EMPLOYMENT TRIBUNALS

Claimant: Ms T Brookes

Respondent: National Education Union

Heard at: London South Employment Tribunal, Croydon

On: 10, 11, 12, 13 and 14 February 2025 and 4 June 2025

Before: Employment Judge Abbott, Mr K Murphy & Mr M Marenda

Representation
Claimant: representing herself
Respondents: Ms H Bell, barrister

RESERVED JUDGMENT

1. The Claimant did not make a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996.

2. The complaint of automatic unfair dismissal is not well founded and is dismissed.

3. The complaint of detriment on the grounds of having made a protected disclosure is not well founded and is dismissed.

4. The Claimant was not disabled by reason of hypothyroidism as defined in section 6 of the Equality Act 2010, but did have the disabilities of Asperger's / ASD, dyslexia, childhood-related PTSD, depression, hearing loss and hip injury as admitted by the Respondent.

5. The complaints of direct disability discrimination are not well founded and are dismissed.

6. The complaint of discrimination arising from disability is not well founded and is dismissed.

7. The complaints of failure to make reasonable adjustments are not well founded and are dismissed.

8. The complaints of direct race discrimination are not well founded and are dismissed.

9. The complaint of direct associative race discrimination is not well founded and is dismissed.

10. The complaint of direct associative transgender discrimination is not well founded and is dismissed.

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

12. The complaint of victimisation is not well founded and is dismissed.

REASONS

Introduction

1. This is the unanimous judgment of the Tribunal on the claim brought by Ms Terri Brookes ("***the Claimant***") following a final hearing on 10-14 February and 4 June 2025. Judgment was reserved. The Claimant, who is admitted as a solicitor in England & Wales, represented herself. The Respondent was represented by counsel, Ms Bell.

2. This claim was presented on 21 July 2022, early conciliation having taken place between 25 May 2022 and 5 July 2022.

3. A List of Issues was agreed with the parties at a Preliminary Hearing before Acting Regional Employment Judge Khalil on 8 February 2024. The parties confirmed at the start of the final hearing that this fully reflected the pleaded issues in respect of liability that are live before the Tribunal, subject to correction of certain dates. The corrected list is as follows (***LOI***):

    1. **Unfair dismissal**

        1.1 Was the reason or principal reason for dismissal that the claimant made a protected disclosure on 22 May 2022 (see below)?

    2. **Protected disclosure**

        2.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

            2.1.1 What did the claimant say or write? When? To whom? The claimant says they made disclosures on these occasions:

            On 22 May 2022, the claimant, a Solicitor, emailed Amanda Brown, Deputy General Secretary and the designated whistleblowing officer disclosing information that the respondent's failure to have or show evidence of legal insurance meant she was unable to undertake any legal activities.

            2.1.2 Did the email disclose information?

2.1.3 Did the claimant believe the disclosure of information was made in the public interest?
2.1.4 Was that belief reasonable?
2.1.5 Did the claimant believe it tended to show that:
2.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation.
2.1.5.2 information tending to show any of these things had been, was being or was likely to be deliberately concealed.
2.1.6 Was that belief reasonable?

3. **Detriment (Employment Rights Act 1996 section 48)**

3.1 Did the respondent do the following things:

3.1.1 The claimant's protected disclosure was ignored by Maria Fawcett (line manager), Kate Robertson (HR Manager), Clive Romain (Head of Legal) and Amanda Brown (see above).

3.2 By doing so, did it subject the claimant to detriment?

3.3 If so, was it done on the ground that the claimant made a protected disclosure?

4. **Disability**

4.1 The claimant's disabilities of Aspergers/Autism Spectrum Disorder, Dyslexia, Childhood related PTSD, Depression, hearing loss and Hip injury are accepted by the respondent as disabilities at the material time under S.6 of the Equality Act 2010.

4.2 Did the claimant have the disability of hypoactive thyroid as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.2.1 Did it have a substantial adverse effect on their ability to carry out day-to-day activities?
4.2.2 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
4.2.3 Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?
4.2.4 Were the effects of the impairment long-term? The Tribunal will decide:
4.2.4.1 did they last at least 12 months, or were they likely to last at least 12 months?
4.2.4.2 if not, were they likely to recur?

5. **Direct disability discrimination (Equality Act 2010 section 13)**

5.1 Did the respondent do the following things:

5.1.1 Subject the claimant to multiple Occupational health assessments (up to 4) in May and June 2022.
5.1.2 Deliberately delayed the claimant's DWP appointment to (on or around) the third week of June 2022.

5.1.3 The claimant's line manager telling the claimant to submit a Flexible Working request on 11 May 2022 and refusing it on the same day.

5.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

5.3 If so, was it because of disability?

6. **Discrimination arising from disability (Equality Act 2010 section 15)**

6.1 Did the respondent treat the claimant unfavourably by:

6.1.1 Dismissing her.

6.2 Did the following things arise in consequence of the claimant's disability:

6.2.1 Unable to do her work without adjustments, namely a specialist chair, assisted computer technology, lip reading provision or adjustments at training meetings?

6.3 Was the unfavourable treatment because of any of the claimant's inability to work?

6.4 Was the treatment a proportionate means of achieving a legitimate aim?

6.5 The Tribunal will decide in particular:

6.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims.

6.5.2 could something less discriminatory have been done instead.

6.5.3 how should the needs of the claimant and the respondent be balanced?

6.6 Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability?

7. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

7.1 Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability?

7.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

7.2.1 Requiring the claimant to work 37.5 hours, 9.00 to 4.30 or 5.00pm.

7.2.2 Conducting meetings/trainings over long Boardroom tables.

7.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant needed rest periods throughout the day and the need to work more flexibly and the claimant was unable to lip-read participants/attendees at the meetings/training?

7.4 Did the lack of an auxiliary aid, namely a specialist chair and assisted computer technology (Grammarly and Glean), put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that it took longer for the claimant to do written work and the claimant was unable to sit comfortably to undertake her work?

7.5 Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

7.6 What steps could have been taken to avoid the disadvantage? The claimant suggests:

7.6.1 Flexible working hours.
7.6.2 The provision of assisted computer technology.
7.6.3 The provision of an ergonomic chair.
7.6.4 Conducting meetings/training so that the claimant could lip read.

7.7 Was it reasonable for the respondent to have to take those steps?

7.8 Did the respondent fail to take those steps?

8. **Direct race discrimination (Equality Act 2010 section 13)**

8.1 Did the respondent do the following things:

8.1.1 Referring to all non-white staff as black.
8.1.2 Telling the claimant that as a white person, she had no say on 'black' issues.

8.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

8.3 If so, was it because of race?

9. **Direct associative race discrimination (Equality Act 2010 section 13)**

9.1 Did the respondent do the following things:

9.1.1 Dismiss the claimant.

9.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

9.3 If so, was it because of the claimant's association with the race of her son who is half Pakistani? The claimant says she informed the respondent in an email on 8 May 2022 about her son being half-Pakistani.

10. **Direct associative transgender discrimination (Equality Act 2010 section 13)**

10.1 Did the respondent do the following things:

10.1.1 Dismiss the claimant.

10.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

10.3 If so, was it because of the claimant's association with her Transgender son? The claimant says she informed the respondent (Sandra Bennett) on 10 May 2022 that she had a Transgender child?

10.4 Does the claimant's child have the protected characteristic of Gender reassignment?

11. **Harassment related to disability (Equality Act 2010 section 26)**

11.1 Did the respondent do the following things:

11.1.1 Subject the claimant to multiple Occupational health assessments (up to 4) in May and June 2022.
11.1.2 The claimant's line manager telling the claimant to submit a Flexible Working request on 11 May 2022 and refusing it on the same day.

11.2 If so, was that unwanted conduct?

11.3 Did it relate to disability?

11.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

11.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

12. **Victimisation (Equality Act 2010 section 27)**

12.1 Did the claimant do a protected act as follows:

12.1.1 On or around 9 May 2022, raised concerns with Maria Fawcett and Clive Romain by email and face to face, that the respondent's stance on labelling all non-white employees as black was discriminatory.

12.1.2 On or around 10 May 2022, at an induction meeting, inform Sandra Bennett that transgender parents' rights should feature in training material.

12.2 Did the respondent do the following things:

12.2.1 Dismiss the claimant.

12.3 If so, was it because the claimant did a protected act?

4. After a short opening session, the first day of the hearing was taken for Tribunal reading. Evidence was heard in person over the following 4 days. Oral evidence was heard first from the Claimant, followed by three witnesses for the Respondent (Ms Maria Fawcett, Ms Emma Forrest and Ms Kate Robertson); each provided a witness statement. By way of adjustments for the benefit of the Claimant, she was permitted to audio-record the hearing subject to certain conditions as ordered by Employment Judge Beale, and breaks were taken at regular intervals. On the fourth day the Claimant reported that she was suffering earache – she was offered further adjustments and indicated she was fine to continue but might need additional breaks, and we ended the day slightly early in the circumstances.

5. The breadth of the issues and the need to take breaks meant that the estimated time for evidence was exceeded, meaning evidence was not completed until just before lunch on the fifth day. It would not have been fair to expect the parties (particularly the Claimant) to proceed straight into submissions after the lunch adjournment, so it was unanimously agreed that submissions needed to be provided later. Both parties wanted to provide oral submissions (the Claimant indicated a desire to provide something in writing also). Taking account of the parties' availability and that of the panel, the earliest date to hear oral submissions was 4 June 2025. We directed that any written submissions should be provided 7 days before that, and the Claimant provided written submissions on 2 June 2025, though (as anticipated) Ms Bell did not. The hearing resumed on 4 June 2025, remotely by video, to hear submissions and for panel deliberations.

6. In closing submissions, Ms Bell drew the Tribunal's attention to the Amended Grounds of Resistance and, specifically, the Respondent's pleaded case that certain of the complaints identified in the LOI do not feature in the ET1 and therefore require permission to amend to be sought and granted. The complaints in question are underlined in the LOI above.

The Tribunal agrees with the Respondent that these specific complaints are not particularised in the ET1 and, therefore, this level of particularity first appeared only at the hearing before AREJ Khalil. Accordingly, (i) permission to amend is required and (ii) each of the complaints is *prima facie* out of time. In respect of (i), as confirmed by the EAT in *Vaughan v Modality Partnership* [2021] ICR 535, the balance of injustice is the critical part of the test for the Tribunal to apply. In circumstances where these complaints were captured in the LOI more than a year before the final hearing and the Respondent dealt with the complaints in its evidence and submissions, it cannot be said that there was any genuine prejudice to Respondent in these complaints being allowed to proceed. We grant permission for these amendments. In respect of (ii), prejudice to the Respondent is also a key factor in determining whether a 'just and equitable' extension should be granted (see *Abertawe Bro Morgannwg University Health Board v Morgan* [2018] ICR 1194). Although no explanation was given for the delay, in all the circumstances – having particular regard to the fact we have been able to properly determine the allegations on their merits without any prejudice to the Respondent – we extend time under section 123(1)(b) of the Equality Act 2010, so these complaints are within the Tribunal's jurisdiction.

7. In addition to the witness statements and written submissions referred to above, the panel was provided with a 2,089 page hearing bundle as well as a case summary, chronology, list of personalities and reading list from the Respondent, and a skeleton argument, two fact sheets, a research statement and a hypothyroidism paper from the Claimant. The size of the bundle was expanded by the inclusion of different versions of transcripts of recordings made by the Claimant. At no point during the hearing was any issue raised as to material inconsistencies between different versions. For consistency, where we refer to transcripts in the remainder of this judgment, we have used the versions prepared by the Respondent's solicitors, which were provided in an easier to read format.

8. In closing submissions, the Claimant also sought to rely upon a document she had produced on 11 February 2024 (shortly after the hearing before AREJ Khalil) and material from a "medical bundle" submitted at an earlier stage of the case. Ms Bell objected to these materials being relied upon, on the basis this was new evidence being relied upon after the evidence had been heard. We accepted that objection was justified and did not have regard to those materials in making our decision. If the Claimant wished to rely on the documents they should have been included in the hearing bundle when it was prepared before the hearing or, at the latest, before the close of evidence. To seek to introduce them during oral submissions was far too late and was not fair to the Respondent.

The relevant law

PROTECTED DISCLOSURES (SECTION 43B ERA)

9. Section 43A of the Employment Rights Act 1996 (***ERA***) defines a 'protected disclosure' as a qualifying disclosure made to a number of identified classes of person, including employers (section 43C ERA).

10. Section 43B ERA defines a 'qualifying disclosure', insofar as relevant, as follows:

> "(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
> […],
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> […]
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

11. The EAT summarised the correct approach to the application of section 43B ERA in *Williams v Brown* UKEAT/0044/19, at [9]:

> "It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

12. As set out by the Court of Appeal in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, CA, an allegation will not necessarily "disclose information" as required by the statutory test. To qualify, the disclosure must have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in section 43B(1).

13. The worker must also reasonably believe that the disclosure did show one or more of those matters. The EAT in *Phoenix House Ltd v Stockman* [2017] ICR 84, EAT, stated that, on the facts believed to exist by an employee, a judgement must be made, first, as to whether the belief was reasonable and, secondly, as to whether objectively, on the basis of those perceived facts, there was a reasonable belief in the truth of the complaints. Thus, there is both a subjective element, in that the worker must believe that the information disclosed tends to show one of the relevant failures, and an objective element, in that that belief must be reasonable.

14. The worker must also reasonably believe that the disclosure was in the public interest. In *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)* [2018] ICR 731, CA, the Court of Appeal rejected the suggestion that a tribunal should consider for itself whether a disclosure was in the public interest. The tribunal has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable. The tribunal has to recognise that there could be more than one reasonable view as to whether a particular disclosure was in the public interest. The necessary belief was simply that the disclosure was in the public interest; the particular reasons why the worker believed that to be so were not of the essence. While the worker had to have a genuine and reasonable belief that the disclosure was in the public interest, that did not

have to be the predominant motive in making it.

AUTOMATIC UNFAIR DISMISSAL (SECTION 103A ERA)

15. Section 94(1) of the Employment Rights Act 1996 (***ERA***) provides that an employee has the right not to be unfairly dismissed by their employer. It is not in dispute that the Claimant was a qualifying employee of, and was dismissed by, the Respondent.

16. Section 103A ERA provides that if an employee is dismissed and the reason or principal reason for the dismissal is that the employee made a protected disclosure, the dismissal is automatically unfair.

17. The principal reason is the reason that operated on the employer's mind at the time of the dismissal — Lord Denning MR in *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA. In other words, it is the main or dominant reason. This is a question of fact for the Tribunal to determine (*Kuzel v Roche Products Ltd* [2008] ICR 799, CA). The burden of showing the automatically unfair reason in this case, where the claimant has less than 2 years' service, falls on the claimant (*Maund v Penwith DC* [1984] ICR 143, CA).

DETRIMENT (SECTION 47B ERA)

18. Section 47B ERA provides (so far as relevant):

> "(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.
>
> (1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A) (a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
>
> (a) from doing that thing, or
>
> (b) from doing anything of that description. …"

19. "*On the ground that W has made a protected disclosure*" means that the protected disclosure materially, *i.e.* more than trivially, influenced the decision maker who subjected the worker to the detriment (*Fecitt v NHS*

Manchester [2012] ICR 372, CA).

20. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, their Lordships emphasised that it is not necessary for there to be physical or economic consequences to the employer's act or inaction for it to amount to a detriment. What matters is that, compared with other workers (hypothetical or real), the complainant is shown to have suffered a disadvantage of some kind.

DISABILITY (SECTION 6 EQA)

21. Section 6(1) EQA provides that:

> "A person (P) has a disability if—
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

22. Supplementary provisions are found in Schedule 1 to the EQA. Paragraph 2 of Schedule 1 provides that:

> "(1) The effect of an impairment is long-term if – (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
>
> (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed…"

23. Paragraph 5 of Schedule 1 provides that:

> "(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if - (a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect.
>
> (2) *"Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid…*"

24. In this context, "likely" means "could well happen" (*SCA Packaging v Boyle* [2009] UKHL 37).

25. In a 'deduced' effects case (*i.e.* where the Tribunal is considering what effect an impairment is likely to have if one ignores the measures being taken to treat or correct it), there is an obligation on a claimant to prove their alleged disability with some particularity, ordinarily with clear medical evidence (*Woodrup v London Borough of Southwark* [2002] EWCA Civ 1716).

26. It is the practice of the Employment Tribunal, consistent with paragraph 12 of Schedule 1, to also take account of ministerial guidance, specifically the

"*Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions related to the definition of disability*" (May 2011) (***the Guidance***). In addition to the Guidance, we also had regard to the guidance on the meaning of "disability" included in Appendix 1 to the "*Equality and Human Rights Commission: Code of Practice on Employment*" (2011) (***the EHRC Code***).

27. The relevant point(s) in time for the assessment of whether the claimant is disabled is the time of the alleged discriminatory act(s) (*Cruickshank v Vaw Motorcast Ltd* UKEAT/0645/00).

DIRECT DISCRIMINATION CONTRARY TO s.13 EQUALITY ACT 2010

28. Section 13 of the Equality Act 2010 (***EQA***) prohibits direct discrimination. Section 13(1) EQA states:

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

29. Disability (section 6 EQA), race including colour, nationality and/or ethnic or national origins (section 9 EQA) and gender reassignment (section 7 EQA) are all protected characteristics.

30. In respect of the latter, section 7(1) EQA provides that a person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex. The word "proposing" connotes a conscious decision, which can properly be described as settled, to adopt some aspect of the identity of a gender different from that assigned at birth. A passing whim will not do, but nor is an intention required that the change should be permanent. Determining whether any particular child has the protected characteristic of gender reassignment will involve a case specific factual assessment. (*R (AA & ors) v NHS England* [2023] EWHC 43 (Admin)).

31. The primary focus in a direct discrimination case is on identifying why the claimant was treated as he was, before coming back to whether it was less favourable treatment because of the protected characteristic (see e.g. *Shamoon*). It is well established law that a respondent's motive is irrelevant and, indeed, the possibility of unconscious discrimination is recognised (see e.g. *Nagarajan v London Regional Transport* [1999] IRLR 572, HL). Moreover, the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment (see e.g. *Gould v St John's Downshire Hill* [2021] ICR 1, EAT).

32. What amounts to "less favourable treatment" is an objective test for the Tribunal (*Burrett v West Birmingham Health Authority* [1994] IRLR 7, EAT), although the Claimant's perception may be taken into account. The treatment cannot merely be different, but must be less favourable (*Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065, HL). Detriment is established if treatment is of a kind that a reasonable worker would or might take the view that in all the circumstances it was to his

detriment (*Shamoon*).

33. A comparator must not share the protected characteristic relied upon, and must have no materially different circumstances – see Lord Scott in *Shamoon*: "*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class.*" This applies regardless of whether the comparator that is used is actual or hypothetical.

34. The bare facts of (i) a difference in status and (ii) a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination (*Madarassy v Nomura International plc* [2007] EWCA Civ 33). Something more is needed.

35. Direct discrimination can occur when an employer treats an employee less favourably because of a protected characteristic that the employee does not personally possess (associative discrimination). In such cases, the real question for the tribunal to determine is whether the protected characteristic of the other person was an effective cause of the treatment of the claimant (*Bennett v MiTAC Europe Ltd* [2022] IRLR 25, EAT).

36. The provisions relating to the burden of proof are found in Section 136(2) and (3) EQA:

> "(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. It is thus for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged is it then for the Respondent to prove that the reason for the treatment was not because of a protected act or characteristic (see, e.g., *Royal Mail Group Ltd v Efobi* [2021] UKSC 33). This will typically be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases as it is unlikely there will be direct, overt evidence that a Claimant has been treated less favourably because of a protected act or characteristic (see, e.g., *Anya v University of Oxford* [2001] IRLR 377, CA).

38. Notwithstanding the above, in *Efobi*, Lord Leggatt repeated Lord Hope's reminder in *Hewage v Grampian Health Board* [2012] UKSC 37 that it is important not to make too much of the role of the burden of proof provisions:

> "They will require careful attention where there is room for doubt as to the facts

necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

DISCRIMINATION ARISING FROM DISABILITY (SECTION 15 EQA)

39. Under section 15 EQA, an employer discriminates against a disabled employee if it treats that employee unfavourably because of something arising in consequence of their disability and it cannot show that the treatment is a proportionate means of achieving a legitimate aim, subject to the knowledge condition (see below).

40. An employer does not discriminate against a disabled employee if it shows that it did not know, and could not reasonably be expected to know, that the employee had the disability (section 15(2) EQA). Knowledge of the precise diagnosis of the disability is not required, what is required is knowledge (actual or constructive) of the facts constituting the disability (*Pnaiser v NHS England* [2016] IRLR 170, EAT at [69]).

41. Something arises in consequence of a person's disability if it is a result, effect or outcome of that disability. The 'something' need not be the sole or main reason for the unfavourable treatment in the mind of the relevant decision-maker, but it must at least have had a significant influence on that treatment so as to be an effective reason for it (*Pnaiser* at [31]).

42. Unfavourable treatment occurs when a reasonable worker would or might take the view that they had been disadvantaged by reason of the act or acts complained of in all the circumstances. An unjustified sense of grievance does not constitute unfavourable treatment (*Shamoon*).

43. To be proportionate, the unfavourable treatment must be both an appropriate and reasonably necessary means of achieving a legitimate aim. The Tribunal must weigh the reasonable needs of the employer against the discriminatory effect of its actions on the employee (*Chief Constable of West Yorkshire Police v Homer* [2012] UKSC 15 at [19]-[27]; *Land Registry v Houghton & Ors* UKEAT/0149/14 at [8]-[9]).

44. Where there is unfavourable treatment it is for the employer to justify it, and the employer must produce evidence to support their assertion that it is justified and not rely on mere generalisations (paragraph 5.12 of the EHRC Code). The Tribunal is bound to examine the employer's explanation for what it did as part of its assessment of proportionality (*Dl Insurance Services Ltd v O'Connor* UKEAT/0230/17 at [36]-[39]).

45. The provisions relating to burden of proof have been covered in the "Direct Discrimination" section above.

FAILURE TO MAKE REASONABLE ADJUSTMENTS (SECTIONS 20, 21 EQA)

46. A disabled employee must show that their employer's provision, criterion or practice ("PCP"), or failure to provide an auxiliary aid, put them at a substantial disadvantage in relation to their employment in comparison with non-disabled persons, and that his employer failed to take reasonable steps

to avoid that disadvantage / provide the auxiliary aid (sections 20, 21, 39 & paragraph 5 of Schedule 8 EQA).

47. An employer is not under a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the employee has a disability and is likely to be put at a substantial disadvantage in comparison with non-disabled persons (paragraph 20 of Schedule 8 EQA).

48. A viable PCP is one that is capable of being applied to others, since the comparison exercise requires a comparator to whom the PCP would also apply. It is a state of affairs (however informal) that indicates how similar cases are generally treated or would be treated (*Ishola v Transport for London* [2020] IRLR 368, CA at [36]-[38]).

49. The purpose of the comparison exercise is to test whether the PCP had the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes that disadvantage is the PCP. The relevant disadvantage must be substantial, meaning more than minor or trivial (*Sheikholeslami v University of Edinburgh* [2018] IRLR 1090, EAT at [48]-[49].

50. Assuming the duty to make adjustments arises, the employer is only under a duty to take such steps as are reasonable to avoid the disadvantage. In determining reasonableness, factors to take into account include the effectiveness of the step in avoiding the disadvantage, the practicability of the step and the financial costs of the step (paragraphs 6.28-6.29 of the EHRC Code).

51. The provisions relating to burden of proof have been covered in the “Direct Discrimination” section above.

HARASSMENT CONTRARY TO S.26 EQUALITY ACT 2010

52. Section 26 EQA provides, so far as is relevant:

> “(1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> […]
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.”

53. Disability is a relevant protected characteristic: section 26(5) EQA.

54. The wording of section 26(1)(b) is important – as it requires conduct that is more than merely upsetting to B. This is a question of fact for the Tribunal. In *Richmond Pharmacology v Dhaliwal* 2009 ICR 724, EAT, Mr Justice

Underhill, then President of the EAT, 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.*"

55. The provisions relating to burden of proof have been covered in the "Direct Discrimination" section above.

VICTIMISATION CONTRARY TO s.27 EQUALITY ACT 2010

56. Section 27 EQA provides, so far as is relevant:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

57. A "protected act", therefore is, in essence, raising an issue of discrimination.

58. In order for a disadvantage to qualify as a "detriment", the Tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. The test must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to their detriment is a reasonable one to hold, that ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory act cannot constitute detriment, a justified and reasonable sense of grievance may well do so (*Shamoon*).

59. The provisions relating to burden of proof have been covered in the "Direct Discrimination" section above.

The facts

60. The role of the Tribunal is to consider all of the witness evidence, and the documentary materials referred to, and form a view as to what is most likely to be the true position on the balance of probabilities. It is important to say that, simply because we may disbelieve the evidence of a witness on a particular point, does not mean that we consider they are deliberately seeking to mislead – nor does it mean we must automatically disbelieve them on other points. Ultimately we have to weigh up all the evidence on all

different points and assess it on its merits.

61. We have only made findings of fact necessary for the disposal of the live issues in this case. We have not referred to every document we have read and/or were taken to during the hearing, but have considered all such documents. We have not considered documents that were not referred to in the written or oral evidence or in submissions – given the size of the hearing bundle, it would have been impractical to do so.

62. The relevant facts are, we find, as follows. References to **[x]** are to pages in the hearing bundle.

63. The Respondent (***the NEU***) is an education union that represents members in the education sector including teachers, lecturers, support staff and school leaders. The NEU has a head office, nine regional offices in England, and offices in Northern Ireland and Wales. Each regional office is led by a Regional Secretary, who manages a team of managers (the Senior Regional Officers, Senior Officers and Officer Managers). All regional offices except the Belfast office have their own Regional Solicitor who also reports to the Regional Secretary but is legally supervised for regulatory purposes by the Head of Legal Strategy, who is based at the head office in London.

64. On 3 April 2022 the Claimant was interviewed for the role of Regional Solicitor for the South East Region. The interviewers were Maria Fawcett (Regional Secretary for the South East Region), Helen Ball (Senior Regional Officer in the South East Region) and Clive Romain (Head of Legal Strategy). In advance of the interview, the Claimant had made the NEU aware of her Asperger's and dyslexia and had requested reasonable adjustments for her interview **[2045]**. She was provided with an extended break between the two parts of the interview (the written task and the interview itself) **[2046]**, and the interviewers were provided with a Dyslexia Style Guide produced by the British Dyslexia Association **[2044]**.

65. Following interview, the NEU decided to offer the Claimant the role. Ms Fawcett telephoned the claimant to offer her the role on 4 April 2022. The claimant subsequently responded by email to request various documents and indicated that she was pleased to be offered the role. She also indicated that she would "*send over any adjustments*" as well, and referred to 'Access to Work' potentially being able to help **[308]**.

66. A conditional offer of employment was sent to the Claimant on 5 April 2022 **[309]**. Among other things, the Claimant was required to complete a pre-employment medical questionnaire **[311]**. The offer letter attached the Role Description **[305]**, which identified the purpose of the role as being "*to conduct claims and litigation in the name of the NEU, and to represent individual members in tribunals and courts in cases requiring specialist legal knowledge or expertise*". Six key responsibilities were set out:

> "1. To be responsible for the conduct of claims and litigation, in the name of NEU Solicitors, within the region.
>
> 2. To undertake the representation, including advocacy when appropriate, of

individual members of the Union in the tribunals and courts, internal hearings and other procedures when required.

3. To undertake the representation, including advocacy which appropriate, of individual members of the Union at regulatory bodies.

4. To provide advice and support to colleagues on legal issues affecting teachers in the region.

5. To contribute to the training of staff and members of the Union on legal issues.

6. To contribute in the preparation of a range of written document and articles on legal issues affecting members."

67. The Claimant completed her medical questionnaire on 7 April 2022. Having done so, she emailed Ms Fawcett and Clare Sharman of NEU's HR team noting there was not enough space in the questionnaire to list the adjustments that may be required **[313]**. Her email went on to say this:

"I have a workplace adjustment passport from the civil service but some of it will not apply to NEU and the whole document is very much out of date. The working environment is very different, not open plan (at least not in Ardingley). Also, adjustments had to be put in place to cover moving from place to place every 6 months which I sincerely hope will not be the case in NEU.

Therefore the adjustments will need further discussion. I am contacting you both as I am aware an occupational therapy assessment would be useful but, Maria, it would also be very useful to have this discussion with yourself regarding the hybrid working pattern?"

68. There were further e-mail exchanges between Ms Fawcett and the Claimant over the following weeks. On 13 April 2022 the Claimant sent Ms Fawcett an email with an attachment (it is not clear exactly which document was attached but, on the balance of probabilities it was her workplace adjustment passport from her time working at the Government Legal Department (***GLD***) – referred to below), with the following commentary **[319]**:

"Please find the above document attached. As previously mentioned, this is very out of date to the point that the assistive technology mentioned no longer exists and I need to use more up-to-date software. We have already discussed working patterns, but you will see these are usually noted on the document also. Some of the adjustments may not apply to the workplace either in Haywards Heath or Reigate/Redhill and others were to do with the bullying I was going through, but this could not be put on the document as bullying. The WPAP needed management approval and to be signed off. Therefore I suggest we have an open conversation, at your convenience, of course, to ensure the adjustments are relevant and efficient.

I have also attached a leaflet that I put together for the Civil Service regarding the same topic for your reference (Printable Version). Apologies if you do not find it useful but it went down well with the National Police Autism Association."

69. It is evident from the Claimant's emails, and we find, that during this early pre-employment period, the Claimant was actively requesting reasonable adjustments, but recognised that the reports she had from her previous

employment were "*out of date*" so there would need to be further consideration of what was reasonable for the Claimant in her new role.

70. The Claimant followed up on 20 April 2022, among other things identifying IT and mobile phone software that she considered she needed (specifically, subscriptions to Grammarly – an AI writing assistant – and Glean – a note-taking application) **[315]**. The following day Ms Fawcett referred these requests onwards to NEU's HR team to take forward **[2053-2055]**.

71. Following triage of the medical questionnaire by the health provider, Medigold, it was determined that a face-to-face consultation was required with an occupational health nurse **[330]**. A request was made to NEU's HR team on 20 April 2022 and Ms Sharman confirmed on the same day that NEU wished to proceed with that face-to-face consultation **[328]**.

72. However, on 21 April 2022 a Medigold nurse telephone consultation was carried out with the Claimant, at the instigation of the Claimant **[342, 2034]**. An email was sent to NEU HR that morning, the outcome notes from which were as follows **[332]**:

> "This candidate has declared that they have been assessed as having Asperger's Syndrome which is likely to be covered by the disability criteria of the Equality Act and may require adjustments in the workplace. This candidate has declared treatment for an ongoing musculo-skeletal health condition which is generally well controlled although she may experience periodic flare-up of symptoms. This candidate reports they have ongoing Mental Health symptoms which appears well managed with medication. She is fit to undertake the proposed role but if there are any concerns or changes in health status in the future, we would recommend a management referral is submitted.
>
> […]
>
> It is recommended that a DSE workstation assessment is undertaken at the start of employment to ensure the workstation and seating is set up correctly and any additional equipment/IT anciliaries requirements are identified. I understand she has a copy of a previous assessment and have asked her to share this with her manager. To manage her conditions she may need flexibility with her working hours, I note that she also has a copy of a previous workplace adjustments passport and have asked her to share this with her manager to consider any necessary reasonable adjustments. Management are advised to discuss these further with the employee and document any mutual concerns and supportive measures or adjustments agreed."

73. The email concluded by stating: "*Please disregard the previous statement of fitness as an OHA appointment is no longer considered required.*"

74. The Claimant herself followed up with Ms Sharman by email, and referred to her workplace adjustment passport and to an ergonomic assessment from her previous employment with the GLD, both of which she attached, which she considered should form the basis of any adjustments required **[342]**.

75. The passport itself **[645-651]** is dated 19 December 2019 and sets out that the Claimant "*has a range of difficulties including a diagnosis of Asperger,*

hearing impairment, PTSD and SpLD" and, later in the document, references are made to a diagnosis of dyslexia and to a hip injury. In respect of working hours, it is recorded that the Claimant's individual requirements were to work "*Mon-Fri 09:30-16:30 in the office and 54 mins working from home each day*" with "*Ad hoc days WFH Permitted*". A list of general adjustments was set out which included that the Claimant may need to record certain meetings dependent on the content of the discussions and whether notes are required, the use of assistive technology (Audio Notetaker) for transcription of recordings, needing to use hearing aids in situations where she is unable to lip-read, and a specific chair as detailed in a separate Ergonomic Assessment (dated 9 August 2019, which identified the appropriate model and included dimensions for the Claimant's ideal desk set-up **[654-658]**). Under specific adjustments for training and examinations (but not on a day-to-day basis), the Claimant was to be afforded rest breaks of 10 minutes per hours, taken at her request. Under emergency contact, it is noted that the Claimant's son has "*Gender Dysphoria (self-identifies as male)*". The passport records that "*as a minimum this must be reviewed annually*".

76. The claimant was sent her formal job offer on 21 April 2022 **[334]**. Within the offer letter it confirmed that her position was full time, 35 hours per week, Monday-Friday, based at the NEU Office in Ardingly, West Sussex. Her appointment was subject to a six-month probationary period **[335]**. Her start date was to be 3 May 2022, and the offer letter attached a statement of particulars of employment **[336-341]**.

77. The process of organising a face-to-face occupational health nurse assessment for the Claimant, which had been put in train prior to the telephone assessment on 21 April 2022, resulted in an appointment letter being issued on 22 April 2022, scheduling the assessment for 11 May 2022.

78. The Claimant commenced her employment on 3 May 2022. A comprehensive induction programme was put in place, including meetings in region and with the Legal Strategy team at head office **[2040-2041]**.

79. On or around 4 May 2022, the Claimant made an application to the Department for Work and Pensions (***DWP***) for an 'Access to Work' grant. A DWP Case Manager, Ben Hauxwell, contacted the Claimant on 4 May 2022 to discuss the application, and the upshot of that conversation was that Mr Hauxwell was to get in contact with Ms Fawcett in order to organise a workplace assessment for the Claimant **[363]**.

80. As part of her induction programme, the Claimant attended the NEU's head office in London on 5 May 2022. Ms Fawcett had invited the Claimant to accompany her to a Regional Secretaries meeting at which Kevin Courtney, the NEU's Joint General Secretary, was to speak about a pay claim the NEU was submitting to the Department for Education. In advance, Ms Fawcett explained that the Claimant's role was to observe. In fact, at the meeting, the Claimant questioned Mr Courtney about the pay claim. Ms Fawcett was of the view that this was not an appropriate forum for the Claimant's questions and that her questioning came across as aggressive, and after the meeting Ms Fawcett apologised to Mr Courtney for the Claimant's conduct.

81. The Claimant chased Mr Hauxwell for an update on the 'Access to Work' application after business hours on Friday 6 May 2022 **[362-363]**. Mr Hauxwell replied the following Monday 9 May 2022 to explain he had not been able to reach Ms Fawcett by telephone and was awaiting an email response **[362]**. The Claimant replied to explain that Ms Fawcett was off sick with food poisoning but that she would reminder her **[361]**.

82. On Sunday 8 May 2022, the Claimant sent an email to Mr Romain raising what she described as "niggling" concerns about two matters **[372-373]**. The first concerned the degree of access that a wide range of people had to the NEU's case management system which, in the Claimant's view, risked undermining legal privilege. The second concerned insurance. It is worth setting out what the Claimant said in this respect in full:

> "… I raised this because as a lawyer under SRA regulation it is my duty to ensure that either I or the company I work for has adequate insurance to cover the activities I will be involved in. At interview it was suggested I may take cases to court maybe twice per year and of course I am Higher Rights qualified. As a director of my own CIC, I am fully aware of the trials and tribulations having the right insurance can cause especially when certain organisations, including trade unions, carry caveats in relation to reserved legal activity. I am fully aware, that NEU does not have to be regulated by the SRA even though all the individual lawyers working for NEU will be (unless they are barristers or CILEX). I am also very aware that lawyers for NEU under the LSA Section 23(2) can carry out reserved activity and that the NEU does not need to be authorised to do so under SRA regulations. However, as a director of a CIC I am also aware that it is very difficult to get SRA fully compliant insurance unless you are a "regulated" or "authorised" organisation meaning that nay reserved activity carried out would not necessarily be covered by the insurance NEU holds. Any miscellaneous insurance will usually hold a clause that states it will not cover reserved activity. Therefore, has the NEU been voluntarily "authorised"? Does the NEU hold insurance covering reserved legal activity? If not, does that mean that throughout my time at NEU I will be restricted to non-reserved activity including not being able to prepare a case for litigation, even in the tribunals? Although tribunals are deemed as non-reserved."

83. It is the Claimant's avowed position (see paragraph 14 of her Particulars of Claim **[15]**) that, from this point, she refused to carry out any legal activities until evidence of appropriate insurance cover was provided.

84. On 9 May 2022, the Claimant emailed Mr Romain (cc Ms Fawcett) raising concerns about the content of certain training materials **[378-379]**. It is admitted by the Respondent that there were also face-to-face discussions addressing the same points. It is worth setting out in full what the Claimant said in her email in this respect:

> "I have just read through the proposals for the discrimination training / questionnaires and although generally very thoughtful in their presentation and reasoning, I have some concerns in relation to the classification of our ethnic minority members and training materials.
>
> I am aware that a policy statement was written, and I believe distributed, amongst NEU in relation to the term "Black" being used for ethnic minority members as well. However, in terms of legality this does exactly what "White" people were doing to "Black" people for thousands of years and could potentially be a litigation risk in

the future.

Chinese, Arabian, Indian, Pakistani members are not "Black" they are ethnic minorities with their own cultures, beliefs and religions and skin colours, all of which vary. As a mother of a half-Pakistani child, I was very concerned to see that ethnic minorities seem not to have a voice.

I am aware that a vote was taken for the term "Black" to be used and encompass "all ethnic groups" however, I humbly request to see the diversity data of the individuals who took part in this ballot, to ensure it was fully representational when it was held. I am assuming diversity data was collected in relation to these matters so that such policies can be written and applied?

It we teach our members that this is acceptable then they will teach our children that this is acceptable. I believe that this is doing the exact opposite to what NEU stands for; instead of empowering minority groups it's taking away their identity.

Also, I believe some of the law and legal explanation on the slides used in relation to the discrimination training is potentially erroneous, or at least misleading and may need correction or further explanation.

I have copied Maria in as my line manager however she is unfortunately off sick today.

I apologise deeply that this is another email raising "issues" and asking questions, but these matters are extremely important for both NEU staff, representatives, and NEU members."

85. On 10 May 2022, the Claimant had a scheduled meeting with Mr Romain, in the course of which the issues raised in her email of 8 May 2022 were discussed. That discussion did not reassure the Claimant in respect of the insurance coverage, and she followed up with an email to Ms Fawcett on 11 May 2022 reiterating her concerns **[371-372]**. Insofar as relevant, she said this:

"[…]
These concerns may be completely erroneous but given my previous experience setting up and running a law firm (Community Interest Company "CIC") and working with the Solicitors Regulation Authority, I believe, that there is a strong possibility that solicitors are not covered to carry out "reserved legal activity" (e.g., Prepare documents for litigation purposes, represent in civil county courts or criminal courts etc), under the current NEU insurance. It is my belief that the current insurance may only cover representation and case work carried out by Union officials who are non-legally qualified.

[…]
Therefore, given that part of my role is to prepare employment cases for litigation and to represent in tribunals I require assurance from NEU that as a legally qualified person (Solicitor) I am insured to carry out those activities. If I am, then that is "music to my ears" but if not, this could seriously impede my role and that of other solicitors working for the NEU.

Therefore, please could I see a copy of the NEU insurance documents to ensure that I am fully covered for carrying out reserved legal activities as part of my role? If not, could you please confirm the insurance status? If I am not fully covered, then my job role may need to be changed or possibly even made redundant.

I hope all the above makes sense, if not, please feel free to contact me for further information or clarity. I am hoping I am wrong and that I am being over cautious, but I am not willing to take the risk. I hope you understand."

86. Also on the morning of 11 May 2022, the Claimant and Ms Fawcett had met (following the latter's return to work following illness) to discuss other matters, including reasonable adjustments and working hours. Regarding the latter, since before 8 May 2022, the Claimant had included in her email signature a statement of her working hours ("*Working Hours: 09.30 – 16.30 (Mon, Wed, Fri) and 08.30-17.30 (Tues & Thurs)*"). Following the discussion on 11 May 2022, the Claimant emailed Ms Fawcett saying, so far as relevant, the following **[384]**:

"As previously discussed, my working hours are in my email signature, but due to the blended working policy requiring flexibility, I do have some (with notice) in terms of the days where I can be in the office and at home. However, fixed days help me plan child care without additional costs and above all aid in maintaining anxiety and stress levels to a minimum with constant changes.

However, as I say, the flexibility is there if required to meet business needs. I will request the change as a reasonable adjustment anyhow when I speak to occ. Health this afternoon.

Therefore, as a formal request, please would you consider putting my working hours (as noted below) in place as a permanent change under the flexible working policy?"

87. Ms Fawcett did not respond directly to the above email. We accept her evidence that she did not interpret this email as a formal request under the flexible working policy (this is evident from her subsequent email of 13 May 2022 – see below – but it is also clear that the 11 May 2022 email did not comply with the requirements of a formal application under the Flexible Working Policy[1]), and did not consider further discussion was required as she had informally agreed the Claimant's working hours as indicated in the Claimant's email signature. The Claimant accepted in cross-examination that it was she who wished to make a formal flexible working request, not that she was told to do so by Ms Fawcett. We do not accept the Claimant's assertion that Ms Fawcett refused / denied her flexible working request, which is not consistent with the contemporaneous emails nor with Ms Fawcett's evidence. In fact, Ms Fawcett agreed (informally) to the Claimant's requested working hours.

88. On the afternoon of 11 May 2022, the Claimant's face-to-face OH assessment was due to take place in London. The claimant attended the appointment but, due to childcare difficulties, took her son with her. She was informed that the appointment could not proceed with her son being

[1] Clause 6.2 of which required an employee's written application to cover: (1) when they would like the proposed new working arrangement to start; (2) the likely impact on the job - potential benefits and detriments, including impact on quality and performance; (3) the impact on their colleagues and the work of the team or department, including any essential cover at core times; (4) any impact on the work of NEU or on the ability to meet members' needs; (5) how any potential negative effects can be overcome and the potential positive impact that the change may have on the employee's work, their team and/or NEU members; and (6) how flexible they can be with the request: whether there are alternative arrangements that could serve the interests of both parties. **[990-991]**

present. The Claimant was upset by this and wrote a lengthy email to Ms Sharman about it whilst travelling home **[385-386]**. As part of this email, she expressed that she would be "*happy for DWP access to work to carry out an assessment*" and "*happy to have an assessment carried out elsewhere*", but not at a Medigold practice.

89. We find that no fault can be placed with the NEU for this OH assessment not going ahead. We accept Ms Fawcett's evidence that the Claimant had not informed her (or to her knowledge anyone else) that she intended to take her son to the appointment and it is, we find, understandable that the provider was not prepared to proceed with an occupational health assessment with a child present.

90. Early on the morning of 12 May 2022, the Claimant followed up with Ms Fawcett, copying Ms Sharman **[389]**. It is worth setting out the substance of the email in full:

> "As you are aware the occ. Health assessment didn't go as planned. However, there is no reason why reasonable adjustments cannot be put in place without it.
>
> Clare has a copy of a report stating that a full assessment was not required and that the reasonable adjustments on the workplace adjustment passport and the ergonomics assessment can be used. However, they will need to be updated.
>
> James is on holiday for a week and to-date reasonable adjustments have been minimal. I am at the point where I really need my assistive tech to be put in place so I can do my job. I am struggling to retain a lot of information because of the tech not being in place and it is making learning my role a lot harder than necessary.
>
> Also, Maria and I discussed flexible working, but my working hours have always been discussed as an adjustment.
>
> DWP access to work has been trying to get hold of Maria by phone and by email since 4th May 2022 to no avail. James Hannam said he would speak to them, so I gave them his details and he is now away.
>
> Therefore, I would really like to know, why the hesitation and the hold up? Is this something that HR needs to rectify, Maria, do you need more support? The occupational health assessment is neither here nor there.
>
> I would very much appreciate it if this could be discussed and would need to be at some length.
>
> Maria, I am aware I have a 1:1 with you Friday but not sure if there will be enough time to discuss the adjustments as well as other factors and Clare, I am not sure if it would be helpful for a member of HR or James to be present?
>
> The fact of the matter is, without my adjustments in place my anxiety and stress levels increase, I become drained a lot easier doing daily tasks, eventually I will burnout. I mask every day to try and fit in which is hard work in itself.
>
> Therefore, sooner this is rectified the better it is for everyone, me, NEU and its members as I will be able to do my job to the best if my ability."

91. Ms Fawcett responded just over an hour later **[388]**. She confirmed that she had now reached out to the DWP regarding 'Access to Work' and was

waiting to hear from them. She asked for confirmation that the Claimant was rearranging her OH assessment because "*this will help the Union and colleagues in the South East and across the Union support you and ensure the appropriate Reasonable Adjustments are put in place*". She also explained that a flexible working request would be the best way to put in place the adjusted hours the Claimant had requested on a permanent basis, and that she had shared the relevant policy with the Claimant. Finally, she explained that a meeting was scheduled for the following day to discuss putting in place reasonable adjustments in advance of the OH report being available.

92. As foreshadowed in Ms Fawcett's email, she and the Claimant met for a routine line manager meeting. The Claimant recorded the conversation, and the transcript was in the bundle **[1418-1446]**. We accept Ms Fawcett's evidence that she was not aware that the Claimant was recording the conversation (which is consistent with her surprised reaction, evidenced in later documents, e.g. **[1556-1557]**, when she discovered this had been the case). In the meeting there were discussions around the "black" terminology issue that the Claimant had raised, her concerns around insurance cover, and reasonable adjustments. As regards the latter, Ms Fawcett explained it was important to ensure the adjustments in place were correct and that this would require some patience in view of the failure of the OH assessment earlier that week as well as the ongoing 'Access to Work' process **[1426]**. Ms Fawcett also referred the Claimant (again) to the flexible working policy **[1427]**.

93. Also on 13 May 2022, NEU's HR team issued a new referral for an OH assessment to the Claimant, for a different provider (BHSF rather than Medigold) **[390-397]**. In due course, a DSE workstation assessment was scheduled for 16 May 2022 and a full OH assessment for 6 June 2022.

94. On the afternoon of 13 May 2022, Mr Romain sent two substantive emails to the Claimant. The first was in response to her email of 9 May 2022 regarding discrimination issues **[378]**. Mr Romain said this:

> "I am writing to confirm the discussion that we had on Tuesday 10th May when we spoke.
>
> The NEU, as a trade union, is lawfully entitled to describe as "black" those of its members who might otherwise be called "ethnic minorities". In reality there is no precise settled term in overall usage. Sometimes, the phrase "Black and Minority Ethnic" or "BAME" is used but this has its detractors. The key issue is that black members themselves have chosen this term, though their own Black Educators Members Conference, as did previous conferences of the NUT. Such meetings did and do include members of African, Asian and various other backgrounds. "Black" in this context essentially means "non white", or someone who could be discriminated against because they not white. Precise numbers or backgrounds of those who voted at these meetings is irrelevant. There has never been any sort of legal challenge to these arrangements and we would defend it there were.
>
> Of course these matters of internal trade union arrangements are not the same as the laws that apply to all employers, including the NEU "as employer" and schools and colleges as employers. Here the key issue, of course, is whether there has been discrimination on the grounds of race. I am not at all aware of any case

where the use of the word "black" in the above context has been problematic."

95. The second email related to the issues of insurance **[375]**. Mr Romain said this:

"When we met on 10th May we discussed the two issues you raised in your email. I thought I had assured you. I was very surprised to learn that you have gone to my colleague Jayne Phillips to continue to raise the issue of our insurance. It is a little unsettling that you do not appear to have much confidence in how we do things.

I will set out the following in writing, hopefully to allay your concerns.

Our insurance arrangements are brokered by Alan Boswell Insurance Brokers Limited. The present insurers are Hiscox Insurance. The total level of cover for our Professional Indemnity Insurance for this calendar year is [REDACTED]. ln the very unlikely event that we had total claims in the year above that amount the assets of the NEU are such that we could cover them. As I said when we spoke the policy provides cover for all in the NEU who provide advice and casework. This includes the "lay" unpaid district and branch advisers and all regional Wales officers including regional and Wales solicitors. We have this cover precisely because we may be sued by a member, or possibly another party, in negligence or breach of contract for failings of anyone in either of these unpaid and paid categories. As I said when we spoke the insurance would cover all activities carried out by you in line with your Role Description. This obviously includes Employment Tribunal casework and representation as that is a fundamental reason why you have been employed.

Those issues around "reserved activities" that applied to when you set up your own particular company, simply do not apply here.

As I also said when we spoke, the main issue in practice is that we act in accordance with the requirements set out by insurers - which is perfectly normal with insurance contracts. I sent you guidance on this as part of the paperwork for the induction.

I have been overseeing the insurance arrangements of the NUT since December 2009 and those of the NEU since September 2017. There has not been a single occasion where any of our solicitors, or anyone else, has got into any form of difficulty or problem due to inadequate insurance cover.

I do hope you will accept this."

96. There followed emails in which the Claimant clarified she had not contacted Jayne Phillips (who was the Assistant General Secretary), rather only the "*appropriate channels*" as she put it, *i.e.* Mr Romain and Ms Fawcett **[374]**.

97. On 16 May 2022, Mr Hauxwell of the DWP confirmed to the Claimant that he had been in contact with Ms Fawcett regarding 'Access to Work' and the Claimant's details had been sent to the referral team **[359]**.

98. Also on 16 May 2022, the Claimant was sent details relating to a potential employment tribunal claim on behalf of a member by a Senior Officer, Hollie Hill, and invited to provide advice **[2063-2064]**. That evening, the Claimant wrote to Ms Fawcett in the following terms **[401]**:

"I have started reading into the case that Hollie sent. However, I still need to make

sure the insurance covers me to provide legal advice as a solicitor.

Without any confirmation of the exact details and cover I can't do my job role.

Given that the policy is with Hiscox I am sure that they do not provide professional indemnity insurance for solicitors reserved or non-reserved activity.

When I started my business, I had to obtain my insurance through a specialist broker just for miscellaneous let alone full SRA compliant insurance.

I will continue to read into the case, but I need the insurance details as soon as possible please, otherwise I can't do my job in any capacity whilst I am SRA regulated."

99. On 17 May 2022, the Claimant emailed Ms Hill to explain "*I need to speak to Maria before I say anything as I don't think I am insured by NEU currently to even carry out advice*" **[2063]**. In parallel, the Claimant emailed Ms Phillips, in the following terms **[402]**:

"I hope you are well, and I apologise for this impromptu email.

I believe Maria has been kind enough to follow up on the aforementioned topic for me and Rachael Curly may have been in touch. However, as an SRA regulated solicitor I really need the Insurance details to ensure that I am SRA compliant and so that I know what type of work I can carry out within my job role. Currently my hands are tied as I do not know what cover is in place, if any.

I have been informed by Clive that you have a policy with Hiscox and generally insured for [REDACTED]. However, Hiscox do not insure any form of legal work directly especially not solicitors. The only way this maybe possible is via a specialist broker. In addition, there will still be some activities we may not be covered for and others that we will be covered to carry out under the policy. This depends on the wording and the restrictions set in place.

I am not questioning NEU at all, I am not doubting its outstanding reputation, it is possible what I see as an issue may not be an issue at all. However, I am simply trying to provide the highest and best level of service to my team, to Maria and to the members of the southeast region. However, I really need the insurance policy details to make sure that I can do this without the risk of complaint, or at worst being struck off for being in breach of the SRA code of conduct. I need the details to be SRA compliant in relation to Client Care letters, I need to know whether I am covered for reserved or non-reserved activity if any activity at all so I can do my job role.

I apologise if you think that I am "going beyond my pay grade" and apologise for the inconvenience caused. However, as a fellow lawyer I sincerely hope you understand my situation and Maria forgives me for contacting you directly."

100. The Claimant wrote in very similar terms to Mr Romain on the following morning, 18 May 2022 **[415]**. Aside from requesting the insurance details, she said this in respect of the case referred by Ms Hill:

"As you are aware I have been asked to advise on a case sent to me by Hollie Hill which both you and Maria were copied into. However, without knowing the details of the professional indemnity insurance I cannot provide any legal advice. I cannot and will not breach SRA Regulations and therefore under the circumstances surely

it is reasonable to ask for such details. Wouldn't you if you were in my position?"

101. Mr Romain responded at 09:38 on 19 May 2022 as follows **[414]**:

"I am attaching a folder that includes our professional indemnity insurance arrangements with Hiscox as arranged with Alan Boswell Insurance Brokers for the year 2022.

As I have already said you can carry out all work in line with your Role Description and there is nothing to worry about.

I trust that this ends this discussion."

102. The Claimant responded almost immediately, at 09:41 **[413-414]**:

"This is very much appreciated. I will of course treat them with the upmost of confidentiality and as soon as I have read through them, providing there are no queries, this does indeed end the discussion and hopefully we can all move forward and as said I can carry out my role to the best of my ability and in full confidence.

Thank you again, I know that sharing such documents takes a lot of trust and I can assure you, you, Maria and NEU have mine in return."

103. By 11:06, the Claimant had completed an initial review of the documents and wrote to Mr Romain as follows **[417]**:

"I am sorry but on initial study, and this is not legal advice but guidance only, it seems that legal work of any kind and the solicitors are not covered by this policy. In fact, I do not believe that ANY of the caseworkers are covered by this policy and that the policy is actually very poor in terms of cover for the requirements of the Union.

This seems to be a standard policy for a trade association which has been underwritten by a broker to support the NEU as a union, but it seems legal work and advice and guidance including representation of any kind and risk has been clearly restricted in cover (not covered). Not to mention that the NEU is not covered for Strike Action or Pay disputes that it may well be involved in (action taken against the NEU)

I am not an insurance adviser or broker and would suggest you seek specialist advice. I am happy to put you in touch with my insurance broker if you or the NEU feel it would be beneficial.

However, this is a dire situation for the Union to be in. I will assist in any way possible. I am awaiting a call back from the insurer to confirm the above but I would suggest this is dealt with as quickly as possible.

If I am incorrect I will of course let you know."

104. The Claimant sent a similar email to Emma Forrest and Ms Phillips (both Assistant General Secretaries) at 11:21 **[413]**:

"I hope you are well. My deepest apologies for this email and again I ask Maria for her forgiveness in approaching you directly regarding this matter.

Please see my email chain to Maria and Clive. I have made some enquiries and have been told that my interpretation of the policy is looking to be correct. However, I am waiting for the executive Insurance broker who put the policy in place to confirm.

I will notify yourselves, Maria, and Clive as soon as I have been told either way. However, as I say I am not an insurance expert, but I would suggest seeking specialist advice."

105. As is evident from these emails, and was confirmed by the Claimant in oral evidence, upon receipt of the policy documents the Claimant had (a) sought to contact the insurance broker to discuss the policy without authorisation to do so from the NEU, and (b) despite telling Mr Romain she would treat the documents "*with the upmost of confidentiality*" had, no more than 100 minutes later, provided the documents to her own insurance broker (Locktons) to review.

106. Having spoken to two brokers at Alan Boswell, shortly before midday the Claimant spoke with David Charles, the broker who put the insurance policy in place. Each of these calls was recorded by the Claimant without her disclosing to the brokers she was doing so. In the ET1 it is alleged by the Claimant that in these calls "*Alan Boswell agreed that the insurance was not suitable for SRA-regulated solicitors; Alan Boswell had made Clive Romain aware, and discussions had been had between them regarding the cover provided by the insurance, but nothing passed on to the solicitors employed by NEU.*" We reject that characterisation. What is evident from the transcript **[465-480]** is that Mr Charles did not have the papers in front of him (he was out of the office at a conference) and was reluctant to have a detailed discussion about the terms with the Claimant "*on the hop*", but indicated he had had detailed discussions with Mr Romain about the scope of cover and that the Claimant should discuss her concerns with him.

107. Following her conversation with Mr Charles, at 12:55 the Claimant emailed Mr Romain, as follows **[416]**:

"Currently as the policy stands, I can confirm that I am not covered as an SRA regulated solicitor by the insurance policy. I have spoke to the executive who put the policy in place, and it seems I may have caught him on the "backfoot".

He is now on leave allegedly until the end of the month as is his colleague and suggests that a discussion may need to be had in terms of the cover required and what can be obtained in relation to extend the cover and so on.

NEU is covered, in my opinion, to a degree but not fully.

This is as far as I can take the matter. Senior management will need to sort out the necessary cover for the solicitors and for other members of staff as necessary.

However, I am not in a position to carry out any legal work until the matter is rectified."

A short time later, at 14:48, the Claimant forwarded this email to Ms Forrest and Ms Phillips **[416]**.

108. The same afternoon, Ms Fawcett chased Ms Brookes for confirmation of whether her Workstation assessment had been booked **[2076]**. The Claimant responded to say "*all assessments are in the process of being carried out if they have not already*". In fact, the Workstation assessment had already taken place (on 16 May 2022), though the report, which the Claimant had to approve first at her request, was not released to the NEU until, at the earliest, 20 May 2022.

109. Ms Fawcett was also in contact with the Claimant regarding the insurance issues. At 14:39 on 19 May 2022 she responded to the Claimant email of 09:41 (seemingly not, by that point, having seen the Claimant's later emails) as follows:

> "This is great that you have the policy now. You are covered to undertake the role of solicitor for the Union in the South East, there's lots to do and I'm looking forward to you being able to start legal work in the Region; having you on the Team will be of huge benefit to members and our staff."

110. At 16:11, by which time she had seen the Claimant's later emails, Ms Fawcett wrote again to the Claimant (this time copying Kate Robertson, the NEU's Head of HR) **[425]**:

> "We are satisfied that we are covered by the Union's legal insurance. The Head of Legal Services and Assistant General Secretary for Business Services have both looked into this matter, following your queries. The Head of Legal Services has sent you our insurance policy today, to reassure you.
>
> It is a management request that you now undertake legal work in the South East Region."

111. The Claimant responded at 16:31 **[424]**:

> "The NEU's own insurance Broker told me to get my own insurance and made it clear that Solicitor's are not covered by the policy I was sent a copy of. I am aware by reading the policy that this does not cover legal activity of any kind and in fact, may not even cover case workers.
>
> The insurance in place is not SRA compliant and as such any legal advice, litigation preparation, or representation I undertake with such a policy in place means I am in breach of the SRA regulations and can be struck off for such actions.
>
> You think I am being a pain and know very little and, in some ways, this may be true, but I worked very closely with the SRA and insurance companies when I was a director of my firm and I know how tough it is to get such coverage and the nuances in the insurance industry relating to unregulated entities.
>
> I am happy to put you in touch with my insurance broker who are experts in the field. I am happy to meet with the "powers that be" to explain the situation and why they are not covered.
>
> I am sorry that two weeks in I no doubt already have a poor reputation. But for the good of my career, my colleagues, and the union I suggest a meeting and further discussion at least, I don't want to have to resign, I like working for NEU, but this is dire.

I am aware you are reassured but unless someone can point out specifically where it says contrary to the above or unless you can show me another insurance policy expressly covering legal activity, or, if someone can please explain to me how the policy is SRA compliant, I am afraid I need to "stick to my guns on this"."

112. Pausing there, we find that the first sentence of the Claimant's email is not consistent with the transcript of the Claimant's telephone call with Mr Charles. It is also evident from the Claimant's emails with Locktons **[426-427]** and we find that, at the time of the Claimant's emails set out above, she had not received any substantive advice from Locktons on the scope of the NEU's insurance – rather she had expressed her belief as to the scope of coverage, and Locktons had agreed to consider the questions she had raised. Accordingly, to the extent the Claimant was making definitive statements about the scope of the coverage provided by the insurance policy in the emails set out above, this was based upon her own interpretation of the documents, not upon any independent expert advice.

113. By this point, the Claimant's position was causing disquiet within the NEU. There were various internal exchanges discussing the matter, and the combined view of Ms Phillips, Mr Romain (both being solicitors) and Ms Forrest was that the Claimant had not properly understood the insurance policy **[2068-2070]**. Early on 20 May 2022, Ms Robertson wrote to Ms Fawcett and Ms Phillips in the following terms **[428]**:

"I think we need to discuss bringing forward her first probation meeting with a view to termination. I know this sounds serious but she is refusing to carry out the work she is employed to do. Are we absolutely confident that the insurance is compliant?"

Although the Claimant sought to argue otherwise in her closing submissions, Ms Robertson's statement that "*she is refusing to carry out the work*" was a factually correct statement in view of the position adopted by the Claimant in her emails set out above.

114. Ms Fawcett responded to say that she had spoken to both Ms Forrest and Ms Phillips, and that the latter was going to contact Mr Charles to confirm what exactly he had said to the Claimant. She also said this **[428]**:

"The present situation cannot continue. My concern is that even if we resolve the insurance issue, there will be another issue and there is further refusal to do the work"

115. At 12:41 on 20 May 2022, the Claimant emailed Sandra Bennett (one of the NEU's Legal Officers), following on from a conversation they had had on or around 10 May 2022. In relevant part, the email read as follows **[533]**:

"As you know I am preparing training sessions for the Southeast and Maternity is one of those topics. Sandra, I think you said when we spoke, this is a key are that you are working on. I have looked a quiz being used and some of the questions but feel it needs adapting in relation to pregnant men.

Yes, I said "pregnant men". I feel that a lot of our training in relation to gender, sex, paternity (not just maternity) is lacking inclusivity in terms of transgender males

and females.

For example, one of the quiz questions and it's answer is as follows; "Can a man claim sex discrimination if an employer chooses to give special treatment to women in connection with pregnancy? No.

Well, if the person is a trans male then yes there is an element of sex discrimination there if they declare the pregnancy and are treated less favourably under the same circumstances.

It is this type of thing I will be covering in the training I offer. Is there any way of incorporating it more widely?"

116. There were discussions between Ms Bennett, Mr Romain and Ms Fawcett as to how best to respond to the Claimant's email but, ultimately, it was decided not to respond because the view was taken by Mr Romain and Ms Fawcett that the Claimant should now be focussing on her casework **[532-533]**.

117. At 13:22 on 20 May 2022, the Claimant wrote again to Ms Robertson (cc Ms Fawcett), following a telephone conversation, on the topic of the insurance. The email read as follows **[433-434]**:

"As discussed, I have spoken to a very reputable broker who helped me to set up my business and sort out the necessary cover. They have stated there are a lot of red flags on the policy and that a meeting would be beneficial to talk through the policy and what is and is not covered as it seems there maybe issues around what was disclosed when the policy was taken out.

My insurance broker is happy to meet with necessary parties to talk you through the types of insurance required, where there are red flags in the current policy and what the business needs moving forward. You don't have to take out insurance with them they just want to offer guidance and have an open discussion to improve the situation going forward. If this is something that the NEU would be interested in, please let me know. Also, I refer to my email dated 19th May 2022. Should the matter not be rectified as stated in the email and on the phone, I will need to unfortunately resign, I have no choice, I cannot breach SRA regulations. Not only in relation to insurance but also in relation to a client insisting I break those regulations, in this case the NEU.

However, for now, based on the information I have and have been provided and should any disciplinary action be determined, I wish to instigate the "whistleblowing" policy under a "deliberate miscarriage of justice" and potential "fraud".

As stated, all telephone calls made or received on my personal phone are recorded, this is lawful. All professional calls made on my business calls are not recorded as it would be inconducive to working relationships.

You have made it clear that I will hear from you early next week and therefore, I will await to hear from you, before any other action is taken on my part."

118. There is no documentary evidence of what advice the Claimant received from Locktons. In view of factual misstatements made by the Claimant in earlier emails, we cannot take on face value what is said in her email as being an accurate summary. On the balance of probabilities we find it is

likely that advice was given that it would be "*beneficial to talk through the policy and what is and is not covered*" and that there were "*red flags*" in terms of areas of clarification required. Indeed, that is consistent with what Mr Charles had said to the Claimant about a need to discuss the terms in detail. We find on the balance of probabilities that Locktons did not speculate about the accuracy of what was disclosed to the insurer when the policy was taken out – all they had been provided with was the end-result so there would be no proper basis upon which to suggest any misrepresentations had been made and it is inherently unlikely they would have done so. Accordingly, insofar as the Claimant's email suggests there may have been issues around what was disclosed when the policy was taken out / the possibility of fraud having been committed, that was based on her own inferences. Such speculation was without reasonable basis, because the Claimant had no knowledge of what representations had been made to the insurer either.

119. It is evident from the Claimant's email that she was contemplating instigating a whistleblowing complaint in the event that disciplinary action was to be taken against her. Although she had ended her email by saying she would await hearing from Ms Robertson before taking any further action, by Sunday 22 May 2022 she had changed her mind about that. On that day she submitted a whistleblowing complaint to the NEU's Designated Whistleblowing Officer, Amanda Brown. The complaint is particularised in an email **[542-543]** and further details were provided by insertion into a Word version of the Whistleblowing Policy **[551-552]**. We set this out in full:

Email:

"Unfortunately, I am contacting you to instigate the whistleblowing policy as you are the named whistleblowing officer. I have attached is copy of the whistleblowing policy, with a very brief statement, and the disclosure of recordings as evidence. However, due to the file size I have not been able to attach these to this email, but I can produce them on request or when needed. I also have copies of correspondence outlining the situation and offering help in rectifying it. Again, due to file size I have not been able to attach them, but they are available upon request or when needed.

My manager involved the head of HR (Kate Robertson) last week as I refused to carry out legal work based on the insurance policy provided to me by Clive Romain, and the information I have from Alan Boswell and Hiscox (Recordings), that I am not covered by the current policy to carry out my job role. I have only had two queries come to me to date. I have had to make it clear that I am currently not able to provide full legal advice but only provide initial guidance and even that is "potentially pushing limits".

I was going to await to hear from HR as to whether any disciplinary action was going to be taken against me before instigating the procedure. However, as this policy is the only protection I have, and I have no other support I have decided to instigate it now. My manager, Maria Fawcett and Kate Robertson seem to think that I can carry out legal work without the necessary insurance and have no interest in my career ending should I follow this request. Unfortunately, this is not the case as I would be in breach of SRA regulations. Also, I believe it maybe misconstrued as "retaliation" if I instigate the policy afterwards.

However, given that this has been an issue pretty much since the start of my

employment (3 weeks) I would like this to rectified as soon as possible as would my team so I can carry out the role I have been employed for.

I would like to have a meeting to discuss the matters raised with the appropriate persons to help get the appropriate insurance cover in place so that all parties can move forward. The broker (Alan Boswell) of NEU's insurance policy has made it clear that solicitors are not covered (Recording). They were aware of this at the time the policy was put in place and discussions were held with Clive Romain to this effect. In fact, according to the broker there were many "discussions" over the years held between this broker and Clive Romain which has unfortunately led to the poor insurance cover being put in place (Recording). An independent reputable broker who has worked with solicitors for over 20 years has stated there are "red flags" in the policy most of which I had already identified, raising concerns regarding the information disclosed to obtain policy.

I have asked for an alternative Insurance policy or an explanation as to how I am covered, and the insurance is SRA compliant but to date this has not been supplied by my line manager or the head of legal, or anyone else in NEU, and it took 3 weeks just to get a copy of the policy. However, the information should have been on the client care letters to meet SRA compliance, in the first place.

For an organisation such as the NEU this shouldn’t be an issue at all. I am very surprised and saddened to find myself in this position. However as stated to Kate Robertson on the phone and via email, if this matter cannot be rectified, I will need to resign although this is a last resort and not something I want to do.

I am so sorry that this has come about so soon. I am a believer in the NEU and what it stands for, but I am not willing to risk my whole career or that of Solicitor colleagues. I also do not want to let my team or the NEU down and above all I need to look out for the NEU members.

I raised the matter through my line management (Maria Fawcett) and legal (Clive Romain), the matter has been raised via Maria and myself with Jayne Phillips and apparently Maria has spoken to Emma Forest. All of which believe the policy provides adequate cover, but I can assure you it doesn't. In fact, the restrictions in place in my opinion could cause problems for the NEU more widely.

If the matter is indeed rectified, then subject to no further action being taken against me, I will of course withdraw my concerns and not take any further action myself. However, I wish to continue working for the NEU and I am happy to help where I can.”

Appendix:

“I wish to instigate the NEU Whistleblowing Procedure in relation to a deliberate miscarriage of justice and potential fraud to obtain insurance.

The in house SRA solicitors working for the NEU and possibly their caseworkers are not covered by the correct insurance (Professional indemnity). It is believed that the incorrect information was divulged to the insurance broker deliberately to obtain the insurance the NEU does have

I have raised the matter with Maria Fawcett my line manager, Clive Romain head of legal services and Jayne Phillips has been involved. I refuse to do any legal work until I receive proof of the correct insurance being in place. If the correct insurance is not in place and I carry out my legal duties as a solicitor I can be struck off by my regulator and will never be able to work again in the legal

profession.

I have made it clear that this policy and indeed my resignation would follow any instigation of disciplinary proceedings simply because I made the NEU aware of the dire predicament they are in through the correct channels. However, I feel the need to instigate the policy prior to any proceedings with HR take place to protect my position.

I have offered help to the NEU to rectify the situation through an expert independent insurance broker who supported me as a director of my own firm. This enables me to carry out my job role and place NEU in a better position moving forward regarding the in house legal team

I have had the NEU insurance policy provided to me checked out by the aforementioned broker and they state there are "red flags" but could not provide any further information unless meeting in person due to their legal position. I have read the policy and understand there to be "red flags" and no coverage for staff in certain situations and it seems this was known by the insurance broker who I have also spoke to.

I have emails stating my position and the clear reasons as to why I cannot carry out legal work. I have telephone recordings of conversations supporting my position with insurance brokers and NEU policy providers.. (Recordings and emails available upon request)

My aim is to remain working for the NEU and to help them obtain the correct insurance moving forward so that NEU colleagues and myself have the necessary cover and are able to support NEU members without being inhibited. I have long term ambitions which I would like to meet whilst working for the NEU. Resignation is a last resort."

120. Consistent with our findings in respect of earlier emails, we find that this complaint misrepresents what the Claimant had been told by Mr Charles about the insurance coverage, and makes allegations of potential fraud in respect of representations made to obtain insurance that are without reasonable basis.

121. Ms Brown acknowledged receipt of the Claimant's complaint on the next working day, Monday 23 May 2022. In her acknowledgement email **[534]** she explained that she was going to be out of the office for 3 weeks from the following day, so would ask the Joint General Secretaries of the NEU to consider nominating another person to investigate in her absence. This she did the following morning, copying the Claimant for her information **[542]**, and the Claimant responded to thank Ms Brown "*for forwarding the emails, as necessary*" **[541]**. The following day, the Claimant was informed by Ms Robertson that Rachel Curley, Deputy General Secretary, had been nominated to investigate the matters the Claimant had raised **[540-541]**.

122. Meanwhile, there continued to be concerns within the NEU as to the Claimant's refusal to undertake legal work. On 24 May 2022, Ms Fawcett emailed the Claimant in the following terms **[432-433]**:

"I am deeply concerned that since you started work with the National Education Union on Tuesday 3 May, you have refused to undertake any legal work. When you initially raised concerns about our insurance, your concerns were taken

seriously by Clive Romain the Head of Legal Strategy, Jayne Philips the Assistant General Secretary for Business Services and myself. As you were so concerned, it was agreed that we would take the unusual step of sharing the Union's insurance policy with you, in doing this you were trusted with this document as an employee of the National Education Union.

Following the sharing of the policy with you, you contacted the Union's insurers, which you were not authorised to do. You have informed the Union you have recorded conversations with the insurance brokers. In addition, you have taken the policy without our knowledge or consent to an external broker.

I note you are still refusing to undertake legal week, which was a management request. You are still in the first few weeks of employment with the Union. Consequently, I would like to bring forward your one month probation review meeting. However, we both have annual leave booked and it is not possible to meet this week or next. We will meet, as planned for your one month review meeting on Wednesday 8 June, 2pm. You are welcome to arrange for a trade union representative to accompany you; HR will be present at that meeting.

Please find attached the NEU Policy on the Probationary Period, which has been previously shared with you."

As is noted in the email, the meeting for 8 June 2022 had been scheduled soon after the Claimant commenced employment **[2060]**.

123. The Claimant responded the same day **[432]**:

"Thank you for your email. As per my voicemail I have received a letter from the SRA today stating that it is down to each individual SRA regulated solicitor to uphold SRA regulations whilst working for a non-regulated entity. This includes ensuring the correct insurance is in place as per those regulations.

As NEU are still determined to carry out disciplinary action although the whistleblowing policy has been instigated regarding the same issues raised.

I am now in a position where I have no choice but to contact ACAS in relation to early conciliation. However, this is a completely voluntary process and up to the NEU if they wish to participate.

However, I am sure you will seek the necessary legal advice."

124. The Claimant followed up with Ms Robertson (cc to Ms Fawcett) the following morning, 25 May 2022 **[568-569]**. To this email she attached a letter she had received from the Solicitors Regulation Authority (SRA) which sets out, in general terms, the obligations on a solicitor working for a non-regulated organisation to "*ensure there are systems and policies in place that would allow [the solicitor] to comply with their ethical and professional standards*". The Claimant stated that "*I can guarantee there are elements covered in this letter that the NEU do not portray in their practices*" and went on to state that "*I cannot carry out legal work without these practices being followed and the correct insurance being in place*". The Claimant also asked a series of questions about the insurance:

"However, in one final attempt to try and put things right, I ask again, is there another insurance policy that has been applied but not disclosed? Is someone able to explain to me how the insurance documents I was sent are SRA compliant? Is

someone able to tell me how the said policy covers SRA regulated solicitors? If the above questions can be answered and evidenced, all actions will be ceased on my part but to date, they haven't been. Times change, regulations change, and I can understand if there has been an honest mistake in which case accept it, change it and move on. I urge you not to keep attempting negative actions."

125. Mr Robertson responded the same morning reiterating that the NEU was satisfied as to the coverage of the insurance policy and that the matters the Claimant had raised were being reviewed with the NEU's insurance broker **[568]**.

126. The Claimant commenced ACAS Early Conciliation that day, 25 May 2022 **[1]**.

127. On 25 May 2022, Ms Bennett emailed Ms Fawcett raising concerns about the Claimant's approach. We set out this email in full **[560]**:

"Feel free to ignore this; maybe none of my business.

Just wanted to flag up that a few colleagues have said that your new regional solicitor has been asking for lots of information and questioning some of our processes and arrangements.

From my long meeting with her, I'm not sure that she fully understands her role as a RW Sol as opposed to a HQ Legal Officer or HQ Policy Lead. Great to show an interest and to be eager to improve processes etc but I got the sense that she wanted to change NEU policy on a whole range of issues rather than focus on working in the regional team to advise & support members & reps around employment & trade union rights.

I'm super keen to work more closely with some of the regional sols on specific topics with the aim of drawing from their professional/employment casework experience but I think that your regional sol had different ideas about how we might work together.

Early days, and I know you haven't had a solicitor for some time, or someone to hand-over, so maybe it will resolve itself once she has some cases to work on."

128. We have no basis to doubt, and so find, that Ms Bennett raised these concerns genuinely and without malintent. That is evident from the tone of the email itself.

129. The Claimant's workstation assessment report **[563-567]** was received by the NEU on or around 20 May 2022. It explained the Claimant's history of Asperger's syndrome, dyslexia, childhood related PTSD, hearing impairment and previous hip injury. Focusing on her hip issue, the report records the Claimant's main symptoms as pain/swelling in both hips, reduced mobility and disturbed sleep. It was advised that she be provided with the same chair she had had at the GLD, a larger adjustable arm for her screen, and additional assistive software (the specifics of which would be looked at by the OH team). A footrest was also advised.

130. Following receipt of the report, James Hannam (the NEU's Health and Safety Officer) wrote to Ms Fawcett outlining the relevant recommendations **[561-562]**: specifically, the identified ergonomic chair (though he could not

find it in stock), larger adjustable monitor arm, assistive software and footrest (each for use at home and in the office). On the same day Ms Fawcett authorised the Despatch team to order the chairs and footrests **[559]**, with the other items needing further consideration. A query was subsequently raised with Ms Fawcett on 27 May 2022 (chased on 8 June 2022) by Despatch regarding dimensions for the required chair (since the identified model was not available). This required further input from the assessment provider because no dimensions were included in their workstation assessment report **[553-558]**, and the provider subsequently had to go back to the Claimant in this regard.

131. There was a series of email exchanges between the Claimant and Ms Robertson on 26 May 2022 **[536-540]**. In summary, the Claimant adopted the position that Ms Fawcett was subjecting her to disciplinary proceedings via the probationary period policy, in respect of matters strongly linked with the issues raised under her whistleblowing complaint which (in the opinion of the Claimant) was contrary to the whistleblowing policy. Ms Robertson explained the probation meeting was not a disciplinary meeting, though there were performance concerns to be discussed. The Claimant sought clarity as to what the performance concerns were, and proposed that the whistleblowing investigation meeting be delayed until after the probation meeting. Ms Robertson explained that Ms Fawcett would explain the performance concerns at the meeting on 8 June, and that the whistleblowing investigation meeting would go ahead on 7 June. The Claimant stated she would be recording the meeting on 8 June as a reasonable adjustment. Ms Robertson sought an explanation of why that was needed. The Claimant explained that this was due to her hearing impairments, dyslexia and Asperger's, and that this was an adjustment in place since 2008. Ms Robertson noted that an OH Report was still awaited in relation to what reasonable adjustments were necessary. Ms Robertson subsequently notified Ms Fawcett of the Claimant's request to record the probation meeting, and that this was acceptable provided Ms Fawcett agreed and explained the recording was for personal use only **[572]**.

132. Also on 26 May 2022, Ms Phillips wrote a letter to the Claimant responding to her concerns about the insurance **[575-576]**. The letter noted that Ms Phillips had consulted with a director at Alan Boswell, who had spoken to the underwriter at Hiscox, and all were confident the insurance fully covered in-house solicitors against claims brought alleging negligence for incorrect advice in connection with the business activity of the Union (i.e. in respect of claims arising out of a member's employment). The letter provided some further clarification around certain sections of the policy and how they interact. The letter concluded by offering a discussion on the following day if the Claimant was not reassured by its contents. This offer was reiterated by Ms Robertson in an email to the Claimant that same afternoon **[579]**.

133. The Claimant responded to Ms Robertson early the next morning, 27 May 2022 at 07:19. We set out the substance of that response in full **[578]**:

> "Yes I have considered Jayne's letter and I can see why she may think the NEU has appropriate insurance cover. However, from my experience in these matters, I can safely say that this is not the case.

I need no further explanation, it is simply a case of the legal services act 2007 being misinterpreted, the erroneous level of insurance being put in place, a nuance between SRA regulations and the LSA 2007 itself and above all what seems to be complacency, poor management (1am not saying Jayne at all) and "the boys club" having a detrimental effect to the NEU.

This is a very complex area and something I had to learn very quickly when I ran my business which was also non-regulated.

Therefore, I am afraid I do not accept that the NEU has appropriate insurance cover. Also, the reason David Charles could not be reached is because he is on leave until 31st May 2022 as it was him that I spoke to. His colleague Gregory Edwards is also away until then. Believe me when I say, he knows that the policy you have in place does not cover SRA regulated solicitors. I have the recording."

134. Consistent with our earlier findings, it is apparent from this email that the Claimant was relying primarily upon her own "*experience in these matters*" in interpreting the insurance policy, and the statement made about Mr Charles' knowledge that the policy did not cover SRA-regulated solicitors was not consistent with what Mr Charles had actually said to the Claimant.

135. Ms Robertson responded to the Claimant at 08:47 **[577-578]**:

"Yesterday Jayne provided you with a comprehensive explanation to reassure you that the insurance policy covers you and all solicitors working at the NEU for the work that they carry out in line with their Role Description. We have also offered you a face to face meeting today at HH if you would like further reassurance and discussion to reassure you. You have not acknowledged the offer of a face to face meeting today. You are not prepared to share the recorded conversation you had with David Charles (without his knowledge) which allegedly supports your concerns.

The NEU as your employer is now in a position where they are absolutely confident about the insurance cover for you to carry out your role. You are refusing to carry out the duties of your role and have made no indication to us that you intend to do so.

Can you confirm to us today that you will either carry out the duties as set out within your Role Description or that you are refusing to do so."

136. The Claimant sent two responses to this email. In her first response at 09:16 **[591-592]**, she explained that the meetings on 7 and 8 June would need to be rescheduled as her Union rep was not available, that she would be happy to share the relevant call recordings "*but not until after the meetings*", sought to justify her lawful entitlement to record telephone conversations, noted she had forwarded Ms Phillips' letter to the SRA for their advice, and said this in respect of the letter:

"From my experience Jayne has unfortunately misinterpreted the legislation and therefore the insurance required. This I am certain. There is no exemption as she describes it for trade unions. The exemption she refers to is the exemption from requiring authorisation, a waiver or regulation to carry out reserved activity. You still need correct insurance cover which you have not obtained because of this misinterpretation and the fact that David Charles and Clive have been friends for years doing each other favours. Although discussions were had about SRA solicitors the matters seem to have been dismissed by Clive."

137. Ms Robertson responded to this point later that morning as follows **[591]**:

> "I would also like to clarify the point you make in your email timed at 9.16 this morning. In that email you appear to be under the impression that Jayne has said trade unions are exempt from obtaining insurance. This is not what she has said. Her letter to you states that the NEU is exempt from authorisation by the SRA due to it being a trade union. She fully accepts that under the SRA regulations a solicitor working for the NEU must ensure we have indemnity insurance which is "adequate and appropriate". We are satisfied that the cover with Hiscox is both adequate and appropriate based upon the services we provide to members. As a qualified solicitor this was all considered by Jayne in her previous post as Deputy Head of the Legal and Member Services department within ATL and reviewed by herself and Clive when changes were made to the Regulations in 2019.
>
> I would ask that you refrain from making personal and unsubstantiated assertions about NEU colleagues and our commercial partners in your correspondence."

138. We agree with Ms Robertson view, and find, that the Claimant's assertion that Mr Charles and Mr Romain "*have been friends for years doing each other favours*" was an allegation made without any reasonable basis.

139. In the Claimant's second response at 09:38 **[577]**, the Claimant stated she was not refusing a meeting with Ms Phillips but was not comfortable with any meeting at which she was not represented, and also pointed to utilising ACAS for discussions.

140. Following extensive correspondence, the Claimant's whistleblowing investigation meeting and probation meeting were rescheduled to accommodate the attendance of the Claimant's Union rep. Ms Robertson continued to request that the Claimant provide her recording of the discussion with Mr Charles in advance of the whistleblowing meeting and the Claimant continued to resist this in correspondence. For example, in one email on 27 May 2022 **[587]** she stated:

> "The recording can be listened to on the day if needed it is not very long, but I will take advice on this point. I am not likely to hand over key evidence prior to a tribunal taking place should it need to."
>
> However, following advice, the Claimant did on 30 May 2022 provide Ms Curley with the recordings of her three calls with individuals at Alan Boswell on 19 May 2022 **[596]**.

141. Ms Curley listened to the recordings, and requested that Ms Phillips also do so and provide a briefing on the issues raised, which Ms Phillips duly produced **[600-603]**.

142. On 6 June 2022[2], the SRA wrote to the Claimant providing their view on Ms Phillips' letter **[1241-1242]**. In material part, the letter stated as follows:

> "My reading of the letter from the NEU dated 26 May 2022 is that they do have insurance in place to meet claims by their members in respect of their legal

[2] The letter is dated on its face 1 June 2022, but **[1241]** shows it was emailed to the Claimant on 6 June 2022.

services to them.

I do not read their letter to say that they do not need insurance; rather they say that that they do not need to be authorised by us as an SRA firm to provide reserved legal activities to their members. If they are satisfied that their members are not members of the public, then I agree with them."

143. The Claimant had her OH assessment by video on 6 June 2022, though the report of that assessment was not provided to the NEU until 15 June 2022 **[1522-1525]**. This delay was because the Claimant felt the report was factually inaccurate, as she set out in an email to HR on 8 June 2022 **[613]**. The report addresses the Claimant's health conditions – hearing impairment, Asperger's syndrome, dyslexia, a mental health condition and a history of bilateral hip symptoms as well as "*two additional conditions for which she is on treatment, which can result in reduced energy levels*". The adjustments that could be considered are listed out and include the possibility of recording certain interactions with permission, allowing her to transcribe with the use of a laptop with 'voice to text' technology, implementation of hearing loops where appropriate, ensuring she can clearly visualise the speaker's lips during meetings/communication so she can lip read if required, suitable word-processing facilities, and implementation of the recommendations of the workstation assessment.

144. On 8 June 2022, the DWP issued a letter confirming the award of an 'Access to Work' grant to the Claimant. This letter **[1685-1687]** was received by NEU on 15 June 2022. The grant covered full funding for a chair, foot rest and subscriptions to Glean and Grammarly Pro.

145. On 10 June 2022, Ms Fawcett emailed the Claimant setting out the performance concerns she wished to discuss at the probation meeting now scheduled for 15 June 2022 **[1288-1290]**. The concerns were grouped into two general areas: (1) an inability to accept the union's position and/or expertise of union staff, and (2) failure to understand your role. The email gave specific examples to illustrate the concerns, including the pursuit of issues relating to the use of the term "black" despite explanations from Ms Fawcett and Mr Romain as to why it is used, the Claimant's (said to be) inappropriate contribution at the Regional Secretaries meeting on 5 May 2022, and the damage in trust and confidence caused by contacting Alan Boswell without authorisation, recording calls with brokers, and providing a copy of the NEU's insurance policy to an external broker. The Claimant provided a written response the same day **[1286-1287]**.

146. The whistleblowing investigation meeting, chaired by Ms Curley, took place on 10 June 2022. The Claimant was accompanied by her Union rep, Clive Scoggins, and there was a notetaker from HR. The Claimant was permitted to record the meeting and a transcript is available **[1293-1324]**. There was a detailed discussion of the insurance issues raised by the Claimant. At one point in the meeting, Ms Curley ("Chair") sought to provide assurance to the Claimant about the insurance coverage and the Claimant ("TB") asked for confirmation in writing **[1305-1306]**:

"Chair: Okay, so I want to get back to my question about the fact that I am giving you absolute assurance that our policies that we provided to you have been used

previously and are being used currently in relation to claims about in-house solicitors.

TB: Okay, well then I thank you for that information but ultimately, unless you can put in writing, without question, from yourself or from the insurance broker that legally reserved activity is covered by that insurance policy, if I can receive that in writing then that's it. I'm happy. That's all I need. So, if you can get the broker or Hiscox to put that in writing that legally reserved activity is covered by that insurance, as per the NEU, then I am more than happy to drop everything and I will take it on the chin and I will say fair enough, I take that. So, if you can provide that then I will go away today. No problems and then you can choose what you do from then on in."

147. There was also a discussion of the adequacy of Ms Phillips' letter of 26 May 2022 **[1308-1309]**:

"Chair: No, [Ms Phillips] spoke to a director at Alan Boswell. Since David Charles has come back, she has also spoken to David Charles again and David Charles has spoken to the Chief Underwriter at Hiscox and everybody is confident that what she has put in writing to you on the 26th of May, which is exactly what you have just asked me for. You just said that if we put something in writing to you confirming that legally reserved activity is covered and that you are insured by us for legal reserved activity, that that would be the end of it. We gave you that assurance two weeks ago in writing.

[…]

TB: Okay, if you get the broker to sign it off— if you can get the broker to sign off that letter then fine. Get the broker to— if these conversations have taken place— now I've proved what conversations I've had. I've gone to the SRA, I've proven what I have done.

Chair: So, why would you question the integrity of very, very senior members of staff who… <crosstalk>

TB: It's not the integrity, it's the due diligence I need to carry out to make sure I can do my job."

148. The topic of a written confirmation was revisited again later in the meeting **[1320-1321]**:

"Chair: … we've covered that our broker and our underwriter and the chief underwriter all accept that for the purposes of that policy, legal activity is covered under the HR heading.

TB: But we don't accept that. What we do accept is there is a difference of opinion with your insurance broker and your underwriter in relation to it, depends on who asks, on what day and what evidence there is of those conversations going ahead. Now, like I said, I put forward evidence that I've spoke to them, I've put forward evidence from the SRA, whether it's right or wrong, and I've made it clear to you where I've stood on the situation. I have received, apart from one letter from Jayne Phillips saying this is our stance but saying that, every member of staff from day one have said the same thing. So, I'm sorry but unless the insurance broker or Hiscox or Alan Boswell or whoever puts it in writing or signs off on that letter, puts a signature on the bottom of that letter from Jayne Phillips and says 'yes we agree fully' then as far as I'm concerned I have not done my due diligence. If they turn round and sign off on that letter, I'll accept it, no problem. But given the fact that

we've both got different opinions on the recording, allegedly, in what they have been telling Jayne or what they have been telling Clive and then in what they have been telling me, including Hiscox. In fact that the third party, whether they be a competitor or otherwise, given, you know, the interest that NEU and Alan Boswell have in each other, ultimately the fact is there is a dispute there and it needs to be sorted and if you want me to go back to work, and I am more than happy to go back to work given the dispute, get an insurance broker to sign off on the document and say we agree fully with that and then that's it. I'll drop it, everything. They don't even have to write anything they can just sign it and confirm that it is witnessed. That's it.

[…]

Chair: Okay, so it's clear that you want a signature on Jayne's letter.

TB: So, if you get the insurance broker to sign off and say yes, and I quote "legally reserved activity is covered by our insurance" signed, dated, job done. Everything will be dropped. I will just go back to work tomorrow. But then I can happily say under section 5.6 of my regulation, I have carried out my due diligence. I've got my insurance, crack on with my work."

149. Following the meeting, the Claimant followed up by email with a draft letter in terms that would be acceptable to her **[1416-1417]**. This text went beyond the confirmation that "*legally reserved activity is covered by our insurance*" sought in the course of the meeting:

"Headed paper:

Dear Ms Brookes

We agree with the content of the letter of Ms Jayne Phillips dated???: in relation to the current NEU insurance policy.

We the undersigned agree that reserved legal activity is covered by the current insurance policy that the NEU hold. We agree that this includes litigation and representation.

We the undersigned also agree that, should a complaint be made to the Solicitors Regulation Authority (SRA) or the legal ombudsman (LeO) against you in the line of your work with the NEU, the current insurance policy that the NEU holds will cover you in such circumstances throughout the whole of those proceedings whether employed by the NEU or not.

Signed

Print name

Position held

Date

Witnessed by (signed)

Print name

Position held

Date”

150. Ms Curley prepared a report of her findings in respect of the Claimant’s whistleblowing complaint, which was sent to the Claimant on 15 June 2022 **[1526]**. The report **[1527-1534]** went over the allegations in detail and concluded as follows:

> “I have looked in detail at the matters raised as set out in this report. I believe the concerns raised that NEU's in-house SRA solicitors and possibly NEU caseworkers are not covered by the correct professional indemnity insurance to be based on erroneous information or assumptions.
>
> I am satisfied, as set out in detail above, that the NEU policy meets the SRA requirement of adequate and appropriate professional indemnity insurance and that reserved legal activity undertaken by solicitors employed by the Union is covered by the NEU's insurance arrangements.
>
> The whistleblowing claim also alleges potential fraud to obtain insurance and that incorrect information was divulged to the insurance broker deliberately to obtain the insurance the NEU does have. These are very serious allegations. If proven, this would call into question the professional integrity and probity of senior members of NEU staff and be a serious disciplinary matter. No evidence has been provided to support these allegations.
>
> The second element of the whistleblowing concern was a deliberate miscarriage of justice.
>
> In the investigation meeting held on 10 June 2022, TB confirmed that if the brokers gave a written commitment that reserved legal activity is covered by the Union's insurance documents then this concern about a miscarriage of justice would fall away. This commitment has been provided by the insurance brokers and therefore I have not considered the claim of a deliberate miscarriage of justice as part of this report.”

151. The report was accompanied by a letter from Alan Boswell dated 14 June 2022 **[1516]** in the following terms:

> “We refer to the letter attached dated 26th May 2022 from Jayne Phillips (Assistant General Secretary) and can confirm that we agree with the contents of this letter.
>
> We further agree that reserved legal activity is covered under the policy for in-house solicitors employed by the NEU providing this activity complies with the declared NEU business activity of “Teachers Trade Union” and the specific job role of the employee.
>
> As previously stated, if you are involved in reserved legal activity deviating from the declared NEU business activity then this will not be covered under the policy. So for example, if you provide advice on conveyancing or pension investment this would not fall within the NEU business activity and would therefore not be covered.
>
> We understand you seek a reassurance that any complaint made against you made through the SRA or Legal Ombudsman will also be covered. Unfortunately we are unable to provide such a blanket reassurance as the extent of cover would clearly depend on the nature of the complaint and whether you were acting within the NEU business profile and your own job description, dishonest or fraudulent

behaviour by an employee being just one example.

As already expressed by Jayne we very much hope this provides the necessary reassurance you require."

152. The letter did not reassure the Claimant, as is evident from her emails later that day, *e.g.* **[1535-1536]** and **[1681]**, concerning the absence of a blanket reassurance in relation to SRA / Legal Ombudsman complaints.

153. Also on 15 June 2022, the Claimant had her 1 month probation meeting with Ms Fawcett. Unusually for such a meeting, the Claimant was accompanied by her Union rep, Mr Scoggins, and an HR Business Partner, Chris Byrne, was also present. The Claimant was permitted to record the meeting and a transcript is available **[1541-1558]**, **[1605-1625]**. The concerns that Ms Fawcett had raised in her email of 10 June 2022, and the Claimant's responses to those points, were discussed at length. We accept Ms Fawcett's evidence that this was a very difficult meeting, which is entirely consistent with the transcript.

154. During a discussion of the use of "black" terminology, there was the following exchange between Ms Fawcett ("MF") and the Claimant ("TB"):

"MF: Terri, it is an example of you not seeming to accept NEU policy. You mentioned black members of staff. There are different channels for that. It is for your view as a member of staff, but I would question, is it right for it to be your view as a white member of staff? So, it is absolutely for black members of staff to have a view on the way they are described. […]

TB: Well, in that case, I'd better say something from a legal perspective. I've made it very clear I've got an ethnic minority child and therefore as a member of staff with an ethnic minority child, you have literally just outlined discrimination by association under the Equality Act 2010, and as a member of HR, you should be told that because that's now on tape.

MF: But that is the Union's position, Terri.

[…]

MF: To be clear, what I'm saying is, it's not your position as a white person to tell black people how they want to be seen. Is that what you're saying, Terri? Is that what you're saying?

TB: No, Maria, it's what you've just said.

[…]

MF: Is separate from what the way— because you're talking about black staff being called black staff, and I'm saying if black staff are happy with that, that is for black staff. It is not for a white person, anybody, for Chris, for anybody else who's white to have…

TB: No, but I can be offended by it. I'm entitled to be offended by it, which is what I expressed. And that is something you can't take away from me, but the fact that you've just turned around and said as a white person, I can't have a view, I'm sorry, but that is more concerning than anything you've properly raised today.

MF: It's not for you to affect that view. It is for black staff, Terri.

TB: No.

MF: No, I'm sorry, it is for black staff.

TB: No, it's not.

MF: It is.

TB: No, it's not. You're basically saying that just because you're not a member of a particular group, you don't have a view.

MF: I'm saying your view doesn't trump theirs."

155. Ms Fawcett gave evidence that the Claimant was "*joyous*" and "*seemed pleased that this had been recorded and seemed to think she had caught me out*". It is certainly clear from the transcript that the Claimant seemed to revel in this, as is evident in the following exchange:

"TB: I stand by my email on the 10th of June. I've made it clear to you, I've got an ethnic minority child. I've made it clear to you I'm a member of staff and as a member of staff that has to abide by NEU policy, that if that is the decision made, that's fine by members, but if that is what is then being told to members of staff that they have to abide by, then yes, I have a view on it, because I have an ethnic minority child and that is discrimination by association because, as a white person, you have literally just said to me I don't have a say. But if a member who just happens to be a teacher goes into a school as an Indian or a Pakistani, and then turns around to a black member and says, 'Oh, by the way, I'm going to the black members' conference' and the black person turns around and goes, 'Why? You're not a black member', and there's conflict, and then the children are then taught, 'Oh, it's alright, if you're not white, you're black'. If my son came home from school, and he has done, saying that he's black, I would be absolutely mortified because if he said that to a black boy, well, then there's a different conflict, and again there's another conflict. Now, as a lawyer to the NEU, if those two members of staff then come to the NEU and say, 'Well, there's a racial discrimination element'. 'Oh, it's alright, because the NEU have turned around and said it's okay to deem us black'. That's fine, because that's the message that's going out. That then causes problems, and as a lawyer, I have to be aware of that. But on top of being a lawyer and being aware of that, the fact that you have just made that statement to a mother of an ethnic minority child and saying that as a white person you don't have a— I'm sorry.

MF: To be clear, Terri, no I just want to say for the tape, to be clear, I am saying that…

TB: That's awful.

MF: … you're— I'm not talking about your child, I'm talking about you as an NEU staff member. <crosstalk>

TB: That's awful.

MF: Can you not talk over me?

TB: That is absolutely awful.

MF: Can you not talk over me?

TB: Seriously.

MF: To be clear, if black members of staff…

TB: Wow.

MF: …are happy, your view is not more important than theirs.

TB: I don't think it is but… <crosstalk>

MF: That's what I'm saying."

156. On a full consideration of the transcript and the overall context of the conversation, we find that Ms Fawcett did not tell the Claimant that, as a white person, she had no say on 'black' issues (as is alleged), but rather that the Claimant's view did not outweigh the views of 'black' members of staff.

157. During the meeting, there was also an exchange regarding reasonable adjustments as follows **[1556-1557]** ("CB" is Mr Byrne):

"TB: … Also, not to mention that there was actually a meeting with you where you made it quite clear that no reasonable adjustments would be put in place unless you knew I was sticking around.

MF: That's incorrect. I deny that.

TB: No, that is correct, and it's on tape.

MF: That's incorrect, Terri.

TB: No, it's not, it's on tape. I've got it on tape. I've got a recording of that 1-1 where you made it quite clear that no reasonable adjustments were going to be put in place until you knew that I was sticking around, and in addition to that, it took you two weeks to get back to the DWP when they were trying to get hold of you for an assessment, and yes you were off sick for two days, but you didn't get hold of them until I put a complaint in writing to you saying you hadn't been in touch with DWP and they were trying to get in touch with you. So, bearing in mind I've got that on tape, you might say all this now, about this inclusivity and about the reasonable adjustments, but believe you me, the timeline of emails and that particular recording says something completely different. […]

MF: Can I just be clear? I have never said that, nor would I ever say it. This is the only conversation, Terri, that I'm aware that you have ever recorded. So, there's two things there. This is the only conversation I'm aware that you'd ever recorded with us. I would never say that. I've got lots of email evidence and have been continuing to work to put your reasonable adjustments in place. It would never be said.

TB: I can play the recording. I've got the recording, it's fine. I'll send it over if you want it.

CB: But did Maria know you were recording the conversation?

TB: Everybody knows I record when… <crosstalk>

MF: No, no we don't. No.

TB: It's a blanket adjustment."

158. In respect of this allegation, the only transcript of a 1:1 meeting between the Claimant and Ms Fawcett in the bundle dates from 13 May 2022 and, therefore, we must assume this was the recording the Claimant relies upon. There is no basis in that transcript **[1418-1446]** for the Claimant's allegation that Ms Fawcett was refusing to put reasonable adjustments in place. As mentioned earlier, Ms Fawcett did express a need for the Claimant to be patient whilst the various assessments were being completed, but it is clear that Ms Fawcett was working towards getting the right reasonable adjustments in place.

159. Ms Fawcett and the Claimant also discussed the insurance issue. At the time of the meeting the Claimant had, but Ms Fawcett had not, received the whistleblowing report. The Claimant forwarded this to Ms Fawcett later that day **[1677]**.

160. After the meeting, In parallel to the correspondence on the insurance matters, the Claimant corresponded with Ms Fawcett regarding reasonable adjustments. On 15 June 2022, the Claimant wrote as follows **[1700]**:

"For the record, if a person is aware of a reasonable adjustment and does not "opt out" of that adjustment being used or provide alternatives then blanket authorisation applies. Just like GDPR. You were aware I needed adjustments since interview (3rd April 2022), you received the workplace adjustment passport and Ergonomic assessment by 21st April 2022. You have now received a DSE assessment and occupational health assessment and DWP has offered funding for key adjustments. However, still there has been no communication to say whether or not you are going to put the adjustments in place. There hasn't been an email stating that since I began work on the 3rd May 2022. There is no longer a reason for delay. Therefore, what are the next steps?"

161. Ms Fawcett responded on 17 June 2022 **[1698-1699]**:

"When you began employment with the National Education Union, you provided information about reasonable adjustments, previously agreed by your former employer, which were from 2019; this is now three years ago.

The Union requested that you attend an Occupational Health appointment, in order for a qualified professional, to assess any disabilities and make recommendations to the National Education Union, as your employer regarding reasonable adjustments.

The first Occupational Health appointment could not go ahead on Wednesday 11 May, during your first full week, because you had difficulties with childcare. You informed me you had taken your child out of school at lunchtime and to attend your OH Appointment. For the avoidance of doubt this is what has caused the delay; I've attached your email (third) attachment confirming this. Firstly, it is a requirement that you have adequate childcare in place, secondly it would have been prudent to request permission from Medigold to take your child with you were any childcare difficulties. The delay of a month, because you could not attend the original appointment made for you has caused the delay.

A second Occupational Health appointment was arranged for Wednesday 6 June and the Union has now received the report and recommendations. They were shared with me at the end of the day yesterday and our emails have crossed and I have sent you an email and invitation to meet on Monday at 9.30am, which you have accepted. As per your request you requested for the Occupational Health not to be shared with your employer at the same time, this added to the delay as your employer did not receive your OH report when you did. You could have chosen to share the Report which you already had receipt of. The National Education Union can only act upon recommendations, once we have received the Report. Which we are, I've attached my email to you and your acceptance of the meeting.

I understand you believe your previous employers' assessment of reasonable adjustments are sufficient and that the National Education Union ought to be putting all of those adjustments in place with immediate effect. A number of adjustments have already been put in place e.g. recording calls with prior authorisation and ordering DSE equipment, as discussed yesterday. Please can you ensure that before you make any recordings you ensure you have permission from whoever you are working with.

Finally, it would have been remiss of the National Education Union to rely on any previous assessment. Your needs may have changed and reasonable adjustments need to be assessed by the National Education Union. […]"

162. On 17 June 2022, Ms Fawcett instructed Ms Hill that she could now send any legal work to the Claimant going forward. Ms Hill spoke to the Claimant that morning, and the Claimant told her that she would not be undertaking legal work at the moment as the insurance issue was not sorted **[1714-1716]**. The Claimant adopted the same position in correspondence with Ms Curley **[1785]**:

"I am currently looking at options to work around the current situation and would like to work with the NEU to put this in place. I would appreciate it if I could have a meeting with necessary persons for this to go ahead.

If of course, the intention for NEU is simply to dismiss me then this will not be of interest to you and a settlement agreement maybe worth considering.

However, I have raised all issues in good faith and would like to move forward in good faith and so if a further meeting is possible please get in touch."

163. On 20 June 2022, the Claimant refused to provide legal advice to Ms Hill regarding a potential claim in respect of a member's rejected flexible working request. Ms Fawcett wrote to the Claimant as follows **[1518]**:

"The National Education Union have provided you enough information, we have insurance. It is a reasonable management request that you provide legal advice as set out in your role description."

164. The Claimant responded in the following terms **[1517-1518]**:

"I am now seeking further clarification from the SRA, Alan Boswell and A solicitor. Once I have that advice and it is made clear that the policy provided covers me in relation to SRA complaints (not the NEU) then I will be satisfied."

165. Later on 20 June 2022, the Claimant had a telephone conversation with

Justine Allen from the SRA Ethics Team; a transcript has been provided **[1799-1816]**. It is evident from the transcript that the Claimant was presenting to Ms Allen her own view of the scope of the NEU's insurance (notwithstanding the assurances provided), and Ms Allen regarded this as a contractual issue that the Claimant would need to resolve with the NEU. It is also evident that, to the extent Ms Allen identified a potential gap in insurance cover (*i.e.* in a situation where a lay client made a complaint to the SRA or LeO), that was a gap that would exist for any solicitor employed in any organisation. In that context, Ms Allen discussed the possibility of the Claimant obtaining her own insurance "*in terms of the risks…and what you want to do about it*".

166. The Claimant forwarded the call recording to Ms Robertson and Ms Curley with the following summary **[1792]**:

> "As requested, please find attached a recording of a discussion I had with a senior manager in the professional ethics team yesterday who told me to get my own insurance. She explained there is a gap in the insurance generally (not just NEU) it's a much wider issue. Solicitors are exposed and can even be sued by their employers when liability can be shared or passed on, but they don't care, they only care about the clients and the recourse they have, they will happily, fine us, suspend us, strike us off, limit our ability to practice but they won't support us. Hence I'm going to contact the Law Society as they should be looking out for solicitors at least, some professional body has to.
>
> I forewarn you, you will not agree or like my view or what I have to say on this recording regarding the insurance but I kindly request that you "look past that" for the purposes of trying to find an amicable solution and moving forward, after all we have already established that we do not agree and that is fine. However, I and my colleagues, still need adequate protection. I really hope that at some point we can truly work together on this and show a united front."

167. Also on 20 June 2022, the Claimant and Ms Fawcett met to discuss reasonable adjustments. Ms Fawcett's notes following the meeting are at **[1865-1866]** and outline several reasonable adjustments that were agreed to be put in place, including the ability to record certain meetings and for the Claimant to attend Legal Strategy team meetings in person to enable her to visualise the speakers' lips. This was not a finalised list because the Claimant informed Ms Fawcett at the meeting that the version of the OH report that Ms Fawcett had been provided with was not the final version. Ms Fawcett had to follow-up with HR to seek to clarify the situation and obtain the final report **[1867-1874]**.

168. On 21 June 2022, the Claimant was issued an invite to a meeting under section 13 – dismissal of the NEU's policy on probationary periods. The panel was identified as being Ms Curley, Ms Forrest and Ms Robertson **[1875-1876]**. The policy was attached, together with a probation report from Ms Fawcett recommending the possibility of dismissal, and email evidence of the Claimant's refusals to undertake legal advice work. Ms Fawcett's report **[1879-1882]** built upon the concerns that had been discussed at the 1 month probation meeting, and concluded as follows:

> "Whilst some of the issues listed above are not as serious as others, there is a clear pattern of behaviour that is inappropriate and contravenes clear standards of

behaviour expected from our professional staff. Terri does not display NEU values and her actions, albeit in this brief period, and consequentially I have no trust and confidence in her ability to carry out her role.

Equally, I don't believe from what I have seen that Terri has the capacity to change, when issues are brought to her attention, she doesn't reflect and/or accept that she could have acted in a different way, instead, she doubles down, often resorting to untrue statements that are very critical of the NEU. […]

In the seven weeks that Terri has worked for the NEU, the only piece of work she has completed is some work on some legal briefings, following the sharing of existing resources being shared from another Region - I would estimate that to be approximately two days' work at most for an experienced solicitor. As previously stated, The South East Region is not any nearer to having a solicitor willing to provide legal advice and representation to members. It is unsustainable to continue to employ someone, who has persistently and continually refused to carry out the primary function of their role.

Ultimately, Terri's actions and behaviour over the last seven weeks, leave me with no alternative but to recommend we terminate her employment, in line with section 11 of the Probation Policy. I do not have trust and confidence in her, nor do I believe she is able and willing to operate within the parameters of 'NEU Values'."

169. Sections 11 and 13 of the policy on probationary periods, referred to in the above, read as follows **[212-213]**:

"**11. Terminating the Employment before the Probationary Period has been Completed**

11.1 Appointment on probation does not imply a guarantee of employment for the full probationary period.

11.2 The length of the probationary period has been set to allow new employees to settle into NEU, to learn their new role and to receive any required training. However, in some exceptional circumstances it might become apparent that a new employee has some fundamental difficulties with the work and is not going to be able to meet the required standards.

11.3 In such a situation the line manager should discuss with their Deputy General Secretary/ Assistant General Secretary/Head of Department and then provide the Head of Human Resources with a report setting out the issues.

11.4 The Head of Human Resources will advise on the possibility of terminating employment before the end of the probationary period. In such circumstances contractual notice will be paid.

11.5 Any decision to dismiss will be taken by the Deputy General Secretary / Assistant General Secretary / Head of Department in conjunction with the Head of Human Resources and a Deputy General Secretary.

11.6 No decision to terminate should be communicated to the employee before the Deputy General Secretary / Assistant General Secretary / Head of Department and the Head of Human Resources has agreed to this decision. In such circumstances, the procedure outlined in paragraph 13 will apply.

[…]

13. Dismissal

13.1 When there is a recommendation by the line manager to terminate a new employee's contract of employment either before or at the end of their probationary period (or extended probationary period), a meeting with the employee will be arranged.

13.2 The meeting will be chaired by a Deputy General Secretary who will be accompanied by the relevant Assistant General Secretary / Head of Department and the Head of Human Resources. This panel will reach a decision about whether to terminate employment.

13.3 The employee will receive at least five days' written notice of the meeting.

13.4 The employee may be accompanied to the meeting by a work colleague of their choice or an accredited union representative.

13.5 The reasons why the employee's appointment is not to be confirmed will be explained. The employee may make representations orally or in writing which the panel will consider.

13.6 The panel will aim to reach their decision promptly and with careful consideration. The decision will be communicated to the employee on the same day and in person if possible.

13.7 The Head of Human Resources will confirm the decision of the panel in writing to the employee and their representative within two working days of the meeting.

13.8 The employee's employment may be terminated with immediate effect although contractual notice will be paid but will usually not be worked."

170. The Claimant provided a response to Ms Fawcett's report **[2036-2039]**. In summary, she denied that the examples identified by Ms Fawcett provided sufficient evidence to terminate her contract, asserted that she was protected against detriment in respect of insurance matters because of her whistleblowing complaint, and stated that some of her 'behavioural' concerns could be attributed to her underlying health conditions, including Asperger's, which should be taken into account.

171. On 22 June 2022, the Claimant alleged in an email **[1888]** that, on 20 June 2022, she had overheard a discussion between Ms Fawcett and Ms Forrest in which the latter expressed support for Ms Fawcett dismissing her. The Claimant therefore queried the role Ms Forrest was to play in the dismissal meeting. In her witness statement for the hearing, Ms Forrest denied expressing this to Ms Fawcett and she was not challenged on that denial in cross-examination. Ms Fawcett also denied the allegation in her witness statement, gave cogent reasons why it would be very difficult for anyone to overhear any discussion she had had with Ms Forrest and was not challenged on her denial in cross-examination. It is noted that, though the Claimant's email refers to the conversation also being heard by another member of staff, no evidence was obtained at the time or subsequently from this other member of staff. On the balance of probabilities, we find that Ms Fawcett and Ms Forrest did not discuss the Claimant's case in the manner alleged by the Claimant, and that Ms Forrest did not express support for the

dismissal. The allegation made in the Claimant's email of 22 June 2022 was therefore a false one.

172. After chasing with the provider, Chris Byrne of NEU HR wrote to the Claimant on 22 June 2022 to state that he had been told the updated, amended OH report had been sent to the Claimant on 21 June 2022 and asking for the Claimant's confirmation the report was now agreed **[1897]**. A similar situation was reached with the updated DSE / workstation assessment report, *i.e.* that a version regarded as final had been provided to the Claimant on 22 June 2022, but the Claimant's permission was required to share it with the NEU **[606]**. On 28 June 2022, the Claimant informed the NEU that the DSE assessment report was still being finalised **[2081]**.

173. On the morning of 29 June 2022, the Claimant emailed Mr Hannam, Mr Byrne and Ms Fawcett as follows **[2080]**:

> "Unfortunately, due to the incompetence of both the occ. Health assessor and the DSE assessor both assessment are factually incorrect and incomplete.
>
> Therefore, as a result I have asked them to amend the report so it is accurate, factual and complete but Refuse.
>
> The assessments were absolutely useless and referred to or relied on data from the civil service assessments. The assessors were disengaged, not interested and didn't not report all the information.
>
> I have now withdrawn all consent and no reports shall be passed to NEU at all. Unless, used as evidence in court.
>
> I am going to seek occupational health support independently as NEU seems to employ organisations that have really poor staff on their books and who don't want to do their job properly or are not fully qualified to comment on my disabilities."

174. Accordingly, final versions of the OH report and DSE workstation report were never released to the NEU, though earlier versions (not apparently endorsed by the Claimant) were provided, as outlined above.

175. The probation dismissal meeting took place on 29 June 2022. The panel comprised Ms Curley (as Chair) and Ms Forrest only (Ms Robertson was on leave). The Claimant was accompanied by her Union rep, Mr Scoggins, and an HR Business Partner, Chris Byrne, was also present as was an HR notetaker. Ms Fawcett attended to present her report. The Claimant was permitted to record the meeting and a transcript is available **[1921-1962]**. There was a detailed discussion of all the issues raised in Ms Fawcett's report, and the Claimant and her representative were given ample opportunity to put forward their counter-arguments (expanding, where necessary, on the Claimant's written response to the report).

176. After the meeting, Ms Curley and Ms Forrest deliberated. We accept Ms Forrest's evidence that the panel considered all of the written evidence before them (including the Claimant's response to Ms Fawcett's report) and what the Claimant and her representative had said during the meeting, and came to a considered decision based on that evidence. The panel decided

that dismissal was the appropriate course of action.

177. Ms Forrest gave clear and credible evidence as to the panel's thought process in reaching that conclusion, which evidence we accept. As Ms Forrest explained in her evidence, the true reasons for dismissal were set out in the outcome letter issued on 1 July 2022 **[1971-1975]**. The principal reason, we find, was that the Claimant continued to refuse to undertake the vast majority of the responsibilities set out in her role description, with no sign of this changing within any reasonable timescale. That is clear in the outcome letter and from Ms Forrest's oral evidence. There was reasonable basis for this reason to dismiss, namely the Claimant's refusal to accept repeated reassurances from the NEU as to the scope of its insurance cover (as set out in the factual findings above), culminating in an insistence on a need for the Claimant to take out her own insurance that was founded on a misinterpretation of advice provided by the SRA.

178. Another contributing reason was the panel's finding that, in some of her dealings with NEU colleagues, commercial partners, and with the SRA, the Claimant had not met the expectation set out in her role description to model professionalism and integrity and act in accordance with the NEU values. The specific issues identified in the dismissal letter, which had reasonable basis in the evidence, were the provision of the NEU's insurance policy to Locktons despite the Claimant having stated she would treat the policy as confidential, and recording various conversations without the knowledge of the other participants.

179. The reason / principal reason for dismissal was not that the Claimant had made a protected disclosure – we accept Ms Forrest's evidence to that effect, which is consistent with what is said in this regard in the outcome letter:

> "However, the panel's decision to dismiss is not because you have raised concerns in good faith, which you had every right to do. The panel's decision is simply due to the fact that you remain unwilling to undertake your Regional Solicitor role, despite being able to do this."

The mere fact that Ms Curley had determined the Claimant's whistleblowing complaint and was also part of the dismissal panel does not change this conclusion. There is no credible evidence to indicate that Ms Curley was ill-disposed toward the Claimant for having raised the complaint; rather, Ms Curley regarded the complaint as made in good faith, fully investigated it, and attempted to assuage the Claimant's concerns by obtaining a further letter of reassurance from Alan Boswell.

180. Moreover, discussions regarding the possibility of ultimately dismissing the Claimant for refusing to work had begun <u>before</u> the Claimant made her whistleblowing complaint (see Ms Robertson's email to Ms Fawcett of 20 May 2022 **[428]**, quoted above). This is a further indication that the principal reason for dismissal was not the whistleblowing complaint but rather the Claimant's refusal to work.

181. We accept Ms Forrest's evidence that the decision to dismiss was not significantly influenced (or influenced at all) by the Claimant being unable to

work without adjustments. As reflected in the outcome letter, the issue was with the Claimant refusing to work – the question of whether she was able properly to work without adjustments never arose, and any perceived inability of the Claimant to work without adjustments did not, we find, feature in the panel's reasoning for dismissal at all.

182. We also accept Ms Forrest's evidence that the decision to dismiss was not significantly influenced (or influenced at all) by:

    a. the Claimant's association with the race of the Claimant's son;
    b. the Claimant's association with her transgender son;
    c. concerns the Claimant had raised on 9 May 2022 (and later) regarding the use of the term "black"; or
    d. concerns the Claimant had raised on 10 and 20 May 2022 regarding the maternity training materials lacking inclusivity in terms of transgender males and females.

    There was no credible basis advanced for asserting that any of these were the case, and the specific allegations were not put to Ms Forrest in cross-examination. Instead, the Claimant challenged Ms Forrest regarding press coverage in respect of what she described as "*institutional allegations of racism and transphobia within the NEU*" – Ms Forrest did not accept there was any such institutional racism / transphobia and detailed her own personal involvement in diversity matters. In any event, unproven allegations made by other individuals against the NEU in general do not prove any material support for the particular allegations made by the Claimant in this case.

183. The outcome letter confirmed that the Claimant would not be required to work her contractual notice period of three months, and would instead be paid three months' pay in lieu of notice plus 2.5 days outstanding annual leave, subject to deduction of applicable tax and NI contributions. This was duly paid on 25 July 2022. The Claimant's dismissal was therefore effective from 1 July 2022.

184. In her closing submissions, the Claimant sought to argue that a decision of the First-Tier Tribunal (Social Entitlement Chamber) on 4 October 2023 **[71-72]** that the payment on 25 July 2022 was not earnings but rather a severance payment "*reinforces the conclusion that NEU's intent was to secure my exit with as little visibility as possible*" and was "*evidence of the NEU's effort to quietly sever ties after engaging in unlawful discriminatory and retaliatory behaviour*". We do not accept that submission. The decision is not binding upon us, and the NEU was not a party to those proceedings. It is clear on the evidence that is before this Tribunal, and we find as a fact, that the payment made on 25 July 2022 was for the purposes described in the outcome letter of 1 July 2022, i.e. in lieu of notice and in respect of outstanding annual leave. The key evidence in that respect (the outcome letter explaining this) was, as the Claimant confirmed, not put before the First-Tier Tribunal.

185. On 3 July 2022, the Claimant filed an appeal against the dismissal decision **[1976-1980]**. She alleged that there were procedural irregularities because of Ms Curley and Ms Robertson's involvement in earlier stages, and the

alleged conversation between Ms Forrest and Ms Fawcett in which Ms Forrest was said to have expressed support for the Claimant's dismissal. She also alleged that the whistleblowing complaint had not been fully resolved because of the inadequate letter from Alan Boswell and the lack of any investigation into her allegations of fraudulent misrepresentation / miscarriage of justice, and that her disabilities had not been considered. She also raised allegations of institutional racism and transphobia.

186. The ACAS Early Conciliation Certificate was issued on 5 July 2022 **[1]**.

187. The appeal hearing took place on 13 July 2022. The Chair was Mary Bousted, Joint General Secretary. Ms Curley attended to present the findings of the dismissal panel. Mr Byrne attended for HR support, and an HR notetaker was also present. The Claimant attended with her Union rep, Mr Scoggins. The Claimant was permitted to record the meeting and a transcript is available **[2010-2026]**. The Claimant and her representative were given ample opportunity to put forward their arguments against the decision.

188. Dr Bousted's decision was to uphold the dismissal. She produced a detailed outcome letter that was issued to the Claimant on 20 July 2022 setting out her reasons for doing so.

189. This claim was presented on 21 July 2022 **[2]**. No time limit issues arise.

190. At all times throughout the chronology set out above, the Claimant was prescribed levothyroxine sodium 200mcg daily for hypothyroidism. Although the Claimant's GP records were before the Tribunal **[116-154]**, there was no evidence in those records (or any other medical evidence before the Tribunal) as to what effect there would be on the Claimant's ability to carry out normal day-to-day activities were she to stop taking that medication. Although some symptoms are described in the Disability Impact Statement **[114]**, there is no detail of the effect of these symptoms on the Claimant's ability to undertake day-to-day activities.

<u>Application of the law to the facts</u>

Complaints related to the dismissal

191. As is reflected in the LOI, several of the Claimant's complaints are concerned only with her dismissal. These are the complaints of:

    a. Automatic unfair dismissal (Issue 1);
    b. Discrimination arising from disability (Issue 6);
    c. Direct Associative Race Discrimination (Issue 9);
    d. Direct Associative Transgender Discrimination (Issue 10);
    e. Victimisation (Issue 12).

192. We have found on the facts that:

    a. The reason or principal reason for dismissal was not the Claimant's whistleblowing complaint of 22 May 2022 (Sub-Issue 1.1);
    b. The decision to dismiss was not significantly influenced (or

influenced at all) by the Claimant's alleged inability to work without adjustments (Sub-Issue 6.3);

c. The decision to dismiss was not significantly influenced (or influenced at all) by the Claimant's association with the race of her son (Sub-Issue 9.3);
d. The decision to dismiss was not significantly influenced (or influenced at all) by the Claimant's association with her transgender son (Sub-Issue 10.3);
e. The decision to dismiss was not significantly influenced (or influenced at all) by the concerns the Claimant had raised on 9 May 2022 (and later) regarding the use of the term "black" (Sub-Issue 12.3); and
f. The decision to dismiss was not significantly influenced (or influenced at all) by concerns the Claimant had raised on 10 and 20 May 2022 regarding the maternity training materials lacking inclusivity in terms of transgender males and females (Sub-Issue 12.3).

193. Accordingly, each of these complaints fails on causation. It is not necessary to address the other sub-issues.

Protected disclosure detriment

194. The first issue that arises is whether the Claimant's whistleblowing complaint made on 22 May 2022 amounted to a qualifying disclosure for the purposes of the ERA (Issue 2.1).

195. As developed in the course of evidence, there are two potential disclosures of relevance within the 22 May 2022 complaint. The first is the one identified in the LOI, i.e. that the Respondent's failure to have or show evidence of legal insurance meant the Claimant was unable to undertake any legal activities (the "I am not covered" disclosure: see **[542]**). The second, which arose in an answer given by the Claimant in cross-examination, is the allegation of "potential fraud to obtain insurance" (see **[551]**). We will deal with each in turn.

196. We can deal with the "potential fraud to obtain insurance" disclosure shortly. Even putting to one side the lack of a pleading of this aspect of the disclosure, we find it falls at the first hurdle. It was not a disclosure of information (Sub-Issue 2.1.2); rather it was a mere allegation made without any factual basis and without any substantiation within the whistleblowing complaint. It contained insufficient factual content and specificity, to adopt the language of *Kilraine*. All the Claimant said was "*It is believed that the incorrect information was divulged to the insurance broker deliberately to obtain the insurance the NEU does have*", but the whistleblowing complaint does not explain what "*incorrect information*" was provided, nor provide any basis whatsoever for the Claimant's belief it was done "*deliberately*".

197. Accordingly, the "potential fraud to obtain insurance" disclosure was not a qualifying disclosure.

198. Regarding the "I am not covered" disclosure, Ms Bell accepted in closing that this statement could amount to a disclosure of information (Sub-Issue

2.1.2), and we agree. Ms Bell disputed that the disclosure was made in the public interest (Sub-Issue 2.1.3). Interpreting the disclosure as a whole, we do not accept Ms Bell's submission on this point. The primary motive was, we find, personal interest. That is abundantly clear from the very nature of the disclosure ("*I am not covered*") and from the paragraphs of the cover email explaining why the complaint was being made at that time:

> "I was going to await to hear from HR as to whether any disciplinary action was going to be taken against me before instigating the procedure. However, as this policy is the only protection I have, and I have no other support I have decided to instigate it now. My manager, Maria Fawcett and Kate Robertson seem to think that I can carry out legal work without the necessary insurance and have no interest in my career ending should I follow this request. Unfortunately, this is not the case as I would be in breach of SRA regulations. Also, I believe it maybe misconstrued as "retaliation" if I instigate the policy afterwards.
>
> However, given that this has been an issue pretty much since the start of my employment (3 weeks) I would like this to rectified as soon as possible as would my team so I can carry out the role I have been employed for."

199. However, whilst not the predominant motive, we accept that the Claimant actually believed the disclosure was made in the interests of all solicitors employed by the NEU, and that this is a sufficient group of the public (and the issue of solicitor insurance of enough significance) for the matter to engage the public interest, applying *Nurmohamed*. This is evident from the reference to risk to "*Solicitor colleagues*" / "**NEU colleagues**" at **[543]** and **[552],** and the disclosure at **[551]** that "*The in house SRA solicitors working for the NEU and possibly their caseworkers are not covered by the correct insurance*". We also accept that belief was reasonable (Sub-Issue 2.1.4), as if the Claimant was correct about the scope of the insurance coverage it would affect all of the NEU's solicitors.

200. The next question is whether the Claimant believed the "I am not covered" disclosure tended to show that (i) a person had failed, was failing or was likely to fail to comply with a legal obligation, or that (ii) this had been, was being or was likely to be deliberately concealed (Sub-Issue 2.1.5). Only (i) is relevant to this disclosure, since the whistleblowing complaint does not suggest there has been any concealment of the scope of the insurance. This, in our judgement, is where the Claimant runs into difficulties. The obligation relied upon by the Claimant in this regard is that under Paragraph 5.6 of the SRA Code of Conduct, which requires a solicitor carrying on reserved legal activities for the public or a section of the public in a non-commercial body to ensure the body takes out and maintains indemnity insurance that is adequate and appropriate. The Claimant accepted in cross-examination that at the time of her complaint she did not understand this to be a legal obligation, but rather a regulatory one. (If fact, she was wrong about that, as section 176(1) of the Legal Services Act 2007 imposes a legal duty on a solicitor to comply with the SRA's regulatory arrangements, but what is important in this analysis was what the Claimant subjectively believed at the time of her complaint.) Accordingly, whilst it is

absolutely plain that the Claimant was (and remains[3]) absolutely convinced of the correctness of her position, we find that the Claimant did not believe the disclosure tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation.

201. Even if we are wrong on that and the Claimant's belief that there would be a potential failure to comply with Paragraph 5.6 of the SRA Code of Conduct was sufficient, there is a separate question as to whether that belief was a reasonable one (Sub-Issue 2.1.6). We find that it was not. By this point in time, the Claimant had already been provided oral and written reassurance by Mr Romain that the insurance in place was adequate to enable the Claimant to undertake her duties including, importantly in this context, the confirmation that "*There has not been a single occasion where any of our solicitors, or anyone else, has got into any form of difficulty or problem due to inadequate insurance cover.*" Ms Fawcett had confirmed to the Claimant by email that Ms Phillips had also considered her queries and was satisfied by the insurance coverage. The Claimant had also been provided with a copy of the policy by Mr Romain. The Claimant had spoken to Mr Charles, who had advised her to talk through the matters with Mr Romain. The Claimant had approached Locktons who, on our findings, had advised it would be "*beneficial to talk through the policy and what is and is not covered*" and that there were "*red flags*" in terms of areas of clarification required. None of that provided a reasonable basis for the belief that the insurance cover was (or was likely to be) inadequate to meet the SRA's requirements.

202. Accordingly, we conclude that the "I am not covered" disclosure was not a qualifying disclosure.

203. Having concluded that there was no qualifying disclosure, the question of detriment (Issue 3) does not arise.[4] However, we consider it appropriate to nonetheless make findings in respect of that issue.

204. The alleged detriment is that the Claimant's whistleblowing complaint was ignored by Ms Fawcett, Ms Robertson, Mr Romain and Ms Brown. In respect of the first three individuals, the fundamental flaw in the Claimant's case is that none of these were responsible for dealing with the Claimant's whistleblowing complaint, so there is no rational basis for alleging that they ignored it. As set out in the factual findings above, the complaint was made to Ms Brown as the designated whistleblowing officer.

205. As to whether Ms Brown can be said to have ignored the complaint, this is not made out on the facts. As set out above, Ms Brown acknowledged receipt of the Claimant's complaint on the next working day after it was made. In her acknowledgement email **[534]** she explained that she was going to be out of the office for 3 weeks from the following day, so would ask the Joint General Secretaries of the NEU to consider nominating

[3] Under cross-examination, the Claimant explained that even if the King was to decree she was covered by the NEU's policy, she would not accept that to be the case. Ms Bell, fairly in our view, relied upon this as evidence of the Claimant's unreasonable approach to the matter.

[4] And the complaint of automatic unfair dismissal would also have failed on this basis, as well as on causation as already explained above.

another person to investigate in her absence. This she did the following morning, copying the Claimant for her information **[542]**. The following day, the Claimant was informed by Ms Robertson that Rachel Curley, Deputy General Secretary, had been nominated to investigate the matters the Claimant had raised **[540-541]**. Moreover, it is plain that the Claimant was not aggrieved at all by Ms Brown's passing on of the complaint, as evidenced by her email to Ms Brown thanking her "*for forwarding the emails, as necessary*" **[541]**.

206. Accordingly, even if the whistleblowing complaint (or any part of it) had amounted to a qualifying disclosure, the detriment claim would have failed.

Disability: hypothyroidism

207. The only contested disability was the Claimant's hypothyroidism. We have found that, at all times throughout the chronology set out above, the Claimant was prescribed levothyroxine sodium 200mcg daily for hypothyroidism. That means this is a 'deduced' effects case, *i.e.* the Tribunal has to consider what effect an impairment is likely to have if one ignores the measures being taken to treat or correct it.

208. As noted in the law section, there is an obligation on a claimant to prove their alleged disability with some particularity, ordinarily with clear medical evidence. Although the Claimant's GP records were before the Tribunal **[116-154]**, there was no evidence in those records (or any other medical evidence before the Tribunal) as to what effect there would be on the Claimant's ability to carry out normal day-to-day activities were she to stop taking that medication. Although some symptoms are described in the Disability Impact Statement **[114]**, there is no detail of the effect of these symptoms on the Claimant's ability to undertake day-to-day activities.

209. On that basis, we find that the Claimant has failed to discharge the burden upon her of satisfying the Tribunal that (ignoring her medication) her hypothyroidism would have a substantial adverse effect on her ability to carry out day-to-day activities. We therefore find that the Claimant was not disabled by reason of hypothyroidism.

Direct disability discrimination / Harassment related to disability

210. We can deal with these complaints together as there is overlap in the factual allegations made.

211. The first matter to deal with in respect of these complaints is to determine whether the conduct / treatment to which the Claimant alleges she was subjected by the Respondent actually happened (Sub-Issues 5.1 & 11.1), before deciding whether the treatment was (1) less favourable treatment (Sub-Issue 5.2) because of disability (Sub-Issue 5.3) and/or (2) unwanted conduct (Sub-Issue 11.2) related to disability (Sub-Issue 11.3) having the proscribed purpose or effect (Sub-Issues 11.4 & 11.5). We will take the three allegations in turn.

212. The first allegation is that the Respondent subjected the Claimant to multiple OH assessments (up to 4) in May and June 2022. This appears in

both complaints. Our factual findings in this respect (see above) can be summarised as follows.

a. On 21 April 2022 a Medigold nurse telephone consultation was carried out with the Claimant, at the instigation of the Claimant. It cannot be said this was an example of the Respondent subjecting the Claimant to an assessment.
b. A face-to-face OH assessment was scheduled for 11 May 2022 (the process for arranging which had been commenced before the abovementioned telephone consultation). Though the Claimant attended, the assessment did not proceed because she attended with her son. This was not the fault of the NEU.
c. The rearranged OH assessment took place, by video, on 6 June 2022.

213. Accordingly, we find that the Respondent only in fact required the Claimant to attend one OH assessment (it was not the Respondent's fault that the appointment did not proceed on the first occasion, necessitating it being rescheduled).

214. The allegation therefore reduces to whether it amounted to less favourable treatment or unwanted conduct for the Respondent to ask the Claimant to attend an OH assessment at all. The Claimant's case appeared to be that this was not necessary, and was therefore less favourable treatment and unwanted conduct, because (a) the nurse telephone consultation indicated no need for a face-to-face assessment and (b) the Respondent should have simply relied upon the 2019 documents that the Claimant provided regarding adjustments made during her previous employment at the GLD. The difficulty with that argument is that the nurse's advice that a further assessment was not needed was on the basis the Claimant would share her previous workplace adjustments passport with her manager to consider any necessary reasonable adjustments, but the Claimant had already shared those documents and had herself indicated that they were out of date (as is also clear on their face) and that "*an occupational therapy assessment would be useful*", which is why the process of booking an assessment had already been put in train.

215. We therefore accept Ms Bell's submission that a hypothetical comparator (someone similarly situated to the Claimant save that the conditions for which they needed consideration of adjustments did not amount to disabilities under the Equality Act) would have been treated in just the same way. The OH assessment was reasonably required in order to properly assess what reasonable adjustments were needed for the Claimant. This was not less favourable treatment.

216. As to whether it was unwanted conduct, although the Claimant did not object to having an assessment at the time, we do accept that (subjectively) she did not consider that an assessment was necessary. It was related to her disability in the sense that it was only because of her conditions (which were in fact disabilities) that the Claimant was being referred for an OH assessment. However, we find the allegation fails because it had neither the purpose nor the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the

Claimant. It was never suggested by the Claimant to any of the Respondent's witnesses (particularly, in this regard, Ms Fawcett) that this was the purpose and plainly it was not – we accept Ms Fawcett's evidence (supported by the contemporaneous documents) that the purpose was to seek to identify the appropriate reasonable adjustments for the Claimant. The Claimant provided no evidence that it had that effect upon her, but we find it is not reasonable for this conduct to have had that effect upon her in any event.

217. Accordingly, the first allegation fails as a complaint of direct disability discrimination and as an allegation of harassment related to disability.

218. The second allegation is that the Respondent deliberately delayed the Claimant's DWP appointment to on or around the third week of June 2022. This is an allegation of direct disability discrimination only. Our factual findings in this respect (see above) can be summarised as follows.

    a. The Claimant made her application for an 'Access to Work' grant on or around Wednesday 4 May 2022. On that date, Mr Hauxwell sought to make contact with Ms Fawcett by telephone and was not successful.
    b. Mr Hauxwell had still not spoken to Ms Fawcett by Monday 9 May 2022 and told the Claimant he was waiting for an email response. (It is not clear when Mr Hauxwell emailed Ms Fawcett, but we can infer it was on that day.)
    c. Ms Fawcett was off sick with food poisoning on Monday 9 May 2022 and Tuesday 10 May 2022.
    d. By the morning of Thursday 12 May 2022 Ms Fawcett had responded to Mr Hauxwell and was waiting to hear further from him.
    e. On Monday 16 May 2022, Mr Hauxwell confirmed to the Claimant that he had been in contact with Ms Fawcett regarding 'Access to Work' and the Claimant's details had been sent to the referral team.
    f. On 8 June 2022, the DWP issued a letter confirming the award of an 'Access to Work' grant to the Claimant, though it was not received by the Respondent until 15 June 2022.

219. As is apparent from that chronology, there was a short delay between 4 and 12 May 2022, explicable in part due to Ms Fawcett being off sick for 2 working days in that period. After that, matters were not in the hands of the Respondent. Ms Fawcett was not challenged on her evidence that she did not deliberately delay the DWP appointment and we have no hesitation in accepting that evidence. We accept she responded to Mr Hauxwell within a reasonable timeframe, taking account of her sickness absence during the period in which he was seeking to contact her, and there is no evidential basis for suggesting she was deliberately slowing the process down.

220. The second allegation therefore fails as a complaint of direct disability discrimination because the treatment alleged did not in fact occur.

221. The third allegation is that Ms Fawcett told the Claimant to submit a flexible working request on 11 May 2022 and then refused it on the same day. This appears in both complaints. Our factual findings in this respect (see above) can be summarised as follows.

a. In a one-to-one meeting on 11 May 2022, Ms Fawcett informally agreed to a request from the Claimant in respect of her working hours – which were agreed to be as set out in the Claimant's email signature.
b. The Claimant accepted in cross-examination that it was she who wished to make a formal flexible working request, not that she was told to do so by Ms Fawcett.
c. Following the 11 May 2022 meeting, the Claimant emailed Ms Fawcett asking for these arrangements to be formalised, and also indicating she would be raising this as a reasonable adjustment in her OH assessment scheduled for that day. Ms Fawcett (reasonably) did not interpret the email as a formal flexible working request.
d. Following the failure of the OH assessment, on 12 May 2022 Ms Fawcett explained to the Claimant that a flexible working request would be the best way to put in place the adjusted hours the Claimant had requested on a permanent basis, and that she had shared the relevant policy with the Claimant.

222. As is apparent from this chronology, the allegation is not made out on the facts. In fact, Ms Fawcett agreed (informally) to the Claimant's requested working hours. She also advised the Claimant that she could make a formal request and provided her with the relevant policy. Ms Fawcett did not tell the Claimant to submit a flexible working request, nor did she refuse one.

223. The third allegation therefore fails as a complaint of direct disability discrimination and as a complaint of harassment related to disability because the treatment alleged did not in fact occur.

Failure to make reasonable adjustments

224. In respect of this complaint, the Claimant relies upon two PCPs and two types of auxiliary aid. We will address each in turn.

225. The first alleged PCP is a requirement for the Claimant to work 37.5 hours a week, 9:00am to 4:30pm or 5:00pm. The Claimant did not address this in her witness statement. In her claim form, she set out that she worked 35 hours a week **[6]**, which is consistent with her contract of employment. The hours the Claimant actually worked, per her own request, were those set out in her email signature – they expand to beyond 35 hours in order to accommodate additional rest periods during the day for the Claimant. As the Claimant herself put it "*… fixed days help me plan child care without additional costs and above all aid in maintaining anxiety and stress levels to a minimum with constant changes.*" The pleaded PCP is therefore not made out on the facts.

226. The second alleged PCP is the conducting of meetings / trainings over long boardroom tables. No evidence has been advanced to support this allegation – it was not addressed in the Claimant's evidence, nor was it put to the Respondent's witnesses. There is no basis upon which we can find that the Respondent had this PCP. The pleaded PCP is therefore not made out on the facts.

227. The first alleged auxiliary aid is a specialist chair. Our factual findings in respect of this can be summarised as follows:

    a. A specialist chair was provided for the Claimant whilst at the GLD, as explained in the 2019 reports she provided to the Respondent.
    b. The Claimant's workstation assessment report was received by the NEU on or around 20 May 2022. Focusing on her hip issue, the report records the Claimant's main symptoms as pain/swelling in both hips, reduced mobility and disturbed sleep. It was advised that she be provided with the same chair she had had at the GLD.
    c. Following review by Mr Hannam, Ms Fawcett directed that an order be placed for the identified chair on 25 May 2022. We find this was within a reasonable timeframe of the recommendation being made.
    d. Processing of the order of the chair was delayed because the particular model was no longer in stock, and measurements were required to identify an alternative. Ultimately this required the assessment provider to go back to the Claimant.
    e. On 8 June 2022, the DWP issued a letter confirming the award of an 'Access to Work' grant to the Claimant. This letter was received by NEU on 15 June 2022. The grant covered full funding for a chair.
    f. By 22 June 2022, the Respondent was informed that a finalised DSE report had been provided to the Claimant, but that she needed to give permission for it to be released to the Respondent. The Claimant never gave that permission.

228. It is evident from this chronology that from 20 May 2022 the Respondent had knowledge of the ongoing impact upon the Claimant of her previous hip injury, and that a specialist chair was recommended for her use. The Respondent took steps to order that chair, but the model identified was no longer available, and the need to get measurements in order to identify an alternative delayed matters. Part of this delay can be put at the door of the Respondent, but part with the Claimant who, in the end, refused to release the final DSE report to the Respondent. On balance, we find that the Respondent did take reasonable steps to provide the requested auxiliary aid, and the fact the chair did not materialise before the Claimant's departure was a consequence of the Claimant's lack of cooperation.

229. Moreover, the Claimant can only succeed in this complaint if she was put at a substantial disadvantage compared to someone without her disability (previous hip injury, in this regard). The alleged substantial disadvantage is that the Claimant was unable to sit comfortably in doing written work. The matter of substantial disadvantage was not covered in the Claimant's evidence. The evidence before the Tribunal indicates that the Claimant had little difficulty producing voluminous written materials during her employment – we have quoted from many such materials in the findings of fact above. Context is also important. This was a situation where the Claimant was refusing to undertake the vast majority of her duties. Any disadvantage to the Claimant from not having a specialist chair did not surface because she was refusing (for other reasons) to perform her role. Accordingly, we find that the lack of the specialist chair did not in fact put the Claimant at a substantial disadvantage compared to someone without her disability during the period of her employment.

230. The second alleged auxiliary aid is assisted computer technology (Grammarly and Glean). Our factual findings in respect of this can be summarised as follows:

    a. On 20 April 2022 the Claimant told Ms Fawcett that she considered she needed subscriptions to Grammarly and Glean. These were software she had use of whilst at the GLD. The following day Ms Fawcett referred these requests onwards to NEU's HR team to take forward.
    b. As recorded in the workstation assessment report provided on 20 May 2022, the question of assisted computer technology was to be considered as part of the OH assessment. That had not taken place by that day (because the assessment scheduled for 11 May 2022 had not taken place, through no fault of the Respondent) and was rescheduled for 6 June 2022.
    c. On 8 June 2022, the DWP issued a letter confirming the award of an 'Access to Work' grant to the Claimant. This letter was received by NEU on 15 June 2022. The grant covered full funding for subscriptions to Glean and Grammarly Pro.
    d. Although a version of the OH report was provided to the Respondent (which discussed assistive technology, but not Grammarly and Glean by name), the Claimant stated this was nor the final version. The final version was never released by the Claimant to the Respondent.

231. It is evident from this chronology that the Respondent was aware from before the start of the Claimant's employment of her desire for this software to support her with disabilities that the Respondent accepts it was aware of (Asperger's, dyslexia, hearing impairment) but, reasonably, was awaiting the outcome of the OH assessment rather than relying on the out-of-date information in the 2019 documentation. The delay in the OH assessment was not the fault of the Respondent. By 15 June 2022, the Respondent knew that the DWP would fund these subscriptions in full, so any culpable delay could only be from this date, but even so it was reasonable for the Respondent to await the final OH report to fully understand the Claimant's needs. The Claimant's employment terminated just over 2 weeks later, before the final report ever materialised. On balance, we find that the fact the assistive technology did not materialise before the Claimant's departure was a consequence of the Claimant's lack of cooperation, not the fault of the Respondent.

232. Further, the Claimant can only succeed in this complaint if she was put at a substantial disadvantage compared to someone without her disabilities (Asperger's, dyslexia, hearing impairment, in this regard). The alleged substantial disadvantage is that it took the Claimant longer to do written work. Much the same can be said here as was already said in relation to the specialist chair. The matter of substantial disadvantage was not covered in the Claimant's evidence. The evidence before the Tribunal indicates that the Claimant had little difficulty producing voluminous written materials during her employment. Moreover, this was a situation where the Claimant was refusing to undertake the vast majority of her duties. Any disadvantage to the Claimant from not having the assistive technology in place did not

surface because she was refusing (for other reasons) to perform her role. Accordingly, we find that the lack of the assistive technology did not in fact put the Claimant at a substantial disadvantage compared to someone without her disability during the period of her employment.

Direct race discrimination

233. The first matter to deal with in respect of this complaint is to determine whether the treatments to which the Claimant alleges she was subjected by the Respondent actually happened (Sub-Issue 8.1), before deciding whether the treatment was (1) less favourable treatment (Sub-Issue 8.2) because of race (Sub-Issue 8.3).

234. The first allegation is that the Respondent refers to all non-white staff as "black". The Respondent admits that is its policy, in the context of the Respondent's members having decided to adopt that term in the political context. The question therefore is whether the Respondent doing so amounts to less favourable treatment of the Claimant because of race. We find this cannot be so. The use of this terminology is universal across all NEU staff; the only way in which the Claimant is treated any differently to the relevant hypothetical comparator is that the comparator would be referred to as "black" whereas the Claimant would not, but in no way can that reasonably be said to be less favourable treatment of the Claimant.

235. The Claimant's position appears to be that she finds this "black" terminology offensive (in particular because she has a mixed-race child). Whilst the Claimant's perception has to be taken into account, we find this is an unjustified sense of grievance and therefore does not amount to a detriment or less favourable treatment. We accept that the Respondent's approach to the use of the terminology is a reasonable one (and the origins of the terminology were explained in detail to the Claimant during her employment).

236. Accordingly, the first allegation of direct race discrimination fails as the treatment in question does not amount to less favourable treatment because of race.

237. The second allegation is that Ms Fawcett told the Claimant that, as a white person, she had no say on "black" issues. This allegation arises out of the meeting on 15 June 2022. In that regard, we have found on the facts that, on a full consideration of the transcript and the overall context of the conversation, Ms Fawcett did not tell the Claimant that, as a white person, she had no say on "black" issues, but rather that the Claimant's view did not outweigh the views of "black" members of staff. The pleaded allegation therefore fails on the facts.

238. We have also considered whether telling the Claimant that her view did not outweigh the views of "black" members of staff was a less favourable treatment because of race. We find it was not. The relevant context is that a democratic decision had been taken by "black" members to adopt the "black" terminology. The Claimant was being told that her own personal view on the appropriateness of that terminology did not outweigh that democratic decision. That cannot be said to be less favourable treatment –

a “black” member of staff raising the same concerns would, we find, equally have been told that their view did not outweigh the majority view of other “black” staff.

239. Accordingly, the second allegation of direct race discrimination fails because the treatment alleged did not in fact occur, and what did in fact occur does not amount to less favourable treatment because of race.

Conclusion

240. All of the Claimant’s complaints are dismissed on their merits. Issues of remedy do not arise.

Approved by:

Employment Judge Abbott

Date: 09 July 2025

JUDGMENT SENT TO THE PARTIES ON
14 July 2025

FOR THE TRIBUNAL OFFICE

P Wing