significant correspondence between the claimant and Mr Dinnage. In his email of 29 July 2022 (page 972), Mr Dinnage stated that

> *The purpose of the referral was to go through the reasons you stated. In our ongoing conversations since January, I have grown more and more concerned about your welfare and ability to maintain reasonable attendance in your role as a leader in Apple. I have personally seen the impact on your health and attendance when we engage in any discussions about Apple or when your attempt to return to work. I am also mindful of updates you have provided Steve and myself recently where you have informed us that your medical professionals themselves have questioned your ability to return to [sic] given you feel Apple is main reason for your continued absence. In addition, I am now under the impression your absence will continue following your update this week in that that you will be providing a further medical note extending your absence. Therefore, I am surprised to see you mention you are in a position where you can work for Apple as this does not coincide with what you have regularly said before. I feel we need to review this conflicting information further.*

120. In the same email he explained that he would shortly invite the claimant to an incapacity meeting in accordance with the respondent's Absence and Attendance policy. He noted that her dismissal was a "possible outcome" of an incapacity meeting.

121. The email of 29 July 2022 from Mr Dinnage was his substantive response to her email of 21 July 2022 (page 973) in which she explained her disagreement with certain statements contained in the referral. In particular she said with statements to the effect that:

- *I am not happy due to stress in my work.*
- *I have had unsustainable absences from work for the past five years.*
- *I have exceeded the absence quota for Apple.*

122. She then went on to state:

> *I desperately want to come back to work as I love my job and I love working for Apple and love what Apple stands for. I have repeatedly told everyone he knows me this, but at the moment I feel extremely unsupported, misunderstood, misinterpreted and misled by Apple, this saddens me further.*

123. On 11 August 2022, Mr Dinnage confirmed that he would delay the incapability meeting until the outcome of the occupational health referral (page 971).

124. There was further correspondence in relation to what the occupational health referral should contain. The claimant's position was set out in her email of 2 August 2022 (page 971). She said that she had:

> *… Never stated a problem with Apple or insinuated that Apple was the trigger for my mental health. Additionally, I can confirm that I have never informed yourself or Steve that my medical professionals have themselves questioned my ability to return to Apple. To ensure total transparency and in order to avoid any further confusion going forward – My issue is not with Apple, myself and the medical professional supporting me have never stated this.*

125. Mr Dinnage replied in an email on 11 August 2022 (page 971). He did not accept what the claimant had said:

> *You will note within the OH referral document I do reference that you have previously informed us working for Apple has impacted your mental health in conversations with Steve and myself this year. I appreciate you dispute [sic], however I still consider this a key point to raise to the medical officer so I would like this addressed in the referral. In addition, I do feel it is imperative occupational health are aware of all aspects of your situation and this includes the fact that you have an ongoing employment tribunal claim. I have added this in purely for reference for their awareness, however, if my view and approach affect your consent please let me know.*

126. The claimant explained further why she did not agree with the content of the occupational health referral by her email of 16 August 2022 (page 986). She requested that what she termed as "the inaccuracies" be removed. Mr Dinnage replied on 19 August 2022 (page 983). He agreed to provide a copy of the claimant's sickness record with the referral but indicated that he would not remove the other points which were in dispute. He noted in particular that Mr Coombs remembered the claimant telling him on 2 May 2022 that her psychiatrist had advised her to leave Apple. Further, he said that he himself remembered her telling him on 27 April that "the thought of coming back to work had filled [her] with significant anxiety". He defended the reference to a legal claim against Apple in the

referral on the basis that it was potentially relevant "to how you experience the situation at work and your sickness absence". He stated (page 984):

> *With this in mind please provide your consent to this by Tuesday, August 23 or let me know if you do not consent to going ahead with the referral on this basis, in which case we will have to continue without an OH report.*

127. On or around 3 August 2022, the claimant approved the submission of the occupational health referral (page 983).

128. We make the following findings in relation to the referral process that we have just described. First, whilst the claimant agreed to the referral, she did not on any realistic reading of the correspondence agree that the contents of it were accurate and Mr Dinnage knew this. Secondly, we find that Mr Dinnage believed the contents were accurate in light of his recollection of the conversations he had had with the claimant, particularly on 27 April 2022, and of what Mr Coombs had told him about conversations he had had with the claimant.

129. An occupational health appointment was arranged for 1 September 2022 but postponed to 5 September 2022 because the claimant had another medical appointment on 1 September. The email with details of her new appointment sent on 2 September 2022 (page 1606) stated:

> *Please see AMENDED TIME of your assessment. The clinician has also changed as per the request of Apple*

130. We find that Mr Dinnage knew that the occupational health physician would be changed by no later than 26 August 2022 because of the emails he exchanged with Ciaran Baker, the Accommodations Business Partner (page 996).

131. The email named Dr Alasdair Emslie as the new clinician. The claimant was alarmed by what she regarded as the respondent's intervention in the choice of clinician which had resulted in the Chief Medical Officer of the occupational health company, Health Partners, becoming involved. She sought clarification from Ms Stables, who worked for Health Partners. Ms Stables emailed the claimant on 7 September 2022 (page 1009) and seemingly contradicted what the email of 2 September 2022 had stated by saying:

> *Due to the details provided in the referral form, your case would be assigned to an senior occupational health physician therefore on my instruction you [sic] case was allocated to Dr M's Lee.*

132. We find this email seemingly contradicted that of 2 September because it at the very least implies that the change of physician was the decision of Health Partners and not of the respondent.

133. The claimant sought further clarification by a phone call with Ms stables on 7 September 2022. However, Ms Stables was running late and the conversation was short. The claimant found that her concerns had not been satisfactorily answered. Ms Stables had, we found, referred rather vaguely during their brief conversation

to “judicial guidance” being the reason for the change of occupational health physician but had not explained what she meant by this.

134. The claimant set out her concerns in an email to Mr Dinnage of 11 September 2022 (page 1013) in which she said she was cancelling her occupational health appointment. Her email concluded as follows:

> *As my concerns and queries have not yet been addressed, I’m going to cancel Tuesday’s OHS meeting with Dr Alistair Emslie (Chief Medical Offices of Health Partners Ltd and Duradiamond Healthcare).*
>
> *Going forward I would like to understand what alternative options are open to me as I do not agree with some of the areas made in the referral report and also have concerns and queries relating to the conflicting information with the OHS referral.*
>
> *Please understand that I’m not being obstructive in this matter, my sole aim remains to return to work.*

135. We find that it is unsurprising that the claimant had such concerns. We also find that they were reasonable in light of the following facts: the commencement of the incapability procedure; the reasons for the 21 July 2022 occupational health appointment not going ahead and the criticisms that physician had made in writing about the way the respondent had handled that appointment; the disagreement about the contents of the occupational health referral; and the contradictory explanation she had received for the change of clinician. The claimant did not as such act unreasonably when cancelling the September appointment.

136. Mr Dinnage replied to the claimant on 13 September 2022 (page 1013). He did not engage with the substance of her email but rather stated as follows:

> *Hi Sherelle,*
>
> *Thanks for your response.*
>
> *I appreciate you sharing the timeline and your experience with Occupational Health to date; in light of this I will pause the referral process and move forward with the incapacity meeting in which we will discuss the purpose and process of the referral as well as your health and wellbeing holistically with the information we have available to us.*
>
> *You will receive an invite shortly.*
> *Kind Regards*
> *Chris*tian

137. We find that by this point Mr Dinnage had become frustrated by the occupational health process in light of the cancellation of the July and September appointments. We find that he believed that the claimant was being deliberately uncooperative and that her concerns about the process were unwarranted. We find

that this was because he did not think carefully about her concerns but rather saw them as simply being obstacles to the process he was attempting to follow.

The incapacity process and dismissal

138. The claimant was invited to an incapacity meeting by letter dated 15 September 2022 (page 1029). The meeting was initially due to take place on 21 September 2022. The claimant did not receive the invitation and the meeting ultimately took place on 4 October 2022. By the time of the meeting, the claimant's last fit note had expired. Indeed, Mr Dinnage speaks to her during the incapacity meeting as though the absence period has now ended (for example, see page 1056).

139. The notes of the 4 October meeting begin at page 1041. The claimant's union representative, Mr Simpkin, attended. During the course of the meeting the claimant said that, so far as the fibroids were concerned, she was "fully healed and discharged" (page 1042). At page 1043 she notes that she is in "a much better mental and emotional place". When asked what her thoughts were about returning to Apple and the role of a manager, she stated (page 1045):

> *Really excited – Apple is my life. It's the best job I've had – I believe in what it stands for, I'm excited to work alongside the leadership, the team and customers and having normality and in comparison, to where I was I'm doing much better. I love Apple and I'm really excited to come back.*

140. Mr Dinnage then asks (page 1046):

> *And in terms of coming back which looks like early December post annual leave? What's the medical advice on how it should look given your time away*

141. The claimant replies that "a phased return to work will be helpful". She also says (page 1046) that she would like to talk about relocating. She expresses confidence in being able to maintain her role and notes that after the events of 2019 she had "come back to work and have been performing as expected in my role".

142. There is some discussion of the occupational health report of 10 May and their concern that she would not make a full recovery until her work-related concerns had been addressed. The claimant comments:

> *That is of the option [sic] of the doctor I have spoken to. I don't know what to say – as far as I'm concerned, I am ready to come back to work and to hold and carry out my full duties.*

143. The claimant then goes on to discuss at some length that her medical professional had suggested a change of location so that she would have no "connection within a work-related way" to Mr Kistner. She commented that any contact with him was a trigger. She agreed that returning to Bromley with "potential connections" with Mr Kistner would make her recovery "more challenging" (page 1049) and suggests a possible move to Covent Garden. Alternatively, she refers to an interest to working "in corporate" and refers to her CIPD accreditation.

144. The claimant, whilst referring to the possibility of contact with Mr Kistner, also states:

> *I will have some sort of interaction with that individual have [sic] to see him and work with him if I want to progress. I'm scared and worried for my mental health and physical safety.*

145. Mr Dinnage pointed out to the claimant (top page 1056) that from when she moved to Bromley until early 2022 her absences from mental health conditions were minimal and suggested that the move to Bromley was "broadly beneficial". The claimant declined to address this question head-on and suggested that "ongoing triggers I was experiencing within working at Bromley" had played into her absence between January and 30 September 2022. She goes on to say, in effect, that remaining at Bromley and so risking exposure to Kistner affects her as follows (top page 1057):

> *Coming and working in Bromley the amount of triggers I experienced and having to deal with those triggers was impacting me daily when I came home feeling physically sick, shaking, feeling anxious and nervous.*

146. In further discussions, the claimant is critical of how the occupational health process has been handled (page 1059) and critical of how the question of her annual leave has been handled (page 1062). She does however end the meeting by referring to her desire to return to work.

147. It would be reasonable to summarise the claimant's position in the meeting as follows. She is ready to return to work and does not say that she will not return, or will be unable to return, to the Bromley store. However, she suggests that her regular attendance would be assisted by her being moved to a job outside the South-East Market, because this would remove the possibility of her being "triggered" by contact with Mr Kistner.

The dismissal and appeal

148. Mr Dinnage met with the claimant on 23 November 2022 (page 1099). He communicated his decision to dismiss her. The dismissal letter of the same date was at page 1093.

149. The letter considers: her condition and prognosis including that "you state that you are now fit to return to work"; the occupational health report; her rate of absence in the period 2019 to 2022; the impact of her absences on the respondent; existing and recommended adjustments; and alternative roles. The findings begin at page 1095. They include at page 1096:

> *That the behaviours you displayed within your absence, including your inconsistency in how you feel about Apple whereby you cite a strong admiration for the business yet continue to share there are serious unresolved issues that impact your attendance, which leads me to conclude that you will not be able to sustain a return as a manager in Bromley or any other Apple Store.*

150. They also deal with matters including the impact of her absence on the Bromley store including on the management team and her direct reports; the level of her absence despite having been relocated to Bromley; the fact that despite the grievance and appeal process the claimant continued to request that she had no contact with Mr Kistner but, given the respondent's managers are required to work with one another in different locations, this did not give Mr Dinnage confidence that she could put her differences aside and maintain reasonable attendance; that there was no evidence from a medical professional that a move to a London flagship store or the people team would support her in returning to work.

151. Mr Dinnage's conclusion was as follows (page 1096):

> *I feel that all reasonable steps have now been taken to support you yet I am unable to gain confidence you will sustain a return to work. As a result of this, my decision is to terminate your employment based on your unacceptable levels of absence and the likelihood that your absences will continue at an unacceptable level.*

152. In light of the claimant's sickness absence record, the failed attempts to obtain a further occupational health report after the one which had been produced in May, and all that the claimant had said at the meeting on 4 October 2022 about difficulties she anticipated if she returned to work in the Bromley store, we find that Mr Dinnage did believe that the claimant's level of absence was unacceptable and that it was likely her absences would continue at an unacceptable level. We find that Ms Parsons also had this belief following the appeal.

The appeal against dismissal

153. The claimant appealed Mr Dinnage's decision (page 1110). She emailed her appeal to the respondent on 28 November 2022 and attached a letter from a consultant psychiatrist, Dr Paul McLaren (page 1109). The letter was dated 25 November 2022 and stated as follows:

> *I am writing to confirm that Mrs Yusuf has been fit to return to work and sustain their attendance since the Summer of 2022, and is currently fit to return to work at time of this letter.*

154. The claimant's appeal against dismissal was heard by Ms Parsons on 9 and 21 February 2023 (page 1169). The appeal outcome was sent to the claimant on 11 May 2023 (page 1216), although the Appeal Outcome Report (page 1217) is dated 19 April 2023. The appeal was unsuccessful.

The termination of the claimant's medical insurance

155. The claimant was dismissed without notice but with a payment in lieu of notice and, on dismissing her, Mr Dinnage explained on 23 November 2022 (page 1105) that her BUPA cover would expire at the end of November, but that EAP could extend coverage for 60 days after termination. We find that this reflected the respondent's normal procedures.

156. The claimant was in fact keen to continue her medical insurance because she had received a further recent diagnosis of cancer. She contacted Mr Dinnage and, as she accepted in cross examination, he took steps which resulted in her medical insurance being reinstated for what would have been her notice period if she had not been dismissed by a payment in lieu of notice being made. We find that, at the date of the decision to dismiss being communicated to the claimant, Mr Dinnage was unaware of the most recent cancer diagnosis.

Submissions

157. The parties both provided written submissions for which we are grateful and which they supplemented by brief oral submissions.

Conclusions

Direct Sex Discrimination (s.13 Equality Act 2010)

1) The Claimant has made the following allegations of less favourable treatment:

(a) On 11 June 2019, Mr Kistner shouting at the Claimant, being aggressive towards her, shaking his finger in her face, putting his fingers to his lips and telling her to "*shhh*" a number of times.

(b) On 12 June 2019, Mr Kistner intimidating the Claimant with his behaviour where he shouted at her, aggressively waved his hands and refused to let her leave the room;

For allegations (a) and (b), did this take place as the Claimant alleges?

158. In light of our findings of fact, allegation 1)(a) is partially made out in that we have found that Mr Kistner put his finger to his lips and shushed the claimant several times.

159. In light of our findings of fact, allegation 1)(b) is not made out and we do not therefore consider it further.

2) Was the Claimant treated less favourably than a hypothetical male comparator in relation to the allegations at paragraphs 1 (a) to (b)?

3) If so, was this because of the Claimant's sex?

160. The claimant contended that there were various matters which were sufficient to shift the burden of proof. These were noted at [85] of Mr Tomison's skeleton argument and [17] of his closing submissions.

160.1. Mr Kistner has professed an inaccurate and untruthful account of the conversations: in light of our findings of fact above, we do not accept that this is the case. His account was partially inaccurate, and that is reflected in our findings in relation to allegation 1) (a). However, the reality of such events is that it is

normal that participants do not have a wholly accurate recollection of how they behaved and tend to recast events in their memories to reflect how they believe they would have behaved. Just as we have found above that the claimant was not dishonest in her recollections, we do not believe that the fact that Mr Kistner's account was not wholly accurate is evidence of deliberate untruthfulness.

160.2. Evidence of the claimant that Mr Kistner exhibited these types of behaviours particularly towards women: we conclude that the claimant's evidence in this respect was not accurate. For example, there are many and obvious differences between the conduct she ascribes to Mr Kistner in her further particulars at page 33 and the information provided by the women listed there either in their interviews with Mr Bever or, in the case of Ms Robinson, in her witness statement prepared for these proceedings.

160.3. The nature of the behaviour exhibited by Mr Kistner is wholly unacceptable in a workplace: in light of our findings of fact above, whilst we find that it is inappropriate for a manager to shush an employee whilst putting his finger to his lips, such behaviour cannot reasonably be classified as "wholly unacceptable".

160.4. The action of "shhhing" a female member of staff indicates a demeaning attitude towards women: we conclude that shushing a female employee does not indicate a demeaning attitude towards women. There is nothing sex-specific about shushing somebody.

160.5. Mr Kistner has not exhibited these types of behaviour towards men: neither party has called any evidence of significance in relation to this issue.

160.6. The fact that his conduct breached the respondent's Business Conduct Policy and Feedback Policy: we find that shushing an employee and putting one's fingers to one's lips would amount to a breach of these policies but not a particularly significant one.

161. Taking these matters together, we conclude that they do not amount to evidence from which we could conclude, in the absence of any other explanation, that the claimant was treated less favourably because of sex. There is simply nothing of significance that points in that direction.

162. Further, if we had concluded that the burden of proof had shifted, we would have concluded that the conduct was not in any way because of sex and that Mr Kistner had simply reacted in an inappropriate manner to the claimant's response to his feedback. We would have found that the way in which he reacted reflected above all his experience over time of the difficulty inherent in giving the claimant feedback (a difficulty experienced by other managers).

163. The claimant's claim of direct sex discrimination therefore fails and is dismissed.

Harassment (s.26 Equality Act 2010)

4) Did Mr Kistner's treatment of the Claimant on 11 and 12 June 2019 amount to unwanted conduct which had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her *related to* sex?

164. in light of our findings of fact above, the first question for us is whether Mr Kistner shushing the claimant and putting his finger to his lips was unwanted conduct. We find that it was.

165. The next question is whether such unwanted conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Having regard to what is said in Dhaliwal and Hughes and others (see [23] and [24] above), we conclude that the conduct was not sufficiently serious to have "violated" the claimant's dignity and that it did not have that purpose or effect. Further, we conclude that it did not have the purpose or effect of creating an intimidating, hostile degrading, humiliating or offensive environment. It was a one-off incident and insufficiently serious when seen in context to create such an environment. The claimant's claim of harassment therefore fails and is dismissed.

166. However, in case we are wrong about that, the next question is whether such conduct related to sex. Mr Tomison puts the claimant's argument in this respect on the basis that the conduct of Mr Kistner was "motivated by" sex ([88] of the claimant's skeleton argument). We have already concluded that the conduct proved was not "because of" sex and we further conclude that it was not in any way "motivated by" sex. There is no evidence of significance that Mr Kistner would not have reacted similarly to a man in the same or broadly similar circumstances. Further and separately, casting the net wider, there is nothing of significance which would enable us to find properly that the conduct relates to sex. The claimant has not shifted the burden of proof to the respondent but, if she had, in light of these matters we would have concluded that the unwanted conduct that we have found was unrelated to sex.

Victimisation (s.27 Equality Act 2010)

5) The Claimant relies on the following allegations as protected acts:

(a) The Claimant's two grievances against Mr Kistner dated 22 July 2019;

(b) The Claimant's concerns regarding alleged discrimination and harassment based on race and sex which were raised by the Claimant at the grievance hearing of 7 August 2019 and in the documentation, which she subsequently sent Ms Boyd on 8 August 2018.

(c) The Claimant's appeal dated 29 October 2019, and the further details provided by the Claimant on 6 November 2019 where she raised concerns about her alleged discriminatory experience based on her race and sex;

(d) The Claimant's Tribunal Claim submitted on 9 February 2020 where she raised concerns about her alleged discriminatory experience based on her race and sex;

(e) The Claimant's concerns regarding alleged discrimination and harassment based on her race and sex which were raised by the Claimant at the appeal hearing of 6 and 10 February 2020.

In relation to the allegations at paragraph (a) above, do these amount to protected acts within the meaning of section 27(2) of the Equality Act 2010?

The Respondent admits that the acts at paragraphs (b) to (e) above amount to protected acts. *The Respondent also admitted on the first day of the hearing that the claimant's grievance of 22 July 2019 at page 363 was also a protected act – that is to say one of the two grievances referred to at (a) above. In his closing submissions, Mr Tomison indicated that the claimant did not rely on the grievance relating to the incidents on 11 and 12 June as a protected act*. *There is therefore no issue for the Tribunal to decide in respect of whether particular matters amounted to protected acts.*

6) Was the Claimant subjected to detrimental treatment because of the above protected acts with respect to the following:

(a) The alleged failure to adequately investigate her two grievances of 22 July 2019 relating to Mr Kistner;

167. We turn first to the question of knowledge: Mr Kistner cannot have victimised the claimant as alleged if he was unaware of the protected acts. In light of our findings of fact at [103] and [104] above, we find that Mr Dinnage knew that the claimant had brought a discrimination claim under the Equality Act against the respondent from around October 2020. He therefore had the necessary knowledge, given that the claimant's case as set out at the hearing was very much that it was knowledge of the discrimination claim that was the reason for the alleged detriments.

168. Turning to the first claimed act of victimisation, in light of our findings of fact above to the effect that there was no such failure there was no such detrimental treatment.

(b) The Respondent's decision of 23 October 2019 not to uphold her two grievances relating to Mr Kistner;

169. At [96] of his skeleton argument Mr Tomison contends on behalf of the claimant that "In making her decision, Ms Boyd's ignored the supporting evidence highlighted at §34 of the Claimant's witness statement and Mr Kistner's own admission that he had problems with composure. She turned a blind eye to that evidence, and she did that because she wanted to shut down the Claimant's allegations of discrimination".

170. We have found at [85] above that the investigation by Ms Boyd of the grievances was significantly better than adequate. We conclude that she did not ignore the highlighted evidence or Mr Kistner's own admission that he had problems with composure. We therefore conclude that the claimant has not proved facts from which we could in the absence of any other explanation conclude that not upholding the grievances was an act of victimisation.

171. Further and separately, if the burden of proof had shifted, we would have concluded that the respondent had proved that the reason for the grievances being rejected was in no sense whatsoever the protected acts. We would have concluded that the reason for the grievances being rejected was that Ms Boyd, after a significantly better than adequate investigation, had concluded in good faith that that there was insufficient evidence for her to uphold any of them. We should add that there was no evidence of any significance before us which suggested that Ms Boyd would have been inclined to "shut down" allegations of discrimination.

(c) The alleged failure to adequately investigate her appeal of 29 October 2019 against the grievance decisions relating to Mr Kistner;

172. in light of our findings of fact above to the effect that there was no such failure, the factual allegation fails – there was no such detrimental treatment.

(d) The Respondent's decision of 26 March 2020 not to uphold her appeal against the grievance decisions relating to Mr Kistner;

173. At [101] of his skeleton argument Mr Tomison contends "In making his decision, Mr Bever ignored the evidence which supported the Claimant's grievance, and he did that because he wanted to shut down the Claimant's allegations of discrimination."

174. We have found above that Mr Bever's investigation was significantly more than adequate. We conclude he did not ignore the evidence which supported the claimant's grievance. This is of course reflected in the fact that he expressly reached a conclusion in relation to the shushing issue and, also, upheld a part of the grievance (see [101] above).

175. We conclude that the claimant has not proved facts from which we could in the absence of any other explanation conclude that not upholding the greater part of the grievance appeals was an act of victimisation.

176. Further and separately, if the burden of proof had shifted, we would have concluded that the respondent had proved that the reason for the grievance appeals being rejected (other than set out in [101] above) was in no sense whatsoever the protected acts. We would have concluded that the reason for the grievance appeals being rejected was that Mr Bever, after a more than adequate investigation, had concluded in good faith that that there was insufficient evidence for him to uphold any more of the appeal than he did. We should add that there was no evidence of any

significance before us which suggested that Mr Bever would have been inclined to "shut down" allegations of discrimination.

(e) The OH process being sabotaged by the Respondent adding inaccurate details to the referral form, not updating the Claimant about changes and then suspending the OH process;

177. We have set out our findings in relation to the OH process at [111] to [137] above. Turning to the specific points made by Mr Tomison in his skeleton argument (its [104]) we conclude:

177.1. **Inaccuracies:** in light of our factual conclusions above, we find that the referral was not materially inaccurate in relation to the level and reasons for her absences. We also find that although the claimant may not have stated that "Apple itself is a trigger for her mental health", Mr Dinnage thought that that was what she believed.

177.2. **Claimant not updated about the changes:** in light of our findings of fact above, we conclude that Mr Dinnage did not update the claimant about the change to a different occupational health physician between 26 August 2022 and 2 September 2022 (when the claimant found out about it).

177.3. **Suspending the occupational health process:** in light of our findings of fact above, we conclude that Mr Dinnage did in effect suspend the occupational health process by his email of 13 September 2022 (see [136] above).

178. The claimant contends that these three matters taken together amount to the respondent "sabotaging" the occupational health process. The Concise Oxford Dictionary defines sabotage as "deliberately destroy or obstruct, especially for political or military advantage".

179. In light of our findings of fact in relation to the three elements of the alleged "sabotage", we conclude that Mr Dinnage did not "sabotage" the occupational health process: the "inaccuracies" were either not inaccuracies at all or reflected Mr Dinnage's understanding of factual matters. So far as failing to update the claimant was concerned, we find that it simply did not occur to Mr Dinnage to do so. He was not responsible for sending the claimant details of her occupational health appointments. So far as suspending the occupational health process, we find that by mid-September Mr Dinnage took the view that it would not be possible to persuade the claimant to attend an occupational health referral in the near future and he believed that he should proceed with the incapability procedure which had been suspended in order for the claimant to attend a further occupational health appointment. We refer to our findings at [137] in this respect: he believed the claimant was being uncooperative and that her concerns were unfounded. He was irritated and frustrated by her.

180. However, we should not place too much emphasis on the exact meaning of "sabotage" and therefore consider whether what we have concluded the respondent did in relation to the occupational health process amounted to an act of victimisation because we conclude that it did amount to detrimental treatment of the claimant.

181. The claimant identifies the matters which are sufficient to shift the burden of proof at [53] of Mr Tomison's closing submissions:

181.1. Breach of occupational health policy: because, it is alleged, Mr Dinnage did not "meet with you in advance to discuss the reason for the referral, along with the advice and guidance they're seeking from Health Partners". We conclude that Mr Dinnage did breach the policy in this way. He did not meet with the claimant and, prior to the July referral, he did not discuss the advice and guidance that he was seeking. Even after the July referral, whilst he identified the advice and guidance that he was seeking – by providing the draft referral to the claimant – he did not have a meeting to discuss it with her.

181.2. Providing reasons which did not align with the advice actual being sought: the claimant relies on the emails at pages 927 and 928 in this respect in which Mr Dinnage said on 7 April 2022 "we really want to understand any adjustments we might need to make to help you to return to work". However, we conclude that following the failed July referral Mr Dinnage was clear that there was a possibility of dismissal when he explained to her that she would be invited to an incapacity meeting which could result in her dismissal (see [120] above).

181.3. Mr Dinnage being unreasonable in refusing to even acknowledge in the referral that the claimant disagree with the factual premise of some of the matters put (and "doubled down" when she raised the matter): the doubling down referred to is the adding in of "in part" in the sentence "Her current mental health issues are as a result of perceived stress caused by the job/employer" (see email at page 966). We accept the evidence given by Mr Dinnage in cross-examination in relation to this: he added in these words because it felt appropriate in light of her referencing other factors in his discussions with her. More generally, however, we find that it was unreasonable for Mr Dinnage to refuse to even acknowledge in the referral that the claimant disagreed with the factual premise of some of the matters included in it. There was no good reason for him to proceed in this fashion; indeed, there are obvious reasons why the occupational health physician might have found such information useful. We do not accept that this point is negated by the claimant having "agreed" to the referral in the terms it was made in light of our findings of fact at [128] above.

181.4. The later conduct relating to dismissal: we deal with the points raised in this respect below and have taken them into account in reaching our conclusions in [182] and [183] below.

182. Overall, having carefully considered the matters specifically relied on by Mr Tomison, we conclude that the claimant has not proved facts from which we could in the absence of any other explanation conclude that the way Mr Dinnage dealt with the occupational health process was an act of victimisation. The conduct of Mr Dinnage was at times clumsy, unsympathetic and even unreasonable (the failure to acknowledge the claimant's disagreement with the factual contents of the referral) but we conclude that there is not evidence from which we could infer a causal link between the treatment complained of and any of the protected acts.

183. Further and separately, if the burden of proof had shifted, we would have concluded that the reason Mr Dinnage dealt with the occupational health process as he did was in no sense whatsoever the protected acts. We would have concluded that, although Mr Dinnage was aware of the Tribunal claim in the most general terms (see our findings at [103], [104] and [167] above), it was of little if any significance to him

other than being part of the factual matrix which explained the claimant's ill-health. It related to events which had taken place at another store, of which he knew nothing, and which involved people with whom he did not work day-to-day. He had no personal interest in the Tribunal claim. Rather, we would have concluded that the shortcomings in the occupational health process reflected a less than sensitive approach by Mr Dinnage to the claimant's absence and the fact that he was process driven. He did not believe at the time that he was in any way responsible for the derailing of either the July or the September occupational health referrals.

(f) Her dismissal;

184. At [113] of his skeleton argument Mr Tomison contended that there were matters from which we could draw inferences that the reason for dismissal was, at least to a more than trivial extent, the protected acts (primarily the employment tribunal claim):

184.1. The Respondent had sabotaged the OH process: we have concluded above that the respondent did not sabotage the OH process, although some criticisms may be made of it – see our conclusions at [179].

184.2. It had no up to date OH report: it is correct that there was no up to date occupational health report and we refer to our findings at [136] and [137] as reflecting the "end point" in the occupational health process.

184.3. Mr Dinnage made no request for medical evidence from the Claimant's treating clinicians: it is correct that Mr Dinnage made no such request. The relevant part of the respondent's Absence and Attendance policy provides (page 1241):

> *Your manager may complete an Understanding Medical Condition form and refer you to Apple's Occupational Health Services to obtain a medical report relating to your condition, or to seek permission to contact your GP. This gives your manager access to relevant medical advice about your return to work, which could include a phased return or other reasonable adjustments recommended by the OHS Advisor or your doctor*

184.4. When Mr Dinnage was asked about this in cross-examination, he answered that he did not recall that part of the policy and that he had not used it before. We find that Mr Dinnage was unaware that the respondent's policy raised the possibility of obtaining medical evidence from an employee's treating clinician.

184.5. The Claimant was repeatedly saying that she was well and ready to return to work: we find that on a number of occasions the claimant indicated that she was well and ready to return to work. However, such comments must be seen in the context of her comments about the problems she foresaw if she returned to work at the Bromley Store because of what she said she regarded as the risk of some form of contact with/reminder of Mr Kistner. We refer in this respect to our findings between [138] and [147] above in relation to the hearing on 4 October 2022.

184.6. The OH report from May 2022 required a follow up report in 8 weeks' time to allow for the Claimant to continue with her therapy at the time after

which, they were "hopeful" that she would be able to return (which further supports the Claimant's own evidence that she was ready to return): read fairly as a whole, we conclude that the occupational health report from May 2022 does not suggest that the claimant would be able to return to work in 8 weeks' time. The more realistic reading of the relevant section of the report set out at [111] above is that after 8 weeks the claimant might be able to re-engage with the employer about her difficulties at work, not return to work. It does not identify any likely date for a return to work.

184.7. There is no real evidence of any significant impact on the Bromley store caused by the Claimant's absence: we conclude in light of Mr Dinnage's evidence that there is no real evidence that the performance of the Bromley store had in objective output terms fallen or that customer service had been affected. However, Mr Dinnage explained clearly the effects of the claimant's absence: the people she line-managed having to be re-allocated and her own non-management work having to be done by other managers at her level or a higher level. We conclude that there was some impact on the team who covered her work.

185. Overall, having carefully considered the matters specifically referred to by Mr Tomison, we conclude that the claimant has not proved facts from which we could in the absence of any other explanation conclude that dismissing the claimant was an act of victimisation. Various criticisms fall to be made of the process leading to the claimant's dismissal, but we conclude that there is no evidence from which we could infer a causal link between the treatment complained of and the protected acts.

186. Further and separately, if the burden of proof had shifted, we would have concluded that the reason Mr Dinnage took the decision to dismiss the claimant was in no sense whatsoever the protected acts. We would have concluded that, although Mr Dinnage was aware of the Tribunal claim in the most general terms (see our findings and conclusions above), it was of little if any significance to him other than being part of the factual matrix which explained the claimant's ill-health. It related to events which had taken place at another store, of which he knew nothing, and which involved people with whom he did not work day-to-day. He had no personal interest in the Tribunal claim. We find that the reason for Mr Dinnage dismissing the claimant was simply that set out at [152] and that, following the appeal, it remained the respondent's reason for dismissing the claimant.

(g) Her medical insurance being terminated (i.e. the decision to terminate her employment with immediate effect).

187. We refer to our findings of fact at [155] to [156] above in this respect. We conclude that the reason the claimant's employment was terminated with immediate effect and a payment in lieu of notice was simply that this reflected the respondent's normal procedures. It was in no sense whatsoever because of the protected acts.

188. The claimant's victimisation claims therefore fails in its entirety and is dismissed.

Failure to make reasonable adjustments (sections 20 and 21 Equality Act 2010)

7) From what date did the Respondent know or could it reasonably have been expected to know that the Claimant had anxiety and depression? *In a discussion at the beginning of the second day of the hearing Ms Reindorf clarified that the Respondent accepted that it had actual knowledge from 18 October 2021 (in light of a document beginning at page 856).*

189. Given that the respondent accepts that it had actual knowledge from 18 October 2021, there is no issue to decide in this respect because the claimant contends that the respondent should have made reasonable adjustments from 4 October 2022 ([135] of the claimant's skeleton argument), offering them either at the incapacity meeting on that date or at the outcome of the appeal.

8) Did the Respondent have the following provision, criterion or practices ("PCP"):

(a) a requirement for employees to have returned to work or be certified fit to return to work, including not having any further absences?

(b) **a requirement for the Claimant to maintain a certain level of attendance at work in order not to be subject to the risk of dismissal;**

190. The respondent accepted in Ms Reindorf's closing submissions that it had such PCPs ([85] of the respondent's closing submissions).

9) Did the PCP/s put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? The Claimant relies upon the following substantial disadvantages:

(a) Her disability increased the likelihood of sickness absence, and therefore the likelihood of:

(1) not being able to return to work;

(2) being dismissed and

(3) her medical insurance being terminated.

10) Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantages?

191. The respondent accepted in Ms Reindorf's closing submissions that the claimant was place at a disadvantage as she claimed and that the claimant knew of such disadvantage from 18 October 2021 ([86] and [87] of the respondent's closing submissions).

11) Would the following adjustments have alleviated the alleged substantial disadvantage(s) for the Claimant caused by the alleged PCP:

(a) Offering her a phased return to work;

(b) Redeployment to other roles and/or branches;

(c) Moving Mr Kistner to another location so that there were no risks of them coming into contact with one another.

(d) Obtaining further advice from OH;

(e) Considering mediation between the various parties involved;

(f) Discounting any disability related absences from counting against the Claimant for the purposes of the capability process;

(g) Offering the Claimant an opportunity to improve and/or setting targets by which her absence levels were to be monitored.

192. The claimant's case is that "all of the adjustments would have alleviated the substantial disadvantage, because it [sic] would have helped to reduce the Claimant's sickness absences, which would in turn have reduced the likelihood of her being dismissed because of sickness absence" ([141] of the claimant's skeleton argument).

193. The question for us, therefore, is whether any of the proposed adjustments would have alleviated the substantial disadvantage because they would have helped reduce her sickness absences and so the risk of dismissal. Turning to each of them individually:

193.1. **Phased return to work:** the claimant asked for a phased return to work at the meeting on 4 October 2022. A phased return had been used to get her successfully back to work in November 2021 ([11] to [12] of Mr Dinnage's witness statement). We find that a phased return to work would have helped reduce her sickness absence going forward, and so the risk of dismissal, because it would have given the claimant the opportunity to adapt gradually to the inevitable pressures of returning to work after a lengthy absence.

193.2. **Redeployment to other roles and/or branches:** although it is clear from what the claimant said on 4 October 2022 that she wanted to move to another role or branch, we conclude that this would not have helped her reduce her level of sickness absence. This is because her rationale for wishing to move was the risk of some form of contact with, or reminder of, Mr Kistner if she returned to the Bromley Store. However, she had worked successfully there from the summer of 2020 to January 2022. There was very little risk of any contact whatsoever with him if she returned to work there. On any realistic assessment, it was not actual or possible contact with Mr Kistner that had prompted her absence from January 2022 and we refer to our findings at [105] to [106] above in this regard. This would not therefore have been a "reasonable adjustment".

193.3. **Moving Mr Kistner to another location so that there were no risks of them coming into contact with one another:** we also conclude that this would not have helped her reduce her level of sickness absence. We repeat our reasoning in [193.2]. This would not therefore have been a "reasonable adjustment".

193.4. **Obtaining further advice from OH:** the real thrust of the claimant's argument in relation to occupational health advice is that the absence of up to date advice meant that the respondent believed that she was not well enough to return to work when in fact she was – see, for example, what she said in the meeting on 4 October 2022 as set out at [142] above. The obtaining of further occupational health advice would not, we find, in and of itself have helped to reduce the claimant's level of sickness absence and would not, therefore, have been a "reasonable adjustment".

193.5. **Considering mediation between the various parties involved:** the question of mediation had been raised by Ms Boyd in October 2019 (page 631) but never pursued when the claimant was still at the Bluewater store. We conclude that arranging a mediation between the claimant and the Leadership team at the Bluewater store in October 2022, some three years later, would not have helped to reduce the claimant's level of sickness absence at the Bromley store. We further find, in light of the uncompromising attitude of the claimant during the meeting on 4 October 2022, that mediation between the claimant and any of her then current managers would have been unlikely to reduce her level of sickness absence. To consider or arrange mediation would not, therefore, have been a "reasonable adjustment".

193.6. **Discounting any disability related absences from counting against the Claimant for the purposes of the capability process:** if all of the claimant's disability related absence had been discounted this would have reduced the claimant's sickness absences for 2022 to more or less zero and so would have indeed reduced the likelihood of the claimant being dismissed.

193.7. **Offering the Claimant an opportunity to improve and/or setting targets by which her absence levels were to be monitored:** as will be clear from our conclusions in relation to the complaint of unfair dismissal, we conclude that these are things that should indeed have been done. However, Mr Tomison put his case on the basis that this would have "helped to reduce the Claimant's sickness absence" and, we conclude, in and of itself it would not have done. This would not, therefore, have been a reasonable adjustment.

12) Was it reasonable for the Respondent to have to take these steps and if so when?

194. In light of our conclusions above, this issue only arises in relation to two issues:

194.1. **The phased return:** we conclude that it would have been reasonable for the respondent to have taken such a step in October 2022. In reaching this conclusion we have in particular taken into account that allowing the claimant a phased return would not have required the respondent to ignore its obvious and reasonable concerns about her attendance record in 2022 and before. If, after a phased return, the claimant had failed to sustain her attendance, the respondent would have been able to resume the incapability procedure.

194.2. Discounting any disability related absences: it would not have been reasonable for the respondent to have taken this step. It would have had the effect of requiring it to ignore the whole of the claimant's near 9-month absence in 2022.

An employer cannot reasonably be expected to ignore an absence of this length in circumstances such as those prevailing in this case.

13) Did the Respondent fail to take these steps?

195. The respondent failed to take the step of offering a phased return and so, in this respect only, breached its obligation to make "reasonable adjustments".

Discrimination arising from disability (s. 15 Equality Act 2010)

14) Did the Respondent know or could it reasonably have been expected to know that the Claimant had a disability? From what date? *In light of the respondent's admissions in relation to knowledge, there is nothing for us to decide in relation to this issue.*

15) Did the following amount to unfavourable treatment by the Respondent:

(a) failing to consider all alternatives to dismissal, in particular a move to the flagship store in view of the Claimant's disabilities;

(b) dismissing the Claimant.

196. At [121] of his skeleton argument, Mr Tomison states "Although there are two instances of unfavourable treatment in the List of Issues, they are essentially the same: that the Claimant was dismissed". We therefore approach our conclusions on this basis.

197. The respondent accepts that the claimant's dismissal was unfavourable treatment ([99] of its closing submissions). It also states that "the reason for it was the lack of any prospective sustained end to her sickness absence".

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

(a) Sickness absence

198. The respondent accepts that the claimant's sickness absence was ""something arising" in connection with her disability". It does not appear that the respondent was seeking to make any distinction between "in connection with" and "in consequence of" but, for the avoidance of any doubt, we find that the claimant's sickness absence was indeed something arising in consequence of her disability.

199. We note that the list of issues has omitted the "because of" question. We conclude that the unfavourable treatment (i.e. the dismissal) was because of the claimant's sickness absence. The claimant's sickness absence was substantially more than a trivial part of the reason for the dismissal.

17) Was the treatment of the Claimant a proportionate means of achieving a legitimate aim? The Respondent states that its legitimate aims were:

(a) Not having an employee as part of its headcount indefinitely when there was no reasonable prospect of the employee returning to work to perform

the full role of manager and sustaining an acceptable level of absence, given the impact of this on customer service and the rest of the team who covered her work.

200. We conclude that not employing someone indefinitely when there is no reasonable prospect of them returning to work to perform the full role of manager and sustaining an acceptable level of absence given the impact on customer service and the rest of the team covering their work is a legitimate aim. To conclude otherwise would be to find that an employer must accept the indefinite absence of a manager who is off work sick with no reasonable prospect of them returning.

201. Turning to the question of justification, we are required to carry out a critical evaluation of the proportionality defence and in doing so should weigh the needs of the employer against the discriminatory impact on the employee.

202. We conclude that carrying out such an exercise results in the conclusion that the dismissal of the claimant was not a proportionate means of achieving the legitimate aim in question for the following reasons:

202.1. Although we have concluded at [184.7] above that there was some impact on the team who covered her work, we have also concluded that there was no real evidence that "customer service" had been affected. The respondent had initially recruited the claimant as an "over hire" (i.e. a manager who appointment was strictly speaking unnecessary in terms of the metrics it used) and, even if she was no longer in effect an "over hire" when she was dismissed, we conclude that the overall effect of her absence on the respondent's business at the Bromley store was very limited.

202.2. By contrast, the effect of the claimant's dismissal on the claimant was very significant indeed for her, given in particular her lengthy employment, and the fact that seeking alternative employment would inevitably be particularly challenging for her given that at the point of dismissal she was about to return to work from a lengthy period of absence.

202.3. Further, this was not a case where there was any up-to-date medical evidence to the effect that the claimant's absence would continue. Rather it was a case where the claimant herself was saying that she was fit to return to work and such up-to-date medical evidence as there was said, by the time of the appeal, that she was fit to return to work (see our findings at [153] above).

202.4. There were various less severe means of achieving the legitimate aim relied on by the respondent:

202.4.1. Allowing the claimant to attempt a return to work, as she said she was able to, setting attendance targets, and then adopting a "wait and see" approach for a limited period of time before, if necessary, again following the capability procedure and dismissing her.

202.4.2. Further and separately, allowing a phased return to work (which we have found above would have been a reasonable adjustment). Clearly, if in fact the claimant had not sustained an acceptable level of absence, the

respondent could at that point have achieved the legitimate aim in question by again following the capability procedure and dismissing her.

202.4.3. Further and separately, making further attempts to obtain a further occupational health report before reaching a final conclusion, rather than relying on one which was by the time of the dismissal nearly five months old. We find that the respondent should have done this in light of our findings of fact at [135] above about the reasons for the claimant cancelling the final occupational health appointment and at [137] about Mr Dinnage's failure to think carefully about the concerns of the claimant which had led her to cancel the appointment in September. We find that, if the respondent had made a serious attempt to address her concerns, then the claimant would have attended a further occupational health appointment. If the claimant had refused to co-operate, or the further occupational health advice had not confirmed that the claimant was well enough to return to work, the respondent could at that point have achieved the legitimate aim in question by again following the capability procedure and dismissing her;

202.4.4. Further and separately, asking the claimant for permission to contact her treating physician as permitted by the respondent's own policy. We made findings in relation to this at [184.3] and [184.4] above. Mr Dinnage was unable to provide any explanation for why he had not done this other than that he was unaware that the policy permitted him to do so. If the claimant had refused to co-operate, or any further medical advice had not confirmed that the claimant was well enough to return to work, the respondent could at that point have achieved the legitimate aim in question by again following the capability procedure and dismissing her;

202.4.5. Each of these alternatives to making a decision to dismiss following the meeting on 4 October 2022 without seeking further evidence or permitting the claimant to attempt a return to work (whether phased or not) would have been a less severe means of achieving the legitimate aim: none of them would have prevented the respondent from dismissing the claimant within a reasonable period of time if she was indeed unable to achieve a satisfactory level of attendance but each would have given her an opportunity to demonstrate that she could achieve the necessary level.

202.5. In light of these conclusions the claimant's complaint that her dismissal was an unjustified act of discrimination arising from disability succeeds.

Unfair dismissal (s. 98 Employment Rights Act 1996)

18) Was the Claimant dismissed for a fair reason? The Respondent will say the Claimant was dismissed fairly by reason of capability.

(a) Did the Respondent genuinely believe that the Claimant was no longer capable of performing her duties?

203. We conclude that the respondent did have such a belief in light of our findings of fact at [152].

19) Did the Respondent act reasonably, in all the circumstances, in treating this reason as sufficient to dismiss the Claimant? In particular:

(a) Did the respondent adequately consult the Claimant on all matters relating to the capability process?

(b) Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position (including at the appeal stage);

(c) Could the Respondent reasonably have been expected to wait longer before dismissing the Claimant?

(d) Did the Respondent consider all alternatives to dismissal?

204. Turning to the question of consultation, an employer should "consult the employee and take his views into account" (BS v Dundee City Council). We conclude that the respondent did consult the claimant, in particular during the meeting on 4 October 2022. We further find in light of the drafting of the dismissal letter that they were "taken into account", in the sense that Mr Dinnage registered the points she had made.

205. However, we conclude that the respondent did not carry out a reasonable investigation, including finding out about the up-to-date medical position (including at the appeal stage). We so conclude essentially for the same factual reasons we have concluded at [202.4.3] and [202.4.4] that there were less severe means of achieving the legitimate aim relied on. We have therefore concluded that any reasonable employer would, in the circumstances of this case, have sought further medical information before reaching a decision to dismiss the employee. We should emphasize that we would not have reached this conclusion if we had found that the claimant had unreasonably failed to cooperate with the respondent's occupational health process or had refused to permit the respondent to contact her GP or treating consultant having been asked to agree to this. In those circumstances we would have concluded that the respondent had carried out a reasonable investigation.

206. Our conclusion in this respect is strengthened by – but not dependent on – our conclusions in relation to the procedural failures we have identified in the occupational health process at [181.1] above, the way in which Mr Dinnage was process driven as we have found at [183] above and did not, we conclude, think carefully about the substantive rather than procedural aspects of the process, his lack of knowledge of the relevant policy as we have found at [184.4] above and our findings that he was clumsy, unsympathetic and unreasonable in how he followed the occupational health policy as found at [182] above.

207. Further and separately, we conclude that the respondent could reasonably have been expected to wait longer before dismissing the claimant. We so conclude:

207.1. Because any reasonable employer would have waited long enough to enable it to carry out a reasonable investigation. In particular, by the date of the appeal hearing there was medical evidence that she was well enough to

return to work. In her oral evidence Ms Parsons said that the letter from the claimant's consultant of 25 November 2022 (page 1109) "lacked some content" as an explanation for not dealing with it in her appeal outcome letter – before going on to say that she should have asked for more medical evidence. Given the lack of any other up-to-date medical evidence, any reasonable employer would have waited long enough at least to permit an attempt to obtain further medical evidence if they thought such further medical evidence were necessary, and they were not prepared to accept the consultant's letter as adequate evidence of an ability to return to work;

207.2. Further and separately, because we have found that permitting a phased return to work would have been a reasonable adjustment;

207.3. Because the claimant had long service;

207.4. Because the impact on the respondent's business was, as we have found at [202.1] above, very limited.

208. In light of what the claimant said about problems she foresaw on returning to the Bromley store at the meeting on 4 October 2022, we would not have reached the conclusion that any reasonable employer would have waited longer but for:

208.1. Our conclusion in [207.1] above.

208.2. Further and separately, our conclusion in [207.2.] above,

208.3. The other factors we have identified in [207] simply add weight to the matters considered in [207.1] and [207.2.].

209. The claimant has not put forward in their skeleton argument or closing submissions any argument that the dismissal was unfair because of a failure to consider alternatives to dismissal, but realistically this issue is subsumed into those already considered.

210. The claimant does however put forward as a specific factor that "the Respondent had caused the latest period of sickness absence through its unreasonable conduct in seeking a postponement of the final hearing in January 2022". However, although we have found at [106] above that the postponement of the hearing in January 2022 and the upset it caused the claimant was a factor in the long period of sick leave that then followed, we have not found either that the respondent's conduct in seeking a postponement was unreasonable or that its conduct caused or exacerbated the claimant's ill-health. As to the former point, a review of the costs bundle suggests that the respondent had a good reason for not informing Mr Kistner of the final hearing dates and generally keeping him abreast of developments in the litigation in the normal way. As to the latter point, we simply do not have sufficient medical evidence. We have therefore concluded that this is not a case to which the principles set out in McAdie or L v M apply.

211. Overall, however, we conclude that the claimant's dismissal was unfair because:

211.1. The respondent did not carry out a reasonable investigation as set out at [205] above; and

211.2. Further and separately, the respondent could reasonably have been expected to have waited longer before deciding to dismiss her as set out at [207] above. In relation to this point, we should note that although the issue was expressed as "**Could the Respondent reasonably have been expected to wait longer before dismissing the Claimant"** we have approached it on the basis that the question for us to consider is would *any* reasonable employer have waited longer – in other words was the respondent's failure to wait longer outside the band of reasonable responses.

Appendix one – the agreed issues

CLAIMS

Direct Sex Discrimination (s.13 Equality Act 2010)

1) The Claimant has made the following allegations of less favourable treatment:
   (a) On 11 June 2019, Mr Kistner shouting at the Claimant, being aggressive towards her, shaking his finger in her face, putting his fingers to his lips and telling her to "*shhh*" a number of times.
   (b) On 12 June 2019, Mr Kistner intimidating the Claimant with his behaviour where he shouted at her, aggressively waved his hands and refused to let her leave the room;
   For allegations (a) and (b), did this take place as the Claimant alleges?

2) Was the Claimant treated less favourably than a hypothetical male comparator in relation to the allegations at paragraphs 1 (a) to (b)?

3) If so, was this because of the Claimant's sex?

Harassment (s.26 Equality Act 2010)

4) Did Mr Kistner's treatment of the Claimant on 11 and 12 June 2019 amount to unwanted conduct which had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her *related to* sex?

Victimisation (s.27 Equality Act 2010)

5) The Claimant relies on the following allegations as protected acts:
   (a) The Claimant's two grievances against Mr Kistner dated 22 July 2019;
   (b) The Claimant's concerns regarding alleged discrimination and harassment based on race and sex which were raised by the Claimant at the grievance hearing of 7 August 2019 and in the documentation, which she subsequently sent Ms Boyd on 8 August 2018.

(c) The Claimant's appeal dated 29 October 2019, and the further details provided by the Claimant on 6 November 2019 where she raised concerns about her alleged discriminatory experience based on her race and sex;
(d) The Claimant's Tribunal Claim submitted on 9 February 2020 where she raised concerns about her alleged discriminatory experience based on her race and sex;
(e) The Claimant's concerns regarding alleged discrimination and harassment based on her race and sex which were raised by the Claimant at the appeal hearing of 6 and 10 February 2020.

In relation to the allegations at paragraph (a) above, do these amount to protected acts within the meaning of section 27(2) of the Equality Act 2010?
The Respondent admits that the acts at paragraphs (b) to (e) above amount to protected acts. *The Respondent also admitted on the first day of the hearing that the claimant's grievance of 22 July 2019 at page 363 was also a protected act – that is to say one of the two grievances referred to at (a) above. In his closing submissions, Mr Tomison indicated that the claimant did not rely on the grievance relating to the incidents on 11 and 12 June as a protected act*. *There is therefore no issue for the Tribunal to decide in respect of whether particular matters amounted to protected acts.*

6) Was the Claimant subjected to detrimental treatment because of the above protected acts with respect to the following:

(a) The alleged failure to adequately investigate her two grievances of 22 July 2019 relating to Mr Kistner;
(b) The Respondent's decision of 23 October 2019 not to uphold her two grievances relating to Mr Kistner;
(c) The alleged failure to adequately investigate her appeal of 29 October 2019 against the grievance decisions relating to Mr Kistner;
(d) The Respondent's decision of 26 March 2020 not to uphold her appeal against the grievance decisions relating to Mr Kistner;
(e) The OH process being sabotaged by the Respondent adding inaccurate details to the referral form, not updating the Claimant about changes and then suspending the OH process;

(f) Her dismissal; and

(g) Her medical insurance being terminated (i.e. the decision to terminate her employment with immediate effect).

Disability (s. 6 Equality Act 2010)

7) The Respondent admits that the Claimant was disabled at the Material Time (14 January 2022 to 15 February 2023) by virtue of anxiety and depression.

Failure to make reasonable adjustments (sections 20 and 21 Equality Act 2010)

8) From what date did the Respondent know or could it reasonably have been expected to know that the Claimant had anxiety and depression? *In a discussion at the beginning of the second day of the hearing Ms Reindorf clarified that the Respondent accepted that it had actual knowledge from 18 October 2021 (in light of a document beginning at page 856.*

9) Did the Respondent have the following provision, criterion or practices ("PCP"):

(a) a requirement for employees to have returned to work or be certified fit to return to work, including not having any further absences?

(b) a requirement for the Claimant to maintain a certain level of attendance at work in order not to be subject to the risk of dismissal;

10) Did the PCP/s put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? The Claimant relies upon the following substantial disadvantages:

(a) Her disability increased the likelihood of sickness absence, and therefore the likelihood of:

(1) Not being able to return to work;

(2) being dismissed and

(3) her medical insurance being terminated.

11) Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantages?

12) Would the following adjustments have alleviated the alleged substantial disadvantage(s) for the Claimant caused by the alleged PCP:
    (a) Offering her a phased return to work;
    (b) Redeployment to other roles and/or branches;
    (c) Moving Mr Kistner to another location so that there were no risks of them coming into contact with one another.
    (d) Obtaining further advice from OH;
    (e) Considering mediation between the various parties involved;
    (f) Discounting any disability related absences from counting against the Claimant for the purposes of the capability process;
    (g) Offering the Claimant an opportunity to improve and/or setting targets by which her absence levels were to be monitored.
13) Was it reasonable for the Respondent to have to take these steps and if so, when?

14) Did the Respondent fail to take these steps?

Discrimination arising from disability (s. 15 Equality Act 2010)

15) Did the Respondent know, or could it reasonably have been expected to know that the Claimant had a disability? From what date?

16) Did the following amount to unfavourable treatment by the Respondent:
    (a) failing to consider all alternatives to dismissal, in particular a move to the flagship store in view of the Claimant's disabilities;
    (b) dismissing the Claimant.
17) Did the following things arise in consequence of the Claimant's disability:
    (a) Sickness absence

18) Was the treatment of the Claimant a proportionate means of achieving a legitimate aim? The Respondent states that its legitimate aims were:

    (a) Not having an employee as part of its headcount indefinitely when there was no reasonable prospect of the employee returning to work to perform the full role of manager and sustaining an acceptable level of absence, given the

impact of this on customer service and the rest of the team who covered her work.

Unfair dismissal (s. 98 Employment Rights Act 1996)

19) Was the Claimant dismissed for a fair reason? The Respondent will say the Claimant was dismissed fairly by reason of capability.

(a) Did the Respondent genuinely believe that the Claimant was no longer capable of performing her duties?

20) Did the Respondent act reasonably, in all the circumstances, in treating this reason as sufficient to dismiss the Claimant? In particular:

(a) Did the respondent adequately consult the Claimant on all matters relating to the capability process?
(b) Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position (including at the appeal stage);
(c) Could the Respondent reasonably have been expected to wait longer before dismissing the Claimant?
(d) Did the Respondent consider all alternatives to dismissal?

REMEDY

21) If the Tribunal considers that the Claimant was discriminated against, harassed and/or victimised:

(a) Has the Claimant suffered financial loss as a result of the discriminatory treatment?
(b) What is the appropriate award for injury to feelings, including personal injury?
(c) What interest should be awarded?
(d) Would it be appropriate to make an award for aggravated damage?
(e) Did the Respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?
(f) Would it be just and equitable to award an uplift in compensation? If so, how much (subject to a 25% maximum uplift)?
(g) Should a Financial Penalty be awarded?

26. If the Tribunal finds that the Claimant was unfairly dismissed:

(a) What financial losses has the dismissal caused the Claimant?
(b) Has the Claimant taken reasonable steps to mitigate her loss? If not, for what period of loss should the Claimant be compensated?
(c) Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure has been followed, or for some other reason (in accordance with the decision in *Polkey v AE Dayton Services Ltd*)?
(d) Does the statutory cap of fifty-two weeks' pay apply?
(e) What basic award is payable to the Claimant, if any?
(f) Would it be just and equitable to reduce the basic award as a result of any conduct of the Claimant before the dismissal? If so, to what extent?

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Employment Judge Evans

Approved on: 8 February 2025

JUDGMENT SENT TO THE PARTIES ON

21 February 2025

FOR THE TRIBUNAL OFFICE

P Wing

Public access to employment tribunal decisions

All judgments (apart from those under rule 52) and any reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/