EMPLOYMENT TRIBUNALS

Claimant: Mrs D Hetherington

Respondent: Cumberland Council

Heard at: Manchester (by CVP) **On:** 12-14 and 19 January 2026

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Miss K Barry, counsel

JUDGMENT having been sent to the parties on 25 March 2026 and written reasons having been requested in accordance with rule 60 of the Employment Tribunal Rules of Procedure, the following reasons are provided:

REASONS

Introduction

1. The claimant has been employed by the respondent (and predecessor organisations) from 18 June 2007. She is a senior social worker and, currently an advanced practitioner. The claimant was diagnosed with cancer in October 2023 and the respondent accepted that at the relevant time she had a disability. The claimant alleged that the respondent subjected her to discrimination arising from disability, indirect disability discrimination, harassment related to disability, and that it breached the duty to make reasonable adjustments. The respondent denied what was alleged.

Claims and Issues

2. A preliminary hearing (case management) was conducted in the case on 9 January 2025. Appended to the case management order produced following that hearing was a list of issues (50). At the start of this hearing, it was confirmed that they remained the issues for me to determine. I confirmed the legitimate aim or aims relied upon by the respondent in its defence of the claims of discrimination arising from disability and indirect disability discrimination, as those elements were recorded in the subsequent amended grounds of response and not the list of issues itself.

3. We agreed that I would determine the liability issues first. I would leave the remedy issues only to be determined if the claimant succeeded in any of her claims. However, it was agreed that I would decide issues 5.8-5.11 (the issues in relation to whether a party unreasonably failed to comply with the ACAS code of practice on disciplinary and grievance procedures, and what impact that would have on remedy) at the same time as determining the liability issues, even though they were technically remedy issues.

Procedure

4. The claimant represented herself at the hearing. Miss Barry, counsel, represented the respondent.

5. The hearing was conducted by CVP remote video technology with both parties and all witnesses attending remotely. The parties had agreed to the hearing being conducted in that way shortly before the hearing commenced.

6. I was provided with a bundle of documents. That had 537 pages. I read the documents in the bundle to which I was referred by the parties.

7. I was provided with witness statements from all the witnesses called to give evidence. On the first morning, after an initial discussion with the parties, I read all of the witness statements and all the pages in the bundle referred to in those statements.

8. I heard evidence from the claimant, who was cross examined by the respondent's representative, and I asked her questions. Her evidence was heard during the extended afternoon on the first day and the start of the morning of the second day.

9. The claimant also provided a witness statement from Maddy Wilkinson, who had been the claimant's trade union representative throughout the relevant events. I was asked to read that statement and did so. Ms Wilkinson did not attend the hearing and give evidence, and therefore I gave the evidence in her statement less weight because she was not cross-examined.

10. I heard evidence from four witnesses called by the respondent. Each of them was cross-examined by the claimant, and I asked them questions where I wished to do so. They were also re-examined where the representative chose to do so. They gave evidence from mid-morning on the second day until mid-morning on the third day. The witnesses who gave evidence for the respondent were:

10.1. Mrs Joanne Atkinson, the respondent's director of corporate and transformation services;

10.2. Mrs Joanne Smillie, at the relevant time the respondent's team manager for long-term interventions west within adult social care and housing, and the claimant's line manager from February 2024 (she is no longer employed by the respondent);

10.3. Miss Sophie Green, senior HR advisor from June 2024 to September 2025; and

10.4. Mrs Gail Wostear, acting service manager for long-term interventions within adult social care and housing from January 2020 and service manager from January 2024.

11. After the evidence was heard, each of the parties was given the opportunity to make submissions. A short break was taken to allow the parties to prepare their submissions and subsequently a further break was taken to ensure that they had both seen the other party's written submissions and had been able to consider them. The respondent's representative and the claimant made their submissions both orally and in writing, albeit the claimant primarily relied upon what she had written and only added to her written submission orally on one specific point. Oral submissions were heard on the afternoon of the third day.

12. I adjourned the hearing to enable me to reach a decision, and the parties were asked to return on the afternoon of the fourth day. That was the Monday of the second week of the hearing, as the case had been listed for Monday to Wednesday of one week and the first two days of the following week (albeit in fact only one day of the second week was required).

13. I informed the parties of my decision and the reasons for it. My Judgment was sent to the parties. As written reasons have been requested, the written reasons for my decision are contained in this document.

Facts

14. The claimant has continuity of employment from 18 June 2007. Prior to its replacement by the respondent, the claimant was employed by Cumbria County Council. The respondent replaced previous authorities on 1 April 2023.

15. I was provided with two copies of the claimant's contract of employment, one dated 19 October 2022 (324) (with Cumbria County Council) and one dated 20 November 2024 (337) (with the respondent). The provisions material to the proceedings were the same in each contract. The claimant was entitled to six months full pay and six months half pay during sickness absence (as a result of her length of service). Nationally agreed terms were incorporated into the contract. There was no dispute that meant that the green book was incorporated into the claimant's contract of employment.

16. The relevant section of the green book reflected the claimant's sick pay entitlement as set out in her contract, but went on to say the following (84):

> "*Authorities shall have discretion to extend the period of sick pay in exceptional cases".*

17. I was provided with some policies and/or guidance, including: the long-term sickness absence guidance (314); the return-to-work guidance (321); and the absence procedure (350). I will not repeat what was said in each of those documents. I was not shown any document which set out a required set arrangement for a phased return to work.

18. The key guidance document, which was the particular focus of evidence and questioning, was a document headed "*Sickness absence/industrial injury absence –*

requests for extensions to sick or industrial injury pay" (359). The respondent's witnesses described it as guidance which had never been formally adopted as a policy or agreed with the trade unions. It had been prepared by Cumbria County Council and not the respondent. It set out the principles and the process which would be used when an application was made for an extension of sick pay.

19. The heading of the guidance said that extensions would only be considered in very exceptional circumstances and that any extension would remain discretionary and would not be a contractual right. In the principles, it was said that it was highly unlikely that any extension would exceed three months and applications could only be made where a reduction to current sick pay provisions was imminent. The grounds for requesting an extension were genuine financial hardship and where there was a terminal illness diagnosis or where there was extended medical intervention required. The genuine financial hardship section referred to the need for evidence that a failure to extend may result in unforeseen genuine hardship which could have a detrimental impact on the employee's ability to recover, and it was said that there should be evidence that all normal financial avenues had been explored including the use of accrued annual leave entitlements. A form to be completed for such an extension was appended to the guidance.

20. The historic nature of the guidance document was clear from the fact that it said that relevant applications would be considered by the relevant Executive Director, which I was told is a role that the respondent does not have. The claimant asserted that meant that any application had to be considered by the Chief Executive. Both applications about which I heard evidence (including the claimant's) were considered (at least at first) by an associate director. The evidence of Mrs Atkinson was that the respondent was not obliged to follow what was set out in the document, but she did apply the principles set out in the document, as those were appropriate principles.

21. On 2 October 2023 the claimant was diagnosed with cancer. It was recorded both by the respondent's occupational health advisor and in the claimant's submissions, as being a rare and aggressive form of breast cancer. The claimant has undergone chemotherapy, surgery, radiotherapy, and immunotherapy. There was, unsurprisingly, no dispute that the claimant had a disability at the relevant time.

22. The claimant was absent from work for a long period following diagnosis. The bundle included a number of fit notes, the first of which (365) was dated 28 November 2023 (following an assessment on 10 October) and certified the claimant as not fit for work from 9 October 2023 until 9 April 2024.

23. I was provided with both a wellbeing absence contact sheet which recorded managerial contact with (and about) the claimant (500), and an HR contact log (489). I will not reproduce in this Judgment details of all of the contact with the claimant and her trade union representative over the relevant period. It was clear from the claimant's evidence and the earlier entries, that there were concerns from an early stage about the potential reduction in the claimant's pay after six months absence.

24. The claimant's annual leave year ran from 13 January to 12 January each year. The claimant carried over some accrued but untaken annual leave at the end of the 2023/24 leave year as she had been unable to take the leave she had

intended at the autumn half-term and over Christmas due to her ill health absence. I was not provided with a document showing precisely the details of the leave carried over, but the claimant referred to it being approximately three weeks of annual leave.

25. On 5 January 2024 the claimant's then line manager, Wendy Willis, telephoned the claimant. I did not hear evidence from Ms Willis who I was told is now retired. Mrs Wostear gave evidence about the reason for the call. Of those who actually took part in the call, the only evidence I heard was from the claimant.

26. The email from Mrs Wostear which led to the call, was sent to Ms Willis and others on 20 December 2023 (367). The recipients were asked to approach the senior social workers to see if anyone would like to reduce their hours by three or seven hours a week. The reason for doing so was explained (trying to identify additional hours to create a vacancy which was recruitable, rather than the two day per week vacancy at the time, which was not).

27. The claimant's evidence was that she was told by Ms Willis that she had been asked by Gail Wostear to make contact with the claimant and to ask her to reduce her hours by seven hours per week, so that the hours could be used to create a post which was more attractive to someone. The claimant's evidence was that she advised that the call was very insensitive, given she was in the midst of cancer treatment, and had already raised concerns about reducing to half pay. In answers during cross-examination, the claimant was adamant that Ms Willis told her that she had been instructed by Mrs Wostear to ask the claimant to reduce her hours by seven per week and she explained why she considered it to be so inappropriate to raise operational matters at all at that time. She emphasised the effect which it had on her. The claimant said that she thought it was insensitive, and she said that any reasonable person would accept that it was not a call that she wanted to receive at that time. The claimant accepted that the request made by Mrs Wostear had been for the conversation to be had with all the senior social workers. When it was put to the claimant that the call had nothing to do with her disability, she said that it did because it was when she was off work at that time.

28. Ms Willis recorded the call in the absence contact sheet in the following terms (502):

> "*Informed Della about Gail Wostear's offer for anyone to reduce their working week by 3 to 7 hours. Della declined this offer*"

29. It was Mrs Wostear's evidence, that she was informed by her senior manager that the claimant was upset about the offer, as it had been raised in a meeting with the trade unions. On 24 January 2024, Mrs Wostear sent an email to the claimant and others (369) saying that she understood that the offer for anyone interested in reducing their hours, had caused some upset. She said it was only intended to be an offer and to remind people of the possibility and there was no pressure for anyone to reduce their hours. The claimant did not receive the email at the time as it was sent to her work email address, and she was not logging onto it during her absence.

30. On 9 February 2024 the log recorded Ms Willis informing the claimant that the union representative had said in a leadership meeting that Ms Willis had told the claimant that she needed to reduce her hours. The note recorded that the claimant

had confirmed this had not been what was said, but in cross-examination the claimant disputed that the note was correct. The claimant explained that Ms Willis had been upset because it had been raised, and she had reassured Ms Willis that she knew it had not been her decision but that it had been Mrs Wostear's.

31. I accepted the claimant's evidence about what occurred in the telephone call on 5 January. I did not find that her account was contradicted by the other evidence which I heard. I accepted Mrs Wostear's evidence about what she asked to be said and that the enquiry was intended to be an offer and not a request. However, Mrs Wostear was not a part of the call and could not evidence what exactly Ms Willis had said when she spoke to the claimant.

32. On 18 January Miss Green advised Ms Willis that, whilst she understood and appreciated that a reduction in pay would increase anxiety, unfortunately this (being an extension of the period for which full pay was paid) was not something which the respondent could offer (503). The option of taking accrued annual leave as a way of extending pay was proposed. It was not clear from the evidence exactly what the claimant was told, but Ms Willis' entry of the following day said that she had made the claimant aware in a telephone conversation of the update and the claimant had asked Ms Willis to speak to her trade union representative. I will not go through all of the details about what the claimant was told and when about the potential extension, but as I have said it appears that the claimant was told on 19 January that an extension to the period of sick pay was not something which the respondent could offer, and therefore it was unsurprising when she was confused by the assertions of those at the respondent later that a decision had not been made. The approach within the respondent to the extension request and to the applicability or otherwise of the relevant guidance document, was inconsistent, confused and confusing, and it was clear to me that the confusion contributed to the claimant's own confusion and unhappiness about the process.

33. On 9 February 2024 the claimant was informed that she was being handed over from Ms Willis to Mrs Smillie, who became her line manager.

34. On 4 March 2024 Mrs Smillie spoke to the claimant and her trade union representative. The claimant's impending reduction to half-pay and the possibility of an extended sick leave period at full pay was discussed. Mrs Smillie referred to HR advice and that normal financial avenues should have been explored including the use of annual leave, and the claimant said that she did not want to use annual leave. The meeting was confirmed in an email (374). Mrs Wilkinson emailed in response asking that the form for requesting an extension of pay was sent to the claimant, and the form appended to the guidance was sent on 5 March.

35. The claimant completed the application form seeking an extension to sick pay on 11 March and explained the reasons which supported her application (377). Ms Wilkinson supported the application and provided her reasons for doing so on 13 March. I was shown an email in which Mrs Wostear said that both herself and Dean Graham (the staffing budget holder) supported the request. Karen Bell supported the application and completed the relevant section of the form for the accountable assistant director (391). Sam Nicholson, the relevant Group Accountant, confirmed that the respondent could afford to maintain the claimant's sick pay at full pay if the proposal was supported (385).

36. On 5 April there were five telephone calls between Mrs Smillie and the claimant, some of which included Ms Wilkinson. There was a dispute about what exactly was said in the first call about the extension of full sick pay. The claimant's evidence was that Mrs Smillie informed the claimant that an informal decision had been made not to extend sick pay. When the claimant asked why, she was told it was as she had not exhausted her annual leave. Mrs Smillie's evidence was that she told the claimant that, after speaking to HR, the informal advice was that the extension to sick pay request was likely to be declined as all other financial avenues had not been explored such as accessing half pay and utilising annual leave (supported by what was recorded in the log (506)).

37. In the second call, the claimant advised that she would be returning to work on a phased return the following week. She said it was due to the need for full pay. The claimant consented to an occupational health referral. There were two further calls about the phased return (including one in which the trade union representative took part). In the final call, the claimant was asked to get a fit note from her GP to say she was fit to return; being something which I would observe was obviously not possible late on a Friday afternoon for a return the following Monday.

38. During the day on 5 April the claimant sent an email to Mrs Smillie (406). That email said that the claimant was left with no choice but to explore the possibility of return to work sooner than anticipated and she requested a meeting to discuss the possibility. Ms Wilkinson also emailed Karen Bell and said that she understood she had refused the extension to pay and she asked for her rationale (433) (rather strangely, in the light of what transpired and who made the decision, Ms Bell responded on 9 April to say that there were a few more people she needed to consult with prior to making the decision – suggesting that the decision would be hers, although that was not in fact the case).

39. The key issue in dispute for the purposes of the issues in the claim about the calls on 5 April, was what exactly was said about the phased return. In her witness statement, the claimant said that a discussion around a phased return was had and it was suggested that she do one-day week one, and two-days week two. She also gave evidence that she raised concerns that she was physically and mentally exhausted and that working a full day was not manageable but was informed that was per the return-to-work guidance. In cross-examination, the claimant said that she was told it was part of the policy. She said that Ms Wilkinson raised concerns and said it was unrealistic to expect the claimant to do a full day (which led to a conversation about medical suspension). Ms Wilkinson's witness statement said that Mrs Smillie informed them of the pattern for the phased return, and she said there was no negotiation. Ms Wilkinson's statement went on to say that she had said that working a full day would be extremely challenging for the claimant to manage. Mrs Smillie's evidence was that the work pattern for the phased return was agreed. In cross-examination, she said that she did not recall strong objection to what she proposed. In her answers to cross-examination, Mrs Smillie emphasised that if the claimant had had concerns about working the one and two days, she could have raised them (albeit she acknowledged that she was away on annual leave throughout the time when the claimant returned to work). There was no dispute that the claimant was told that she only needed to do administrative tasks and would be home-based, and would not need to complete in-person visits (there did appear to be a dispute about whether the claimant was asked to do client-facing work in week

two, but that was not relevant to the issues which I needed to determine). In submissions, the respondent emphasised Mrs Smillie's evidence that the claimant was given the lightest tasks imaginable.

40. Following the conversations on 5 April, Mrs Smillie sent the claimant a letter (416) and provided a wellbeing absence action plan (418). She also provided a blank employee passport for the claimant to complete. At the weekend and before her annual leave, Mrs Smillie referred the claimant to occupational health. During cross-examination, Mrs Smillie explained why it was she had not previously referred the claimant to occupational health, in summary she said that the claimant was being open about the advice she was receiving from her oncologist who was better placed to advise than an occupational health advisor and because she did not want to intrude into matters with the claimant more than she needed to.

41. The claimant did work from home on 8 April and for two days in the following week. She returned to ill health absence thereafter as she had an operation on 20 April. The claimant described herself as being quite unwell after major surgery for a period afterwards. The claimant completed the employee passport on her first day of return (427). Notably the claimant did use that form to record the matters about which she was aggrieved ("*I have no other option but to return to work whilst recovering from chemo and awaiting surgery due to the organisation not supporting my application for an extension to sickpay and them not agreeing to medically suspend me whilst I receive the treatment required")* but she did not record on it any issue with the length of time to be worked during her phased return.

42. It was Miss Green's evidence that the respondent does not have a generic approach to phased returns, as no two situations are the same. It was her evidence that each return-to-work plan is tailored to the individual's needs. I was not taken to any document which did stipulate a particular return-to-work pattern, or which gave a template for or preference for a particular pattern of return.

43. I found that the phased return-to-work pattern was one which Mrs Smillie proposed and there was no negotiation about it, but I did not find that the claimant and Mrs Wilkinson raised concerns about working a full day as they said. On that dispute, I preferred Mrs Smillie's evidence about what was said, as I accepted that was genuinely her recollection. I also noted that there was no contemporaneous record of any dispute about working one or two days during the phased return, and I would have expected any dispute to have been recorded by the claimant in the return to work passport she completed on the Monday or to be raised by her trade union representative with the chief executive when she raised her concerns (later on 8 May). I did not find that the pattern was genuinely agreed, as Mrs Smillie's note recorded, but I did not find that there was any clear vocal objection to the periods. Had there been such an objection, the claimant would have recorded it in her return-to-work passport alongside her other criticisms of the respondent. The claimant's focus on 5 April was her need to return to full pay and her wish to return to work to receive that pay.

44. On 8 April 2024 Mrs Wostear telephoned the claimant. She had been asked to do so by Dean Graham to reassure the claimant that no decision had been made about the extension of sick pay. The call was made late in the day, just before 5 pm (which was after the end of the claimant's working hours, something which Mrs

Wostear acknowledged she had forgotten). It was the first time that Mrs Wostear had contacted the claimant during her lengthy absence.

45. It was the claimant's evidence that Mrs Wostear asked why the claimant's trade union representative had been trying to contact Karen Bell (the assistant director of operations) about the outcome of her request for an extension of sick pay. She said Mrs Wostear informed her that the decision wasn't a no, it was an informal no. It was her account that Mrs Wostear said that the people who were making the final decision had not yet met to discuss the request. The claimant asked who was making the decision and Mrs Wostear refused to tell her because decision makers change. It was also the claimant's evidence that there was a discussion in which the claimant asked why Mrs Wostear had not supported the union representative's request to consider medical directed absence, to which Mrs Wostear replied that she was well enough to work from home. The claimant became upset, and Mrs Wostear ended the call. The claimant emphasised that Mrs Wostear had had no prior contact with her until that point. She said that it was the context of the call which resulted in the effect which it had and that it violated her dignity because she was unwell.

46. Mrs Wostear denied that she asked the claimant why her trade union representative had contacted the assistant director about the application. She denied telling the claimant that she was not entitled to an extension of pay or medical suspension because she was well enough to work at home. She also said she did not recall saying that the claimant was well enough to work from home and said that she felt confident that she did not say it. She denied saying what the claimant alleged about an informal no, and explained that was not wording she would use as it did not make sense. She acknowledged that the claimant was noticeably upset during the call. She said her focus was on clarifying the claimant's misunderstanding, so that the claimant could be reassured.

47. There were no notes taken of the call. Following the call, Mrs Wostear emailed Mr Graham about it (431). She said that the claimant had been very upset and wanted to be medically suspended "*which I side stepped*". She told him that the claimant was aware that a decision had not been made (which I assume meant that the claimant had been made aware) but had challenged why it had taken so long. She recounted that the claimant had said that she was the only person who hadn't been given this (apparently referring to the pay extension) and she said that they should ask HR about this. She concluded her email by saying "*A very difficult conversation*".

48. There was a direct conflict in the accounts provided of that telephone conversation of 8 April between the claimant and Mrs Wostear. I accepted that both witnesses endeavoured to provide an accurate account of what was said. On balance, on what occurred in that conversation, I preferred Mrs Wostear's evidence to that of the claimant. I found her to be a truthful witness, and I accepted what she said about some of the words alleged not being language she would have used. I also accepted that she did not refer to the claimant as being well enough to work from home, as I accepted her explanation about why that was not a decision which she would make or something which she would have said.

49. During her cross-examination, Mrs Wostear was asked about decision-makers and why she would not tell the claimant in the call who the decision-maker

would be. In her answer, Mrs Wostear described it as being a really confusing situation and she said she was not one hundred percent sure who the decision maker was (she said that she had never dealt with it before). I accepted her evidence and would observe that if the service manager found the process to be a really confusing situation, it was unsurprising that others including the claimant appear to have been utterly confused by it.

50. On 24 April 2024 Claire Gierth, an Interim Assistant Director HR & Organisational Development (from whom I did not hear evidence), wrote to the claimant (439). That letter was received by the claimant five days after her surgery. She said that she was unable to authorise the claimant's request following her application to extend sick pay. She went on to say:

> "*Upon review of your sick pay provisions and your annual leave entitlement, I can see these financial avenues have not been exhausted. Based on your length of service you are entitled to six month's full pay and six month's half pay; you currently have 164 days half pay remaining. I also reviewed your accrued annual leave which shows your remaining entitlement is currently 362.6 hours*"

51. The first occupational health report obtained by the respondent was dated 30 April 2024 (442).

52. On 8 May 2024 Mrs Wilkinson wrote to Mr Seekings, the respondent's chief executive officer, about the decision made on the extension of the claimant's sick pay (448). She asked him to personally intervene and explained why she thought he should do so. The letter was focussed on the pay decision. She did not criticise the length of time the claimant has been asked/required to work during her phased return.

53. Mr Seekings shared the email from Mrs Wilkinson with Mrs Atkinson (being the director with overall responsibility for human resources) and asked her to prepare a response. As a result, Mrs Atkinson sent a letter to Mrs Wilkinson about the claimant on 24 May 2024 (456). She informed her that the respondent was unable to agree to extend the claimant's sick pay. In her letter she said the following:

> "*I can appreciate that this is a difficult time for her, particularly in the context of current economic climate, and as an organisation we want to support her both while she remains off work, and during and after her return to work. However this must be done within the remit of the appropriate policies to ensure consistency and fairness across all of our employees, irrespective of the circumstances …*
>
> *Neither HR (who approved the requests) or I are aware that any extensions to sick pay have been granted to any employee of Cumberland Council since 1st April 2023, except one due to am admin error made by the council, which had a detrimental financial impact on the employee.*
>
> *Given this, and that there is no formal agreement with regards to extensions to sick pay, the council is unable to agree to extend Delias sick pay. In making this decision, I have reviewed Della's sick pay provision and her annual leave*

entitlement. Based on Della's length of service, she is entitled to six month's full pay and six month's half pay; at the time that the original decision was made, she had 164 days of half pay remaining and 362.6 hours of annual leave. To ensure consistency and fairness to others on long term sickness absence, some of whom have a similar diagnosis to Della, an extension to sick pay cannot be approved. Della can choose to use her annual leave whilst she is on half pay to top up her sick pay …

I apologise for the delay in a decision regarding the original request for an extension to sick pay and for the upset this caused Della, I have raised this with those involved. I understand from her managers that Della is a valued employee"

54. Mrs Atkinson gave evidence about her decision. She said that there was not, and never had been, a formal policy or process in place for extending paid sick leave. She explained the high absence levels at the respondent and the fact that various projects and strategies had been adopted aimed at reducing absence levels. She said that when considering the claimant's application, she had been concerned about the precedent that could be set and that there might be an expectation to extend sick pay. In answering a question asked by the claimant in the hearing, Mrs Atkinson emphasised that she was sympathetic to the personal circumstances which the claimant had faced, but explained that in the context of the respondent as an organisation the circumstances were unfortunately not exceptional as the respondent will have a number of employees impacted by long-term ill-health, or life-threatening illnesses at any time. She explained that, at the time of the decision, the claimant had one hundred and sixty-four days of half-pay remaining and accrued annual leave equivalent to almost ten weeks. She said that the claimant had the option of using some, or all of, her ten weeks of annual leave. She said that she still believed what she had decided was the right decision, emphasising the need for fairness and consistency for all employees and ensuring that the respondent used public funds to best serve the council's residents and service-users. During cross-examination, she said that costs was a factor in her decision, but it was not the sole factor. I did ask Mrs Atkinson about how her decision related to that of Ms Gierth. Mrs Atkinson explained that she had re-made the decision.

55. In her letter (as I have quoted) Mrs Atkinson apologised to the claimant for the delay in a decision being made. When giving evidence during the hearing, she gave her sincere apologies for the significant delay which had occurred.

56. The claimant agreed that the respondent had a duty to safeguard their funds.

57. The claimant's pay during sickness absence reduced to half pay after six months of absence. The claimant did ultimately take a period of accrued but untaken annual leave during her sickness absence, for which she was paid full pay (although the claimant said that there was some confusion about it and delay in it being paid appropriately). The claimant has now returned to work. She returned to a different role from that she fulfilled when she commenced absence.

58. I heard some evidence about when the respondent had exercised the discretion to extend sick pay in other cases. It was the claimant's perception that others had been granted it in the past. Ms Willis was recorded in the HR contact log

as having said on 25 January 2024 (494) that "*its very difficult as others have been historically been paid*". The claimant's trade union representative in her email to Mr Seekings of 8 May 2024 (448) said that she had never had a refusal (albeit as the respondent highlighted no names or details were provided of those for whom an extension had been granted). It was Miss Green's evidence that she was only aware of two cases where it had been granted after her move to the HR advisor role with the County Council in April 2022 (the claimant's and the one I will go on to detail). The respondent's response of 23 April 2025 to a freedom of information request was that the respondent's system did not record that level of detail, so it did not have that information (499). When she made her decision, Mrs Atkinson referred in her letter of 24 May 2024 (456) to the fact that the only extension granted since 1 April 2023 was as a result of an administrative error. Her letter explained that neither HR nor her personally had been aware of any other. When cross-examined, Mrs Atkinson clarified that she had not spoken to everyone in HR before sending the letter. That was why there had in fact been a further case identified where someone had been granted the extension which had not been referred to in Mrs Atkinson's letter. The anonymised documents for that grant were included in the bundle. Miss Green gave evidence about them. That was an individual with leukaemia who had been granted an extension after she had exhausted all sick pay (including half pay) and all accrued but untaken annual leave. In the decision letter in that case of 30 April 2024 (517) the relevant assistant director said that it was not a formal procedure followed by the respondent, however the service would offer a three-month extension of her half-pay.

59. This Judgment does not seek to address every point about which I heard or about which the parties disagreed. It only includes the points which I considered relevant to the issues which I needed to consider in order to decide if the claims succeeded or failed. If I have not mentioned a particular point, it does not mean that I have overlooked it, but rather I have either not considered it relevant to the issues I needed to determine or I have not considered it necessary to refer to in these reasons.

The Law

60. Section 15 of the Equality Act 2010 provides:

> *(1) A person (A) discriminates against a disabled person (B) if —*
>
> > *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> >
> > *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

61. For unfavourable treatment there is no need for a comparison, as there would be for direct discrimination. However, the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it. The Supreme Court in

Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65 said that there is a relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify, but that treatment which is advantageous cannot said to be unfavourable merely because it is thought it could have been more advantageous or because it is insufficiently advantageous. In her submissions, the respondent's representative referred at some length to the decisions in **Williams**, including highlighting a passage in which it was said that a previous Judgment was not authority for saying that a disabled person had been subject to unfavourable treatment within the meaning in section 15, simply because she thinks she should have been treated better. I was also reminded of the broadly analogous decision in **Cowie v Scottish Fire and Rescue Service** [2022] ICR 1693 in which it was found that a decision not to extend the payment of full special pay during absence did not amount to unfavourable treatment based upon the principles determined in **Williams**.

62. The respondent's counsel relied upon what was said in **T-System Limited v Lewis** UKEAT/0042/15 in which it was said that to assess whether something was unfavourable there must be measurement against "*an objective sense of that which is adverse as compared to that which is beneficial*". She also placed some reliance upon the decision in **O'Hanlon v Revenue & Customs Commissioners** [2007] EWCA Civ 283 (albeit I found that case of less assistance when considering section 15, as the argument in the Court of Appeal was focussed on whether it can be a reasonable adjustment to extend pay rather than whether it was unfavourable treatment, but it would have been important had I been considering whether extension of pay was a reasonable adjustment). I was also referred to what was said in the EHRC employment practices code at paragraph 17.21.

63. In her submissions, the claimant relied upon the case of **Land Registry v Houghton** UKEAT/0149/14 as showing that what she suffered was unfavourable treatment. That was a case in which non-payment of a bonus was found to be unfavourable treatment. The decision did not focus upon or explain in detail what unfavourable treatment is.

64. **Pnaiser v NHS England** [2016] IRLR 170 (a case referred to by both parties in their submissions) outlined the correct approach to be taken:

> *"From these authorities, the proper approach can be summarised as follows:*
>
> *(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than*

trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises….

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator…

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed."

65. Section 15(1)(b) provides that unfavourable treatment can be justified where it is a proportionate means of achieving a legitimate aim. That requires: identification of the aim; determination of whether it is a legitimate aim; and a decision about whether the treatment was a proportionate means of achieving that aim. The test is an objective one, for which I must make my own assessment. I need to balance the real needs of the organisation against the discriminatory effect of the thing being justified.

66. I took into account the guidance in relation to objective justification contained in the EHRC Code of Practice on Employment. It is for the respondent to justify the practice, and it is up to the respondent to produce evidence to support its assertion that it is justified. I must ask myself whether the aim is legal, non-discriminatory, and one that represents a real, objective consideration? I must then ask myself whether the means of achieving the aim are proportionate? Treatment will be proportionate if

it is ‘an appropriate and necessary’ means of achieving a legitimate aim. Necessary does not mean that it is the only possible way of achieving the legitimate aim, it will be sufficient that the same aim could not be achieved by less discriminatory means.

67. I considered what is known as the cost-plus principle (albeit the Court of Appeal has not encouraged the use of that label). That is the principle that an aim that is no more than a wish to save costs, cannot succeed as being a legitimate aim. Something more than solely saving or avoiding costs is required for it to be a legitimate aim. The key cases on that issue were considered by the Court of Appeal in the Judgment in **Heskett v Secretary of State for Justice** [2021] ICR 110. The claimant correctly referred to that case as being authority for the fact that cost alone cannot justify discrimination. In that decision, Underhill LJ confirmed that it is permissible for an employer to rely as a legitimate aim on a real need to reduce or constrain staffing costs. That is, a need for budgetary constraint can be a legitimate aim, which would mean that the focus is then on the proportionality of the matter being considered (it does not fall foul of the rule that cost alone cannot justify something which would otherwise be discriminatory).

68. The claimant in her submissions emphasised the need for a lawful equality act balancing exercise and referred to **City of York Council v Grosset** [2018] IRLR 746. The respondent’s representative in her submissions referred to the same case in relation to knowledge and discrimination arising from disability. On the balancing exercise required, the respondent referred me to **Homer v Chief Constable of West Yorkshire** [2012] UKSC 15, **Department of Work and Pensions v Boyers** [2022] EAT 76 and the **Williams** case to which I have already referred.

69. Section 19 of the Equality Act 2010 provides:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:*
>
> > *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> >
> > *(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> >
> > *(c) it puts, or would put, B at that disadvantage, and*
> >
> > *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

70. When considering a claim of indirect discrimination, it is necessary to consider the statutory test in stages:

70.1. The first stage is to establish whether there is a PCP;

70.2. If I am satisfied that the PCP contended for has been or would be applied, the next step is the analysis of whether there is a particular disadvantage for those with the relevant protected characteristic when compared to those that do not share the protected characteristic. The comparative exercise must be in accordance with section 23(1) of the Equality Act 2010. In relation to disability, it is therefore necessary to consider those with the individual's particular disability.

70.3. If the group disadvantage is established, then it must be shown that it did or would put the individual at that disadvantage.

71. The burden of proving those elements is on the claimant. I must then decide whether the respondent's approach was a proportionate means of achieving a legitimate aim, applying the same approach and principles as I have set out for discrimination arising from disability.

72. In her submissions, the claimant referred to group disadvantage and to the case of **Essop v Home Office** [2017] ICR 640. It was confirmed in that case that there was no need for proof of the reason why the affected group suffered the disadvantage, there was only need for the evidence that the group was in fact placed at the disadvantage.

73. Section 20 of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20(3) provides that the duty comprises the requirement that where a provision, criterion or practice of the employer's puts a person with a disability at a substantial disadvantage in relation to a relevant matter in comparison with people who do not have a disability, to take such steps as it is reasonable to have to take to avoid the disadvantage. That requires not only the existence of a disability, but also: identification of a PCP; and knowledge (actual or constructive) on the part of the employer.

74. Section 21 of the Equality Act 2010 provides that a failure to comply with the requirement set out in section 20 is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

75. The matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of an employer;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the claimant, including:

   i. the nature of the claimant's disability;

ii. why this disability placed the claimant at a substantial disadvantage;

iii. what the substantial disadvantage was.

76. The requirement can involve treating the person with the disability more favourably than others.

77. Whether something is a provision, criterion or practice should not be approached too restrictively or technically, it is intended that phrase should be construed widely. A one-off act can be a PCP, but it is not necessarily the case that it is (**Ishola v Transport for London** [2020] IRLR 368).

78. I am required to objectively assess the issue of whether the person with the disability has been put at a substantial disadvantage and there must obviously be some causative nexus between the disability relied upon and the substantial disadvantage. I must consider the overall picture.

79. In assessing the efficacy of any proposed step, it is only necessary to establish that there was a real prospect of the step avoiding or reducing the relevant disadvantage.

80. A duty to consult is not of itself imposed by the duty to make reasonable adjustments, the only question is, objectively, whether the respondent has complied with its obligations to make reasonable adjustments or not. The duty involves the taking of substantive steps, rather than consulting about what steps might be taken. That point was not made in submissions but is a legal principle which I consider I am bound to follow (and which was confirmed in well-known cases such as **Tarbuck v Sainsbury Supermarkets Ltd** [2006] IRLR 664 and **Salford NHS Primary Care Trust v Smith** EAT 0507/10)**.**

81. In her submissions, the claimant referred me to the well-known authorities on reasonable adjustments of **Archibald v Fife Council** [2004] ICR 954 and **Nottinghamshire County Council v Meikle** [2005] ICR 1**.** In her submissions, the respondent's representative said that the case of **Griffiths v DWP** [2015] EWCA Civ 1265 held that if a PCP bites harder on the disabled employee than it does on a non-disabled employee, then the substantial disadvantage test was met for the purposes of a reasonable adjustment claim.

82. Section 26 of the Equality Act 2010 says:

"A person (A) harasses another (B) if – (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of – (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

"In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

83. The EAT in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for her; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, it is normally a healthy discipline for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

84. Conduct which is intended to have the relevant effect will be unlawful even if it does not, in fact, have that effect. If the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in that regard has both subjective and objective elements to it. The assessment requires me to consider the effect of the conduct from the claimant's point of view; the subjective element. I must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element. I must do that taking into account all the other circumstances of the case.

85. Tribunals have been warned that whilst it is important to be sensitive to the hurt that can be caused by comments or conduct, it is important not to encourage a culture of hypersensitivity or the imposition of legal liability for every unfortunate phrase. I must consider whether it was reasonable for the conduct to have the effect on this claimant. The respondent’s counsel referred to the following cases on the issue of whether it could be found to be reasonable for alleged conduct to have had the required effect: **Reverend Canon Pemberton v Right Reverend Inwood** [2018] ICR 1291; **Greasley Adams v Royal Mail** [2023] ICR 1031; and **Land Registry v Grant** [2011] ICR 1390. In the latter case, Elias LJ said about the words used in section 26 “*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment”.*

86. One of the questions to be determined in a harassment complaint, is whether the thing alleged was related to the relevant protected characteristic. In this case, that is whether the conduct alleged was related to disability. That is a broad concept. The conduct does not have to be because of disability or motivated by disability (the claimant referred to **Heafield v Times Newspapers** UKEAT/1305/12 as authority for that point). The test is wider than the test for direct discrimination (related to disability will apply in more circumstances than whether something is because of disability). I must consider all the surrounding circumstances: the evidence in the round. Context may in fact point strongly towards or against a conclusion that conduct is related to disability. I must not focus only on the perception of those doing the thing as the alleged harasser’s knowledge or perception is relevant to the question I need to decide, but it is not determinative. Their own perception of whether the conduct relates to disability is not conclusive (**Hartley v Foreign and Commonwealth Office Services** UKEAT/0033/15). The test is an objective one to which the intention of those involved may form part of the relevant circumstances. I must identify and spell out with some clarity the relationship between the conduct and the disability in question.

87. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination or harassment case and provides as follows:

> *"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".*

88. At the first stage, I must consider whether the claimant has proved facts on a balance of probabilities from which I could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. At this stage I do not have to reach a definitive determination that such facts would lead me to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

89. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. I must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

90. The way in which the burden of proof should be considered has been explained in many authorities.

Conclusions – applying the Law to the Facts

Discrimination arising from disability

91. In issue 1.1 I was asked to decide whether the respondent treated the claimant unfavourably by not exercising the discretion to extend the payment of full pay during the claimant's sickness absence? When absent on ill health grounds, the claimant was paid full pay by the respondent for six months of absence and half pay for six months thereafter. That was her contractual right and was what was set out in the green book. It was however a lengthy and comparatively generous period of payment during sickness absence, particularly when contrasted to the limited right to statutory sick pay which is the statutory minimum requirement, and something operated by a significant number of employers.

92. The respondent submitted that what was I was being asked to decide was analogous to the **Williams** and **Cowie** cases to which I have referred in the section on the law above. The representative submitted that ceasing to pay the claimant full pay after six months of absence from work was not unfavourable treatment at all. The discretion to, or possibility of, paying a further extended period of full pay during sickness absence was not about unfavourable treatment, it was about determining whether someone should be treated even more favourably than she already had been. I agreed with that submission. What was relied upon was not unfavourable treatment at all. As a result, the claimant's claim for discrimination arising from disability did not succeed.

93. As a result of that decision, I did not need to go on and consider issues 1.2 to 1.6. As I heard argument and evidence about them, I have addressed in this Judgment what my decisions on issues 1.2 and 1.3, would have been (albeit I have done so more briefly than I otherwise would have done). The claimant's sickness absence arose in consequence of the claimant's disability. As the claimant submitted, the reduction in her pay was because of her absence, which was due to her cancer. However, as the unfavourable treatment relied upon was the decision not to exercise the discretion to extend the period of full pay, I did not find that the unfavourable treatment alleged was because of the claimant's sickness absence. The reasons for the decision not to extend sick pay were (ultimately) those evidenced by Mrs Atkinson, not that the claimant was absent from work on ill-health grounds. The reasons for the decision not to extend sick pay were (in summary): the period of half pay remaining (and the length of that period); the existence and amount of accrued but outstanding annual leave which could be taken; the wish to be consistent and fair to all employees; and the effective management of the respondent's finances in the context of the respondent's high absence levels.

94. For issue 1.4, the aim relied upon was the effective control and management of the respondent's finances. That was a legitimate and non-discriminatory aim. That aim was one which was capable of being justified, as it sufficed to meet what was required to amount to cost-plus (as I have explained in the section on the law) rather than simply being costs alone. I did not accept the claimant's submission that costs and consequence alone cannot justify discrimination and that meant that the respondent could not rely upon the legitimate aim contended, cost alone cannot justify discrimination, but costs plus (as existed in this case) could.

95. The question of whether the decision not to extend the period for which the claimant was paid full pay during her sick leave absence, was a proportionate means of achieving that legitimate aim was a more difficult and complex one. As I have found that the claimant's claim for discrimination arising from disability did not succeed because of my findings on issues 1.1 and 1.3, I could not go on and determine that issue and did not need to do so. The equivalent argument in relation to the indirect discrimination claim is addressed below, and that addresses the respondent's argument based upon the need for the claimant to have exhausted the period for which she would be paid half sick pay, before it would consider the exceptional circumstances to exist in which it would extend sick pay.

96. As the impact of accrued annual leave is specific to the justification argument for the discrimination arising from disability claim (it not being part of the PCP in the indirect discrimination claim), it is appropriate for me to address what I would have found on that argument/factor if I had been considering the proportionality of the unfavourable treatment alleged for the discrimination arising from disability claim. I was concerned by the respondent's reliance on the need for a claimant to have exhausted or used all of their accrued but untaken annual leave. As the claimant emphasised, the two types of leave are for different purposes and the conflation of annual leave with further paid sick leave appeared to me to potentially undermine the purpose of annual leave. On a more nuanced and detailed basis, I could understand the view taken that the claimant could have taken the accrued annual leave carried forward from the previous year as a way of extending her period of full pay, as that would have no adverse impact on taking the appropriate amount of annual leave in the year in question. I also understood for that accrued leave that where she had

chosen not to take it, that meant that the respondent could take the view that she was not in the financial position required for the extension of the period of full pay during sickness absence. However I considered it wholly unsatisfactory for the claimant in April (of a January to January annual leave year) to be required to take all of her annual leave for that year before the discretion would be exercised, where that would leave the claimant with a large portion of that annual leave year with no leave left to take (for the purposes for which annual leave is granted). It did not appear to me that any of the respondent's decision-makers had addressed this difficulty or fully thought-through what exactly it was that the claimant was being asked to do. However, as I have said, I have not needed to determine whether any unfavourable treatment was a proportionate means of achieving a legitimate aim, but had I have needed to do so I would not have found that a refusal to exercise the discretion would have been a proportionate approach if it was based on a requirement that an employee exhaust that year's annual leave entitlement (and pay) during leave which was in practice due to sickness, before the discretion would be exercised.

Indirect discrimination

97. The first issue to be determined in the indirect discrimination claim (2.1) was whether the respondent had a PCP (provision, criterion or practice) of not exercising the discretion to extend the payment of full pay after six months absence.

98. The respondent in the submissions made by its representative denied that it was a PCP of the respondent's. She submitted that the respondent did exercise the discretion when considering the claimant's application for an extension of sick pay, and this was determined after considering the merits of the application and (it was said), in particular, whether or not the claimant had exhausted her contractual entitlements and annual leave. I accept that the respondent's representative is correct that in this case the respondent did consider exercising its discretion shortly after six months absence, because both Ms Gierth, as recorded in the letter of 24 April 2024, and Mrs Atkinson, as recorded in her letter of 24 May 2024, applied the exercise of discretion and reached a decision. The difficulty which was raised by the respondent's representative's submission was whether the PCP relied upon was simply a PCP that the respondent did not consider at all whether to extend the payment of full pay, or whether it was the respondent's practice not in fact ever to extend full sick pay after six months' sickness absence (even where it was considered).

99. I did look at the claimant's grounds of complaint and the case management order to see if either document assisted me in deciding what exactly was the PCP relied upon. Neither did so. In her submissions, the claimant referred to the rigid application of the respondent's rules in not extending sick pay. In practice, I accepted that the claimant's case was primarily not about whether a process was followed, but about the fact that the respondent had a practice of not extending full pay before half sick pay had been exhausted. I therefore decided that was the PCP relied upon. I considered the respondent's submission to be based upon an overly semantic application of what was said in the list of issues and what I was being asked to determine.

100. In this case, whilst both of the respondent's decision-makers considered exercising their discretion to extend sick pay, in practice both decided that they would not do so. The key reason why each of them chose not to do so was because the claimant had not exhausted the period of half pay during sickness absence which she was entitled to for the second six months of her absence on ill health grounds. For the other individual for whom I had a documented decision on the exercise of discretion, it was emphasised that the discretion had only been exercised in that applicant's favour after that applicant had exhausted her entitlement to both six months full pay and six months half pay. Accordingly, I did find that the respondent had a practice of not exercising the discretion to extend the payment of full pay in an applicant's favour after six months absence, as the applicant needed to have exhausted their entitlement to half pay before that discretion would be exercised in their favour (which would not be after six months sickness absence for longer serving individuals).

101. Issue 2.2 was whether the respondent had applied that PCP to the claimant. On a similar basis to that which it had argued on issue 2.1, the respondent denied that it had applied the PCP to the claimant because her application was considered and rejected after a determination on the merits. As with issue 2.1, I accepted that argument as put forward on a strict reading of 2.1.1, but moving away from the overly semantic consideration of the issue, the PCP which I found that the respondent had applied was in fact applied to the claimant. The primary reason why Ms Gierth and Mrs Atkinson chose not to exercise the discretion in the claimant's favour was because she still had a long period of half pay remaining (Ms Gierth said one hundred and sixty-four days at the time of her decision, a figure to which Mrs Atkinson also referred in her decision letter).

102. Issue 2.3 asked whether the respondent applied the PCP to persons with whom the claimant did not share her protected characteristic, that is non-disabled people, or would it have done so? The respondent's representative did not expressly address that issue in her submissions. I found that the respondent applied the PCP which I have described to all or would have done so (irrespective of the reason for the ill health absence).

103. Issue 2.4 asked whether the PCP put persons with whom the claimant shared her protected characteristic at a particular disadvantage when compared to persons with whom the claimant does not share the protected characteristic? Were those with a cancer diagnosis put at a particular disadvantage compared with those who did not? The respondent's counsel contended that the claimant was not placed at a particular disadvantage because she had the benefit of half pay for six months and all employees entitled to those contractual benefits by reason of their length of service would be expected to utilise them if they were eligible by reason of a sick/fit note. I did not accept the respondent's argument on that issue. Those diagnosed with cancer were placed at a substantial disadvantage by the PCP which I have found that the respondent applied when compared to those without cancer, because they are more likely to be absent for at least six months and in receipt of half pay (rather than full pay) as a result. I consider that to be self-evident and not to require any specific evidence to substantiate. The fact that anyone absent for more than six months on ill health grounds would be in the same position irrespective of the reason for their absence (be it cancer or otherwise), does not alter the fact that the PCP

applied put persons with a cancer diagnosis generally at the particular disadvantage of receiving less than full pay when compared to those without a cancer diagnosis.

104. The respondent did not accept that the claimant was placed at that disadvantage (issue 2.5). However, the reasons why I have not accepted the respondent's arguments on issues 2.1 to 2.4, also meant that I found that the claimant was placed at the disadvantage of receiving less than full pay (even if she was receiving half pay for six months of absence).

105. That left me to decide whether the practice of not exercising the discretion to extend the payment of full pay (in an applicant's favour) after six months' absence, was a proportionate means of achieving a legitimate aim (issues 2.6 and 2.7)? I have already found that the aim relied upon (the effective control and management of the respondent's finances) was legitimate. I therefore needed to decide whether the practice was a proportionate means of achieving that aim? The respondent submitted that it was. I appreciated that the claimant argued that it was not. On balance, I found that it was a proportionate means of achieving the legitimate aim relied upon. In reaching that decision I considered of particular importance the following:

105.1. Effective management of the respondent's finances is a real and pressing need for the respondent, as emphasised by Mrs Atkinson in her evidence. I noted that the relevant budget holders supported the claimant's application, but in considering the PCP more widely and whether it was a proportionate means of achieving the legitimate aim relied upon, I accepted the broader evidence heard about spending public money and the current pressures on that money;

105.2. Those for whom this was being considered had already received six months of full pay during absence on ill health grounds and (importantly) would also receive six months of half pay in addition. That meant that the discriminatory effect of the PCP existed but was lessened by the long period of half pay which each individual would receive; and

105.3. With any approach such as this, there will always exist the possibility of continuing payment for a longer period, which would have a lesser discriminatory impact, but continuing full pay for a further period would not meet the aim identified and relied upon.

106. I did not accept the respondent's submission that approving the extension of full pay would render the contractual clause relating to half pay to be meaningless. I also did not accept that it would not have been rational or reasonable to extend pay. It is entirely possible to have a contractual provision which is valid and effective, even though a discretion might be exercised on occasion to vary it (many private sector sick pay schemes operate on precisely that basis, where for example there is no contractual entitlement to sick pay over and above SSP, but company sick pay is still paid in some circumstances). I have also already expressed my reservations about the emphasis given to exhausting accrued annual leave and I did not consider that a PCP which had required all accrued but untaken annual leave up to the end of the current leave year to have been exhausted before the discretion would be

exercised in an individual's favour, would have been a proportionate approach. However, for this indirect discrimination claim and for this PCP, I accepted that it was a proportionate means of achieving the legitimate aim relied upon.

The duty to make reasonable adjustments

107. The respondent accepted that it knew or ought reasonably to have known that the claimant had a disability from October 2023 when she informed it of her diagnosis (issue 3.1).

108. The PCP relied upon for the reasonable adjustments claim was set out clearly in the list of issues at 3.2.1. It was said to be a generic return to work policy that required a particular set pattern when returning to work (one full day in week one, two full days in week two etc). I needed to decide whether the respondent had that PCP. The respondent denied that it did. I found that it did not. As the respondent submitted, there was no PCP along those lines. Mrs Smillie did adopt a return-to-work pattern for the claimant in April 2024 which fitted with the PCP alleged. The fact that she did so on that occasion did not mean that the respondent had a PCP generally. I accepted Miss Green's clear evidence that the respondent does not have a generic approach to phased returns and that no two situations were the same and each return-to-work pattern was tailored to the individual. As a result, I did not find that the respondent had the PCP relied upon. As I did not find that the respondent had the PCP relied upon, the claimant's claim for breach of the duty to make reasonable adjustments did not (and could not) succeed.

109. I did not need to determine issues 3.3 and 3.4. I have explained when addressing the facts what I found occurred in the discussions on 5 April 2024 about the return-to-work pattern. As a result of what I found, I would have accepted that any such PCP (had one been applied) did not put the claimant at a substantial disadvantage. I also would not have found that the respondent knew or could have been reasonably expected to know that the claimant was likely to be placed at a particular disadvantage.

110. The alleged adjustment relied upon at issue 3.5.1 (an occupational health assessment) was not something which could have been found to have been a reasonable adjustment in and of itself, as it would not have been the substantive step or adjustment required, rather being a way of investigating the possible steps. The step of applying a tailored phased return to work plan (issue 3.5.2) might have been a reasonable adjustment required, had I found that a generic return to work policy/pattern had been applied. In her submissions, the claimant also alleged that granting a temporary extension of full sick pay was a reasonable adjustment which the respondent was required to make. That was not the case I was asked to determine and was not recorded in the list of issues, but in any event, I would not have found it to have been a reasonable adjustment on the basis set out in the case of **O'Hanlon.**

Harassment related to disability

111. I have set out in the facts section of this Judgment what I found occurred on 5 January 2024 in Ms Willis' conversation with the claimant (alleged harassment 4.1.1). What I found was said was unwanted conduct. It was clear that the claimant

found that being telephoned whilst off on ill-health grounds and whilst undergoing cancer treatment to be told by her manager that she had been asked to make contact with the claimant and to ask her to reduce her hours by seven hours per week, was not only unwanted but it also had a significant adverse impact on the claimant (issue 4.2).

112. Issue 4.3 asked me to decide whether the conduct was related to disability? I did not find that it was. I understood that it occurred while the claimant was absent on ill health grounds, as the claimant emphasised when she was asked why she contended it was related to disability. As the claimant submitted, the conduct only had to be related to disability, not motivated by it. However, something that occurs whilst someone is on ill health absence, is not related to disability simply because it occurs during the period of absence. I appreciated that the particular adverse effect it had on the claimant was largely because of the claimant's health and her disability. However, the conduct itself was not related to disability. Mrs Wostear asked that all of the senior social workers be contacted to be made the same offer. They were all contacted. The contact made and what was said was not related to disability.

113. The allegation of disability related harassment for what was said on 5 January 2024 did not succeed because it was not related to disability (issue 4.3). Had I not found for the respondent on that issue, I would have otherwise found that what was said in that call did amount to harassment. I would have found that the call and what was said in it did have the effect of creating a humiliating or offensive environment for the claimant and it was reasonable that it had that effect. As the claimant contended, the call, including the timing of it and what was said, was insensitive. I agreed with her evidence that any reasonable person who had thought about it would accept that it was not a call that she wanted to receive at that time. I would not have found that the purpose of the call was that required for harassment and I accepted Mrs Wostear's evidence about what she asked to be said to the senior social workers and why. However, the call that actually took place, and what was said in circumstances where the claimant was absent from work undergoing cancer treatment, would have been found to have had the requisite effect.

114. The second allegation of harassment was based upon what Mrs Wostear said when she contacted the claimant on 8 April 2024. I have recorded in the facts section what I found was said. I did not find that Mrs Wostear said that she had contacted the claimant to ask why the claimant's trade union representative had raised a query about the extension of the claimant's sick pay and I did not find that she told the claimant that she was not entitled to an extension of sick pay or medical suspension because she was well enough to work from home. I accepted that the claimant did not want to be contacted by Mrs Wostear and was upset by, and during, the call. My decision was, therefore, reached based upon what I found was said in the call, rather than what was alleged.

115. I found that the call was unwanted (issue 4.2). Contrary to the respondent's representative's contention, I found that the call was related to disability (issue 4.3), because Mrs Wostear telephoned the claimant to discuss a decision in relation to the extension of sick pay in circumstances where the claimant was on long term absence and had needed to ask for an extension because of absence as a result of her disability. Considering all the circumstances in the round, I found that the conduct was related to disability (albeit not motivated by it). I considered that there

was a material difference in that respect between the conversation on 8 April about pay during sickness absence which had resulted from disability, and the conversation on 5 January (which I have already addressed) about hours of work raised for reasons unrelated to sickness, absence, or disability.

116. I did not find that the purpose of the call was that required for unlawful harassment (issue 4.4). I accepted Mrs Wostear's evidence about why she made the call.

117. In considering issue 4.5, it was clear that the call had an adverse effect on the claimant as she became so upset that Mrs Wostear decided to end the call. However, I did not find that it was reasonable for the call to have had the effect required (that of undermining the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her). Taking account of the strength of those words and the test to be applied (including being aware of what was said by Elias LJ in the **Land Registry** case to which I have referred), I did not find that it was reasonable for what was in fact said in that call to have had the requisite effect.

Other issues

118. At the start of the hearing, it was agreed that I would consider whether the ACAS code of practice on disciplinary and grievance procedure applied and whether either party unreasonably failed to comply with it (issues 5.8-5.11). Neither party addressed those issues in submissions. I believe that the issue potentially arose because the respondent was contending that the claimant had not raised a formal grievance and so she had not complied with what was required. Technically, the claimant did not raise a formal grievance. However, what she did was complete a formal application form on the form which she was provided by her manager (even though the respondent appeared to contend that the form was not one that applied or should have been used) and she completed an employee passport raising her concerns (which did not appear to have been considered by anyone). Once a formal decision was reached by an interim assistant director in writing, her trade union representative challenged the outcome in writing to the respondent's chief executive officer. That appeal against the decision made was considered and responded to by Mrs Atkinson, a director acting on direction from the chief executive. The ACAS code does not require that grievances be labelled as such, it applies to all concerns problems and complaints which an employee raises with their employer. I did not find that the claimant failed to comply with the ACAS code of practice in relation to the main elements of her claim as she did raise them and her trade union representative effectively appealed the outcome, and I would not have found any failure to have raised all matters to have been unreasonable where matters had been raised and addressed first by an interim assistant director and second (after that outcome had been contested) by a director. Technically the respondent may not have addressed what was in real terms a grievance in accordance with the code, but I would also not have found any failure to do so unreasonable in the circumstances being considered in this case.

119. At the end of her submissions, the respondent's representative addressed what was said in the green book and, in her oral submissions, the claimant also addressed it. It was contended by the respondent that the discretion given to

Authorities in the green book can only be exercised once all sick pay, including half sick pay, has been exhausted (or, at least, common sense said that was the only way it reasonably could be exercised). The claimant submitted that was not the case. I agreed with the claimant on that issue. It is entirely possible and appropriate to read the relevant provision in the green book as providing an Authority with the discretion to extend the period of full pay paid, as well as the period of half pay. It may be that there are circumstances in which an Authority appropriately and reasonably chooses to do so. I do not read the wording used as clearly limited only to a consideration of an extension of half pay and I disagree that it is contrary to common-sense for full pay to be extended where half pay still exists. However, that does not mean that an Authority is obliged to exercise its discretion in any way by what is said in the green book. The wording used is such that it does not impose an obligation on an Authority to do so, and the absence of parameters or factors set out in the green book does not inhibit an Authority from setting out its own criteria or factors which it will apply when it considers whether to exercise the discretion in favour of someone asking it to do so.

Summary

120. For the reasons explained above, I did not find for the claimant in any of her claims.

Employment Judge Phil Allen

14 April 2026

REASONS SENT TO THE PARTIES ON
6 June 2026

FOR THE TRIBUNAL OFFICE