EMPLOYMENT TRIBUNAL

Claimant: **Nicola Ferguson**

Respondent: **Department for Work and Pensions**

Heard at **LONDON SOUTH**
By CVP

On: **18 to 22 August 2025**

Before
Chairman: EMPLOYMENT JUDGE N COX
Tribunal Member: J Jerram
Tribunal Member: K Murphy

Appearances:

For the Claimant: **In Person**
For the Respondent: **Mr McHugh (Counsel)**

RESERVED JUDGMENT

The unanimous judgment of the tribunal is :-

1. The claimant's claims relating to events before 2 January 2024 are out of time and are dismissed.

2. As regards the remaining claims:

   2.1. The complaint of discrimination because of something arising in consequence of disability is not well-founded and is dismissed.

2.2. The complaint of failure to make reasonable adjustments is not well-founded and is dismissed.

Approved by Employment Judge N Cox

Date: 18 September 2025

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

RESERVED REASONS

The following are the unanimous conclusions of the tribunal

Claims and Issues

1. The claimant brings the following complaints:

   1.1. Discrimination because of something arising in consequence of disability (Equality Act 2010 ("EQA") s 15):

   1.2. Failure to make reasonable adjustments (EQA s 20-21).

2. The respondent defends the claims.

3. The issues were discussed at a case management hearing before EJ Fowell on 1 April 2025.

4. They were further discussed with the parties at the start of the hearing and agreed to be as follows (adopting the numbering from the case management order):-

Time limits

11. Such claims have to be brought within three months of dismissal (i.e. three months less one day) plus any time spent in early conciliation. And if the time limit would otherwise have run out during early conciliation, a further month is added on to allow time for the claim to be submitted.

12. Here, the relevant dates are as follows:
a) Early conciliation began on 7 May 2024
b) Early conciliation ended on 18 June 2024
c) The claim was submitted on 17 July 2024

13. Since ACAS was first contacted on 7 May 2024, any acts or failures which took place before 8 February 2024 are potentially out of time.

14. To pursue any earlier acts of discrimination, Ms Ferguson must either prove that:
a) the discrimination was in fact conduct extending over a period of time and ending after this last act, or
b) it would be just and equitable to extend the normal time limit.

Disability
15. There are a total of 15 health problems listed in Ms Ferguson's impact statement. We agreed that the main conditions are:

a) fibromyalgia,
b) joint hypermobility,
c) pancreatitis,
d) osteoarthritis,
e) general anxiety disorder and
f) menopause.

16. The DWP accepts that the first four conditions amount to a disability and that Ms Ferguson was disabled with them from August 2023 (in the case of fibromyalgia, and joint hypermobility), and from December 2022 with pancreatitis. They also accept that she is disabled with osteoarthritis but the date when that became a disability is unclear. Evidence in relation to the other conditions can be presented at the hearing.

17. The first question in each case is whether Ms Ferguson had a physical or mental impairment at the material time?

18. If so, did it have a substantial adverse effect on her ability to carry out normal day-to-day activities?

19. If so, was that effect long term? In particular, when did it start and, at the material time (date)
a) had it lasted for at least 12 months, or
b) was it likely to last at least 12 months?

20. Note that in assessing the likelihood of an effect lasting 12 months, account should only be taken of the circumstances at the time the alleged discrimination took place, not afterwards.

21. Were any measures taken to treat or correct the impairment? But for those measures would the impairment have been likely to have had a substantial adverse effect on Ms Ferguson's ability to carry out normal day-to-day activities?

22. NB. There is statutory guidance entitled Guidance on Matters to be Taken Into Account in Determining Questions relating to the Definition of Disability (2011), which the Tribunal is required to take account. (It can be found by searching online for the title.)

<u>Discrimination arising from disability</u>
23. This involves unfavourable treatment because of something arising in consequence of Ms Ferguson's various conditions.

24. Firstly, at the relevant time, did the DWP know that Ms Ferguson had a disability, or could it reasonably have been expected to know?

25. If so, what unfavourable treatment did she receive? She relies on the following:

a) In or about April 2023, stopping her access to the computer systems while she was off sick.

b) At around the same time, excluding her from the team performance, reward and recognition scheme. (She was told she was not entitled to take part by her manager Robert Cornford and his manager Clare Stanley (HEO).

c) On 12 October 2023, Marcus Baughurst rejecting her grievance about the above complaints.

d) On 21 December 2023, Jo Bray rejecting her appeal about the above decision.

e) On 9 February 2024 refusing her application for special leave, i.e. to be paid in full during her return to work period from 2 October to 27 November 2023.

f) Not holding her 'welcome back' meeting with Mandy Isaac until 18 January 2024.

g) At that meeting, not discussing the reason for her absence and whether any of it was disability related, as required by the sickness absence policy.

h) Failing to adjust her sickness absence records to re-classify some of the absence as disability related.

i) Her return to work plan having only been agreed for January 2024, Zoe Marshall, her new HEO
• Had no plan in place at the beginning of February and then
• Rejected her application for special leave to cover the period to 8 February.

j) Requiring her to use holiday and flexi-time to cover Mondays and Fridays during her phased return. (Her request to have those days as unpaid leave was refused on 12 March 2023 by Maria Dawes.)

k) Occupational Health having advised that her position should be reviewed about four weeks after her phased return came to an end, Maria Dawes
• Did not have any review and / or
• Did not extend her phased return period.

l) On [21 August 2024] [Date amended at the start of the hearing] refusing her request to record meetings with managers. [[This appears to refer to the conduct of the claimant's grievance conducted by Mr Bruce Campbell].

26. Did the DWP treat her unfavourably because of the "something arising" in consequence of her various conditions, namely:

a) in respect of (a) to (i) above her long-term absence from October 2022; alternatively

b) in respect of (e), (i), (j) and (k), the difficulty she had in working full-time hours over the course of a week; alternatively

c) in respect of (j), the difficulty she had in working full-time hours over the course of a day; and

d) in respect of (l), her cognitive impairment / 'brain fog' / 'fibro fog'/

27. Can the DWP show that this treatment was a proportionate means of achieving a legitimate aim? The DWP will need to set out that aim(s) and its case on proportionality in the amended response. [These justifications were set out in the Respondent's Amended Grounds of Resistance dated 25 April 2025].

<u>Failure to make reasonable adjustments</u>

28. Ms Ferguson says that the DWP had a provision, criterion or practice of:
a) not allowing staff on long-term sickness absence to take part in the term performance, reward and recognition scheme;
b) applying the staff sickness absence policy;
c) applying the leave policy;
d) not allowing members of staff to record meetings with managers.

29. If so, did it put her at a substantial disadvantage compared with others in that:
a) she had a period of long-term sickness absence;
b) she needed more flexibility and support to enable her to return to work in or around January 2024;
c) she suffered from her cognitive impairment / 'brain fog' / 'fibro fog'.

30. If so, did the DWP take such steps as were reasonable to avoid that disadvantage? The burden of proof does not lie on Ms Ferguson, but she says that the following steps should have been taken:
a) allowing her to remain in the team performance, reward and recognition scheme;
b) allowing her request for special leave to cover the period 2 October to 27 November 2023;
c) adjusting her long-term sickness absence records to re-classify some of the absence as disability-related;
d) allowing her request to have Mondays and Fridays as unpaid leave during her phased return;
e) allowing her to record meetings with managers.

31. Did the DWP know that she had various conditions or could they reasonably have been expected to know?

32. If so, did the DWP know that she was likely to be placed at this disadvantage or could they reasonably have been expected to know?

5. *The List of Issues included consideration of remedy. In light of our conclusions these are not relevant and it was agreed at the start of the hearing that remedy would not be dealt with in evidence or considered at this hearing*

The Hearing

6. The hearing took place over 5 days. The issues were discussed and clarified at the outset. We took some time to explain to the claimant how the issues could be used as a structure for her questioning and submissions to assist the tribunal to understand the case better. We also discussed and agreed that remedy would be considered at a separate hearing. We warned also that the truncated hearing time estimate (6 days to be heard within 5 days) might necessitate delivery of a reserved judgment. In the event the evidence took less time than expected but having deliberated on the fourth and fifth days we decided nevertheless that we wished to reserve our judgment.

7. The claimant indicated that she needed regular breaks approximately hourly as reasonable adjustments and these were provided. She occasionally became emotional and additional breaks were taken as necessary.

8. The tribunal gave permission, unopposed by the respondent, for the claimant to make a minor amendment to a date in the claim form which had been entered in error – amending a reference to a meeting with Mr Campbell from 5 July 2023 to – we think it should be - 2 August 2023 (the claimant referred to 18 August 2024).

9. We had a hearing bundle of 1272 pages.

10. The respondent provided us with a cast list and a reading list, to which the claimant added additional documents.

11. We had witness statements and heard oral evidence from:

    11.1. The claimant on her own behalf;

    11.2. For the respondent from:-

11.2.1. Amanda Issacs who was a Senior Executive Officer and supported the claimant line management during the claimant's transferring to Maria Davies' team in late 2023/early 2024

11.2.2. Jo Bray who was a Customer Service Leader and Appeal Manager of the claimant's first grievance outcome.

11.2.3. Clare MacKinnon and Operations Manager who provided further oversight and supported the claimant's line management until her transfer to Maria Davies Team

11.2.4. Zoe Marshall a Higher Executive Officer who supported C's line management following the claimant's move to Maria Davies' Team

11.2.5. Bruce Campbell a Partnership Manager who was the Decision Manager of claimant's final grievance.

12. There was a witness statement from Mr Robert Cornford who was the claimant's line manager during most of 2023. However, for reasons the Respondent did not explain he did not attend to give oral evidence and so we did not give significant weight to his statement although it was helpful in giving general background to the Rewards and Recognition Scheme and the awards made in 2023.

13. There was an issue at the start of the hearing about whether up-to-date policies had been included in the bundle and whether there were policies which had not been disclosed and were missing from the bundle. As regards whether the policy and procedures documents which were in the bundle were those in force at the relevant time, this was confirmed in a witness statement provided overnight on Day 1 by Ms Cloke, the respondent's Head of HR. The claimant did not ask to cross examine Ms Cloke, and we accept that the documents in the bundle were those that were in force at the material time. As regards missing documents, the claimant referred to underlying policy documents that were not in the bundle. Because of the risk to the hearing if there needed to be a significant additional disclosure exercise, we asked her to identify what she thought would be critical to her case in the missing documents. Ultimately she chose not to pursue this issue.

14. We had written and oral submissions from the respondent. The claimant was given the opportunity to make closing submissions but she simply thanked the tribunal and the respondent for their time and attention. We reassured her that her claim form, witness statement and evidence and the underlying documents to which we had been referred would be taken into account when reaching our conclusions.

Findings of Fact

15. We make the following findings of fact on the balance of probabilities and in light of the totality of the witness evidence we have read and heard and the documents to which we have been referred. We reference only those matters which we have considered necessary for our conclusions.

16. The claimant was employed by the respondent as an administrator in the respondent's Hastings UC Service centre dealing with initially child maintenance and latterly universal credit applications. She had a good attendance record prior to December 2022. She was employed on a Homeworking Contract.

17. She experienced a significant health setback in late 2022 and went off sick on 1 December 2022. She did not return to work until 2 January 2024., when she returned to work under a phased return to work plan.

18. The claimant received full sick pay for 6 months, reducing to half pay for a further 6 months up to a maximum of 12 months pay.

19. The claimant is a public authority which operated a large number of policies and procedures, supplemented by managerial guidelines. This information was published and available for staff to access via the respondent's IT system.

20. The most relevant parts of critical policies, procedures and guidelines are set out below:

Attendance Management Policy and Procedures:

Managers must:

2. (c) Support and work with the employee to explore what they can do, or might be capable of doing with help, to continue to work or return to work as soon as possible. Referrals to the Employee Assistance programme or Occupational Health Service, for advice on preventing or resolving health-related problems can be made at any time, not only when sickness absence occurs;

(d) Consider and put in place temporary workplace adaptations or reasonable adjustments to help an employee stay at work, maintain their performance or return to work.

(e) Take decisions that are reasonable, proportionate and based only on the circumstances of the case – always standing back from the detail to check that the outcome feels fair and can reasonably be justified. The requirement is to achieve a fair outcome through a fair process.

(f) …. Managers should ensure that SOP is updated throughout the attendance management process.

During sickness absence

16. The manager must keep in regular, appropriate contact with the employee during their absence in accordance with the agreed arrangements. This contact must not be overly prescriptive. Keeping in touch must be positive, supportive and appropriate to the individual circumstances. The way a manager engages with the employee during sickness absence is key to helping them return to work.
17. The 'keep in touch' discussions will focus on an employee's health and wellbeing, the support a manager can provide and what an employee is doing to aide their recovery.

18. If the absence reaches 14 consecutive calendar days, the manager must follow the guidance on continuous sickness absence.

Returning to work
19. The manager must hold a supportive welcome back discussion after every period of sickness absence, on the day the employee returns to work.

20. Following the welcome back discussion, the manager should close the sickness absence on SOP promptly.

Health & Attendance Improvement Meeting (H&AIM)

27. When a trigger point is reached the manager must issue the employee with an invitation to a formal meeting called the Health & Attendance Improvement Meeting (H&AIM) giving at least 5 working days written notice… They must be allowed to be accompanied by a work colleague or trade union representative of their choice…

28. The H&AIM must be welfare focused. Its main purpose is for the manager to understand more about the employee's absence(s), including more about their illness, the treatment they are having or had, what the employee is doing themselves to maintain a satisfactory level of attendance and what might be done to achieve a satisfactory level of attendance:
(a) There is no pre-determined outcome to the support-focussed H&AIM;
(b) Most of the time should be spent discussing support, help and health / wellbeing improvement, focusing as much as possible on practical things that might be done;
(c) Consider whether advice from Occupational Health is required
(d) Reasonable adjustments and other corrective/supportive measures (such as Temporary Workplace adjustments and PTMG) should be considered and discussed.

Formal action for continuous, long-term absences

49. Absence is long-term once it reaches 28 consecutive calendar days. The purpose of long-term sickness action is to get the employee back to work within a reasonable time giving them the help and support they need to return.

50. In all cases, the manager and employee must agree a Back to Work Plan to set clear goals and actions to facilitate a successful return to work.

51. After 14 consecutive days the manager must arrange a keep in touch discussion with the employee to explore the support needed to help the employee return to work. If the absence continues beyond 28 days it is important to have regular formal review meetings, normally monthly, to explore the support needed, but also to consider whether the employee is likely to return within a reasonable time frame.

52. At the review meeting the manager must be sensitive and supportive, trying in all cases to help the employee overcome their illness and return to work. They should:
(a) Discuss with the employee whether they are likely to return to work in a reasonable timescale
(b) Explore whether there are any underlying problems or disability which may be contributing to the absence and if any reasonable adjustments are required.
(c) Ask the employee for their opinion on their condition and if there is a realistic possibility of a return to work soon
(d) Ask if there is anything that can be done to help them return to work for example returning to work on Part Time on Medical Grounds
(e) Explore with the employee what treatment they are receiving or what they are doing themselves to help manage or improve their condition;
(f) Review and update the Back to Work Plan.

It is mandatory that managers arrange an Occupational Health Case conference when an employee's absence…

<u>Attendance Management Advice</u>

Meetings: ….
Q12. Can an employee be accompanied at an informal meeting?
Yes. While these meetings remain informal they should be supportive and an employee may feel they would like support from a colleague or Trade Union representative
Q12a. …Meetings that are required as part of the attendance management process can be conducted either face to face in a DWP office or virtually using MS Teams/telephone… Note that if it is agreed to use MS Teams for a meeting,

it should not be recorded unless it is necessary as a reasonable adjustment. Please refer to Q14a in Standards of Behaviour Advice.

Part time medical grounds (PTMG)

Q16. How long should a period of PTMG last?
PTMG is for a maximum period of 13 weeks. This may be extended after discussion with HR Casework but it must not be indefinite. PTMG is not suitable, nor must it be extended, when the employee will not be able to return to their contracted hours within a reasonable period of time.

[NB: Part Time Medical Grounds arrangements were envisaged as an alternative when a phased return to work with temporary workplace adjustments and reasonable adjustments were or were expected to be unsuccessful in the short term. A PTMG arrangement would involve the employee's working hours and therefore pay being reduced for the period of the PTMG arrangements]

Examples of temporary workplace adaptations

Working arrangements
Phased return to work following a short absence, building up from shorter hours and/or fewer days to the employee's usual working pattern. This build up should be over a short period of time. Options could include:
1. flexi credits
2. special leave (paid or unpaid)
3. recording as sick leave.
4. The approach taken may also be dependent on whether any other temporary workplace adaptations have been implemented.

This does not replace the availability of a formal part time medical grounds arrangement which may be appropriate for a longer period after a long-term/serious illness

The availability of a formal part time medical grounds arrangement which may be appropriate for a longer period after a long-term/serious illness

1. changes to working hours to allow a later start/earlier finish/shorter days or to allow travel at quieter times;
2. providing assistance with travel costs (e.g. taxi fares) …
3. working from home (if appropriate) subject to the usual rules on working from home. This may include an employee working at home on more days than they normally do, for example initially working at home for 5 days per week rather than for 2 days per week but building up office working days over a reasonably short period;
4. allowing occasional short breaks throughout the day e.g. to allow an

employee with chronic back pain to stand and undertake basic stretching exercises or to allow an employee experiencing stress or a mental health problem to take time out in a quiet area.

Control of IT user accounts

21. The respondent operated a policy or practice of controlling user account access to its IT systems when employees were on long term special leave. It provided

15. It is important that only the right people have access to DWP's systems and data. Managers must take appropriate action for those on long term special leave to ensure. IT accounts do not remain live when they should not be, and where employees are on long term leave, accounts are closed as if the user had left the department.

16 Managers will need to consider removal of access from applications, the termination and handling of employee user smart card and whether to suspend or fully delete user access to the departmental computer system by DWP Place, including system access to enable employees to do their job on return to work.

<u>Special Leave Procedures</u>

1.Special Leave may be paid or unpaid and can be taken as half or full days unless stated otherwise in the relevant leave category below.

2. In most circumstances, there is no automatic entitlement to special leave. The time off is discretionary and subject to business need. Where there is a statutory right to time off, this is indicated in the procedures below. ..

5. When employees are absent on paid or unpaid Special Leave, the Department's normal Standards of Behaviour Procedures, The Acceptable Use Policy and other rules of conduct continue to apply.

Applying for Special Leave

7. The only permissible way of applying for special leave is via SOP.

Deciding Requests for Special Leave

10. Managers should award special leave in line with the policy, procedures and advice. They may decline applications when it is reasonable to do so. In such cases, employees may apply for annual leave or flexi leave to cover all or part of the absence. Such applications must be considered in the normal way.

11. Applications for Special Leave must always be decided on the basis of what is reasonable and appropriate in the circumstances, taking into

account business needs, the employee's needs, the impact on colleagues and the Department's reputation.

Control of IT user accounts

15. It is important that only the right people have access to DWP's systems and data. Managers must take appropriate action for those on long term special leave to ensure. IT accounts do not remain live when they should not be, and where employees are on long term leave, accounts are closed as if the user had left the department.

16. Managers will need to consider removal of access from applications, the termination and handling of employee user smart card and whether to suspend or fully delete user access to the departmental computer system by DWP Place, including system access to enable employees to do their job on return to work.

Special Leave Categories

[Categories of Special leave included matters such as bereavement, military service training, tribunal attendance, career breaks and, relevantly Disability and Health Related Leave [DHRL]. The relevant provision for DHRL provided [emphasis added] *:*

52. Managers may grant special leave with pay to help employees manage their disability or long-term health condition for which ongoing treatment is needed <u>after the employees fit enough to work.</u> In the case of disabled employees, this might be a reasonable adjustment, or one of several reasonable adjustments made to help the person participate equally at work.

53. The amount of special leave granted must be based on the individual circumstances of each case. The normal expectation is that up to five days special leave with pay may be granted in any rolling 12 months. But there may be cases where it is reasonable to provide more support. For example, where employees are undergoing kidney dialysis or counselling. Managers should apply discretion with sensitivity and common sense. And seek advice from the HR expert….

55. <u>Disability and health related leave must not be used to mask sickness absence. If employees are unable to attend work due to sickness or injury, or the remaining symptoms of sickness or injury, they must take sick leave.</u> Disability and health related leave must also not be used for routine treatments or appointments that most people experience in order to maintain good health such as doctor, dentist checkups and non-disability related hospital outpatient appointments.

57 Managers must record these absences on SOP. Under the other health and disability category of special leave..

...

Standards of Behaviour Policy
Q14(a) If the employee and manager agree, can MS Teams' recording and transcription functionality be used to record meetings?

No. For various reasons, including personal privacy and data protection ones, MS Teams recording and transcription is currently restricted to work meetings at which private matters and personal staff data will never be discussed….
As it cannot be foreseen at formal meetings (Discipline, Attendance Management, Poor Performance or similar) what will be said and placed as a recording in a data file, and there is a risk that such data files may not be stored correctly and appropriately deleted, for these and other reasons MS Teams is currently not to be used within DWP to record anything other than standard work meetings. Exception might be made within DWP for a disabled employee if recording a formal meeting or using a transcript was a reasonable adjustment under the Equality Act 2010 and all other possible alternative adjustments (such as normal note-taking by a colleague at the meeting) have been considered and would not meet the disability-related need.

Award and Recognition Policy and Procedures

In Year Reward and Recognition Scheme

1.1 Teams and Individuals can be recognised for displaying exemplary behaviours or making a significant contribution to team performance. Recognition can be remembering to say a simple thank you, sending an e- card or nominating an individual or team for an award. Financial rewards can be either by voucher or cash. …

1.3 Business areas will have local processes for nominations and decision making. Responsibility for authorising and ordering in year awards sits with line managers.

Incentive Scheme

2.1 The scheme can be used by managers to incentivise teams and individuals, for example, to improve performance against team objectives. The manager, will identify a specific piece or area of work, which is business critical and decide to make an award to a team or an individual if the piece of work is completed to the required standard and within set limits. The scheme and level of incentive must be discussed and agreed with the budget holder in advance to ensure sufficient funding is available.

3.4 In considering nominations for awards, individuals or panels with decision-making responsibilities must guard against any possibility of unintentional discrimination. All employees fall into the scope of the policy, and not just those in a particularly visible or high profile role.

22. The respondent also operated a grievance policy and procedures. There was no complaint about the application of any grievance or appeal procedures and the details of these do not need to be set out.

23. After she commenced sick leave on 1 December 2022 Mr Cornford held a 28-day formal long term absence meeting with the claimant on 6 January 2023 in accordance with the Absence Management policy and procedures and produced a draft back to work plan.

24. However, the claimant remained signed off sick. An Occupational Health ("OH") report at that time certified her unfit for any work with no predictable return date due to pancreatitis and an inflammatory condition. The claimant reported fatigue, loss of appetite nausea, sweats and weight loss.

Reward and Recognition Award

25. Mr Cornford informed the claimant by email that the Team had been nominated amongst the teams making up a group of teams in the South-East region for performance awards based on maximising the percentage of new claims paid for the months of March and May 2023. The claimant acknowledged this as good news at the time.

26. As above the Reward and Recognition Scheme envisaged that individuals or teams could be nominated for awards. Nominations were considered by a group of colleagues to ensure consistency with other awards and alignment with the respondent's policies and objectives. The sums involved ranged from £25 up to a maximum of £75 in cash or vouchers.

27. Mr Cornford's team was notified that it had won awards and received a certificate and two £25 vouchers on 9 September 2023. Mr Cornford's witness statement stated that the team decided to put the award aside for a gathering later in 2023.

28. The claimant mentioned to Mr Cornford on 10 July 2023 on a Keep in Touch ("KIT") call that she felt awards given after December 2022 should include her because it was discriminatory not to do so. She contended that she was told by Mr Cornford and by his HEO Clare Stanley on 17 August 2023 that she could not take part in the scheme because she had not been in work during those months. She contended before us that she was entitled to recognition and to participate in the award for two reasons:

28.1. First, because she had in fact contributed to the performance of the team by making process suggestions to improve payment performance in the course of KIT calls with Mr Cornford. In support of this contention she relied upon two undated manuscript pages which she said were her notes of KIT meetings and which referred, she told us, to suggestions for payment performance improvements. On the evidence we were not persuaded that the claimant made contributions which would or might have entitled her to be included in the award granted to the team on this basis. The claimant did not anywhere state when these conversations took place, and there are references within the documents that the claimant will be signed off for another month from 20 February 2023 which strongly suggest that the recorded conversations took place before 20 February 2023. This is outside of the months for which the rewards were granted. We find that the claimant did not in fact contribute to the work of the Team in or in relation to the months of March or May 2023.

28.2. Second, and alternatively, because she was off sick she was excluded from participating in the reward for that reason alone and that that amounted to discriminatory conduct. We consider the legal analysis below, but as regards our findings of fact we record that the claimant was absent on sick leave for the months for which performance was rewarded and did not contribute to the performance. She was also in practice excluded from whatever gathering was subsequently partly funded by the reward because she was at home, off sick and not present to participate in it. The respondent's evidence (Ms Isaacs) was that recipients could themselves decide how to use the reward and that if that use (for example buying a cake or having drinks) coincided with the absence of an employee whether on sick leave, holiday or for any other reason, the position would be that those members of the team would not enjoy the benefit, while (for example) new arrivals who happened to be present would benefit from something they had not contributed to. This is simply an aspect of team working. We accept Ms Isaac's evidence.

29. We find as a fact that the respondent did not operate a PCP of excluding employees who were on sick leave from participating in the Reward and Recognition Scheme. If the claimant, in common with any employee had contributed and been able physically to attend any gathering to mark the award when it took place we think that she would likely have been informed (we so infer because Mr Cornford in fact informed her of the awards) and invited if her disabilities allowed.

30. Picking up the chronology again, Mr Cornford continued to hold periodic remote KIT meetings with the claimant during this period. We find that these were weekly until about Mid-July. Mr Cornford went on leave in July, August and all of September. A topic in her grievance and appeal was that

these were not held from mid-July until 25 August 2023. There is no specific complaint before us about frequency of KIT contacts. We find that the contacts exceeded at all times the monthly minimum envisaged by the Attendance Management Procedures, Mr Cornford and a Ms Clare Stanley were engaging with these concerns and arrangements to restore the weekly calls from 25 August 2023 were put in place.

31. However, we find that by about August 2023 there was a mismatch between the support which Mr Cornford and Ms Stanley were providing and the claimant's expectations of what should have been provided. We note from the grievance investigations by Mr Baughurst (see below) that Mr Cornford reported to Ms Stanley that he was receiving 4 or 5 emails a day from the claimant about wages and payment issues by the end of August 2023. We find that by about this time the effective relationship between the claimant and Mr Cornford was breaking down and Ms Stanley was also concerned that her interactions with the claimant were being misinterpreted. This led Ms Isaacs, who had supervisory responsibility for the department, to step in and line manage the claimant's absence and return to work from November (see below).

IT System Access

32. Ms Isaacs told us, and we accept that the Control of IT policy which was expressed to apply to employees on special leave was applied, for the same reasons – to preserve system and data security – to employees on long term sick leave. We find that the restriction or limitation of access to IT systems was a policy and procedure that was applied to all employees. There was no policy option simply to maintain access.

33. The claimant's access to the respondent's IT system stopped in about April 2023 after the claimant had been absent continuously for 90 days. The claimant's access was fully stopped, and not limited or restricted. This was not an automatic process. It was decided upon by Mr Cornford as the line manager at the time.

34. As a consequence of stopping her access the claimant would have been unable herself directly to access some information of potential relevance to her absence: she referred to the respondent's information 'hubs' and underlying policy and procedures documents relating to absence management, special leave which were accessed by 'click through' links in the online policy and procedure documents. However, Ms Isaacs' evidence, which we accept, was that the claimant still retained access to all of the respondent's employee support services and resources because such access was available through an employee's personal email. She could also access Teams calls as necessary through her private email address. There is at least one example [113] in June 2023 of Mr Cornford using the claimant's talktalk personal email address as her 'work' address

for the purpose of communicating with her to provide a voucher (possibly for medical treatment) and in response to which the claimant asks for information about the respondent's employee assistance support programme as she was 'struggling and may need some support' after a recent health update.

35. Ms Isaacs also said that the claimant could have asked Mr Cornford for any information or any access to any policy resources she needed. We find if the claimant had asked that that would have been done. There is, of course, the point that without access to the system that the claimant might not have known what to ask for, but there is no evidence that that was a matter or concern that she raised or explored with the respondent at the time. By contrast on 10 July 2023 Mr Cornford sent a suite of links to the claimant (with an offer to provide hard copies) in response to her request for full guidance on Attendance Management, Annual Leave, Disability , the long term absence procedure, part time medical grounds adjustments, phased return guidance, and information on reasonable adjustments.

36. We find therefore that the claimant was not in fact effectively cut off from resources or from contacts with her team leader as a result of her IT access being terminated. When discussions began in October 2023 concerning her return to work she raised the question of access with Mr Cornford on 11 October 2023 and he in fact initiated that process on 12 October 2023.

37. Resuming the chronology, the claimant's sick pay reduced to half-pay from May 2023.

38. In June the claimant had requested some annual leave time to be taken in August – we understand that her intention was that this would allow her half pay to be effectively upped to full holiday pay. She did not receive a prompt response to this request. She complained about this in her first grievance

39. On 31 July 2023 the claimant was signed off unfit to the end of August 2023 because of pancreatitis.

40. The claimant sought and obtained assistance from her union from about this time.

41. On 17 August 2023 the claimant made a GDPR request relating to her personnel and other records held on her by the respondent.

42. On 24 August 2023 the claimant raised a grievance based on perceived discrimination against her arising from: failure to provide information requested, ignoring a request for annual leave made in June, lack of information about work and opportunities as part of KIT contacts and lack of information about pay and sick pay. She expressed her concern that

previously supportive contact had changed after she started to raise questions about sick pay and attendance management issues in June/July and made her Subject Access Request.

43. Mr Baughurst – a manager outside of the claimant's leadership hierarchy as the claimant had requested – was assigned to deal with the grievance. He also agreed to change the proposed note-taker at the claimant's request.

44. On 14 September 2023 Mr Baughurst conducted a grievance meeting with the claimant, who was accompanied by her union representative. The claimant was given the opportunity to comment on the minutes. We accept the minutes as an accurate record of the meeting. Mr Baughurst subsequently held interviews with Mr Cornford and Ms Stanley.

45. The claimant attended an OH appointment on 28 September 2023. The report dated 10 October 2023 records the claimant's continuing symptoms of fibromyalgia, joint hypermobility, pancreatitis, long-term sleep disturbance and fatigue during the day. Mention is also made of osteoarthritis having been made in a previous report. The report advised:

46. The claimant remined unfit for work. The OH adviser was unable to provide a specific date for a return to work but suggested that she should be fit to do so within 8 weeks.

    46.1. She would be affected at work by varying levels of fatigue and a degree of brain fog.

47. Pre-existing adjustments should remain in place. She would benefit from a phased return to work. Recommendations having been discussed and agreed, these should be reviewed by management and there might be a referral back to OH if necessary. She would benefit from microbreaks.

    47.1. The claimant appeared to be experiencing a degree of isolation from the team and would benefit from joining the team via 'Teams' calls as she prepared to return to work.

48. In the interim the claimant continued to express further dissatisfaction with the responses to her emails and with communications with her.

49. On 1 November 2023 Mr Baughurst issued his grievance outcome letter. Having investigated he concluded that despite a breakdown in communications between all parties there were no grounds to find discrimination or malicious intent. He rejected the grievance. The claimant was advised of her right to appeal.

50. On 16 November 2023 Ms Isaacs held a KIT call with the claimant. Ms Isaacs informed the claimant that when she was able to return to work she

would join a different team led by Maria Dawes (Executive Officer) and her HEO Zoe Marshall. Ms Isaacs would take over temporary line management responsibility for the claimant and address her return to work arrangements together with Ms MacKinnon in support. This was to be further discussed at the next fortnightly planned catch up call. In a further call on 25 November 2023 Ms Isaacs updated the claimant about her flexi-credit and accrued annual leave accruals and entitlements and approved the claimant's request to take a period of annual leave between 27 November and 22 December and on 28 and 29 December 2023 which was to be deducted from her accrued annual leave entitlement.

51. The effect of the claimant taking these dates as leave was that notwithstanding that her sickness leave of absence would come to an end on 27 November 2023, the start of her phased return to work would not commence until 2 January 2024.

52. Ms Isaacs and the claimant agreed a very detailed return to work plan in the course of November 2023 [280-281]. The plan envisaged in broad terms:

    52.1. Phased return to work from 2 January 2023

    52.2. Working days Tuesday Wednesday and Thursday

    52.3. Mondays and Fridays to be taken as annual leave days;

    52.4. Lunch and formal tea breaks plus microbreaks half hourly as required;

    52.5. Use of assumed consent to finish early if unable to work a full day, and short notice leave if required subject to management approval

    52.6. The plan also noted the claimant had 42 minutes in accrued flexi credit at end of her last full week in work, an annual leave balance of 44 days of which 10 were taken as pay, and as at 5 December 2023 a further 20 were being taken as pay plus 2 booked for Christmas leaving a balance of 12 days.

53. The draft plan – prior to approval by Ms Dawes – was sent to the claimant on 7 December 2023. That email and the attached plan stated that Ms Dawes would be on holiday during the claimant's first week back and the aim of the meeting to be held on 2 January 2024 with Ms Isaacs was to be "for us to catch up and review your BTWP (Back to Work Plan) SMP (Stress-Management Plan and WRAP (Wellness and Reasonable Adjustments Passport) etc." On 14 December 2023 Ms Isaacs responded to a query from the claimant explaining that annual leave taken during leave of absence on half sick pay is paid at the half pay rate.

54. Ms Jo Bray - an independent manager – was asked to conduct the claimant's appeal against the first grievance outcome. She held an appeal meeting with the claimant, who was accompanied by her union representative, and there was a note taker. We accept the notes as a broadly accurate record.

55. Ms Bray explained that the scope of her task was a review of the grievance decision not a rehearing. This was in accordance with the respondent's grievance and appeal policy. The claimant was permitted to make representations and provided with copies for comment of the notes of Mr Baughurst's interviews with Mr Cornford and Ms Stanley. She was also allowed to introduce new topics, including the stopping of her access to the IT System and exclusion from the Reward and Recognition Scheme.

56. Ms Bray sent her outcome letter to the claimant on 21 December 2023. She partly upheld the grievance decision because there were failures by Mr Baughurst to adhere to certain technical requirements of the grievance procedures – for example not holding a meeting to explain the outcome and omitting to attach to the report copies of emails which the claimant had submitted. However, she dismissed the claimant's allegations of discrimination. She also dismissed the claimant's complaints in relation to the IT access and Reward schemes because the steps taken were in accordance with applicable procedures.

The Phased Return to Work

57. The claimant began her phased return to work on 2 January 2024.

58. Ms Isaacs met on Teams with the claimant and her union representative on that day. The meeting lasted 90 minutes. We find that there was extensive discussion of the arrangements for the claimant's phased return to work. Following the meeting an updated phased return to work plan was produced. No issues were raised by the claimant or her representative about the nature or content of that meeting at the time. Ms Isaacs allocated flexi-time to the claimant to take the rest of that first day off.

59. On 9 January the claimant met on Teams with Maria Dawes, her new team leader to introduce her to the team. The claimant also provided Ms Dawes with a copy of her Wellness Recovery Action plan – a mental health action plan that had been proposed following her OH report of October 2023.

60. On 11 January the claimant emailed Ms Isaacs, Ms Dawes and Ms Marshall with a list of outstanding actions. These included: Welcome Back Meeting to be booked - to be reviewed weekly on Tuesdays with Team Leader (Maria and / or Zoe / Mandy); and Workplace Adjustment Passport to be reviewed on 2nd January.

61. Ms Isaacs responded on the same day apologising and explaining that she had thought that the Welcome Back meeting had been held with Ms Dawes on 9 January 2024, and Ms Dawes had understood that Ms Isaacs had held the formal Welcome Back Meeting on 2 January – the claimant's first day back at work. Ms Isaacs offered to conduct a formal Welcome Back meeting on 16 January – the claimant's next working day. In the event this was agreed to be held on 18 January 2024.

62. Ms Isaac's notes of this meeting indicate, and we find that that meeting involved discussion of the claimant's health issues and covered aspects of the claimant's return to work arrangements which had already been discussed on 2 January 2024. It reflected a generally positive start back to work by the claimant. The claimant's Workplace Adjustment Passport was sent later the same day. This recorded the need for microbreaks and flexible working hours amongst other items. Ms Isaacs also arranged for an updated OH assessment.

63. The topic of Disability Related Special Leave for the period 2 October to 27 November 2023 was not discussed at this meeting. Ms Isaacs told us, and we accept, that she had already discussed the topic with the claimant at the meeting on 2 January 2024 and concluded that the claimant was not eligible for such leave because at all times the claimant was signed off sick and was therefore not eligible for Disability Related Special Leave for that period.

64. On 23 January 2023 the claimant sent Ms Isaacs an email that she was seeking 2 October 2023 to 27 November 2023 as Disability Related Special Leave on the grounds that the 10 October 2023 OH report advised that she would require this period to adjust to medication.

65. The claimant was assessed by OH again on 24 January 2024. The report confirmed that the claimant was now fit for work. It recommended:

    65.1. Flexible working, including working from home. Refraining from working excessive daily hours - remaining within her current hours of 8:00 AM to 4:00 PM; additional microbreaks, as well as 15 minute breaks mid-morning and mid-afternoon and a reduction in workload. It noted that currently the claimant was using annual leave for two days per week (Monday and Friday) in order to reduce her weekly working hours. It suggested that as the claimant reported a reduction in symptoms over the forthcoming month, days could be added in gradually, starting with 1/2 day and building up gradually as her tolerance allowed. When she had built up to full time hours the situation should be monitored as a trial. If her attendance dropped then there should be a trial period of 6 months of reduced hours again. If this failed to permit a return to full-time work then a move to a permanent part time medical grounds working pattern was suggested.

66. There was an exchange of emails on 27 and 30 January 2024. The claimant complained that she had tried to claim Disability Related Special Leave for 2 October to 27 November 2023 on the SOP system (see her email of 23 January 2023 above) but had been unable to do so. Ms Isaacs responded, copying extracts from the Special Leave Policy and explaining that the claimant did not fit the criteria for Disability Related Special Leave because she was signed off sick during that period. The claimant then complained that the reason she was not able to enter her claim for Disability Related Special Leave was because the matter, along with others, was not discussed at the Welcome Back Meeting on 18 January 2024 as the procedures suggest it should have been.

67. As a consequence, the claimant refused to engage with Ms Dawes and Ms Marshall on 30 January 2024, when there was a scheduled discussion as part of weekly phased back to work reviews, to consider and agree the phased return plan as it moved into the month of February. Ms Dawes' email of 2 February 2023 records this refusal and that the claimant said that it was because of the claimant "*feeling that there were issues preventing this*".

68. Ms Marshall spoke to the claimant at length by phone on 1 February 2024 to get some clarity on the issues to be addressed. She recalled the conversation as not being productive.

69. On 2 February 2024, the Claimant emailed Ms Isaacs and Ms Dawes to say that she would not be attending work because she felt that there was no back to work plan in place for her for the month of February 2024. Ms Dawes responded later that evening dealing with the claimant's point about Disability Related Special Leave for October and November 2023 and updated the position on the various matters surrounding the claimant's back to work planning, reasonable adjustments and other support procedures.

70. The claimant responded later in the evening of 2 February 2024 with a lengthy email insisting upon a decision on her Disability Related Special Leave request for October/November 2023 and further review on her February back to work plan. The tone of the email was challenging and at the end the claimant said " *In future I wish to have meetings facilitated by either "recording the meeting" if my TU rep is unavailable to be present"*. Her email was copied to Ms Isaacs, Ms Marshall and Ms Mackinnon.

71. In light of the correspondence a further meeting was agreed for 6 February 2024. On 5 February 2024 Ms Mackinnon authorised the claimant two days of flexi-credit for the period when the claimant felt she could not attend work due to there being no action plan in place for February 2024 and confirmed that her special leave application would be formally decided.

72. At the meeting on 6 February 2024 the claimant was accompanied by her union rep. She agreed to continue with her phased return on the basis previously agreed in the January Back to Work plan. She asked that her non-working days be the subject of flexi-credits as Reasonable Adjustments rather than using up her accrued annual leave days and Ms MacKinnon agreed to refer this request to the complex cases team for a decision. The output of the meeting was a further back to work plan for February in substantially unamended form with the rider that the claimant's above request would be considered, and a small number of other minor administrative clarifications around pay and leave queries and health and wellbeing activities.

73. By a letter dated 8 February 2024 Ms Marshall notified the claimant of her decision on the claimant's application for the period of absence between 2 October and 27 November 2023 to be classed as Disability Related Special Leave. Ms Marshall's decision was to refuse the request. Ms Marshall set out extracts from the relevant guidance in her letter and stated that "During the dates above you were currently signed off as being unfit for work by your GP and looking into our current policy and procedures this absence will not be supported consulting guidance your request does not come within any of the criteria". She also explained that the SOP would be amended to reference the claimant's request and the decision to refuse it.

74. On 8 February 2024 Ms MacKinnon responded to the claimant's request that instead of accrued annual leave and flexi-working being utilised to make up her working hours per week during her phased return to work period (as had previously been agreed) that she instead be allocated flexi-time credits for Mondays and Fridays. Ms MacKinnon, having taken advice from the Complex Cases team rejected the claimant's request. The reason given for the refusal was:

> "*Your absence is classified as a Long-Term Absence and so falls under Part Time Medical Grounds and is supported by our formal policy – see below.*
>
> *The availability of a formal part time medical grounds arrangement which may be appropriate for a longer period after a long-term/serious illness*
> *• changes to working hours to allow a later start/earlier finish/shorter days or to allow travel at quieter times*
> *• providing assistance with travel costs (e.g. taxi fares) to get to and from work in cases where it is the travel and*
> *not the work that is the barrier. This is subject to the usual rules on claiming travel expenses*
> *• working from home (if appropriate) subject to the usual rules on working from home. This may include an employee working at home*

on more days than they normally do, for example initially working at home for 5 days
per week rather than for 2 days per week but building up office working days over a reasonably short period
• allowing occasional short breaks throughout the day e.g. to allow an employee with chronic back pain to stand and undertake basic stretching exercises or to allow an employee experiencing stress or a mental health problem to take time out in a quiet area

I have also read the guidance that supports a short-term absence return and the application of Temporary Adjustments – please see below.

Examples of temporary workplace adaptations
Working arrangements
Phased return to work following a short absence, building up from shorter hours and/or fewer days to the
employee's usual working pattern. This build up should be over a short period of time. Options could include:
*• * flexi credits*
*• * special leave (paid or unpaid)*
*• * recording as sick leave.*
*• * The approach taken may also be dependent on whether any other temporary workplace adaptations have been*
implemented.
This does not replace the availability of a formal part time medical grounds arrangement which may be appropriate for a longer period after a long-term/serious illness

75. However, in the email Ms MacKinnon notified the claimant that she would support the granting of flexi-time credits to the claimant for all the Mondays and Fridays from 15 January 2024 (ie: 15,19,22 and 29 January and 2 and 5 February 2024) . This was stated to be by way of acknowledging the impact that the last few weeks had had on the claimant's physical and mental health and her consequent ability to increase her hours at the pace she had expected, and further that the claimant would not want to break into her new annual leave entitlement which renewed in February to facilitate her phased return to work period. She made clear that all other Mondays and Fridays during continuing phased return to work would need to be covered by annual leave or flexi-time credits.

76. On 13 February 2024 Ms Marshall and Ms Dawes held a regular return to work review meeting with the claimant. In that meeting the claimant asked for the meeting to be recorded. Ms Isaacs refused to permit recording. We accept her evidence that the reason for her refusal was that she was seeking to apply the policy against the recording of meetings which might involve personal information. The claimant therefore refused to proceed

with the meeting and it was rescheduled. Ms Marshall subsequently sent a copy of that policy to the claimant.

77. A further phased return to work review meeting took place remotely on 22 February involving the claimant and her union rep and Ms Dawes and Marshall. Ms Marshall allowed this meeting to be recorded.

78. On the same day a formal Health and Attendance Improvement Meeting (HAIM) was held. The claimant was present and accompanied by her union representative. This meeting was also recorded. Much of this meeting involved Ms Dawes explaining that once a sickness absence is recorded on the SOP it cannot be re-categorised until the employee returns to work, and the claimant asking questions about her record of absence because of sickness and challenging how her annual leave was recorded in SOP.

79. On 12 March 2024 Ms Dawes emailed the claimant to reject her request for the remaining Mondays and Fridays in February to be the subject of flexi-time credits rather than using up accrued flexi-time and annual leave. She refused the claimant's request. The reason she gave was:

> *I'm not approving a request for unpaid special leave, as we're able to continue to support you on full time pay when you are not working full time- such support should not be continuous. Guidance includes that such support should not continue for longer than a few weeks, and that you would continue to use annual and Flexi leave to make up the part of the week they are not currently working. We have supported your return to work with Flexi-credit for seven days over a period of four weeks under reasonable adjustments. Your phased return has been extended to the end of March. Under the decision, you will continue to increase your hours. Up to full time or look at a temporary change to working pattern.*

80. Weekly phased return to work discussions continued thereafter with the claimant, and either Ms Dawes or Ms Marshall. Oversight and support continued to be provided also by Ms MacKinnon.

81. The phased return to work continued through March and April. Emails from Ms Dawes following these meetings show that the claimant was making a strong return to work. For example, on 22 March 2024 Ms Dawes' email records: "*I was so happy to hear that you were having a good week this week. That you felt you could take on more work than we had originally agreed, as discussed in our weekly catch up.*" On 28 March the email records: "*Another fantastic week, you have taken extra work of over 200 cases this week, which has taken you to 1026 Claims. Your new claims intake is now on par with the rest of our team. Along with our daily Handovers (HO)....Your case load has grown by 300 since our last*

meeting, with you asking for more. We agreed I would allocate another 100 case and a proportion of new cases at 4pm today. Ready for you on Tuesday 2nd April when we return from Easter Holiday Weekend. We are aiming to get your case load to 1600 once you are at full time hours." At that meeting it was agreed that the claimant would work Mondays through April, with Fridays trialled with the expectation of Monday to Friday working by the end of April. The email contained a section headed 'Wellbeing'. It stated : "*We agreed you will let me know if anything is becoming to much for you, either workload growth or handovers. ....I have given you an open invitation to come into the office for either a coffee, wellbeing meeting, team meeting or your 1-2-1 so we can be face to face. Using your access to work for the taxi fares. You stated that you are starting to feel better, enjoy getting back to work and thriving with the results you are seeing within yourself*."

82. Further records of review meetings show increasing weekly hours – effectively full time over April - and the claimant asking for more cases until she reached 1666 cases by the end of May.

83. The claimant commenced early conciliation on 7 May 2024.

84. Weekly phased return meetings continued until 30 May 2024. They were then replaced with fortnightly reviews.

85. Once the claimant had resumed full time working by the end of May the respondent treated the claimant's phased return to work as complete as at 31 May 2024.

86. The claimant told Ms Dawes in a fortnightly review meeting on 27 June 2024 that she did not want to discuss her health progress as she was '*feeling let down by the DWP and this is setting off [her] triggers*". Ms Dawes discussed another OH assessment. The claimant's Homeworking Contract was due for review in July 2024 and the OH report would also inform that issue. Ms Dawes later told Mr Campbell that at this meeting that the claimant screamed at her and requested unpaid special leave.

87. On 5 July 2024 the claimant in an email to Ms Dawes complained about how the last meeting was not conducted in a private room and more generally about how she felt the respondent was treating her. She asked that: "*As a reasonable adjustment request – I would also like to request that these meetings are recorded for the sake of some of the conditions that impact me, memory, fibrofog*".

88. Ms Dawes considered the policy on recording remote meetings and concluded that because the meeting concerned matters of the claimant's health, that the applicable policy indicated that such meetings should not be recorded. She therefore refused the request.

89. The claimant raised a second grievance on 5 July 2024. Mr Campbell was an independent manager who was appointed from a rota to conduct the grievance.

90. Mr Campbell contacted the claimant and met her on 2 August 2024 with a note taker. Mr Campbell declined a request by the claimant to record that meeting because there was a note taker present and he said that the claimant would be sent and could comment on those minutes. Mr Campbell established that the gravamen of the claimant's grievance was an allegation that Ms Dawes had discriminated against her because, broadly, there had a been a failure to follow procedure in relation to her phased return to work, and Ms Dawes had wrongly rejected the claimant's request for unpaid special leave, and refused to allow her to record a meeting. Mr Campbell interviewed Ms Dawes and reviewed the OH reports before making his decision.

91. Mr Campbell concluded that the claimant had been supported appropriately through a phased return to work process, that appropriate consideration had been given to her request for special leave and the use of flexi-time during her phased return, and refusal in both cases was consistent with applicable policies. The same was true of the refusal to permit a recording of a meeting.

92. He notified the claimant of the reasons for his refusal of her grievance on 21 August 2024.

Narrative observations

93. Our overall impression of the case is that the claimant who had previously enjoyed a good attendance record and good relations with her then team members despite working remotely, was adversely affected, both physically and in terms of her mental wellbeing by a nasty health set-back in December 2022. She had no immediate family at home to support her. She appeared to us to be placing a significant, and we think excessive, degree of reliance and expectation on her employer and managers to sustain her spirits during her protracted ill health. Despite weekly contacts from her line manager, we believe she likely began to feel increasingly detached from her work and consequently anxious and vulnerable. There were a small number of on the face of it minor, but to the claimant troubling, incidents: the cutting off of her IT access, her perception of her exclusion from the Rewards and Recognition award and finally, in October, notice that she was to change teams, which fed into her anxieties. Her general anxiety was exacerbated further from around mid 2023 by financial worries when her sick pay fell from full to half pay. From this point she became increasingly demanding of her managers in terms of the provision of information about her rights and treatment concerning pay and holidays and increasingly suspicious of the respondent's 'system'. Those

suspicions affected her relations with colleagues and managers adversely and she came, in our judgment, to look for problems and shortcomings where there was no objective basis for such suspicions. She became convinced that because she was experiencing disability she was the target of discrimination and complained about multiple aspects of her treatment by her managers. Her questions in cross-examination appeared to us at points to be aimed at eliciting admissions that there was collusion between managers and independent managers to subject her to discriminatory conduct and suppress the truth about that. Our impression was, on the contrary, that her requests, complaints and grievances and her phased return to work were all handled in a supportive manner in accordance with those individuals' understanding of the applicable policies and procedures. Where discretions were available, on many occasions (perhaps unsurprisingly once managers came to think the claimant was likely to subject their actions to tribunal scrutiny) those discretions were exercised in her favour – for example in relation to the granting of flexi-time credits during January 2024.

94. We were overall satisfied that the Respondent's witnesses were honest and sought to assist the tribunal, notwithstanding our concern that to some extent witness statements had been prepared for them rather than by them – there were identically worded paragraphs with identical (erroneous) page references.

95. The claimant also gave her evidence honestly. However, she was at times reluctant to accept matters put to her even when they were evidently true and evidenced in the documents. An example was her maintaining the position that her return to work plan was not subject to regular review when she was taken to clear documentary evidence showing that weekly reviews were held with her and her managers for that very purpose. On the other hand, when she was asked to identify what it was about the decisions made by the respondent's managers was 'because of something arising from her various disabilities', she accepted in most cases that she was unable to identify any such reason for the respondent's actions.

96. Our impression was that the claimant began her claim believing that as she had been long term absent and experienced disabilities, it must follow that the refusal of various of her complaints and requests must have been discrimination, and her claims were worked up from that premise. As the hearing developed and the claims were tested in detail in a sensitively and carefully conducted, but highly effective cross-examination by Mr McHugh, the claimant herself appeared to lose some confidence in her claims, although we acknowledge that it must have been a mentally tiring experience for the claimant to conduct the hearing herself and we have made no inferences from her demeanour or conduct during the hearing.

97. We set out below our legal analysis and conclusions.

Time Limits : Applicable Law

98. Section 123 of the EQA provides that:

> *(1) ..... a complaint within section 120 may not be brought after the end of -*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable....*
>
> *(3) For the purposes of this section—*
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

99. When considering whether there is a continuing course of discriminatory conduct (for which time runs from the end of the period within which the conduct took place), the claimant must prove, in order to establish conduct extending over a period (a) that the incidents are linked to each other, and (b) that they are evidence of 'an ongoing situation or continuing state of affairs': Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686. The tribunal must distinguish between such cases and instances of a one-off act of discrimination which has continuing effects. The issue in that case was whether a rule or policy was of continuing application (and therefore a course of conduct) or a one-off application with continuing effect: Parr v MSR Partners LLP [2022] EWCA Civ 24.

100. If the claim is out of time there is no jurisdiction to consider it unless the tribunal considers that it is just and equitable in the circumstances to extend time. That is essentially a question of fact and judgment for the tribunal to determine: Robertson v Bexley Community Centre [2003] EWCA Civ 576

101. The claimant has the burden of proving facts and persuading the tribunal to exercise its discretion that it is just and equitable to extend time to allow claims to be brought in relation to earlier acts.

102. The applicable principles are summarised in Miller and ors v Ministry of Justice and ors EAT 0003/15 and Abertawe Bro Morgannwg University

Local Health Board v Morgan [2018] EWCA Civ 640, [2018] ICR 1194 at paragraph 17-19; Jones v The Secretary of State for Health and Social Care 2024EAT 2: In summary:

102.1. the discretion to extend time is a wide one;

102.2. the Employment Tribunal adheres to strict time limits. The exercise of discretion is the exception rather than the rule. But there are no presumptions and no strict requirement for the applicant to prove a good reason for a delay;

102.3. what factors are relevant to the exercise of the discretion, and how they should be balanced, are a matter for the tribunal. The prejudice that a respondent will suffer from facing a claim which would otherwise be time-barred is customarily relevant in such cases;

102.4. the tribunal may find the checklist of factors in S.33 of the Limitation Act 1980 helpful but this is not a requirement and a tribunal will only err in law if it omits something significant.

102.5. The discretion must be exercised logically and fairly, proven acts of discrimination carry weight in balancing injustice to a claimant who is denied any remedy because of delay alone, particularly where a respondent will suffer little or no prejudice. Logo v Payone [2025] EAT 95

102.6. Further problems can arise with mental conditions. But there is no general principle that a person with mental health problems is entitled to delay as a matter of course in bringing a claim: Department of Constitutional Affairs v Jones 2008 IRLR 128, CA.

Time Limits: Analysis and Conclusions

103. Since ACAS was first contacted by the claimant on 7 May 2024 acts or omissions which took place before 8 February 2024 are potentially out of time.

104. For the purposes of calculating time we find that:

104.1. The respondent's act of stopping the claimant's access to the IT system occurred by about mid April 2023;

104.2. The exclusion of the claimant from the reward scheme occurred in respect of the awards for March and May 2023 occurred on or about 9 September 2023;

104.3. The decision by Mr Baughurst to reject her first grievance was made and communicated on or about 12 October 2023;

104.4. The decision by Jo Bray to reject the claimant's appeal was

made and communicated on or about 21 December 2023

Continuing course of action

105. The Respondent submitted that:

105.1. whilst incidents in Issues 25 a) to c) which predate 8 February 2024 are linked factually to each other they have no factual link to the 'in time' elements of the claimant's claim.

105.2. the matters do not provide evidence of an ongoing situation/continuing state of affairs. The allegations are all individual instances/decisions and do not demonstrate a factual link to the later matters relied upon by the claimant in her claim.

106. Applying the test outlined in Hendricks we agree with the respondent's submission that the matters above, whilst linked to each other by reason of their context – the claimant's absence from work and the application of established policies and procedures to, and in that situation – they are instances of individual decision-making by different persons in relation to specific issues (such as IT access and the Rewards scheme). They do not evidence an ongoing course of conduct or continuing state of affairs. Moreover, aside from the mere fact that the long term absence policy and procedures also provided for return to work protocols and the claimant was relying on the same suite of disabilities, there was no, or no sufficient factual link between these elements and the elements of the claimant's claim that were out of time. The later claims in particular relate to the Respondent's conduct and decisions concerning and during the claimant's phased return to work. By that stage the claimant was working with a substantially different team.

107. However, in so far as complaints relate to the claimant's phased return to work, which commenced on 2 January 2024, we think that there is a strong factual link with those allegations and the late (post 8 February 2024) allegations. There is commonality of management and a factual link with the claimant's return to work process. Accordingly we think that allegations concerning matters arising on and after 2 January 2024 are continuing over a period ending in May 2024 and so are in time. The claims relating to the period before 2 January 2024 are therefore in our judgment out of time unless it is appropriate to extend time on the ground that it is just and equitable to do so.

Discretion to extend time on the just and equitable ground

108. In considering whether it is just and equitable to extend time in relation to conduct occurring before 8 February 2024 we have taken into account all the circumstances and the evidence and submissions before us.

109. In favour of extending time:

109.1. If time is not extended the claimant will be prejudiced by being shut out from pursuing some of her claims.

109.2. The claimant told us that she wanted to exhaust the internal grievance and appeal process before starting a formal claim in relation to the 2023 conduct. Although not strictly an answer to a failure to abide by time limits, it was a rational and reasonable election by the claimant to pursue internal grievance and appeal processes before initiating a dispute.

109.3. The claimant was experiencing a variety of disabilities and personal challenges at points during her absence during 2023 and her early return to work period. Her disabilities included, as she claimed, brain fog, adverse effects from medication and stress. These impairments would likely make the process of initiating a claim more difficult and potentially induce in the claimant a delay or reluctance to embrace initiating formal conflict.

109.4. The respondent would not be significantly prejudiced from a practical or forensic point of view if the older claims were allowed to proceed. It has been able to produce a number of relevant witnesses and much of the evidential landscape is documented. Furthermore, the hearing has taken place and it was not argued that the jurisdiction point be determined at the start of the hearing, so that the decision whether to extend time would not save the respondent the expense of the hearing.

110. Against extending time:

110.1. The starting point is that prescribed periods for presenting claims are generally to be complied with. If time is extended the respondent will be deprived of a statutory defence;

110.2. The claimant sought and obtained the assistance of her union in connection with the subject of her potentially discriminatory treatment by about August 2023. We infer that a union representative would be generally aware, able and likely to advise the claimant of the time limits for claims;

110.3. In her evidence the claimant accepted that she was aware generally of her right to bring a claim for disability discrimination in connection conduct occurring before 8 February 2024, and that she had advice and assistance from her union representative. She told us that she wanted to exhaust the internal grievance and appeal process before starting a formal claim. But she was informed of the outcome of her grievance by 1 November 2023 and of the rejection of her

appeal by 21 December 2023. She did not then commence early conciliation until 7 May 2024, some 6 months after the dismissal of her grievance and 5 months after the dismissal of her appeal. That is a lengthy period of delay;

110.4. As set out above, after January 2024 the issues largely concern a different set of circumstances – namely the claimant's return to work arrangements and her complaints concerning that issue and period. They are different in character and time from what the decisions and conduct occurring in the previous year in different circumstances.

110.5. By not extending time the claimant is deprived of the chance to pursue only some, not all of her claims.

110.6. Having heard evidence in relation to those claims which would be excluded, together with those that are within time, we are able to assess their merits, and as set out elsewhere in this judgment their merits are weak.

110.7. Although there was no specific practical or forensic prejudice to the respondent (as Mr McHugh accepted), he relied upon the general prejudice of the respondent's witnesses having to recall matters from 2023 which were unnecessarily stale.

111. There is relatively little in the balance of prejudice on either side. Balancing the factors as a whole, taking into account the fact that the claimant knew of her right to initiate steps to protect her claimed rights, their weak merits, the prejudice, though limited, to the respondent's witnesses recall and the general starting point that tribunal claims should be brought within prescribed time limits we conclude that it would not be just and equitable to extend time for the claimant's claims.

112. Accordingly, we consider that we have jurisdiction to determine only those claims that relate to conduct on and after 2 January 2024.

113. In case we are wrong about that, we have nevertheless set out relevant factual findings and indicated our conclusions on the basis of the evidence and the substantive merits on the claims that are out of time.

Disability and Knowledge

114. The respondent accepted and we find that the claimant's conditions of fibromyalgia, joint hypermobility, pancreatitis, and osteoarthritis, each amount to a disability within EQA section 6 and that Ms Ferguson was disabled with them, to the respondent's knowledge:

114.1. from August 2023 (in the case of fibromyalgia and joint hypermobility), and

114.2. from December 2022 with pancreatitis.

115. The claimant was diagnosed with osteoarthritis from 2017. We find that the respondent had constructive knowledge of the claimant's osteoarthritis from 10 October 2023 when it was referenced in an OH report of that date. The claimant's impact statement refers to a diagnosis of cervical osteoarthritis in 2017. We consider that when the respondent became aware of the claimant's fibromyalgia and joint hypermobility conditions it ought to have made inquiries about how those conditions affected her and whether those conditions which manifested in her as joint pain were the result of or connected with other conditions which could affect her in a similar way. Had it done so the claimant would likely have referred to her earlier formal diagnosis. On that basis we find that the claimant had constructive knowledge of the claimant's osteoarthritis condition from 31 August 2023. The respondent had actual knowledge of this condition from 9 January 2024 at the latest, when it is referenced in the claimant's Wellness Action Recovery Plan.

116. We find that the respondent had actual, alternatively constructive knowledge that the claimant had an anxiety condition amounting to disability from May 2022. The claimant alleges in her impact statement that she was diagnosed with General Anxiety Disorder in 2017. There is no evidence of a formal diagnosis from her medical records. However, the extent of symptoms connected with her various musculo-skeletal conditions was noted to include anxiety as a symptom in an OH report of 3 November 2021, and again, where the anxiety condition was noted as something likley to benefit from talk therapy, in an OH report of 26 May 2022. That report also recommended long-term workplace adjustments and support. In the grievance interview note dated 19/October 2023 [1186] Mr Baughurst records that Mr Cornford said "that he had "consciously tried to keep the focus of their discussions informal as he did not want to exacerbate her anxiety". We think that he would not have used language such as 'her anxiety' if he did not recognise that the claimant experienced anxiety as a continuing condition which required at least some management at work.

117. We were not satisfied that the claimant had discharged the burden of proving that the respondent had knowledge, actual or constructive, that the claimant was disabled by menopause. The first reference to menopause in the bundle is in a KIT meeting on 21 November 2023 when the claimant added it to the list of impairments she was experiencing and said she was awaiting consultation with a specialist. Ms Isaacs in an email dated 7 December 2023 also referring to menopause in a meeting she held with the claimant on 5 December 2023. We find therefore that the claimant had actual knowledge of concerns by the claimant about menopause conditions from 5 December 2023. However, there was no discussion about specific support for this condition initially. A CIPD consultant

referenced the condition as part of a list of conditions affecting the claimant in an email dated 28 February 2024 in the context of the claimant's request for flexible working. We find that the respondent was actually or constructively aware that the claimant had an impairment of menopause which, together with other disabilities, was the subject of a request by the claimant for some adjustments from 28 February 2024. But there was no medical or other evidence from the claimant herself provided to the respondent which illuminated the frequency, severity or nature of the adverse effects on the claimant's ability to carry out her day-to-day activities specifically related to menopause. On the evidence we find that the respondent was aware that the claimant was experiencing menopause, but whilst that could amount to a disability we are not satisfied that the claimant, even taking into account the potential impacts of menopause together with other disabilities has proved that the condition had significant adverse effects on her and so we find she has not discharged the burden of proving that she was disabled by reason of menopause.

118. However, as the respondent submitted, correctly in our view, the claimant was treated at all times as if she experienced all of the admitted conditions as disabilities. In effect she was managed as an employee who experienced disabilities. It makes little difference whether and to what extent the additional conditions were disabilities or not. Accordingly, for the purposes of our analysis we have assumed in the claimant's favour that she experienced all of the additional conditions she relies upon as disabilities and that the respondent had actual or constructive knowledge that the claimant experienced those disabilities and that any applicable PCP would be likely to place the claimant at same particular disadvantage as would be the case with her admitted disabilities.

Discrimination Claims – General

119. An employer must not discriminate against an employee in the terms of their employment, by dismissing the employee or by subjecting the employee to any other detriment EQA s 39(1). This prohibition gives rise to the right to claim under Section 13 and section 15 of the Equality Act.

Burden of Proof

120. Section 136 applies to any proceedings relating to a contravention of the Act and provides:

"(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".

121. There is therefore a two-stage analytical process. Stage 1 concerns the primary facts and Stage 2 the employers explanation. Guidelines on the application of the burden of proof provisions were provided in the Court of Appeal in Igen v Wong [2005] EWCA 142 and subsequently restated and explained in Hewage v Grampian Health Board [2012] ICR 1054 (SC) Efobi v Royal Mail Group Ltd [2021] UKSC 33 and Field v Pye & Co [2022] EAT.

122. The burden of proof is on the claimant at stage 1 to prove facts from which a tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an act of discrimination. The employer's explanation is disregarded. The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found, and the tribunal assumes that there is no adequate explanation for the facts. Inferences may be informed by evasive answers or failures to adduce evidence from relevant witnesses. The tribunal may also draw inferences from a failure to comply with applicable codes of practice. It is not sufficient at this stage for the employee merely to prove a difference in protected characteristic and a difference in treatment. Something more is required: Madrassy v Nomura International [2007] ICR 867 (CA). At this stage ultimately the tribunal must stand back from the detail and look at the cumulative picture.

123. If the claimant proves such facts, the burden shifts to the employer to prove on the balance of probabilities that the dismissal or detrimental or less favourable treatment was in no sense whatsoever on the grounds of the protected characteristic. Since the employer is normally in possession of the facts necessary to make out an explanation, a tribunal will normally require cogent evidence to discharge the burden of proof, and will examine failures to comply with applicable codes of practice carefully.

124. But the employer only has to prove that the reason for the treatment was not the forbidden reason. The employer does not need to prove that they acted reasonably or fairly, but in such cases the tribunal will be astute to test explanations that the employer was only acting unfairly and not for the discriminatory reason: Komeng v Sandwell Metropolitan Borough Council UKEAT/0592/10/SM.

125. In an appropriate case, where the Tribunal is able to make a clear finding of fact as to the reason why the respondent behaved as it did, it may do so without the necessity of engaging in the two-stage analysis, although it must clearly articulate that that is the approach it has taken: Hewage v Grampian Health Board [2012] UKSC 37.

Discrimination Arising from Disability (EQA s 15)

Applicable Law: Discrimination Arising from Disability (EQA s 15)

126. Section 15 of the Equality Act 2010 provides

15 Discrimination arising from disability

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

127. Accordingly it will be unlawful for an employer or other person to treat a disabled person unfavourably not because of that person's disability itself (which would amount to direct discrimination under S.13 EQA) but because of something arising from, or in consequence of, the person's disability.

128. Claimants bringing a claim of discrimination arising from disability under EQA s.15 are entitled to point to treatment that they allege is unfavourable in its own terms, they do not need to 'compare and contrast' the treatment with the treatment of other employees.

129. The word 'unfavourably' is broadly analogous with concepts such as 'disadvantage' or 'detriment' found in other provisions of the EQA. The EHRC Employment Code provides helpful advice as to the relatively low threshold of disadvantage required to engage EQA section 15. The concept of detriment is interpreted widely and the key test is whether treatment is of such a kind that a reasonable worker would or might take the view that, in all the circumstances, it was to their detriment. The test is satisfied even if the tribunal itself reasonably considers there was no detriment. In order for a worker to establish that they have suffered a detriment, it is not necessary for them to show that they have suffered any physical or economic consequences: Warburton v CC of Northamptonshire Police [EA -2020-00376] 14 March 2022

130. When considering the question of whether there has been 'unfavourable treatment' the tribunal has to answer two questions of fact, namely:

130.1. What was the relevant treatment? And

130.2. Whether the treatment was unfavourable to the claimant?

131. Tribunals should not focus solely on the question of 'treatment' through the prism of a claimant's complaint. The correct approach is to look at the whole factual context before determining what the relevant 'treatment' was: Cowie v. Scottish Fire & Rescue Service [2022] EAT 121 see para 79.

132. A tribunal must consider whether there was anything intrinsically 'unfavourable' or disadvantageous about the treatment. Treatment which could be 'more favourable' does not fall within the scope of s.15: Williams v. Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65.

133. The phrase 'something arising in consequence of' the disability should be given its ordinary and natural meaning: T-Systems Ltd v Lewis EAT 0042/15 the EAT. The EHRC Employment Code — para 5.9 states that the consequences of a disability '*include anything which is the result, effect or outcome of a disabled person's disability*'. The List of Issues above identifies the 'something' arising from disability upon which the claimant relies for each of her complaints.

134. It is necessary to identify two separate causative steps for a claim under EQA s.15 EQA to be made out: York City Council v. Grosset [2018] IRLR 746. These are that:

134.1. the disability had the consequence of 'something', and

134.2. the claimant was treated unfavourably because of that 'something'. It does not matter in which order those questions are asked. The tribunal must:

a) identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. Then;

b) establish whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator: see Mrs Justice Simler in Pnaiser v NHS England and Anor 2016 IRLR 170, EAT . There must be at least some objective evidence demonstrating a link between the 'something' and the disability: iForce v Wood UKEAT/0167/18 3 January 2 (unreported).

135. An employer has a defence to a claim under section 15 if it succeeds in showing that the unfavourable treatment to which the claimant has been subjected is a proportionate means of achieving a legitimate aim. The burden is on the employer to prove that the aim was legitimate and the means adopted proportionate.

136. Legitimacy and proportionality are objectively assessed. The business need justification relied upon is to be objectively assessed by the tribunal itself. It need not have been in the mind of the employer at the time: Cadman v. Health and Safety Executive [2005] ICR 1546, although the burden remains on the employer and it will be more difficult to prove an objective justification that was not in the employer's mind, or if the employer does not lead evidence of how, as part of the process leading to dismissal, its decision-makers considered other, less discriminatory, alternatives.

137. To be proportionate, the employer's actions have to be both an appropriate and reasonably necessary means of achieving its legitimate aim and, for that purpose, it is relevant for the tribunal to consider whether any lesser measure might have served that aim. When considering that particular question, the tribunal should give a substantial degree of respect to the judgement of the employer's decision maker as to what was reasonably necessary to achieve the legitimate aim (provided the decision maker has acted rationally and responsibly), but the tribunal does not have to be satisfied that any suggested lesser measure would or might have been acceptable to the decision maker or otherwise caused him or her to take a different course. The tribunal applies an objective test: Birtenshaw v Oldfield [2019] IRLR 946

138. EHRC Employment Code sets out guidance on objective justification which broadly reflects the case law. In summary:

138.1. the aim pursued should be legal, should not be discriminatory in itself, and should represent a real, objective consideration.

138.2. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29).

138.3. As regards proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

139. In considering a business needs justification defence in a long term absence case the tribunal needs to engage with the reasons given by the employer and scrutinise the relevant working practices, business considerations and particular needs relied upon: Birmingham City Council v Lawrence EAT 0182/16.

Analysis and conclusions: Discrimination Arising from Disability (s 15)

Did the DWP know that Ms Ferguson had a disability, or could it reasonably have been expected to know?

140. Yes, this is proven or assumed in the claimant's favour: see above.

Something arising from disability

141. The claimant was absent from work continuously from 1 December 2022 until 2 January 2024. We are satisfied that, aside from the period when she elected to take annual leave in December 2023, her absence was because of the effects of her various disabilities.

142. Following her return to work on 2 January 2024 the claimant undertook a phased return to work. That phased return to work was recommended by OH reports because the nature of her impairments and their effects on her meant that initially when returning to work she had difficulty in completing full time working over the course of a 5 day week. We are satisfied that these difficulties were because of the effects on her of her various disabilities.

143. The claimant's phased return to work included provision, initially, for reduced daily working hours, micro breaks and assumed consent for early finishing of work. We are satisfied for the same reasons that the claimant experienced difficulty in working for a standard full working day and that that difficulty was the result of the impacts on her of her disabilities.

144. As regards 'cognitive impairment/brain fog/fibro brain', we accept that anxiety and her fibromyalgia would lead the claimant to experience some "cognitive impairment" and performance related impairments as a result.

Unfavourable treatment because of something arising in consequence of disability

145. We have determined that the allegations of unfavourable treatment arising in the period before 2 January 2024 are out of time. We record our findings and observations without prejudice to that determination.

Issue 25 a) In or about April 2023, stopping her access to the computer systems while she was off sick:

145.1. It was common ground that the claimant's access to the respondent's IT system was cancelled completely in about April 2023.

145.2. There was a policy procedure or practice of the respondent to cancel or limit access to IT systems after a continuous absence of 90 days.

145.3. Mr Cornford, as the claimant's then line manager, was the person who exercised the discretion and he cancelled the claimant's access to the IT system in full.

145.4. We would have been able to decide, without the application of the two-stage analysis that the reason Mr Cornford made the decision he made was because the policy required restriction of IT access in cases of long term absence. Long-term absence was a consequence of the claimant's disabilities.

145.5. We find that the test of unfavourable treatment is satisfied because the claimant herself considered and a reasonable employee might reasonably consider the turning off of her full IT access was unfavourable treatment. The consequences of that decision included contributing to a feeling of exclusion on the claimant's part and limiting her access directly to specific policies which might otherwise be directly accessed by click-through links.

146. If the claim had been brought within time we would have been satisfied on the evidence that the conduct was a proportionate means of achieving a legitimate aim:

146.1. The respondent's witnesses, whose evidence we accept, stated that there were two legitimate aims behind removal of IT access: (i) Data security reasons and (ii) enabling an employee to focus on their recovery and not feel pressured to participate in work.

146.2. We accept the respondent's submission that its absence management procedures as a whole are consistent with the purpose of assisting with recovery.

146.3. We find that Mr Cornford's actions fell within the parameters of the relevant IT policy. His decision simply to suspend the claimant's access, rather than construct a more complex and specific set out restrictions (the details of the possibilities available to him were not spelled out in the evidence before us) was within the scope of his discretion, the policy and was objectively reasonable. Moreover the claimant was (and we find would have been) provided on request with any information she requested, and her access was restored when a back to work plan was agreed in late 2023.

146.4. We accept Ms Isaac's evidence there was no <u>need</u> for the claimant to access any of the IT systems whilst absent and we have found that any information or resources she required could have been and would have been provided via KIT meetings and/or requests to her line manager. The only practical difference for the claimant was that she needed to make a request for access to certain underlying

documents via click-through links, rather than, if she had full or perhaps partial access, she could have done that directly herself.

146.5. The steps taken were therefore proportionate in all the circumstances and the justification defence would have been made out.

Issue 25 b) At around the same time, excluding her from the team performance, reward and recognition scheme. (She was told she was not entitled to take part by her manager Robert Cornford and his manager Clare Stanley (HEO).

147. We are satisfied that if brought within time this claim would have failed for the following reasons:

147.1. The Reward and Recognition Scheme was made for the purpose of encouraging and rewarding contributions to the respondent's performance goals;

147.2. The claimant did not contribute to the periods for which rewards were made;

147.3. She was not excluded from the scheme because of her absence or any other thing arising from her disability. She had no entitlement to participate in the scheme for the reason given by the respondent's managers.

147.4. The decision about her entitlement to participate was made because she had not contributed, not because she was on long term absence. We are able to make this determination without relying on the two stage analysis;

147.5. There was no causative link between the decision and her disabilities.

147.6. In any event, a reasonable employee would not consider that her treatment was unfavourable. The scheme rewards and recognition were a benefit. She was, in effect, complaining that she was not treated more favourably by being permitted to receive some form of additional benefit to which she had not contributed. We agree with the respondent's submission that this is a classic example of treatment described in the Williams case as favourable treatment that could have been more favourable. In all the circumstances, considering the respondent's treatment as a whole her treatment in this respect was not unfavourable.

Issue 25 c) On 12 October 2023, Marcus Baughurst rejecting her grievance about the above complaints.

Issue d) On 21 December 2023, Jo Bray rejecting her appeal about the above decision.

148. If these claims had been brought in time, we would have found them not well-founded and dismissed them.

148.1. The rejection of a grievance and refusal of appeal are capable of amounting to unfavourable treatment. There was no complaint about the procedure adopted in each case.

148.2. The claimant in her witness evidence accepted that there was no link between any of her disabilities and the decision in the case of the grievance or appeal. There was no evidence from which to infer that the decisions were made because of anything arising in consequence of her disabilities.

148.3. We find on the balance of probabilities (in the case of Mr Baughurst) and accept the evidence of Ms Bray, and that in each case the decision-maker acted as they did for the reasons set out in their outcome letters.

148.4. The proper conduct of a grievance and appeal in compliance with a published policy involves the pursuit of a legitimate aim: namely that of dealing with employee grievances in a fair, consistent and proportionate manner. We are satisfied that the procedures adopted were consistent with the published policies, the reasons given were objectively justifiable and that the conduct was therefore proportionate.

148.5. The respondent would therefore have been able to rely on the justification defence.

Issues 25 f-h)
f) Not holding her 'welcome back' meeting with Mandy Isaac until 18 January 2024.
g) At that meeting, not discussing the reason for her absence and whether any of it was disability related, as required by the sickness absence policy.
h) Failing to adjust her sickness absence records to re-classify some of the absence as disability related.

149. The first formal Return to Work Meeting using the structured template did not take place until 18 January 2024.

150. However, Ms Isaacs, who was at that stage effectively transitioning line management responsibility for the claimant to her new team Leader Ms Dawes, held a 90-minute meeting on 2 January 2024. At that meeting the claimant was accompanied by her union representative. There was extensive discussion of the arrangements for the claimant's phased return to work including the reasonable adjustments which would be put in place.

Following the meeting an updated phased return to work plan was produced. No issues were raised by the claimant or her representative about the nature or content of that meeting at the time. We find that the substance and content of the meeting was substantially the same as it would have been had it been a formal Return to Work Meeting at which the structured Return to Work Meeting form would have been used as a framework. This finding is supported by it being the purpose of the meeting (as indicated by Ms Isaacs in her email of 7 December 2023) to discuss the Back to Work Plan and other elements of return-to-work support. We find also that there was in fact discussion about the disability-related reasons for her absence. This can be inferred from the fact that at the meeting between Ms Isaacs and the claimant on 16 November 2023 Ms Isaacs minuted extensive discussions about the impairments arising from the disabilities relied upon by the claimant in this claim.

151. We accept Ms Isaac's evidence that the reason for the delay in convening a formal Return to Work Meeting earlier was confusion between herself and Ms Dawes: Ms Isaacs believing that it took place at Ms Dawes meeting with the claimant on 9 January 2024 and Ms Dawes believing it had already been done on 2 January 2024 by Ms Isaacs.

152. Given that there had been extensive discussion about her return to work arrangements on 2 January 2024 with her acting line manager which substantially covered the ground envisaged in a formal Return to Work meeting, and a very prompt response to her pointing out the oversight, the delay itself in holding the formal structured meeting would not, in our judgment, be regarded as unfavourable treatment by a reasonable employee.

153. We consider in any event that there was no causal link between the delay in holding the formal Return to Work Meeting and anything arising from her disabilities. The claimant was not able to explain any such link. The reason for the delay was simply confusion, exacerbated by the change of team and Ms Dawes initial absence on holiday.

154. The claimant specifically complains that by reason of the delay in her formal Return to Work meeting her absence record on the SOP database could not be adjusted to show some of her absence as Disability Related Special Leave rather than long-term sickness absence.

155. We find this was not unfavourable treatment:

155.1. An email from Ms Isaacs on 2 February 2024 explains that the claimant's sickness absence on SOP was closed on 2 January 2024 so that there would be no delay to the processing of her pay. So early (as required) updating of her status was advantageous to the claimant and required by the applicable absence procedure;

155.2. The claimant was not entitled to Disability Related Special Leave because she was not fit to work in the period for which she claims. The applicable guidance made clear that the Disability Special Leave Policy was not intended to apply to periods of sickness absence whether the sickness was disability-related or not. She had no reasonable expectation of benefitting from that advantage.

155.3. The delay in holding the formal return to work meeting did not amount to unfavourable treatment and there was no causal connection between the delay, the claimant's inability, or a decision by the respondent not to record periods of sickness absence on the SOP as Disability Related Special Leave and the claimant's disabilities.

156. This complaint is accordingly not well-founded and is dismissed.

Issue 25 e) On 9 February 2024 refusing her application for special leave, i.e. to be paid in full during her return to work period from 2 October to 27 November 2023.

157. Ms Marshall, in her letter dated 8 February 2024, notified the claimant that she had decided to refuse her application for Disability Related Special Leave for this period.

158. We find the reasons for Ms Marshall's refusal were as set out in her letter. In short, the claimant was signed off sick by her GP and her absence (correctly) recorded as sickness absence and that the claimant did not fall within any of the criteria. We are able to reach that conclusion clearly on the evidence without conducting the two-sage analysis.

159. The respondent submitted that:

159.1. this was not 'unfavourable treatment' but an example of the treatment described in the Williams case as favourable treatment which could have been more favourable. In any event;

159.2. the refusal of the application was plainly justified. The period of special leave requested was well outside the normal scope of the policy and covered a period of time when according to both the OH Report and her own fit notes the claimant was unfit for work.

160. We consider that these submissions are broadly correct. The claimant was not by reason of the decision to refuse her application subjected to 'unfavourable treatment'. A reasonable employee would not reasonably have expected to be dealt with more favourably than the policy and guidance indicated.

161. In any event, the consistent application of policies relating to employee absence was a legitimate aim and the decision to refuse was in our judgment well within Ms Marshall's remit and objectively a reasonable one, so that the respondent's conduct in this regard was a proportionate means of achieving a legitimate aim and the respondent makes out a defence of justification.

Issue 25 i) Her return to work plan having only been agreed for January 2024, Zoe Marshall, her new HEO
• Had no plan in place at the beginning of February and then
• Rejected her application for special leave to cover the period to 8 February.

162. The second bullet point has been considered above and is not well-founded.

163. As regards the complaint that Ms Marshall/the respondent had no back to work plan in place for February 2024, we find that his claim fails on the evidence.

164. We have found as facts that the claimant had a detailed phased return to work plan in place from, materially late November 2023, which was updated in December 2023, and revised after the meeting on 2 January and further discussed 18 January 2024. The plan itself was based on the OH Report from 10 October 2023. The plan referenced a phased return to work from 2 January 2024 and detailed working days and hours, breaks and assumed consent to leave alongside other matters. It provided for the plan "to be reviewed weekly" and in fact weekly reviews were held throughout January 2024. The further OH report on 24 January 2024 in broad terms recommended a continuation of the existing working pattern arrangements with monitoring and flexible adjustments to be implemented when she has any flare ups.

165. The claimant adopted the position in correspondence and in her evidence before us that there was no return to work management plan in place for February 2024 and it followed that her existing phased return to work arrangements would stop. She accordingly refused to attend the weekly meeting on 30 January 2024 whose purpose was to review her ongoing return to work plan.

166. We find that the claimant's claimed assumption that her support would end on 30 January 2024 was objectively unreasonable even if, which we do not find proven, she genuinely held that belief. Her arrangements were under weekly review. There was nothing in the correspondence or in the Return toWork Plan or in any statements made by the respondent's managers that suggested the plan would simply stop after 31 January 2024 or would be significantly altered. The OH Reports of October 2023 and January 2024 envisaged a continuing phased return to work. The

claimant's own refusal to attend the weekly review meeting on 30 January 2024 brought about the very thing about which she complained at the time – the latest OH report of 24 January 2024 had not been discussed – and about which she complained in these proceedings. Her conduct was not objectively reasonable.

167. This head of complaint is not made out on the evidence and is not well-founded.

Issue 25 j) Requiring her to use holiday and flexi-time to cover Mondays and Fridays during her phased return. (Her request to have those days as unpaid leave was refused on 12 March 2023 by Maria Dawes.)

168. The claimant's application for Disability Related Special Leave to cover Mondays and Fridays was refused by Ms Dawes on 12 March 2024. The consequence is that the claimant's Monday and Friday absences were accounted for by deduction from her accrued flexi-time and holiday allowance.

169. The claimant was, as a consequence of using holiday and flexi-time credits paid at her full salary for the Mondays and Fridays she was not working. Disability Related Special Leave enabled an employee contractually to take time away from work which would not otherwise be authorised. Where – as was the case with the claimant she had exhausted her sick pay entitlement, her absence under Disability Related Special Leave would have been unpaid. The claimant accepted in cross-examination that if her application had been granted by Ms Dawes it would have disadvantaged her financially because she would have been required to reimburse the respondent for the payment she received while she was not at work.

170. We find that the refusal of the claimant's application would not have been regarded by the reasonable employee as, and did not in fact amount to unfavourable treatment.

171. Furthermore, in Ms Dawes email of 12 March 2024 she gave reasons for refusing the claimant's application. She did so after taking advice from the respondent's complex cases team. Her reason was that the respondent was already able to support the claimant on full time pay when she was not working full time, and the applicable guidance indicated that such support should not continue for more than a few weeks and that the claimant still had holiday and flexi time credits to use, and that she had been granted additional 7 days additional flexi time over 4 weeks in January and February.

172. We are satisfied that the reasons given by Ms Dawes were the reasons for refusing the claimant's request. There was no material from which to infer or find any link between anything arising from any of the claimant's

disabilities and Ms Dawes decision. Her decision was not in consequence of anything arising from the claimant's disabilities.

173. Furthermore, her decision was clearly within the scope of Ms Dawes discretion, was clearly explained and objectively reasonable. It was favourable financially for the claimant. In our judgment it was a proportionate exercise of her discretion as a means of pursuing the legitimate aim of managing staff absence and return to work welfare and consistently applying applicable existing absence and sickness policies. Accordingly the respondent makes out a defence of justification

174. This complaint is not well-founded and is dismissed.

Issue 25 k) Occupational Health having advised that her position should be reviewed about four weeks after her phased return came to an end, Maria Dawes
• Did not have any review and / or
• Did not extend her phased return period.

175. The OH Report of 24 January 2024 suggested, amongst other things that after the claimant returned to full time work, that her attendance be monitored.

176. We find that, contrary to the claimant's complaint, in fact Ms Dawes held weekly reviews of the claimant's phased return to work plan through March and April 2024. The reviews evidence that the claimant had been working (with relevant adjustments) full time for several weeks and had been building up to and had achieved full working capacity, to which the claimant had expressed agreement, by the end of May 2024 .

177. Accordingly her phased return had ended and the parties were in the monitoring period envisaged by the OH Report. Ms Dawes suggested on 21 May 2024 that reviews be carried out fortnightly from June 2024.

178. The claimant's complaint of unfavourable treatment is not made out as a matter of fact on the evidence and is dismissed.

Issue 25 l) On [2 August 2024] [Date amended at the start of the hearing] refusing her request to record meetings with managers. [This appears to refer to the conduct of the claimant's grievance conducted by Mr Bruce Campbell]

179. The claimant's grievance before Mr Campbell referred to the refusal of a request made by her to Ms Dawes as a reasonable adjustment to record a meeting on 5 July 2024. She says that in consequence of her disabilities she suffered fibro-fog and memory impairment and required this as a reasonable adjustment. Ms Dawes refusal to allow her to record a

meeting amounted, she said, to unfavourable treatment. We consider Ms Dawes refusal below for completeness.

180. However, we understand the claimant under this head (as amended) is making a separate complaint about the conduct of Mr Campbell at the grievance hearing. His note of the meeting recorded that the claimant said she suffered from a variety of conditions causing memory and brain fog, that she appreciated that some meetings cannot be recorded but that some can. In response Mr Campbell did not permit the recording of the meeting but confirmed that the note taker would be recording factual notes only in order to make an account of the meeting and that they can both make changes to the notes if appropriate once these have been written up.

181. A refusal to record the meeting was capable of amounting to unfavourable treatment because of something arising from the claimant's disability.

182. We are satisfied that Mr Campbell's refusal to permit the claimant to record the meeting was for the reason stated during the hearing: namely that he considered that the impairments to memory and fibrofog arising from the claimant's disability would be adequately addressed by an independent note taker and an opportunity to approve minutes. His refusal was, we find, informed by the respondent's policy, to which the claimant referred, against recording meetings which included matters relating to health.

183. The guidance/policy against recording such information included, in our judgment the legitimate aims of maintaining staff wellbeing and maintaining information security. The consistent application of those policies is also a legitimate aim. Given that Mr Campbell had provided an independent note taker and an opportunity for the claimant to approve the meeting notes, we are satisfied that his conduct was a proportionate response to the impairment arising from the claimant's disabilities.

184. The respondent therefore established the statutory defence of justification.

185. Accordingly we dismiss this complaint.

186. Our understanding is that the claimant's complaint under Issue 25(l) was corrected to reference Mr Campbell's refusal to record the meeting. However, we record that in their submissions the respondent at least appeared to understand that the claimant's complaints were in fact as to (i) Ms Dawes refusal to allow recording of the meeting on 5th July 2024 and (ii) Mr Campbell's decision on 21 August 2024 to refuse the claimant's grievance against Ms Dawes.

187. If the misunderstanding is ours we make the following observations:

187.1. Ms Dawes explained to Mr Campbell on 15 August 2024 her reasoning for refusing the claimant's request to record the meeting on 5 July 2024. Her reason was that she had referred to the respondent's policy against recording meetings and understood that meetings should not be recorded when they concerned health related discussions. She nevertheless offered the claimant the attendance of a note taker and the right to be accompanied. We accept that those were her reasons. For the same reasons as set out above in relation to Mr Campbell's refusal, we are satisfied that the respondent would have made out the defence of justification.

187.2. Mr Campbell's conduct of the grievance hearing itself was not otherwise challenged by the claimant and his conclusions appear to us to have been reasonable, justifiable and justified. On that basis there is no evidence of unfavourable treatment arising from the decision to refuse the grievance itself. In any event the claimant accepted in cross-examination that there was no link between the decision and anything arising from her disabilities. We think she was right to make that concession.

Failure to make reasonable adjustments EQA s 20

Applicable Law : Failure to make reasonable adjustments EQA s 20

188. The duty to make adjustments under S.20 EQA applies where a provision, criterion or practice (PCP) has been applied by the employer that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Where a PCP puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

189. A failure to comply with the requirement is a failure to make reasonable adjustments and an employer will be regarded as having discriminated against the disabled person : EQA s.21.

190. A 'substantial disadvantage' is something that is 'more than minor or trivial': section.212(1). The tribunal must identify the nature and extent of the disadvantage to which the claimant is subjected with some degree of precision. The substantial disadvantage must be established by comparison with 'persons who are not disabled', so the duty to make reasonable adjustments is only triggered if it is established that the relevant PCP causes greater disadvantage to the disabled claimant than it does to non-disabled people to whom the requirement is applied, not by reference to non-disabled persons generally.

191. The tribunal must state how the adjustment that it considers reasonable would actually have alleviated the claimant's substantial disadvantage: Environment Agency v Rowan 2008 ICR 218, EAT.

192. The claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred — absent an explanation — that the duty has been breached.

193. Once satisfied that the section 20 duty has potentially been triggered, the tribunal will consider what adjustments could and should have been made. It will need to identify the 'step' or 'steps', if any, the employer could reasonably have taken to prevent the claimant suffering the disadvantage in question. Again, the onus falls on the claimant, not the employer, to identify in broad terms the nature of the adjustment that would ameliorate the substantial disadvantage. Having done so, the burden then shifts to the employer to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

194. The section 20 duty only arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The test of reasonableness in this context is an objective one: Smith v Churchills Stairlifts plc 2006 ICR 524, CA, and so may require a tribunal to substitute its own view for that of the employer. The focus must be on whether the adjustment itself can be considered reasonable rather than on the reasonableness of the process by which the employer reached the decision about the proposed adjustment. The courts have held that one factor above all others is crucial: the effectiveness of the proposed step or steps. The EHRC Employment Code (see para 6.28) suggests examples of reasonable adjustments in practice and of matters that a tribunal might take into account in determining reasonableness of the adjustments:

a) the effectiveness of the step;
b) the extent to which it was practicable for the employer to take the step;
c) the financial and other costs that would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities;
d) the extent of the employer's financial and other resources;
the availability to the employer of financial or other assistance in respect of taking the step;
e) the nature of the employer's activities and the size of its undertaking;
f) 'What is a reasonable step for an employer to take will depend on all the circumstances of each individual case' — para 6.23.

195. Mr McHugh drew our attention to the following authorities and propositions of law:

196. The approach of the tribunal to a claim of failure to make reasonable adjustments has been set out by the higher courts in a number of cases, including Environment Agency v Rowan [2008] ICR 218, in which the EAT held as follows (para 27)

> *"In our opinion an employment tribunal considering a claim that an employer has discriminated against an employee pursuant to s.3A(2) of the Act by failing to comply with the s.4A duty must identify:*
>
> *(a) the provision, criterion or practice applied by or on behalf of an employer, or*
>
> *(b) the physical feature of premises occupied by the employer,*
>
> *(c) the identity of non-disabled comparators (where appropriate), and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.*
>
> *In our opinion an employment tribunal cannot properly make findings of a failure to make reasonable adjustments under ss.3A(2) and 4A(1) without going through that process. Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."*

197. Per the Court of Appeal in Ishola v. Transport for London [2020] EWCA Civ 112 not all one-off acts and decisions necessarily qualify as PCPs. The words 'provision, criterion or practice' are not terms of art, but are ordinary English words. They are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, it was difficult to see what the word 'practice' added to the words if all one-off decisions and acts necessarily qualify as PCPs.

198. Per the EAT in Carreras v. United First Partners Research – UKEAT/0266/15/RN – (7th April 2016, unreported) there has to be a causative link between the PCP and the disadvantage suffered by the employee, as that would inform the determination of what adjustments an employer was obliged to make.

199. Per the EAT in Conway v. Community Options Ltd [2012] EqLR 871 if an adjustment would not remove the disadvantage claimed by the Claimant then it will not be reasonable for it to be made.

Analysis and conclusions: Failure to make reasonable adjustments

200. We refer to paragraph 28 to 30 of the List of Issues.

201. For the purposes of the claimant's claims of failure to make reasonable adjustments we repeat our findings and assumptions above in relation to the respondent's knowledge of the claimant's disabilities.

202. The claimant relied upon the following as substantial disadvantages suffered by her as a consequence of the PCPs she relies upon compared to others who did not have her disabilities:

a) Long term sickness absence;
b) Her need for additional flexibility to facilitate her return to work in January 2024;
c) Her cognitive impairment.

203. We do not understand how these disadvantages are said to arise in consequence of the application of the PCPs. They appear to be statements of the aspects of the claimant's disabilities which make her situation different from those who did not have her disabilities. Putting the point another way, if reasonable adjustments such as the claimant suggests were put in place, they would not result in the claimant no longer having those particular disadvantages. However, for the purpose of analysis we assume in the claimant's favour that she could establish a causative link between these disadvantages and the PCPs.

The Reward and Recognition Scheme:

204. The complaint concerning the alleged PCP of not allowing staff on long-term sickness absence to participate in the recognition and Reward Scheme is out of time. Even if it were in time, we conclude that on the evidence there was no PCP of not allowing employees on long-term sick leave to participate in the scheme, and that in any event there was no substantial disadvantage suffered by those with the claimant's disabilities compared to those on long term sick leave for reasons other than disability. This complaint is dismissed.

The Recording of meetings

205. We find there was a PCP of not allowing members of staff to record meetings which was to be found in the terms set out in the relevant policy /guidance. In particular recording was generally not permitted where the meeting concerned health-related matters.

206. We find that the PCP was not applied in every case. On at least two occasions recorded in our findings of fact the claimant was allowed to record a meeting as an exception. The policy itself recognises that a discretionary variation is permissible if no reasonable alternatives are available.

207. On the occasions when the claimant requested and was not permitted to record a meeting we find that she was offered, or made aware of, or provided with either a note taker and the opportunity to review and comment on the minutes of the meeting and/or permitted to have a union representative or a colleague accompany her to take notes.

208. The respondent was a large employer with detailed procedures and specialist HR support. There was no practical or financial obstacle to permitting recording of remote meetings. However, the respondent was a public authority with responsibility for the careful and compliant management of data and data security for a large number of individuals and staff. Each instance of non-standard practice involving the potential for the loss of sensitive personal data represented a compliance and legal risk and a practical concern for the respondent in this regard.

209. Having regard to all the circumstances, and the nature of the disadvantages upon which the claimant relies, we consider that in particular the fibrofog/memory impairment disadvantage was reasonably addressed by the respondent's practice of providing a note-taker and a written record of the meeting and/or of allowing the claimant to be accompanied.

210. The complaint is not-well founded and is dismissed.

Sickness absence management and refusal of special leave requests

211. We find on the evidence before us that the respondent had the following PCPs:

a) Applying the staff sickness absence policy;
b) Applying the special leave policy.

212. The claimant suggests that the following adjustments should have been put in place:

a. allowing her request for special leave to cover the period 2 October to 27 November 2023;

b. adjusting her long-term sickness absence records to re-classify some of the absence as disability-related;

c. allowing her request to have Mondays and Fridays as unpaid leave during her phased return.

213. The respondent is a public authority and employer of a large number of public servants. It had detailed policies and procedures and guidance on their application. The sickness absence management policy and Disability Related Special Leave policy had clear legitimate purposes. In relation to the special leave policy, the purpose was to provide extra support and flexibility for those employees who were fit for work but who needed additional time off.

214. The claimant was certified as not fit for work during the period in 2023 for which she claims that discretion should have been exercised as a reasonable adjustment to recategorise her absence as special leave.

215. The respondent submitted, correctly in our opinion, that it would not be reasonable in the circumstances which applied to treat the claimant in this way. The claimant asked for special leave so that, in effect, she could avoid using up her holiday and flexi-time credits and thereby enjoy a financial advantage. There was no basis upon which we could discern that differential treatment for that purpose would address any particular disadvantage the claimant had identified.

216. This complaint is not well-founded and is dismissed.

Approved by Employment Judge N Cox

Date: 18 September 2025

Judgment sent to the parties and entered in the Register on: : :

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for the Tribunal Office

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