EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms L Edwards		Pick Everard

Heard at: London Central **On**: 4-7, 10-13 May 2021 (and 14 and 17 May 2021 in Chambers)

Before: Employment Judge Stout
Ms Maria Pilfold
Mr Richard Miller

Representations
For the claimant: Nabila Mallick (counsel) (direct access)
For the respondent: Richard Hignett (counsel)

LIABILITY JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Respondent did not discriminate against the Claimant because of her sex or disability contrary to ss 13 and 39 Equality Act 2010 (EA 2010);
(2) The Respondent did not discriminate against the Claimant because of something arising in consequence of her disability contrary to ss 15 and 39 EA 2010;
(3) The Respondent did not fail to comply with the duty to make reasonable adjustments in ss 20 and 39 EA 2010;
(4) The Respondent did not fail to pay equal pay to the Claimant for like work in breach of ss 65 and 69 of the EA 2010; and,
(5) All claims presented outwith the primary time limit in s 123(1)(a) of the EA 2010 as extended by s 140B EA 2010 are outside the jurisdiction of the Tribunal.

REASONS

Introduction

1. Ms Edwards (the Claimant) was employed by Pick Everard (the Respondent) from 6 June 2018 with the job title of Senior Construction Health & Safety Consultant. She resigned on 4 July 2019. In these proceedings she brings claims for direct sex and disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and equal pay.

The type of hearing

2. This has been a remote electronic hearing under Rule 46 which has been consented to by the parties. The form of remote hearing was V:fully video. A face-to-face hearing was not held because of the pandemic and no-one requested the same.

3. The public was invited to observe via a notice on Courtserve.net. A number of members of the public joined. There were intermittent issues with connectivity which were resolved by short breaks and repetition of short questions/answers. There was a problem with the volume of Mrs Morrish, but she was able to adjust her microphone so that she could be heard, albeit she was quieter than others in the 'room'.

4. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

Preliminary issues

5. At the start of the hearing the parties raised a number of preliminary issues, including the following matters which we dealt with as follows:

    a. *Claimant's application of 23 April 2021 to strike out the Response on the basis that the Respondent has submitted falsified documents* – Ms Mallick developed her submisions on this, and Mr Hignett responded, but on it appearing that the Claimant may reconsider the application once she had had an opportunity to consider the Respondent's response to it, we directed that this consideration happen over night and on the second day the Claimant confirmed that the application was not pursued, although the Claimant still had doubts about the authenticity of some documents, which it was agreed to deal with in evidence. The

Claimant agreed to withdraw paragraphs 23, 24, 26, 27, 28 and 28(2) of her 'Conduct Statement' as a result.

b. *Claimant's application of 28 April 2021 regarding the Respondent's alleged altering of its witness statements* – not pursued as the Claimant's counsel confirmed the statements have not been altered.

c. *Claimant's application of 29 April 2021 regarding alleged GDPR breach* – This was discussed but not pursued, the Judge having reminded the parties that the Employment Tribunal does not have jurisdiction over complaints in relation to breach of the GDPR *per se*.

d. *Claimant's application to admit an additional witness (Andy Berry) and the evidence of Helen Marshall and Hannah Dewar for whom witness orders had been obtained* – These applications were resisted by the Respondent but granted by the Tribunal for reasons given orally at the hearing. In the event, however, Mr Berry was not able to attend and no application was made for a witness order.

e. *Helen Marshall's application to discharge the witness order previously made by Employment Judge Baty* – This was not granted for reasons given orally at the hearing.

f. *Respondent's application to admit Supplementary Bundle of 12 pages* – This was resisted by the Claimant but granted for reasons given orally at the hearing.

g. Claimant's application to use her bundle rather than the Respondent's – As not all the documents were in the Claimant's bundle, this bundle could not be used exclusively. It was also not the best bundle to use from the Tribunal's point of view as it did not comply with the President's guidance on electronic bundles, not having a separate index, or all documents the same size and orientation, but it was agreed that (by way of a reasonable adjustment for the Claimant) during cross-examination of the Claimant everyone would refer to the Claimant's bundle where the document appeared in that bundle.

h. Claimant's application regarding the number of Respondent witnesses – the Claimant objected to the Respondent calling eight witnesses, which was more than had been indicated when the hearing was first listed. As all of the Respondent's witnesses appeared to be giving necessary evidence relevant to the Claimant's claims, we permitted the Respondent to call all its witnesses.

The issues

6. The issues to be determined were agreed at the outset to be as follows:

Jurisdiction

(1) Are any of the matters complained of outside of the 3-month limitation period? The Claimant notified ACAS under the EC regime on 7th July 2019; the EC certificate was issued on 22nd July 2019; and the ET1 on 27th September 2019.

(2) Insofar as any of the complaints are prima facie out of time:

a. Do they form part of a continuing act?

b. If not, is it just and equitable for the Tribunal to extend time?

Disability

(3) It being admitted that C is a disabled person by reason of Dyslexia, and that R had knowledge that C suffered from a dyslexia impairment from 11 June 2018, by what date did R have knowledge of the remaining elements of the definition of a disabled person applying the test in Gallop v Newport City Council?

Factual allegations of unfavourable/ less favourable treatment

(4) Did R subject C to the following treatment:

a. Jeff Hughes-Jones (hereafter, "JHJ") ignoring C at the summer party (June 2018) [GoC, para 14]

b. JHJ failing to support C in her role, in particular by failing to have face-to-face
meetings with her [GoC, para 13]

c. JHJ failing to conduct an annual appraisal [GoC, para 26]

d. JHJ insisting that C should work on his projects rather than attend project meetings [GoC, para 16] — as to which see C's further information containing three examples in her further particulars of claim dated 12 October 2020 which are:-

i. JHJ insisting that the C should cancel a RIBA Risk Management workshop she had arranged for a client on the 13 May 2019 and instead attend the R's London office to provide training to James Hymers;
ii. JHJ asking the C to cancel all of her meetings diarised for 18 July 2020 and instead travel to Carlisle to attend RIBA stage

3 meeting that JHJ allegedly did not want to attend, due to travel time;

iii. JHJ instructing the C to either not go to a project meeting and/or stop the work she was doing to undertake his work instead immediately.

e. JHJ not giving C access to Focalpoint in order to complete tasks [GoC, para 15]

f. JHJ harassing C by telephone and HR failing to take appropriate action in response to C's complaint [GoC, para 24]

g. R overlooking C for the role of "Associate Construction Health and safety consultant": C will contend she was not given the equal opportunity to be considered for the role and that her application was not genuinely or fairly considered [GoC, para 17-22]

h. R raising unjustified disciplinary charges against C and undertaking an investigation behind her back [GoC, paras 29-32]

R criticising C for the way she filed electronic documents and characterising this as a disciplinary charge [para 32]

j. John Sharp (hereafter, "JS") criticising C for constantly being on her mobile phone [GoC, para 43]

k. JS unfairly criticising C for comments she made on a fee proposal document made by James Hymers [GoC, para 44]

I. HR sending C information on how to recognise dyslexia in children [GoC, para 36]

m. Dismissing C or effectively causing her to resign (constructive dismissal) [GoC, para 50].

n. Presenting C with a new job description without prior consultation [GoC, para 21].

o. EHS failing to respond to C GP letter dated 14 June 2019 [GoC, para 34] and sharing C'S sensitive personal data with third parties [GoC, para 47].

Direct discrimination (s.13 EqA)
Sex

(5) Did R treat C less favourably than it treated or would have treated a male comparator? C relies upon the treatment at para 5.a.-o. above.

(6) Was any of this treatment because C was a woman?

Disability

(7) Did R treat C less favourably than it treated or would have treated a male comparator? C relies upon the treatment at para 5.a.- o. above.

(8) Was any of this treatment because C was a disabled person?

Discrimination arising from disability (s.15 EqA)

(9) Did R treat C unfavourably because of something arising in consequence of her disability? In particular C relies upon the treatment at paras 5 h, i, j and m above. As regards the "something arising" from C says:

a. C's dyslexia makes it harder to file electronic documents according to a particular system and a particular method because C has difficulties with organisation and orientation which makes it difficult to use filing systems and/or libraries. This is compounded when trying to organise files. C struggles to make sense of visual input. In this regard, C relies upon the treatment at para 5. h, i and m above.

b. C's Dyslexia renders her more heavily reliant upon her mobile phone as a Dyslexia aid. Specifically, C uses the Dyslexia Notes app in order to type herself frequent reminders and tasks against different coloured background because (1) a feature of her dyslexia is particularly weak auditory short term memory function and also a general problem in storing and retrieving information in her memory; and (2) her difficulty in forming letters means her handwriting is immature print script, letters poorly formed and illegible (even to herself). Further, C uses her Dyslexia calculator app on her phone where numbers are shown against different coloured backgrounds to make them stand out and easier to recognise because C has problems with auditory memory including sequencing and digit span. In this regard, C relies upon the treatment at para 3. h, j and m above.

(10) In each case can R show that such treatment was justified?

a. Was it a legitimate aim for R to protect its IP and facilitate collaborative working? Was requiring employees to save files centrally a proportionate means of achieving such an aim?
b. Was it a legitimate aim for the Respondent to ensure that its employees focused their time on work tasks? Was monitoring (even anecdotally) its employees phone usage and commenting on phone usage which might not be related to work a proportionate means of achieving this legitimate aim?
c. Was it a legitimate aim for the Respondent to ensure that its employees maintain good standards of conduct? Was R's application of its disciplinary procedure a proportionate means of achieving that legitimate aim?

Failure to make reasonable adjustments (ss.21 and 22 EQA)

(11) Did R apply to C the following PCPs:

a. JHJ's practice of giving instructions about work orally (without recording them in writing) ~~and moving the goalposts frequently~~
~~b. JHJ practice of requiring C to undertake work for him rather than go to project meetings~~[1]
c. R's policy regarding the saving of electronic files

(12) Did those PCPs put C at a substantial disadvantage? C contends as follows:

a. Regarding the first and second PCP's, it put C at a substantial disadvantage in that she would incur difficulty remembering and following oral instructions and become stressed. A feature of her dyslexia is marked weaknesses in phonological processing, auditory sequential memory and short term memory function, and general problems in storing and retrieving information in her memory. JHJ moving the goalposts compounded this. It increased the level of confusion and stress for C.

b. Regarding the third PCP, it put C at a substantial disadvantage because she has difficulties with orientation and organisation which makes it difficult to use libraries and electronic filing systems. A feature of her dyslexia is that she struggles with visual input and matrix reasoning. This means she muddles the orientation or order of symbols, struggles to locate the correct place on a page and has difficulty with charts and visual organisers.

(13) Did R know, or would it have been reasonable to expect R to know, of that disadvantage?

(14) Did R take reasonable steps to avoid that disadvantage? C contends that it was reasonable for R to:

a. Properly and formally assess C's need for reasonable adjustments at the outset of her employment

b. Refer C to Occupational Health and/ or to Access to Work before raising or progressing any disciplinary process and investigation

c. Require JHJ to put instructions to C about work in writing

d. Be flexible in the way it permitted C to file her saved work to a drive backed up by IT daily

[1] Struck-out allegations were withdrawn by the Claimant in closing submissions.

e. Permit C to use apps on her mobile phone for note-taking and for calculating

Equal pay

(15) Did C and James Hymers perform like work?

(16) Has R shown a reason for the difference in pay which is genuine, not a sham, and which is material? The material factor which the Respondent relies on is that the Claimant's line manager (James Hymers) was employed in a more senior role as an Associate and as a result of this senior position had additional managerial and other responsibilities which the Claimant did not.

(17) Is that reason tainted with sex discrimination?

(18) Can C show the reason advanced by R involves a PCP which has an adverse disparate impact on women?

(19) Can C show a disparate adverse impact even though there is no relevant PCP?

(20) Can R show that, although there is a disparate adverse impact, there is a total absence of sex discrimination?

7. In addition, the Respondent invited us to consider whether, if the Claimant had not resigned, she would have been fairly dismissed in any event, or what the chances of that were. The Claimant resisted this on the basis that she had not been put on notice of this point. This was an issue for us to decide having regard to the overriding objective. We decided that although normally it would save time and costs for this issue to be considered as part of the liability hearing, on this occasion the Claimant had indicated she would wish to give further evidence on this point and it was understandable that she had not prepared her statement to deal with it as the issue is not articulated in the Respondent's Response or in the Agreed List of Issues. In those circumstances, we considered that dealing with the *Polkey* issue at this hearing might lead to further difficulties with the timetable for this hearing, and it was preferable for the parties to identify the issue and prepared their cases in response if it remains an issue after the Liability stage.

The Evidence and Hearing

8. We read the pages in the Claimant's bundle, the Respondent's bundle and the Supplementary Bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing.

9. We explained our reasons for our various case management decisions carefully as we went along.

10. We received witness statements and heard oral evidence from the following witnesses for the Claimant:

    a. The Claimant;
    b. Hannah Dewar (under a witness order: see above);
    c. Helen Marshall (under a witness order: see above).

11. Although we granted permission for the Claimant to call a further witness (Andy Berry) in the event he was unable to attend and no application was made for a witness order. Another witness for whom the Claimant had obtained a witness order (Sakhi Mayo) could not be contacted by either party and so the witness order had not been served on her and she did not appear.

12. We received witness statements and heard oral evidence from the following witnesses for the Respondent:
    a. Alastair Hamilton (Partner at the Respondent who has worked there for 34 years, as a partner for 12 years);
    b. Andrew Seaman (National Director of Quantity Surveying for the Respondent who joined in September 2013, based in the Leicester office);
    c. Elizabeth Hardwick-Smith (Director of HR and Training since 23 April 2019);
    d. Glenda Creasey (HR Manager for the Respondent for 8 years);
    e. James Hymers (Associate Health & Safety Consultant for the Respondent since 13 May 2019);
    f. Jeff Hughes-Jones (Associate Director for the Respondent for 13 years);
    g. Jo Morrish (previous Director of HR and Training, left in April 2019 after 11 years);
    h. John Sharp (Regional Director for London and the South East since 18 May 2018).

Adjustments

13. In the light of the Claimant's disability, we agreed to use, so far as possible, the Claimant's bundle where documents were in it. We agreed to have more frequent breaks, at least every hour for the Claimant during cross-examination, and to stop at 2.30pm to allow her to take her medication. In fact, the Claimant took her medication at other times so the break at 2.30pm was not necessary. When being cross-examined, the Claimant asked for more time to read documents sometimes, and asked the Respondent's counsel to slow down. He did, and we gave him more time for cross-examination than planned (c 2 additional hours), so that he could go at a pace suitable for the Claimant. When we got to the additional documents that we had admitted at the start of the hearing, the Claimant was given

time overnight to re-read the email of 2 October 2018 before being asked questions about it.

The witness evidence

14. Our assessment of the witnesses' evidence in this case is set out in our findings of facts below. However, it is appropriate in this case to make some general observations about the evidence that we have heard.

15. While the Claimant was being cross-examined we noticed that there were some aspects of the way that she behaved in cross-examination that appeared to us to be relevant to the issues in the case, in particular as to the way that the Claimant behaved in her interview for the Associate role (where she was alleged to have made at least one sarcastic comment), and how she behaved in a meeting with Mr Hymers and Mr McNally on 29 May 2019 (where it was alleged that she appeared angry and disengaged). At the end of her cross-examination and re-examination, in the course of Tribunal questions, the Judge indicated to the Claimant that she was going to put to her some points regarding how she had appeared at times during the hearing. The Judge made clear that the Tribunal did not yet know what they would make of all the evidence from both sides, and so did not know whether or to what extent these points may be relevant, but that fairness required that they be put to her. The Judge then put the first point that the Tribunal had in mind, specifically that in the course of the hearing we had heard the Claimant be sarcastic on a number of occasions, for example she said that if Ms Hardwick-Smith spent less time baking and more time doing her job we would not be here, and something similar about Ms Creasey. The Judge asked whether it would be fair to infer from these sorts of comments that the Claimant may have been sarcastic in her dealings with the Respondent including at the interview.

16. The Claimant gave a very long and emotional response to that question. She said that she felt that the cross-examination was unfair because Mr Hignett was going very fast and she had been under a lot of pressure when answering the questions. She reminded us that in addition to her dyslexia she has a neurological disorder (about which she has not, and does not wish to provide details, having redacted references to it from her medical notes). She said that she was unwell in the course of cross-examination, and spoke to Ms Mallick who advised her to stop, but the Claimant wished to carry on because the case had already been delayed over a year and it would have resulted in wasted costs for both sides. (We warned the Claimant about her right to assert privilege over her legal advice, but she said she was happy to tell us about this exchange.) She said that she had to call the emergency doctor during the course of her cross-examination because she was in debilitating pain and as a result her medication was increased but it took a while to kick in. Having given her answer, the Claimant then asked for a break and we adjourned for lunch indicating that both sides should reflect on what they had heard and raise any points they wished to after lunch. Neither party raised anything further after lunch.

17. For our part we considered whether in the light of the Claimant's response we had any concerns that the trial to that point had not been fair, but we were satisfied that, despite what the Claimant had said, cross-examination had for the most part proceeded at an appropriate pace. As set out above, when Mr Hignett had speeded up unduly because we had indicated he needed to complete his cross-examination within the time originally agreed, the Claimant had complained about the pace and we had then allowed Mr Hignett the additional time so that he could slow down. We also considered whether in the light of the Claimant's response it was necessary to put to the other specific point in relation to her conduct at the hearing that we had in mind may be relevant, which was that on a number of occasions during cross-examination when the Claimant was unhappy with something that the Judge or Mr Hignett had said or asked her, she often turned right away from the camera for extended periods of time and put her head on her hand in a way that made it look as if she was angry or had disengaged which appeared very similar to her conduct at the meeting on 29 May 2019 as described by the Respondent's witnesses. Given how upset the Claimant had been by our first question, however, and given that we took it from her response that she had understood we were not just asking her about sarcastic comments but about her behaviour during the hearing more generally, we decided that fairness did not require us to put this further specific issue. We accordingly asked just one more question after the lunch adjournment, which was whether the effects of the Claimant's neurological condition had been similar while she was working for the Respondent. Her response to this was that it 'was complicated' and she could not say whether it had been better, worse or the same while she was working for the Respondent.

18. We have taken full account of what the Claimant told us about how she was feeling during her evidence and we have considered very carefully what bearing this has on our assessment of her evidence in this case. Ultimately, we have as a result placed little weight on the fact that the Claimant on multiple occasions did not answer the question put to her (for example, the Judge asked her four times whether or not she had seen the GP put her education psychology report in the envelope with the letter of 14 June 2019 before she gave an answer to the question). This is because we recognise that a difficulty in following the questions may have been attributable to her being in pain and having difficulty concentrating (or, indeed, attributable to her dyslexia). However, on reflection we did not consider that what the Claimant told us about how she was feeling during cross-examination accounted for the aspects of her behaviour that we have found to be relevant to the issues, specifically the sarcastic comments, and her anger and looking away from the camera. This is because for most of her cross-examination she did not behave like someone in pain, but took action to prolong cross examination, complaining about Mr Hignett's questions, seeking to ask him questions (even after we had explained that that was not the function of cross-examination), refusing to answer questions on a document (the Associate job description) even after we had ruled that the questions were relevant and at one point when Mr Hignett said he would

leave the matter of the NHS material on dyslexia for closing submissions she demanded that this be dealt with and repeated at length the evidence she had given in her witness statement about it. We have therefore in our findings of fact placed some weight on the Claimant's behaviour during cross-examination in relation to the two specific incidents that we identified. In each case though, we have also received other relevant evidence, and we did not regard the Claimant's behaviour during cross-examination as being determinative in relation to either incident.

19. As will be seen from our findings of fact we also found the Claimant to be an unreliable narrator in many respects. In particular, we found that she created her letter that she maintains she sent to the Respondent on 5 June 2018 at a later date between 12 and 21 March 2019, that her recollection of the events of 18 July 2018 and what happened around the time of her probation review was inconsistent with the contemporaneous documentation and we have also rejected her evidence on some other points. We have considered whether any of this is explained or excused or should have been viewed differently because of how the Claimant was feeling during cross-examination, but we have decided that the Claimant's unreliability cannot sensibly be attributed to any pain she was in during cross-examination.

20. In contrast, we have found the Respondent's witnesses on the whole (although not in all respects: see our findings in relation Ms Hardwick-Smith on 1 July 2019) to be reliable witnesses who have given accounts that are consistent with the contemporaneous documentation and with each other.

The facts

21. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

22. The Respondent is a construction consultancy with 13 offices situated in the UK and employs approximately 550 employees. The Claimant was employed by the Respondent from 6 June 2018 with the job title of Senior Construction Health & Safety Consultant. This is a role that involves fulfilling the duties of the Principal Designer/Advisor under Regulations 11 and 12 of the Construction (Design and Management) Regulations 2015 (the 2015 Regulations).

23. The Claimant has four degrees, including a Masters Degree from the top university in the world for the built environment. She also scored in the top 1% of her year in the UK in her Applied Health and Safety degree, being

awarded First Class. She is registered as Chartered by the Institution of Occupational Safety and Health (IOSH) and was on the expert register (OSHCR) in 2018. Prior to joining the Respondent the Claimant worked for one of the Respondent's competitors in a lead consultant capacity.

The Respondent's business

24. The Respondent is a construction and property consultancy with 13 offices in the UK and over 500 staff. During the Claimant's employment the Respondent had no female representation at partner or executive board level, but there was until shortly prior to the Claimant's arrival a female partner called Jo Griffin-Shaw who had dyslexia. At director level there are 10 women out of 66 directors, two of the women sit on the group functions board. Women are better represented at the Respondent than the industry average as it employs 29% women whereas the construction industry as a whole is 14% women. It has a human resources (HR) department, but no occupational health (OH) department.

25. When the Claimant joined the Respondent she joined its London office. As she joined the Health & Safety Team another Senior Consultant in the London office moved on, so that there were still just two Senior Consultants in the London office. They were the only members of the Health & Safety team in the London office. They reported to Mr Hughes-Jones who was an Associate Director based in the Leicester office. The Health & Safety team also had a consultant in Bristol (Barry Whyte), a consultant in Cardiff, a consultant in Gloucester and four members of staff in Leicester, including Helen Marshall and Hannah Dewar. There were two long-standing female employees in the Health & Safety Team, Zoe Spiers (who had been there since 2011) and Ms Marshall (who had been there since 2016). When she started the Claimant was invited to sit as a guest on the London Management Team (in place of Mr McNally who was previously sitting on it) because she had some business development in terms of clients she was bringing from her previous employer.

The Claimant's appointment

26. The Claimant was interviewed for a role at the Respondent by Mr Hughes-Jones and Mr Cowie in June 2018. No one from HR was present. No notes of this interview (if there were any, or if they were retained) have been produced as evidence in these proceedings. The application form the Claimant completed, on 22 March 2019 via the Respondent's website, was for the Senior Consultant role to which she was subsequently appointed. The Claimant says that application was one filled in on the Respondent's website, but in fact she was then put forward for a different role by a recruitment consultant, which she says she understood to be an Associate role. She has produced no disclosure to support her case that this is what she was told by a recruitment consultant as her computer from this time was damaged and could not be fixed. In any event, the Claimant's case is

that at this interview she raised with the Respondent a wish to be appointed to an Associate role. Mr Hughes-Jones denies that there was any discussion about an Associate role. An Associate role would be two levels above that of Senior Consultant, Principal Consultant being the intervening level. He accepted that there was discussion about promotion prospects in general terms. We accept Mr Hughes-Jones' evidence on this point for reasons we set out below.

27. The Claimant impressed at interview, Mr Hughes-Jones considering her to be a strong candidate for the Senior role.

28. An offer letter for the role was sent to her on 4 June 2018 by Csaba Princz (then Resourcing Advisor for the Respondent) by email at 13:15 (R145). The salary was for £60,000 with a 'package value' of £63,500 including benefits.

29. On 5 June 2018 the Claimant telephoned and spoke to Mr Princz and at 11:32am he emailed the Claimant confirming that she was to start the next day and *"With regard to the job title, we'd like to keep it as Senior Construction H&S Consultant for the time being and will review it once you have successfully completed your probationary period"*. This was what Mr Hughes-Jones had said to Mr Princz when Mr Princz raised the Claimant's query with him and he was copied in on this email. Mr Hughes-Jones did not recall any discussion with Mr Princz of an Associate role, he recalled the enquiry being about a Principal role. The Claimant responded at 12:32 saying *"No problem. I look forward to meeting you tomorrow"*.

30. The Claimant completed a Pre-Employment Medical Questionnaire (which we deal with below). She also completed, signing each of the documents on 5 June 2018, the Offer Letter, Terms and Conditions of Employment and an Equal Opportunities monitoring form. At 7.16am on 6 June 2018 she emailed Emma Cavanagh (HR Administrator) stating *"I have returned the paperwork in the post so you should receive it today or tomorrow"*.

31. There is a letter in the bundle (R165) dated 5 June 2018 from the Claimant which states:

> Further to my job interview with Allan Cowie and Jeff Hughes Jones and our conversations on the telephone on 5 June 2018, I am writing to formally document I am happy to accept the Senior Construction H&S Consultant position on the basis that Jeff Hughes Jones has agreed HR will review and change my job title to Associate Construction H&S Consultant at the end of my probationary period.
>
> On a separate note I would like to inform you that I was formally diagnosed with severe dyslexia at age six by an Educational Psychologist at The Dyslexia Institute in London. It is classified under the Equality Act as the adverse effect is substantial and long term.
>
> I look forward to starting at Pick Everard and meeting you shortly.

32. That letter thus appears to be a conditional acceptance of the role, subject to change in job title. The Claimant says she sent this to the Respondent with the other paperwork, but the Respondent maintains this was not received. The first that any witness for the Respondent saw of this letter was on 21 March 2019 when the Claimant sent a PDF copy of it to Allan Cowie following a conversation with him in which she said that she had been promised the Associate role (164). Various members of the

Respondent's staff provided 'comments' regarding this letter at the beginning of April 2019 (R245). The comments include: Mr Princz denying ever having seen the letter before, Mr Princz and Mr Hughes-Jones maintaining there was no mention of an Associate role and both of them agreeing that the discussion was about a Principal Consultant role. Mr Hughes-Jones maintained that evidence in these proceedings. The document properties show the PDF as having been both 'created' and 'modified' on 21 March 2019 (245), but this would have been the date that it was saved as PDF. The Claimant said that she did not have the Word version of this document because of the aforementioned problem with her personal computer. There is no reference to this letter on the contemporaneous emails or signed contract, the Claimant having apparently signed all the documents without qualification. The Claimant in her letter of 5 April 2019 (244) alleged that what she wrote in the 5 June 2018 letter was also verbally agreed with Mr Princz on the phone (a point that is not consistent with his email of that date), and maintained that the Respondent had breached her contract by failing to appoint her to the Associate role. She also wrote that *"If my letter dated 5 June 2018 is not on my personal file then it is highly likely that [the letter] was misplaced with my personal/medical information which went missing on 18 June 2018 at 15.32pm"*. This is a reference to the fact that the Claimant's Pre-Employment Medical Questionnaire was lost by the Respondent and the Claimant asked to supply a duplicate copy. The Claimant also alleged that the Respondent had lost her DVLA information and referred to a letter from her car insurance (Aviva) dated 21 January 2021 which confirms that the Claimant called on 6 June 2018 at 11:14am to request duplicate documents for her employer. When the Tribunal pointed out that this letter does not evidence that the Respondent had lost any driving documents, but only that on her first day of employment she requested to be provided with duplicate documents to give to her employer, the Claimant said that there was a further conversation not recorded in this letter which demonstrated what she was saying.

33. The Claimant maintains that, consistent with her case that she was promised a change in job title to Associate following completion of probation, once she had completed probation she raised the question of change in job title with Mr Hughes-Jones but he was 'having none of it'. The Claimant made this point in her letter of 5 April 2019 and Mr Hughes-Jones comments on that on 9 April 2019 saying she had *"certainly"* not raised these questions with him. He maintained that in his evidence in these proceedings. When it was put to her in cross-examination that she had not raised this letter at the end of probationary period (as to which see below), she gave two inconsistent answers before, on the third time the question was put, asserting that she had had a conversation with Mr Hughes-Jones.

34. We find that the Claimant did not write the letter of 5 June 2018 on that date and did not send it to the Respondent. She wrote it at some point between 12 March 2019 (when she first intimated an equal pay claim in relation to the Asssociate role, but without asserting that she had a contractual entitlement to be appointed to that role) and 21 March 2019 when she sent

the purported letter of 5 June 2018 to Mr Cowie for the first time, following which she contended in her letter of 5 April 2019, for the first time, that the Respondent's failure to put her into the role of Associate at the end of her probationary period was a breach of contract. That letter of 5 April 2019 indicates that the Claimant had seen an opportunity (because the Respondent had on 18 June 2018 notified her that it had mislaid her pre-employment medical questionnaire) to say that there were other documents, including this letter, that were mislaid at that point. However, it is clear to us that the letter of 5 June 2018 was not written when she said it was for the following reasons, none of which is determinative on its own, but each of which cumulatively points to that finding:

a. The PDF of the letter was sent to Mr Cowie on 21 March 2019 with a PDF creation date of that date and not 5 June 2018.
b. There is no reference to it on the emails of 5/6 June 2018 or on the contractual and other documentation that the Claimant signed and returned at the start of employment.
c. It is inconsistent with the terms of Mr Princz's email at the time, which provides no categorical assurance of change in job title, and no reference to the Associate title at all.
d. It is implausible that the Respondent would make a definite promise of a change in job title following probation at all, let alone to a role two levels higher in the hierarchy.
e. It is inconsistent with the pre-employment medical questionnaire that she completed at the time in that it refers to her dyslexia as 'severe' and the adverse effect as 'substantial'.
f. There is no reference to it in the discussion with Mrs Morrish for which a file note was made on 11 June 2018. At that point no documents had been lost for Mrs Morrish was looking at the Claimant's pre-employment medical questionnaire. If she also had the letter with its mention of 'severe' dyslexia and 'substantial disadvantage' it is implausible that there would not have been some discussion of it.
g. There is no reason to doubt the genuineness of the Respondent's witnesses consistent evidence that they had never seen the letter before.
h. Although it has not been the Claimant's case in these proceedings that she had a contractual entitlement to the role of Associate, that <u>is</u> what she asserted in her letter of 5 April 2019. However, if that were true, and truly her belief, it is inconceivable that the Claimant (who has a law degree and understands what a contractual condition is) would not have:
    i. Qualified her contractual documentation by reference to the letter of 5 June 2018 to make clear she was only accepting the role conditionally;
    ii. Raised it in writing as soon as it was confirmed that she had passed her probationary period; or, at least,
    iii. Raised the alleged breach of contract in writing at the first opportunity when she heard that the Respondent was advertising the Associate role and/or prior to being

interviewed and/or in her email of 12 March 2019 when she first made an equal pay complaint.

i. The Claimant has not produced the original Word document of the letter, and we reject her evidence that this was because her computer was damaged as it is implausible that if this were true the Claimant would not have mentioned it previously by way of explanation for her failure to disclose documentation related to the start of her employment, such as correspondence with recruitment consultants. This is especially so given the extensive prior correspondence between the parties and case management hearings dealing with disclosure.

j. The fact that the Claimant in her 5 April 2019 letter, when first articulating her breach of contract claim, suggested that, if the letter of 5 April was not on her personal file it was because it had been lost with the pre-employment medical questionnaire on 18 June strongly suggests that the Claimant knew she had just created the letter and had identified the loss of the medical questionnaire as an opportunity to 'get away with' creating the document.

k. The facts that the Claimant no longer rests her case on the 5 June 2018 letter in these proceedings, or maintains that there was a breach of contract, and did not mention the letter in her witness statement or attempt to put forward a positive case in her witness statement in response to the Respondent's allegation, made clear in its disclosure, that the letter of 5 June 2018 was an after-the-event forgery, also all strongly suggest, and we so find on the balance of probabilities, that the Claimant knows that the 5 June 2018 was not a genuine letter.

35. In the light of the foregoing, we also accept the Respondent's evidence that there was no discussion of Associate role specifically in the course interview process. Consistent with Mr Princz's email of 5 June 2018, there was a general discussion of promotion prospects and the possibility of review of job title following probation, but no specific assurance regarding promotion to Associate. As that is two levels above, the natural next step would have been to Principal in any event.

<u>The Claimant's work</u>

36. The Claimant's case in these proceedings was that she was effectively doing the Associate role from the outset of her employment. She relied heavily in this regard on the fact that Mr Cowie in his interview for the disciplinary investigation had said *"prior to James Hymers joining the practice, [she] saw herself as heading up the London H&S team. And in many respects she was."* However, it is clear from the rest of Mr Cowie's statement that he did not think she was already doing the Associate role as he said *"I've advised her that she needs to work towards the role of Associate"*.

37. The Associate Job Description includes the following responsibilities/activities that are not part of the Senior Consultant role: full team management and line management responsibility including provision of pastoral care for staff, appraisals and reviews; deputising for the Associate Director; chairing meetings and being responsible for team compliance and quality and control of day-to-day programming and planning of staff resources and utilisation. The Respondent's witnesses also placed importance on the business development aspects of the Associate role. The Claimant's role did not include any line management responsibility. She was in an equivalent role to Mr McNally and was not responsible for his line management, appraisals or reviews. They both reported direct to Mr Hughes-Jones. The Claimant in her interview for the Associate role acknowledged that both she and Mr McNally were at a 'senior level' and further said that although she was doing work within the Associate job description, she needed more authority to do more business development, and felt that she had not been given that level of autonomy.

38. In the circumstances, we find that the Claimant was not already doing the Associate role. In this respect, the line management responsibility (or, rather, lack of it) is key. A managerial role is different to a non-managerial role. The operational aspects of the Senior and Associate roles, in a small team, were similar, but the two roles were quite distinct. The Claimant had no line-management responsibility and, in her own words, was also (as is to be expected given that her role was two ranks below that of Associate) not given the autonomy that would be given to an Associate in terms of business development.

<u>The Claimant's disability and requests for adjustments</u>

39. The Claimant has Dyslexia and has disclosed medical evidence to support this diagnosis which is accepted by the Respondent. She says that the particular form of Dyslexia she has is Trauma Dyslexia or Acquired Dyslexia, although this is not mentioned in any of the medical evidence disclosed. Since it is not necessary to these proceedings for us to decide what form of dyslexia the Claimant has, we will just refer in this judgment to the Claimant's disability being 'dyslexia'. It was diagnosed when she was six. She received special educational provision for this while at school. She was granted 25% extra time in school examinations. She was also provided with additional support at university. She is also medically treated for am (apparently separate) chronic neurological disorder daily, which she does not rely on as a disability in these proceedings. Her conditions are likely to be lifelong.

40. The Claimant declared her disability to the Respondent in a pre-employment medical questionnaire. In her disability impact statement she says that she submitted an education psychology report with this questionnaire, but she did not mention that on the pre-employment medical questionnaire or in the statement for these proceedings and there is no

evidence that any report was received by the Respondent at that time, so we find that it was not submitted at that time.

41. The Claimant also says that an education psychology report was sent direct to the Respondent by her GP on 14 June 2019 and she has obtained a letter from her GP dated 10 June 2020 [551] which states that the letter of 14 June 2019 *"was sent directly to Elizabeth Hardwick-Smith, the HR director of Pick Everard. We believe that a copy of the dyslexia report was also attached to this letter"*. However, the letter of 14 June 2019 itself was not addressed to Ms Hardwick-Smith and stated that the GP had *"seen a copy of the report"* and *"as such"* supported her request for reasonable adjustments to be made at work, but did not refer to enclosing the report. It is thus drafted in terms which strongly suggest no report was enclosed. Further, when the Respondent was provided with a copy of the GP's letter of 14 June 2019 by the Claimant on 17 June 2019, Ms Creasey telephoned her on 19 June to request a copy of the education psychology report referred to. Ms Creasey's file note of that conversation indicates that the Claimant responded that it was extremely personal, her parents have not even seen it, so she would not be sharing it with the Respondent. When this was put to the Claimant in cross-examination, she denied saying this to Ms Creasey, and maintained that she said she would not be providing a copy of the report because she had already provided lots of copies of the report and the Respondent had lost them. She said she had complained about this to the Information Commissioner's Office (ICO) and that the ICO had said it would be investigating the complaint, and that the Respondent had not responded to the ICO's investigation. However, that latter point is incorrect as the Respondent had replied as is set out in the Claimant's own 'Conduct' witness statement. Further, we find that she did not at any point during her employment provide to the Respondent a copy of any education psychology report. The Claimant's own evidence on this has, as noted, been inconsistent with the documentation. There is no evidence that a report was ever received. The GP's letter of 10 June 2020 was written at her request a year after the event and is couched in terms of 'believe' that do not categorically confirm that a report was sent. The terms of the GP's letter of 14 June are in fact, we consider, clear that no report was sent, and we accept Ms Creasey's evidence, supported by her contemporaneous file note, that the Claimant's position was that she did not want the Respondent to see that report.

42. On 11 June 2018 the Claimant discussed her disability with Jo Morrish (former Director of HR and Training) by telephone. (The Claimant thought this conversation took place on 6 June 2018 and that Mrs Morrish's file note of the conversation was wrongly dated but we find that the file note is right and the Claimant's recollection wrong as Mrs Morrish was away that week and 11 June was her first date back in the office.) Mrs Morrish had in front of her at that point the pre-employment medical questionnaire in which the Claimant had indicated that she had a disability, Dyslexia, and would need a reasonable adjustment of a laptop computer 'as discussed with HR'. The Claimant told Mrs Morrish that she uses her iphone to record notes of meetings and other notes when she is out of the office. It was agreed she

could continue doing so with her personal phone. Otherwise, the Claimant confirmed that dyslexia had not really affected her in previous roles and that she did not require any further adjustments (R153). Mrs Morrish did not therefore seek any additional medical evidence or make a referral to occupational health as there seemed to be no need. The Respondent has other employees with dyslexia who have requested other software such as Read & Write Gold, which has been provided, but the Claimant did not ask for (or want) this, refusing it when Ms Creasey offered it on 21 May 2019.

43. The Claimant gave oral evidence in these proceedings that she uses special dyslexia apps on the iphone to assist her with her work. She said that she told Mrs Morrish this on 11 June 2018. Mrs Morrish said this was not mentioned and she did not inquire further about the Claimant's use of her iphone as the Claimant had said she used her personal phone and was happy to continue using it. We accept Mrs Morrish's evidence on this point as we have found her to be the more reliable witness and on this occasion it is supported by her contemporaneous file note.

44. Regarding the use of apps, the Claimant also gave evidence that the Respondent's witnesses, in particular Mr Sharp, ought to have realised that she was using dyslexia apps on her phone because she frequently used a special dyslexia calculator which had different colours. Mr Sharp agreed that he had frequently seen the Claimant use the calculator on her phone, but he said he did too, and so did others, when doing calculations for fee proposals. He said that the Claimant has an iphone 6 and he has an iphone 6S and so far as he could see the calculator app was the same on both phones. He did not know she had dyslexia until he was informed of this in the course of the disciplinary proceedings in early/mid June 2019. We accept his evidence on this point as he has been the more reliable witness. Mr Hamilton, however, was told by Mrs Morrish and/or Mr Hughes-Jones at the start of the Claimant's employment that she had dyslexia.

45. On 27 July 2018 the Claimant was struggling and spoke to Mrs Morrish about the possibility of being provided with an iPhone in place of her Pick Everard mobile phone and replacing her fixed desktop machine with a portable surface device. Mrs Morrish emailed Mark Wormald (in IT) to request this (R157). He agreed to provide the portable surface device, but told Mrs Morrish that there was no point replacing the work mobile with an iPhone as it does not really do anything different but was more expensive. Mrs Morrish informed the Claimant of that on the telephone on 30 July 2018. The Claimant accepted what Mrs Morrish said and did not seek to argue her case for an iPhone.

46. Mr Hughes-Jones was copied in on the email to Mr Wormald, but did not discuss it with the Claimant when he met with her on 31 July. He regarded the information about the Claimant's dyslexia as confidential/sensitive and something that HR was dealing with. The Claimant did not raise it with him either.

47. The Claimant said in the course of the disciplinary investigation (and maintains in these proceedings) that it had also been agreed by Mrs Morrish at the outset of employment that she could save documents in her personal drive and transfer them to the main job files periodically as a reasonable adjustment. Mrs Morrish denies that this was ever raised with her and says that if it had been she would not have agreed to it because she is aware of the importance to the Respondent's security, for GDPR purposes, and for colleagues to be aware of each other's work, for all work to be saved on the shared drives. Mr Hamilton, Mr Hughes-Jones and Mr Sharp also all confirmed the importance of the policy to the Respondent in these respects. Ms Hardwick-Smith confirmed that there was nothing on the Claimant's personal file indicating that any adjustment in relation to file-saving had been discussed. Mr Sharp gave uncontradicted evidence that the Respondent's policy on saving documents to the shared drive is covered in induction and that he was unaware that the Claimant was not saving documents onto the shared drive. Mr Hughes-Jones said in his statement for the disciplinary investigation, and maintained in these proceedings, that the fact that the Claimant was not saving work correctly was raised with him by Mr McNally near the start of her employment. After that he spoke to the Claimant on a number of occasions about the need to save work on the company server rather than on her local drive and that she never mentioned any adjustments required in that respect (C302). Mr Hamilton says that in their conversation on 15 May 2019 in which he sought to warn her that her behaviour was becoming a conduct issue he spoke to the Claimant about the need to save work on the server and she said that because of her disability she had an agreed adjustment from Mrs Morrish. Mr Hamilton thought it was not sustainable so he said that Ms Creasey would be in touch to understand this further. Ms Creasy spoke to the Claimant on 21 May 2019, and made a file note of the conversation. The Claimant said that she keeps information in one area on her U drive and then transfers it in bulk periodically, that this was as discussed with Mrs Morrish when she first started as an adjustment for her dyslexia, and that she wished to keep doing this. Ms Creasey agreed with the Claimant in this meeting that if she was going to work in this way the periodic transfer of information was absolutely critical. However, it appears that the Claimant's line management did not agree and so one of the points included in the disciplinary allegations against the Claimant of which she was notified by Ms Hardwick-Smith on 13 June 2019 as a *"minor breach"* was *"IT breach: incorrect email saving and document saving – despite being ased on a number of occasions to follow the firm's procedure. High risk for the firm"*.

48. The Claimant deals with the question of saving electronic files at paragraphs 126-132 of her statement. She refers there to the fact that some of her files related to a project for the Houses of Parliament, which was a security restricted project to which employees not working on the project did not have access. The Respondent does not dispute this, but this is not relevant to the issue for which the Claimant was subjected to disciplinary action, which was saving documents on her personal drive rather than the shared server. The Claimant possibly attempts to deal with this point at paragraph 132 of her statement where she says, *"I accept that I have*

difficulty using library systems and it takes me longer to file documents due to my disability". This echoes the report from the Open University (527) that concerns physical libraries, not electronic filing systems, and says that *"Lydia finds libraries difficult to use. She struggles locating books. Book loans are too short .. The UCL Library has short opening hours and she struggles doing things in the allocated time."* There was also evidence in her witness statement that she has difficulties with orientation, organisation and visual input which she said made it difficult to use a library and was compounded when trying to organise books/files and that she has difficulty remembering numeric codes, but none of this relates to the Respondent's specific policy either. In cross-examination, she added that it was difficult and time-consuming to move files from her personal drive to the shared drive and that it was not just a matter of click and drag, but we note that that is only an issue if the document is saved in the wrong place in the first place. The Claimant has thus provided no evidence as to why she was disadvantaged by the Respondent's policy in relation to saving files onto the Respondent's server.

49. Mr Hamilton accepted in evidence that it does take a little longer to save a document on the Respondent's server than on a personal drive as there is a need to look up the right job number, locate the file and then save it to that folder.

50. Although the Claimant mentioned Read and Write Software in paragraph 132 of her witness statement apparently in connection with the issue of saving documents, she accepted in cross-examination that she had not needed or wanted this. She said that *"the Mail Manager add on software which could have resolved my issues with filing was never considered as a reasonable adjustment at all"*, but she has provided no further evidence about this software or how it might have worked. In cross-examination, she said that she asked Ms Creasey about this on 21 May 2019, but this is not reflected in Ms Creasey's file note and, given the Claimant's unreliability, we therefore do not accept that the Claimant did raise it with Ms Creasey. It was also not put to any of the Respondent's witnesses that Mail Manager add on software could have alleviated any disadvantage the Claimant was suffering. The first time that the Claimant mentioned that the reason why she was not saving documents and emails directly onto the Respondent's servers in accordance with the Respondent's policy was on 15 May 2019 to Mr Hamilton when he sought to warn her that her behaviour was becoming a conduct issue.

51. We reject the Claimant's evidence that she had an adjustment agreed with Mrs Morrish at the outset in relation to saving files because we find Mrs Morrish to be the generally more credible witness and because we find it improbable that Mrs Morrish would carefully have documented the other adjustments requested by the Claimant at the outset, but not this one, especially given Mrs Morrish's conviction as to the (obvious) importance to the Respondent's security of documents and emails being saved on the Respondent's servers. We find that the Claimant was aware of the Respondent's policy in relation to saving documents and emails from the

outset and we accept Mr Hughes-Jones evidence that he raised the fact that she was not saving documents and emails in the right place with her a number of times and she did not say to him that she was having difficulties with this because of her disability. There was no evidence to contradict him on this point, and he maintained his evidence in cross-examination, saying that it was HR who told him that the Claimant was saying that the saving policy was causing her difficulties because of her dyslexia. That must have been after 15 May 2019 when the Claimant first mentioned this to Mr Hamilton as we have rejected the Claimant's evidence that she mentioned it to HR at any point before then.

Mr Hughes-Jones' treatment of other employees

52. Mr Hughes-Jones was the Claimant's direct line manager when she joined. Before joining the Respondent Mr Hughes-Jones worked for 26 years in the RAF as a Facilities Manager, ultimately attaining the rank of Flight Sergeant. He commenced employment with the Respondent in 2007. He was promoted (without needing to apply) to Associate in 2015 and Associate Director in May 2018. In his roles he has been responsible for managing a team of 6 to 8 people at any one time, of which four have been female Consultants since 2016.

53. One of those females was Sakhi Mayo who was employed briefly towards the end of 2017/beginning of 2018 who also complained about Mr Hughes-Jones in an induction review on 18 December 2017, describing his management style as *"military and micro-managing"* and 'bullying'. Ms Mayo is recorded as saying that she felt that she 'could not win' with Mr Hughes-Jones and in the middle of a 1-2-1 on 22 January 2018 she requested to have someone from HR present. She was observed to be 'in floods of tears and mental distress at Mr Hughes-Jones unfavourable and/or detrimental treatment in the workplace on a regular basis'. She went off sick and then resigned. Mr Hughes-Jones and Mrs Morrish gave uncontradicted evidence that there had been issues with Ms Mayo's performance from the outset of employment, which Mr Hughes-Jones had raised at an early stage (well before the 10-week induction review for which we have notes).

54. Another female employee was Hannah Dewar, from whom we heard oral evidence. She was an Assistant Construction H&S Consultant in the Leicester office between 29 May and 12 October 2018. In her exit interview with Glenda Creasey she included in her reasons for leaving 'relationship with manager' and 'quality of supervision'. She also complained about Ms Marshall and in oral evidence she made clear that she had not enjoyed the job at all because she was working with two people who she did not get on with. In the exit interview, Ms Dewar described how Mr Hughes-Jones would belittle her and get angry very quickly. Ms Creasey told her that there had been a number of complaints about Mr Hughes-Jones. In LinkedIn messages sent to the Claimant that are in the bundle, Ms Dewar mentioned

another employee, Barry Whyte, who had had difficulties with Mr Hughes-Jones and did not like his management style, and the Claimant in her witness statement (paragraph 39) also said that Mr Whyte had put in complaints to HR. Ms Dewar also referred to *"a middle-aged man that was hired after I left and he lasted 1 year"*. In oral evidence, she was asked if she perceived any difference in treatment of employees by Mr Hughes-Jones and she said that she could not say, she only thought that Mr Whyte had dealt with the situation better because he was older and more experienced/confident. She could not comment on whether there was any difference in treatment because of sex.

55. Another female employee managed by Mr Hughes-Jones was Helen Marshall who joined the Respondent on 27 June 2016 and still works for them. At an induction review meeting on 5 October 2016 Ms Marshall told Mrs Morrish that she was not enjoying the role as much as she had hoped as she did not know what she was supposed to be doing, although she felt her relationship with Mr Hughes-Jones and other colleagues was good. On 8 June 2018 she emailed Mrs Morrish as follows: *"Thank you for your time yesterday when I discussed with you my concerns regarding the on going issues with regards to Jeff Hughes Jones. As you are aware there has been a high turnover of staff in my team which appears to have largely related to Jeff's management style and treatment of his team. …"*. She said that Ms Dewar had also told her that she was upset at the way she was being treated by Mr Hughes-Jones. Mrs Morrish met with Ms Marshall to discuss and followed up with her a week later (as the files show) at which point she was happier. Mrs Morrish agreed to speak to Mr Hughes-Jones. Following Ms Dewar's departure, issues resurfaced. On 18 October 2018 Ms Marshall emailed Mr Hamilton to thank him for meeting on 28 September and to record that they had discussed Ms Dewar's decision to leave and concerns regarding Mr Hughes-Jones approach to staff management, which she considered amounted to bullying. Mr Hamilton responded that he was going to discuss matters with Mrs Morrish. Mr Hamilton then discussed with Mr Hughes-Jones, made him aware of the issues that had been raised and asked him to reflect. On 9 November 2018 Mr Hamilton met with Ms Marshall again. The file note of that meeting, which is not disputed, indicates that he told her that he had spoken to Mr Hughes-Jones and that Mr Hughes-Jones had taken matters on board. Mr Hamilton told Ms Marshall to provide feedback on the situation going forwards, which Ms Marshall was happy to do. Ms Marshall gave evidence to the Tribunal, consistent with her email to the Tribunal of 30 April 2021 seeking to discharge the witness order, was that following that discussion Mr Hughes-Jones management style changed 'overnight' and there were no more issues. They were now getting on well.

56. Mr Hymers gave evidence (para 7) that he was aware when he arrived that there were difficulties between Mr Hughes-Jones and staff in the London office, including not only the Claimant but also Paul McNally, who had also complained about Mr Hughes-Jones 'difficult and overbearing' management style. Mr Hymers had not seen Mr Hughes-Jones treat women differently to

men. He also found him difficult at the start, but has adjusted to his way of working. Mr Hymers was not challenged on this evidence.

57. There were other female employees, not mentioned by the Claimant who have been managed by Mr Hughes-Jones without apparent complaint. These include Sonia Dike and Zoe Spiers who has been in the team for 8 years but was away on maternity leave while the Claimant was employed.

58. It was put to Mr Hughes-Jones in cross-examination that it was a pattern of behaviour for him to raise counter-allegations and performance concerns about female members of staff who raise complaints against him. Mr Hughes-Jones denied this. He said the position with Ms Mayo was different as there were issues with her performance right from the start. He said that he did not even know that Ms Dewar had raised complaints about him until she left. He said that after his discussion with Mr Hamilton on 1 November 2018 he took on board the criticisms and changed his management style. It was also suggested that the Respondent's HR department, in particular Mrs Morrish who had worked with him for 11 years, was protecting Mr Hughes-Jones because he was a high earner. Mrs Morrish denied this and said she felt she dealt with matters fairly and appropriately.

59. We find that there is no evidence of a pattern of behaviour of Mr Hughes-Jones counter-complaining against female employees who complain about him, and it follows that there is no evidence of 'protection' of Mr Hughes-Jones by HR. In Ms Mayo's case, Mr Hughes-Jones had identified performance concerns before she complained about him. There is no evidence he ever complained about Ms Dewar or Mrs Marshall. On the contrary, Mrs Marshall's evidence was that he had moderated his management style completely after being spoken to by Mr Hamilton and had sought to develop her and push her towards promotion in her role, which had only not happened because she did not want the additional responsibilities that came with the Associate role.

60. We find that none of this evidence provides a basis for an inference that Mr Hughes-Jones generally treated women differently. It is apparent that both men and women had been unhappy about his management style in the past, including the unnamed middle-aged male, Mr Whyte and Mr McNally. It is also apparent that not all women have been unhappy with Mr Hughes-Jones. There are other females who have worked in the Health & Safety team without complaint, including Zoe Spiers who has been there for many years. It was suggested that neither Ms Dewar or Ms Marshall would have been willing to say that sex discrimination was a part of it because of the stigma that might thereafter attach to them, or (in Ms Marshall's case) because she was still working for the Respondent. However, we consider there is no reason not to accept their evidence at face value because it is clear that Mr Hughes-Jones' management style was a problem for both men and women. We find that it was, consistent with his background in the armed forces, a service style of management, culturally different to that of private enterprise and that he had failed to recognise those differences until he was spoken to by Mr Hamilton, at which point he was able to adapt. The

only thing potentially contradicting Ms Marshall's evidence as to the reformation of Mr Hughes-Jones after 1 November 2018 are the Claimant's complaints in these proceedings, but our findings regarding those complaints are set out elsewhere in this judgment.

Line management of the Claimant in the initial months of employment

61. The Claimant was working in the London office and received a standard induction when starting about which she was very complimentary at her probation review on 12 September 2018. John Sharpe (Regional Director) met her on the first day. An independent contractor working in the London office (Robin Corbett) also provided the Claimant with an introduction to the London office. Mr McNally (the other Senior H&S Consultant) was also around subsequently (though he was on holiday when she started). As the Claimant and Mr McNally were based in the London office but their line manager (Mr Hughes-Jones) was based in Leicester, they were sat close to Mr Sharpe and Allan Cowie (Regional Strategic Development Director) who, as the most senior employees in the London office, fulfilled a 'pastoral' line management function for them. The Claimant disputed this designation of 'pastoral line manager'. We find it was not a formal role, but appropriately describes the role that Mr Sharpe and Mr Cowie fulfilled for the Claimant as is apparent from her own evidence that she worked closely with them and, indeed, took her concerns regarding Mr Hymers' fee proposal straight to them on 21 May 2019.

62. Mr Sharp's evidence, which there is no reason for us not to accept as there is nothing to contradict it, is that he was not told about the Claimant's disability at the outset of employment and did not know about it until the events of May and June 2019. It was submitted on behalf of the Claimant that it was implausible that he could be her pastoral manager and not know about her disability, so that either we should find he did know about her disability or that he was not her pastoral line manager, but we find there is no inconsistency in the Respondent's evidence on this point. While it might have been desirable for him to be told about the Claimant's disability, it is equally understandable that he was not given the Claimant's position at the outset was that it did not affect her significantly so there was no need for him to know. In any event, it is entirely plausible that he was both not told about it, and that he was fulfilling a pastoral line management role given his seniority and physical location.

63. Although Mr Hughes-Jones was the Claimant's line manager, he did not meet her at the start of her employment. He was on annual leave from 12-19 June 2018 and again from 3-11 July 2018 and did not have an opportunity to travel to London because of his Leicester workload until 31 July 2018. On that day he met with the Claimant for an hour. They did not discuss her disability at that meeting. Their next face-to-face meeting was for the Claimant's end of probation review on 12 September 2018. Because they were in different offices, for the most part Mr Hughes-Jones'

instructions to the Claimant were given in writing, although he accepted in cross-examination that he would prefer to use the telephone. The Claimant never asked him to give instructions in a particular way.

Summer Party 2018

64. Shortly after the Claimant commenced employment there was a summer party to which all the Respondent's employees were invited. There were over 300 people there and the seating was arranged so that each regional team sat on separate tables. The Claimant complains that Mr Hughes-Jones made no effort to communicate with her at the party. She said that he did not speak to her. Mr Hughes-Jones sat on a table with the H&S team from Leicester. The Claimant was on the London team table. Mr Hughes-Jones was not aware whether she was at the party, or indeed anyone else from the London team. He acknowledged in cross-examination that he should have asked who was coming and spoken to her and other consultants. The Claimant said that she did not go to speak to Mr Hughes-Jones because she was not in a position from which it was easy to get out of her seat and then Mr Hughes-Jones moved away to another table.

Meeting 18 July 2018

65. The Claimant in these proceedings complains that Mr Hughes-Jones asked her to cancel all of her meetings diarised for 18 July 2018 with clients on projects she was working on and instead travel to Carlisle to attend a RIBA stage 3 meeting that Mr Hughes-Jones did not want to attend himself, even though he had managed the project for over a year and had detailed knowledge of the project. The Claimant said in her witness statement that she had to do a lot of work to read into the project, which was not meaningful for her in terms of personal career development and she had a long way to travel from London (12 hours travelling in total for the day) whereas someone in the Leicester office could have covered it more easily. The Claimant said she also had to be up at 5.30am the next day to attend a business development function at Smith of Smithfield at 8am. Mr Hughes-Jones denies any involvement in this incident. He said that the Carlisle project was nothing to do with him.

66. There is some documentary evidence that relates to this incident. On 13 September 2018, the day after her probation review, the Claimant emailed (R200) Mr Hughes-Jones and Mr Sharp. This email contains a complaint about *"Meeting Attendance on 18 July 2018"*. from which it appears that the Claimant's concern at that stage was that Stuart Hills had on 16 July instructed another employee (Barry Whyte) to attend a design team meeting in Manchester on 18 July. He had then decided against that and arranged for Helen Marshall to cover the meeting. The Claimant wrote that she had been unable to cover the meeting in Manchester *"due to having a RIBA Stage 3 meeting for Sands in Carlisle which I had agreed with the Client I would attend with the Manchester project team. The train ticket was booked*

in advance and I was unable to change the journey/times or add to it as the return journey time was 10 hours (5 each way) on top of full working day." In her subsequent email of 17 September 2018 (R199) she also stated *"I would also like to highlight the health and safety issues posed by Stuart Hills expecting a member of staff to travel from London-Carlisle-Manchester-London in the same day and placing one brand new member of staff under excessive pressure with virtually no support"*.

67. When it was put to the Claimant in cross-examination that these emails were inconsistent with the complaint that she now advances in these proceedings she said that *"the instruction from Jeff came before this email"*, and that the Respondent had failed to disclose documentation related to it. The next day, in re-examination, she said in answer to questions about the matter for Selfridges that she was also dealing with around this time: *"at the material time Helen was not working on the Selfridges project, I had been asked to go to Selfridges in Manchester but I was unable to go because I was in Carlisle and I couldn't be in two places at once"*. That latter answer is consistent with the emails in the bundle, but not with her witness statement in these proceedings. Mr Hughes-Jones' evidence regarding this incident was that neither the Manchester nor the Carlisle projects were anything to do with him.

68. In the circumstances, we conclude that what was in the Claimant's witness statement regarding this incident was inaccurate. The position was as set out in her email of 13 September 2018. We reject her assertion in cross-examination that the instruction from Mr Hughes-Jones about which she now sought to complain had preceded the events she described in that email. It is implausible that if the Claimant had a grievance about Mr Hughes-Jones' conduct in relation to that Carlisle trip that she would not have mentioned it in her emails at the time where she complains about the conduct of others (particularly Mr Hills) in relation to that date. Further, it is plain from her email of 13 September that the meeting had been arranged by her with the client and was not a project of Mr Hughes-Jones that he was trying to foist on her and for which she had to read in especially.

Access to Focal Point software

69. The Claimant complained in her statement that she was not given access to the Focal Point software when she started employment. Focal Point is a time sheet recording, holiday and money management software. There are different levels of access. The Respondent's practice (as explained by Mr Sharp) is to give full access to those at Associate level and above and more limited access to less senior employees. The Claimant and Mr McNally did not therefore have full access at the outset of employment, but Mr Hymers did when he started. The Claimant said she required it to produce work in progress (WIP) reports and that she asked Mr Hughes-Jones and he refused to provide it. Mr Hughes-Jones recalled the Claimant asking him verbally between July and September 2018 for access to certain Focal

Point reports and he provided her with any reports she needed. He did not think that she needed full access to Focal Point for the work he had asked her to do. He said he did that for other individuals in the office who did not have full access too. Mr McNally did not have full access either. Mr Sharp also gave evidence that full access to Focal Point was not required for WIP, which was produced using Excel. We accept the evidence of Mr Sharp and Mr Hughes-Jones that Focal Point was not required for WIP reports. Mr Hughes-Jones' evidence was that he *"eventually"* agreed to give her enhanced access on 3 September 2018 because she was running a few H&S projects/jobs that she had generated from her previous employment and needed to manage project hours as the designated job-lead. The Claimant said that Mr Hughes-Jones did not give her access until she spoke to Mr Sharp. The documents in the bundle show that on 3 September Mr Sharp asked Mr Hughes-Jones if he could arrange access to Focal Point reports for the Claimant or whether Mr Hughes-Jones would like Mr Sharp to request it. On 7 September at 15.21 Mr Hughes-Jones asked for access to be arranged. Mr Haines responded that he would need to speak with accounts. At 16.30 Mr Hughes-Jones emailed the Claimant asking her to confirm if she had access for reports and the Claimant replied at 16.50 saying that she did not have access to job time etc. There are no further emails, but the Claimant accepted in oral evidence that from this point access was arranged. Our conclusions regarding this complaint are set out in the Conclusions section of our judgment.

End of probationary period

70. The Claimant's employment was subject to a 12-week probationary period. A probation review took place on 12 September 2018 between the Claimant and Mr Hughes-Jones. Mr Sharp was also present. The Claimant in her witness statement (paragraph 58) accepted she had a one hour meeting on 12 September 2018 with Mr Hughes-Jones, but (paragraph 63) denied having a probation review meeting and she maintained that position under cross-examination even after it was put to her that Mr Hughes-Jones notes of the review meeting are dated 12 September 2018, and her own email of 17 September 2018 in which she sought to appeal the decision to extend her probationary period referred to the *"end of my probationary period meeting on 12 September 2018"*. The Claimant was also sure that in any event Mr Sharp was not present at the meeting, but Mr Sharp was able in oral evidence to describe the layout of the room, and the Claimant sent an email following the review on 13 September 2018 to both Mr Hughes-Jones and Mr Sharp which it is unlikely she would have done if he were not at the meeting (R200). The probation review form itself (R197) also refers to further review by Mr Sharp as well as Mr Hughes-Jones. We therefore find that the probation review meeting happened on 12 September 2018 and that Mr Sharp was present together with Mr Hughes-Jones and the Claimant's recollection is incorrect. Because the Claimant could not recall the meeting, she answered in response to most cross-examination questions about the meeting that she was 'unable to confirm or deny'. As she has forgotten the meeting altogether, we accept the Respondent's

entire evidence regarding the meeting, which evidence is also consistent with the documentary record.

71. Mr Sharp and Mr Hughes-Jones recalled there being many positives discussed at the meeting, and this is reflected in the review form which notes that the Claimant had settled in well and picked up the Respondent's procedures quickly. However, there were concerns about managing client expectations as issues had arisen on the Selfridges' project, in particular in relation to advice that the Claimant had given about confined spaces without visiting the site which the Client had in retrospect complained about and asked for her to be taken off the project (an issue on which Mr Hughes-Jones had been briefed by Stuart Hills by email of 10 September 2018). There were also concerns regarding her manner when addressing colleagues in internal communications which Mr Allan had felt to be 'rude and forthright'. The latter concerns had been raised with Mr Hughes-Jones by Rod Allan. Mr Hughes-Jones believed that the concerns were raised in an email. The email has not been located but there is no reason for us not to accept that the concerns were raised. Because of these various concerns the Claimant's probation was extended by 8 weeks. Mr Sharp explained at this hearing that it could have been extended by up to 6 months. 8 weeks was viewed by him as a short extension.

72. The Claimant was angry at the end of the probationary meeting and left before it ended, as both Mr Sharp and Mr Hughes-Jones recall. The Claimant alleged in her witness statement that at the meeting on 12 September 2018 Mr Hughes-Jones described Alastair Hamilton, Stuart Hills and Rod Allan as *"sharks circling waiting to attack"*. Mr Sharp and Mr Hughes-Jones denied this in their witness statements; Mr Hughes-Jones said he would not use such language. Neither of them were cross-examined on the point. When the Claimant was cross-examined about this, the Claimant said that it was not in a meeting where Mr Sharp was present that this was said. This is an allegation that was not mentioned in any document by the Claimant during her employment, but appears for the first time in her claim form in these proceedings. We accept the Respondent's evidence on this because the Claimant's recollection of this whole sequence is not consistent with the documents, and there was no other face-to-face meeting between the Claimant and Mr Hughes-Jones around this time with which she could have confused it.

73. On 13 September 2018 the Claimant emailed (R200) Mr Hughes-Jones and Mr Sharp setting out three points regarding the Manchester Trafford project (including the 18 July 2018 meeting dealt with above) and the confined spaces advice for Selfridges. Mr Hughes-Jones replied the same day saying *"Thanks for the below which will now be filed as we need to move on."* He attached the Probationary Review Document and asked her to review it and sign it, appending any comments she wished and scan it back to him. On 16 September 2018 (a Sunday) Mr Hughes-Jones emailed the Claimant again at 20.16 asking if she could return "the Probationary Document", indicating again that she could add any comments if she wished. The Claimant in her witness statement (para 63) said that this was

all Mr Hughes-Jones had done about the end of her probation and that they did not have a meeting to discuss it, but we reject that evidence for the reasons set out above.

74. On 17 September 2018 the Claimant wrote to Mrs Morrish, copying in Mr Hughes-Jones seeking to appeal the decision to extend her probationary period. She stated that she had not been provided with 'factual written evidence' of concerns, did not believe she should be held responsible for the issues for reasons she had set out in her email of 13 September and 25 pages of evidence she had submitted with that (R199). She said that due to the issues raised she would not sign the Probation Review (and she did not).

75. The Claimant then spoke to Mrs Morrish on the phone that afternoon, as is apparent from C204, and Mrs Morrish confirmed there was no formal process for appealing against a decision to extend a probationary period. Mrs Morrish told the Claimant that Mr Hughes-Jones would arrange a catch-up meeting in the next couple of weeks. The Claimant in reply requested a copy of the formal written complaint from Selfridges. Mrs Morrish was on holiday, and did not respond immediately. On 19 September 2018 the Claimant spoke to Ms Creasey complaining that Mr Hughes-Jones had not provided her with any evidence to support his decision regarding probationary period (R202). On 28 September 2018 Mrs Morrish responded to say that there was no written complaint (R203) but that Mr Hughes-Jones would set up a meeting with the Claimant the next week to discuss.

76. On 2 October 2018 Mr Hughes-Jones emailed the Claimant and Mrs Morrish providing her details about the complaint from Selfridges (which his email indicates he thought he had already explained at their meetings on 31 July and 12 September). This email shows Mr Hughes-Jones taking a balanced approach, explaining why the client had asked for her to be removed from the project, emphasising this was not a formal complaint, just feedback and that there were lots of positive things regarding her performance, although he remained concerned about her *"forceful attitude, curt emails and communication style"* and said that he needed *"to consider whether this fits in with our firm's culture"*.

77. The Claimant was then treated as passing her probation on 23 October 2018 (R205-206). She did not then refer to the 5 June 2018 letter or suggest that her job title ought to have been changed as she contends was promised at the start and on the basis of which she maintains she accepted the employment. In oral evidence she said that the reason she did not raise it at the end of her probationary period was because all Mr Hughes-Jones did at the end of her probation was to email her on 16 September at the weekend asking her to return the document and there was not an opportunity for her to say anything. The question was asked again, reminding her that we were looking at 23 October 2018 when she was informed by Mr Hughes-Jones and HR that she had passed her probationary period. She then said that she had already raised the issues about her probation with Mr Hughes-Jones so there was no point reiterating

the same point over and over again. It was then put to her again that she did not mention it on 23 October 2018 in response to being told that she had passed her probationary period and that the first time she had raised the 5 June 2018 letter was on 21 March 2019 after her interview for the Associate role. At this point she said that she had had a conversation with Mr Hughes-Jones about it previously *"and he was having none of it"*.

78. The Claimant complains that she had little face-to-face contact with Mr Hughes-Jones. He gave uncontradicted evidence, which we therefore accept, that after the probation review meeting, he met with her in the London office on 25 October 2018, 4 December 2018 and 12 December 2018 and that they also did frequent Skype or telephone call catch-ups, generally on a Friday.

Associate role

79. The Claimant complains that the Respondent overlooked her for the role of Associate Construction Health & Safety Consultant, that she was not given an equal opportunity to compete for the role and her application was not genuinely or fairly considered.

80. The need for an Associate Health & Safety Consultant role in the London office was identified by Mr Hughes-Jones because he considered there was an opportunity from a workload perspective and it was becoming difficult for him to manage the team remotely. Mr Hughes-Jones spoke to Mr Hamilton about it and they agreed to approach recruitment consultants to test the market. They also intended to advertise it internally, but Mr Hamilton said they did not consider only looking internally as they did not consider that would necessarily give them the best candidate for the position. Recruitment for Health & Safety Consultants has always been challenging for the Respondent and they are almost always open to approaches from recruitment consultants with potential candidates.

81. The role was advertised externally from 1 February 2019. The Claimant was informed of this by recruitment consultants who thought she might be suitable. The Claimant then spoke to Allan Cowie about it on 18 February 2019.

82. By email of 19 February 2019 the advertisement of the role was notified internally to all members of the Health & Safety Team by Mr Princz. Those who wished to be considered were to email Mr Hughes-Jones by 22 February 2019. The Claimant says that they were already interviewing by that stage and she believes they would not have told anyone internally if she had not raised it. It is incorrect that they had interviewed already as the first interview was not until the next day, but in any event we accept the Respondent's evidence as a matter of fact that they always intended to advertise internally as there is nothing to contradict it. The Respondent was not bound to advertise internally, but they did so. So far as the new Associate role was concerned, the Claimant was from the Respondent's

perspective in the same position as Mr McNally or, indeed, any of the other Senior or Principal Health & Safety Consultants. She was someone who might have wished to apply for the Associate role. They were all informed about it at the same time and all had the same opportunity to apply. The fact that the Claimant in the end was the only internal candidate makes no difference to the position as it would have appeared to the Respondent from the outset since there is no evidence (which we have accepted) that the Respondent knew before advertising the Associate role that the Claimant either thought she was doing that role or had been promised it or otherwise expected just to be promoted into it.

83. The Claimant emailed her application on 20 February saying that she would be away on holiday but available for interview from 4 March onwards (C150).

84. In the Claimant's CV submitted for the application she included a number of points that she had not included when applying to the Respondent the previous year. These appear to have been intended (as is to be expected) to tailor her CV to the Associate-level job description. In particular, she included more references to management experience. On the CV when she applied to the Respondent the only references to management experience are on the Arla Foods job where she said that she *"Managed/controlled 250+ contractors on site on a daily basis undertaking construction works"* and on the Facilities Service Group job she previously wrote that the *"Managed 20 FSG Reactive operative's OOH activity, ensuring health and safety compliance"*. The Personal Profile section on that CV did not refer to management experience. On the CV submitted with her application for the Associate role, however, she put on her Personal Profile *"Ability to manage teams up to 300 providing pastoral care and ensuring teams understand and comply with all health and safety requirements, practices and procedure"*. Regarding her work at Pick Everard she stated that she was *"Responsible for heading up a team"*, that she had *"Proven management of consultants"* and responsibility for *"Delegate work and monitor staff performance"*.

85. On 28 February 2019 Mr Hughes-Jones emailed Mr Hamilton regarding the Associate applications. In relation to the Claimant's CV he wrote: *"She says she manages 300. Not the case. I have spoken to Jo Morrish and she has advised that as an internal candidate we are within our rights to discuss in more detail Lydia claims to UR and RR'S. This is worth probing to understand how much she actually does know. Also business plan and financial targets are worthy of discussing as well. She does sit on the London Management Team"*. The Claimant maintains she does have experience managing 300 contractor personnel, as her employment reference from RNM dated 28 March 2014 states that in that role she had responsibility for 250 contractor personnel. The Claimant complained that when annotating her CV by hand Mr Hughes-Jones had 'scribbled out' information including this point without checking her employment references held on file with HR. It is apparent, however, that Mr Hughes-Jones has not scribbled anything out but has annotated and highlighted points on her CV

about which he had queries. Mr Hughes-Jones also said when cross-examined that he had not seen the RNM reference until he saw it in the bundle and we accept his evidence which is plausible and not contradicted. He could not therefore have realised what she was referring to when she said she had managed teams of 300 people. When shown it he said it did not show that she was line managing the contractors, the reference was a reference to the number of people working on the project for which she was co-ordinating the health and safety systems.

86. One of the external applicants who was ultimately successful was Mr Hymers. His first interview was on 20 February 2019; the other ultimately successful candidate was interviewed on 27 February 2019. Mr Hymers was scored 27/30 at that first interview; Ms Fahey was scored 25/30. In his email of 28 February 2019 following those first interviews, Mr Hughes-Jones identified Ms Fahey's lack of management skills with her current team because of not working in the office and said that this would need a second interview. Regarding Mr Hymers, he wrote *"I believe [he] is of strong character. So James' score is 27 and Raena's is 25 if you agree"*. This score was reached by scoring each candidate on a score sheet against three different criteria, with comments explaining the scores. These interviews were conducted face-to-face in a meeting room in the office. The Claimant considered that the location of the interviews was chosen to humiliate her and that interviews could have been held on a different floor in a different part of the building. This part of the Claimant's case was not put to the Respondent's witnesses and in any event there is no evidence to support it. If the Claimant felt humiliated, we infer that comes from her belief that it was 'her' job being advertised, but so far as the Respondent was concerned it was not her job being advertised, but one two grades higher which they had no reason to believe she thought she was already doing.

87. There was also at least one other external candidate, Amy Jane Farr, whose identity the Claimant learned through some means. Face-to-face first-round interviews were arranged for Raena Fahey, Amy Jane Farr and James Hymers. As the Claimant was an internal candidate, she did not have a first round interview. She, Mr Hymers and Ms Fahey were interviewed in the second round. For all those second-round interviews Mr Hughes-Jones was on Skype as he had just had an operation, but for Mr Hymers and Ms Fahey they were in the office with Mr Hamilton so had to speak both to the screen and to Mr Hamilton in the room. For the Claimant's interview all participants were on Skype (C467). Mrs Morrish attended her interview with Mr Hughes-Jones and Mr Hamilton because she was the internal candidate.

88. The Claimant's interview was on 8 March 2019. It lasted about 1 hour. Mrs Morrish expected it to last longer, but the Claimant's answers to questions were short and so they got through more quickly than they expected. In oral evidence the Claimant initially denied that she had been asked about her claim to have managed 300 people in the interview, but it is apparent from the notes of the meeting (which she does not dispute) that she was asked about her experience of managing teams, with reference to her CV and that

she responded by referring to her experience of managing the H&S side of a job involving 300 people for which she had a reference. Mr Hamilton clarified whether she meant managing a team or the H&S resource and then she said that she 'looked after 20-30 men for 5 years on a project'. When this part of the notes was put to her by the Tribunal, she still maintained that she was not asked specifically about the claim to have managed 300, but there was no need as she had already given her answer on that. She was asked questions on the company business plan and financial targets that required detailed company specific knowledge rather than a standard set of questions asked of external candidates. The Respondent's witnesses considered she was sarcastic and negative during the interview. It was particularly noted that her answer to the question *"What is your role regarding WIP? What is it?"* was *"Well Jeff, it is Work in Progress"* which Mrs Morrish recorded in the contemporaneous notes as being said in *"a disrespectful tone"*. When asked about this in cross-examination the Claimant said that she *"could not recall and could not confirm or deny"*. The Interview record completed by Mr Hughes-Jones also notes that she came across as defensive and angry, saying she was *"not given autonomy to develop the business"*, was *"put in a box"* and that she had brought in big fees for the firm when in fact she has only brought in £16,000 [R222]. When asked if she had any questions at the end, she took the opportunity to complain about the process, asking why she was not told about the role until 19 February and saying that she *"Felt that you should have openly communicated"* (R220). When asked about this in cross-examination, the Claimant said *"It was a charade Mr Hignett"*. Mr Hamilton said he had never been in an interview where the candidate has been so rude and combative with the interview panel. Mrs Morrish considered her behaviour inappropriate. She said that there was no need for the Claimant to have raised complaints about the process during the interview. She had already done that with HR before the interview (which we take to be a reference to the Claimant having complained already about the external advertisement). In cross-examination the Claimant repeatedly referred to the interview, angrily, as *"a charade"*. She was asked by Mr Hignett whether she thought she could have done better in the interview. She responded: *"if it had not been a charade and the decision had already been made, I could have acted differently, but I believe that he had already been offered the role and I believed from conversations in the office that it was a charade"*.

89. The Claimant was scored 24/30 for her interview (R222), being given the same score as Mr Hymers for technical competencies (9/10), 8/10 for previous relevant work experience with the comment *"Similar role held in the past as an H&S Advisor – but not as an Associate"* and 7/10 for behavioural competencies, where she was marked down for her conduct during the interview. Mrs Morrish's notes of the post interview discussion (R225) include under the 'Actions' *"AJH/JHJ to give feedback to Lydia when decision made on Associate role"*.

90. We accept the Respondent' witness' evidence as to the Claimant's conduct during the interview, not only because we have found their evidence to be generally reliable, but also because it was clear from her answers to

questions in cross-examination that the Claimant knew she had not conducted herself wholly appropriately in that interview, and that the reason was because she had convinced herself it was a charade. It was put to the Respondent's witnesses, variously, that her comment about WIP was a joke and/or an appropriate answer to the question, but it is apparent from the interview record that it is a sarcastic comment. Although the words used could have been uttered in a jokey manner, that was not how they were perceived by the Respondent's witnesses and we accept their evidence on that. This is both because the Claimant made clear that she was so angry about the interview and regarded it as a charade, and because in the course of her evidence in these proceedings we witnessed her on a number of occasions make sarcastic remarks in a manner that appears very similar to the behaviour observed by the Respondent's witnesses. We have in mind the occasion when she said of Ms Hardwick-Smith that *"if she spent less time baking and more time doing her job we wouldn't be here now"*, and when she said about Mr Hignett 'you appear to be telling me Mr Hignett rather than asking me so I have nothing further to say' and when she was challenged about her allegation that Ms Hardwick-Smith said *"Your going"* she said *"Yes, she gave me that little heads up"*. We further find that the Claimant's belief that the interview was a charade was without foundation: the Respondent did not need to advertise internally or interview her, it went to a lot of trouble to do so, involving three senior individuals in an hour-long interview. As a matter of fact the decision had not already been made before she was interviewed. She was interviewed between the first and second interviews for the external candidates. She was scored equally with the other candidates for qualifications. Had she acquitted herself better in interview, we can see no reason why she would not have been in with a chance of appointment.

91. On 12 March 2019 (230) the Claimant emailed Mrs Morrish complaining about the process by which the Associate role had been advertised, noting that she had been told the role would pay £15,000 more than she was being paid and stating that she believed she had been *"doing the same work and/or similar work which has equal value to the role advertised and the company's Clients have been charged for my work at Associate rate"*. She asked for information to establish the facts and asked Mrs Morrish to clarify if her work was equal to that of her comparators. She asked for a response within 7 days. It is notable that in this email she does not contend that she is already doing the Associate role or that she is contractually entitled to that role.

92. Mrs Morrish replied immediately that she would have to speak to Mr Hughes-Jones who was off recovering from a knee operation, but indicating that it would help to know who her comparators were. The Claimant responded by identifying the charge-out rates for 8 of her team members. On 19 March 2021 Mrs Morrish sent the Job Descriptions for the Claimant's role and the Associate role to the Claimant. She queried the salary she had been told about by recruitment consultants. She said that charge-out rates did not necessarily correlate to job value. She said that the Claimant had higher pay than some Associates in the firm and that she was paid more

than all her team members apart from Mr Hughes-Jones who was an Associate Director.

93. Following a conversation with Mr Cowie, the Claimant wrote to him on 21 March 2019, sending him a copy of the letter that she maintains she sent to the Respondent on 5 June 2018 (R164).

94. Mr Hymers' second interview was on 26 March 2019 and Ms Fahey's second interview was also on 26 March 2019 (p 235). Both of them were asked questions in the interview about how they would manage conflict with other staff members. Mr Hymers was specifically asked how he would manage a current person within the Respondent not being given the promotion to Associate, which was a reference to the Claimant although she was not named. Since the Respondent's witnesses were challenged regarding these questions, we record our view that these were reasonable questions to ask in interview, especially given that it was already apparent how unhappy the Claimant was about the Associate recruitment and so ability to manage a disgruntled team member was potentially going to be important. Following the second interview, Ms Fahey's score was increased so that both she and Mr Hymers scored 27/30, i.e. 9/10 on each competency. Mr Hamilton says they scored higher on 'previous relevant work experience' because they had more business development experience in their previous roles and they thought they could generate fee income. They scored higher on behaviour competency principally because of the Claimant's behaviour in the interview. Although Mr Hymers was not as well qualified, the Respondent considered he had more vision and had strong attributes in terms of delivery. Both Ms Fahey and Mr Rymers were offered the role, with offer letters going out on 1 April 2019, but Ms Fahey turned it down. Both successful candidates were offered starting salaries of £67,500 (503 and 237).

95. The Claimant considers that she was better qualified than either Ms Fahey or Mr Hymers. The Claimant has 15 years experience, a 1st in Level 6 Applied H&S, is a Chartered Member of the Institution of Occupational Safety and Health (IOSH), a Registered Expert on OSHCR and a Member of IIRSM. Ms Fahey was also a Chartered Member of IOSH. Mr Hymers was less qualified. He was a Graduate Member at the time of appointment, but attained Chartered status within a short period of starting at the Respondent. He has a 2:2 in Level 6 Applied H&S and only 6 years' experience. So far as Mr Hughes-Jones was concerned, however, all the candidates had the necessary technical qualifications for the role. Technical qualifications were not, however, the only competencies that were being assessed.

<u>Associate interview outcomes and feedback</u>

96. The Claimant learned from an unidentified third party that Mr Hymers had been appointed to the Associate role. She spoke to Mrs Morrish about this on 2 April and complained that she had not even had feedback yet. The

Claimant says that in this conversation on 2 April she was instructed not to undertake any more work falling with the Associate job description. She says that she was sent a new job description by email by Mrs Morrish. The Claimant maintains that this email has not been disclosed by the Respondent. Mrs Morrish denies that she told the Claimant not to undertake any work falling within the Associate job description, or that she sent the Claimant a new job description. When it was suggested to the Claimant that she might have confused this with an email from Mrs Morrish of 19 March 2019 in which she sent her job descriptions for Construction H&S Consultant and Associate H&S Advisory, the Claimant said *"I am not getting confused are you suggesting I am stupid".* We note that in Mr Cowie's interview for the disciplinary investigation he stated: *"Lydia has told me that she will not now perform any duties that are described within the job description of 'Associate' in spite of my advising her that this is the wrong way to go about things. I advised her that her best chances of promotion to Associate are by doing the job as visibly as possible. But she doesn't share that view."* The Claimant viewed Mr Cowie as an ally and it was suggested on a number of occasions during the hearing, including during closing submissions, that the Respondent had avoided calling him because he would have assisted the Claimant. We find that on this point the Claimant has misremembered. It is implausible that Mrs Morrish would send her a new job description given that her job had not changed. The Claimant's account to this Tribunal is inconsistent with what Mr Cowie says she said to him (although we acknowledge Mr Cowie has not been cross-examined). The Claimant may have confused this with the email from Mrs Morrish of 19 March. We therefore conclude that she was not sent a new job description and there is no document in this regard that the Respondent has failed to disclose.

97. On 2 April 2019 Mr Hamilton spoke to the Claimant on the telephone in the early evening to give her feedback regarding her interview. The Claimant suggested that this would not have happened if she had not complained, but we find her belief to be incorrect: it is apparent from Mrs Morrish's notes of the interview on 8 March that there was an intention to give her feedback from the interview. It would not have been appropriate to give that before the successful applicants had been notified. Letters only went out on 1 April 2019 and the Claimant was given feedback the next day. There is no inference to be drawn that there was not an intention to give feedback. The feedback was frank and perceived by the Claimant as 'negative', but that reflected the view the panel had taken of the Claimant's performance at the interview.

98. On 5 April 2019 the Claimant emailed Mr Hamilton attaching a formal letter in which she complained about what she regarded as the agreement at the start of employment that at the end of the probationary period her role would be changed to Associate role. In this letter she asserted that there was an agreement to change her job title and that she had verbally asked for her job title to be changed at regular intervals since the end of her probationary period. She also complained about the recruitment process for the Associate role (R242). She said that the external candidates (whose

names she knew) were not as qualified as her, as they did not hold Expert Consultant status and therefore should not even have been short-listed. In this letter the Claimant states that in her conversation with Csaba Princz on 5 June 2018 *"Csaba Princz informed me that Jeff Hughes Jones had advised him my job title would be changed to Associate at the end of my probationary period and my employment contract would be updated. I verbally agreed to accept the Senor Construction H&S Consultant job title on the basis it would be changed to Associate at the end of my probationary period"*. Regarding the letter of 5 June 2018 she said *"If my letter dated 5 June 2018 is not on my personal file then it is highly likely that it was misplaced with my personal/medical information which went missing on 18 June 2018 at 15.32pm".* She complained that the recruitment process had disadvantaged her and humiliated her. She concluded her letter by saying that she was raising these matters on an informal basis *"to give you the opportunity to resolve the breach of contract however I reserve all legal rights"*. This letter was circulated to Mr Hughes-Jones, Mr Princz and Mrs Morrish who all provided their comments on the document.

99. On 9 April 2019 Mr Hamilton replied, copying in Mrs Morrish, saying that he was pleased she wished to deal with it on an informal basis and inviting her to discuss the contents of the letter by Skype the next day. The Claimant responded later that afternoon *"Thank you for your email dated 9 April. In my opinion you have made your position crystal clear and I don't want to discuss the issues any further. Thank you for the offer of a work plan. I will make my professional development plans independently."* The Claimant thus refused to meet with Mr Hamilton the next day.

100. On 15 April 2019 Mr Hamilton responded to the Claimant's email of 9 April. As she had declined his offer to talk through her issues informally, he set out his response in the email. He stated that he did not believe that she had been offered an Associate role or that there had been an agreement to change her job title. He explained why the other candidates had been successful but she had not, stating: *"although it was considered you are technically competent in your role there remains a need to develop your personal competencies including your approach to verbal communication and how you interact with others which sometimes comes across as abrasive and direct … [the other candidates] demonstrated a more general positive approach and particularly with regard to how they would take the role of Associate forward in managing and developing people and developing the workload in the discipline"*. He wrote that the Respondent was not aware that the Claimant had requested further adjustments for her disability beyond the provision of the surface device and that he did not believe that she had been disadvantaged in the recruitment process. He concluded that he was sure the right decision had been made not to appoint her to the Associate role at this point, but he was still happy to discuss with a view to development plans for her to help her strive to achieve that role. He said he was sure she was aware of the grievance procedure, but he attached a copy for her information.

Preparation for Mr Hymers' start date

101. On 18 April 2019 the Claimant emailed Mr Hughes-Jones regarding Mr Hymers' start date. She wrote that, as discussed on the phone, he would have a London office induction by Michaela when he arrived in the office. She wrote *"As discussed on the telephone I will be in the office that week however I do have meetings already arranged which I will be attending. I will also be covering Paul McNally workload as he is on annual leave therefore I will have very limited free time available. I trust you will provide James and introduction to Picks in the 3 days you are in London"*.

102. There was a meeting between Mr Hughes-Jones, Mr McNally and the Claimant on 26 April 2019 to discuss arrangements for Mr Hymers' start. The Claimant took notes and ciculated them (252). Mr Hamilton and Mr Hughes-Jones considered that the Claimant's notes (which was not a practice she had adopted previously) did not reflect the meetings and that her decision to start preparing these notes was part of her retaliation for not getting the Associate role. Nonetheless, these are the only evidence we have for this particular meeting. They show that Mr Hughes-Jones said that he was going to recruit for another Associate in the London office, but the Claimant and Mr McNally said that there was not enough work available in London for two Associates, but that cover was required at London Stansted. Mr Hughes-Jones asked the Claimant and Mr McNally what projects could be handed over to Mr Hymers when he starts. The Claimant said she had no projects that could be handed over. Mr McNally identified four of his projects which could be handed over. Mr McNally advised that Kamran Qureshi (a male Senior Health & Safety Consultant) who was at that time working at the London Stansted office had received no communication/support from anyone except him since starting and Mr Hughes-Jones agreed to contact him.

103. The Claimant in her response to the disciplinary investigation says that she emailed Mr Hymers on 26 April inviting him to meet the team on 10 May 2019, which was before he was due to start work. He did not attend. This email was not in the bundle before us and not referred to in her witness statement.

104. An email from the Claimant of 8 May 2019 (C262) purports to be the notes of a telephone call on 7 May 2019 in which she states that Mr Hughes-Jones had 'demanded' that she cancel meetings w/c 13 May *"to accommodate the new starter and have a catch-up meeting"* with Mr Hughes-Jones and Mr Hamilton, and that Mr Hughes-Jones had informed her that she was *"surplus to requirements"* in the London office *"as the new starter James Hymers is commencing work on 13/05"*. The note concludes *"LE notes JHJ continued reference (since March) to permanent staff in the London office being surplus to requirements"*.

105. Mr Hughes-Jones replied the same day as follows:-

> I have read over the email below. I am not clear on the purpose of this telephone record that has been sent to Paul, David, John, Allan and myself. This was not something that I had requested, nor would be expected in the usual course of conversation between work colleagues.
>
> In our call yesterday morning we discussed a meeting that Alastair and I would like you to join on Wednesday 15th May, at 11.30 in London Meeting Room 1. You have already verbally accepted this meeting and I have followed this up with a meeting invite so that you have a reminder.
>
> I feel it necessary to remind you of the conversation we had yesterday morning as the summary you have provided below is factually incorrect.
>
> At no point in the course of our conversation did I demand that you cancel meetings. Before speaking with you, I had already clarified with John Sharpe that your presence at the Management Meeting on 15 May was not required. We discussed between us how arrangements would be made for someone else to take the minutes.
>
> At no stage did I advise you or Paul that you are "surplus to requirements" - not yesterday and not previously. Naturally, I am therefore concerned at the summary you provide below.
>
> Alastair and I are looking forward to catching up with you on Wednesday, as already agreed. For completeness, and in line with usual company practice, please ensure you accept the diary invite that has been sent to you.

106. The Claimant replied: *"I disagree with your email below. Moving forward please can I kindly ask that you send email communication instead of telephoning me to avoid any issues"*.

107. The Claimant alleges in her witness statement (paragraph 83) that on 9 May 2019 Mr Hughes-Jones called her *"21 times in 3 hours"* as she refused to cancel a client meeting on 13 May 2019 in order to provide training to Mr Hymer. The Claimant says that Mr Hughes-Jones had been told she was not available by the receptionist but continued to call. It appears from the Claimant's email to Ms Creasey of 10 May 2019 that she spoke to Ms Creasey on 9 May 2019 at 09.28am regarding Mr Hughes-Jones making *"repeated unnecessary/unwanted repeat telephone calls regarding James Hymers"*. On 10 May 2019 (the Friday before Mr Hymers was due to start) she emailed Ms Creasey at 09:50 attaching a photo of her office landline showing *"17x"* calls from Mr Hughes-Jones' number stating that Mr Hughes-Jones telephoned her *"17 times on one phone and a further 4 times on another phone in less than a day. Jeff had been made aware I was not available by another member of staff however he continued to call em repeatedly"*. Ms Hardwick-Smith replied to say that she could not see the image attached. The Claimant replied *"The system has blocked the image. I will try and save it as a PDF and resend to your phone. Alternatively, I will print it and send it to you."* On 13 June 2019 (R444), when starting the disciplinary investigation, Ms Hardwick-Smith told the Claimant again that she had not received the image from her. The Claimant did then send the image in her response to the disciplinary investigation on 17 June 2019 (p 329). In cross-examination the Claimant maintained, even after being shown these emails, that Ms Hardwick-Smith had been lying about not being able to see this image on the first occasion and that it was not

blocked because otherwise it could not later have appeared in the investigation pack for the disciplinary hearing. She did not accept that it appeared in the investigation pack because she had sent it subsequently, but we find that this was what happened as is apparent from the emails. There is any event no basis for alleging that Ms Hardwick-Smith is lying about this because there is no reason for her to do so; we do not find that it follows from Ms Hardwick's failure to tell the whole truth regarding the 1 July incident of sharing the Claimant's disciplinary response with Mr Hymers and Mr Sharp (see below) that she is to be disbelieved on this aspect of her evidence where what she says is consistent with the documents at the time.

108. No one from HR responded to the Claimant's complaint about the telephone calls, but Ms Creasey gave evidence, which we accept that the Respondent's deskphones do not show when calls were made, so for example on her own phone display it also showed she had about 17 calls from the Claimant. There was a record of Mr Hughes-Jones telephone calls to the Claimant's work mobile (628) and that shows that Mr Hughes-Jones called once on 7 May 2019 and once on 8 May 2019. The duration of each call was 4 seconds, which suggests the call was not answered. It was not put to Mr Hughes-Jones that he had called the Claimant 21 times on 9 May 2019, nor was it put to him that he had been told by the receptionist that the Claimant was out but had kept calling. It was suggested to him by reference to the record that on 11 January 2019 he called the Claimant four times so that he had a tendency to keep calling when someone did not answer. The Claimant was asked in cross-examination whether she took any of Mr Hughes-Jones' calls on 9 May. She was not sure whether she had or not. She said she believed she had but that she went out for lunch and he continued to call. Mr Hughes-Jones denies calling the Claimant repeatedly on 9 May, but does say that during this period she often refused to accept any phone calls or communications from him and so the reason for missed calls was because she did not answer her phone or call back. He recalled on several occasions being informed by the receptionist in London that the Claimant was at her desk (despite not answering my calls) and her not returning any of his calls.

109. Mr Hughes-Jones does, however, accept that at some point he asked her to cancel a RIBA Risk Management Workshop on 13 May 2019 because he did not consider it was necessary for her to attend this as she was not delivering the workshop and it is a standard piece of work that could be done by anyone. The Claimant said in her witness statement that the 13 May was the day the client had specifically requested and it would damage her client relationship to cancel the meeting. In cross-examination she added that the workshop could not go ahead without her as she was leading the workshop.

110. In the event, on 13 May the Claimant did not attend the London office and it is unclear what she did on 13 May as she has provided no evidence about this and was not cross-examined on it. Her diary shows the RIBA Risk Management Workshop at 9am followed at 9.30am by 4 hours of private appointments.

111. In relation to the telephone calls and the 13 May RIBA Risk Management meeting, we find that Mr Hughes-Jones did ask her to cancel this meeting and meet with Mr Hymers. He did so because he believed it was reasonable for the reasons he gives in his evidence. However, neither of them explained to the other either why they thought the meeting could be cancelled or why it could not. The outcome was that the Claimant refused to cancel the meeting. Mr Hughes-Jones did try to get hold of her around 8/9 May and found, as she accepts, that she was not answering his calls. He did not, however, call her as many times as she alleges because the "17x" display on the Respondent's phone does not show that the calls were made at any particular time and it is clear from her work mobile records that he did not call her at all on her mobile on 9 May (rather than 4 times as she alleges). Further, we accept his evidence that when he called the receptionist she told him that the Claimant was at her desk, but she was not answering his calls. This is because we have found him to be the more reliable witness, the Claimant's case was not put to him, and the Claimant's evidence about what the receptionist told her she had said to Mr Hughes-Jones was hearsay, whereas Mr Hughes-Jones' evidence is his own direct evidence. Finally, we reject the Claimant's evidence in cross-examination that she had answered one of his calls. She has proved to be an unreliable witness and even she was not sure about that particular piece of evidence.

112. When it was put to the Claimant in cross-examination that she had felt she was entitled to the role of Associate and when she did not get it she behaved badly from this point onwards, she did not at first answer. When the Judge asked Mr Hignett to wait for the Claimant's answer, she said *"look at how I was treated before you judge me"*. When it was pointed out that still was not an answer to the question, the Claimant said that she was *"not confirming or denying"*. Mr Hignett put to her that she had become *"disengaged and not interested"*. She responded *"no comment"*. We find that the Claimant in in her answers to these questions acknowledged that she had, in general terms, behaved badly with the Respondent because of her disappointment with the Associate recruitment process.

Mr Hymers' joining

113. The Outlook diaries for the Claimant and Mr Hymers show that in the five weeks before Mr Hymers joining the Claimant worked from the London office on 17 out of the 23 working days in those five weeks and did not work from home any day. After he joined on 13 May the Claimant worked in the London office on only 8 out of 25 working days, and 6 out of those 8 days were days when Mr Hymers was not in the office. She worked from home on five days and took four days' annual leave. The Claimant and Mr Hymers were only in the London office together on 21 May and 29 May and briefly on 13 June. This does on the face of it show a change in her working patterns before and after Mr Hymers' arrival. Outlook diaries for the

Respondent's employees were open access so everyone could see each other's diaries.

114. Mr Hymers started on 13 May. He received an office induction from the receptionist in London. Mr Hughes-Jones travelled to the London office to go through some general induction work with him. Mr McNally was on annual leave and the Claimant was not in the office. During the induction process Mr Hughes-Jones informed him that the Claimant was unhappy with the outcome of the recruitment process and he thought that Mr Hymers needed to know this as her line manager. Mr Hughes-Jones did not at this stage tell Mr Hymers to take notes on the Claimant, but he did a week or so later when Mr Hymers started to experience negative conduct from her. The Claimant suggested otherwise on the basis that Mr Hughes-Jones in his statement for the disciplinary investigation wrote *"I have spoken with James on numerous occasions regarding Lydia and her poor attitude. I have asked James to remain calm and positive when dealing with Lydia's issues and to keep a record of events."* However, this statement is consistent with Mr Hymers' evidence that it was not during his induction that Mr Hughes-Jones told him to keep a record, but later once he started experiencing negative behaviour from her. Mr Hymers was not told about the Claimant's dyslexia at the outset of his employment. He only became aware at the disciplinary stage when he was informed of this. He gave evidence, which we accept, that his father and brother have dyslexia and so he is alert to dyslexia as a condition and is observant and ready to assist with it, but he did not notice anything about the Claimant's behaviour that indicated to him she had dyslexia.

115. On 13 May 2019 Ms Hardwick-Smith spoke to the Claimant. Ms Hardwick-Smith made a file note of that call (R262-3). She understood that the Claimant had requested to change her line manager, although it is unclear when or how this request had been made because Mr Hamilton's evidence is that the Claimant made the request to change line manager in a telephone call on 15 May. The Claimant had previously requested that Mr Hughes-Jones contact her only in writing so it is possible that this was what had prompted Ms Hardwick-Smith's call. This point was not explored in cross-examination by either party. Ms Hardwick-Smith explained to the Claimant that her new line manager was going to be Mr Hymers anyway. The Claimant was very unhappy on the call, saying that she had been promised the Associate role when she started, she had been doing the role for a year and that she felt bullied out of her job because of the way in which the recruitment was handled. She said that Mr Hughes-Jones was intense, sometimes called her 10 times a day, and was obsessive about Mr Hymers and always talking about him coming on board. She repeated her complaint that Mr Hughes-Jones had described her as 'surplus to requirements'. She said that she did not want any contact with Mr Hughes-Jones and would not meet with either Mr Hughes-Jones or Mr Hymers. Ms Hardwick-Smith asked her what could be the solution. The Claimant said it was not for her to find a solution, she was struggling and could not see a way forward. Ms Hardwick-Smith got her to agree to a phone call with Mr Hamilton on 15 May in place of a meeting.

116. The Claimant gave evidence that Mr Hughes-Jones was in London for three days 14/15/16 May and throughout May/June, but Mr Hymers' evidence was that following the introductory induction stages, Mr Hughes-Jones left early to go back to the Leicester office and after that he phoned fairly regularly to see how they were getting on, but did not meet face-to-face. On this we accept the Respondent's evidence as the Claimant was not in the office that week so is not in a position to give direct evidence about who else was.

117. On 14 and 15 May the Claimant was working from home. She did not attend the London office for the Management Meeting on 15 May even though it was in her diary.

118. On 15 May 2019 the Claimant consulted her GP regarding work-related stress, in part related to the alleged telephone calls.

119. On 15 May 2019 in place of the scheduled meeting between the Claimant, Mr Hughes-Jones and Mr Hamilton, the Claimant and Mr Hamilton spoke on the telephone regarding her behaviour in relation to Mr Hughes-Jones and Mr Hymers and the fact that she had not been saving her work and emails onto the company's servers as per company procedures and as requested by Mr Hughes-Jones. In his statement for the disciplinary investigation (which Ms Mallick submitted, and we agree, is likely to be reliable as it was written so close to the time) he said that he explained to her at this meeting that her behaviour was disruptive and becoming a conduct issue. The Claimant explained to Mr Hamilton that her difficulties with saving files was related to her dyslexia. Mr Hamilton emphasised the need for her to make a positive contribution and said that he would discuss her needs regarding online filing with Ms Creasey. We accept all his evidence as to what was said at this meeting, which was not disputed by the Claimant.

120. On 16 May 2019, the Claimant advised her team that she had the following dates booked as annual leave: 17, 20, 23, 24, 27 and 31 May. Mr Hymers responded thanking her for the update and asking her to let him know if any assistance was required to cover projects during her leave [265].

121. On 17 May 2019 at 11.34 the Claimant emailed Mr Hamilton with the subject heading *"Making a way forward on the development plan"* (266). She asked him to let her know a date/time to make a way forward on the development plan, though indicated that she was on annual leave a lot in the next two weeks.

122. Mr Hamilton replied at 13.44 thanking her for the conversation on Wednesday and her email. He noted that although she does not want to raise a formal complaint against Mr Hughes-Jones, her line management will move to Mr Hymers to provide a 'fresh start'. He encouraged her positive contribution and said that Ms Creasey would be in touch to discuss any adjustments she needs to have to help her comply with the firm's procedures on online filing. He also stated that he had asked John Sharp to

introduce her to Mr Hymers on 21 May when she was back in the office. He said that, as discussed, he would like to see more open communication and collaboration between her and colleagues from there on. He wrote that he was away the Bank Holiday week but would be in touch in the next 2 to 3 weeks to see how things were going with Mr Hymers and to discuss her development plan.

123. The Claimant alleges that she was called after the London Management Team quarterly meeting by a member of the management team who said *"Jeff has well and truly fucked you over. Start looking for a new job"* (para 121). She did not identify who this was. This allegation is not mentioned in any document at the time, but appears for the first time in the Claimant's witness statement. We do not accept the Claimant's evidence in relation to this comment. We have found the Claimant to be a generally unreliable witness and if someone really said this, we would have expected the Claimant to name the person and to seek a witness order in respect of them as she has done for other witnesses, including Ms Marshall who is still employed by the Respondent.

124. On 16 May the Claimant was on site with a client in Camden and on Friday 17 May and Monday 20 May she was on annual leave.

125. On 21 May 2019 Mr Hymers introduced himself to the Claimant when he arrived in the office at 9.30am and said he was *"only over there if you have any questions or need anything"* to which the Claimant responded *"no I'm fine thanks"* and then, audibly but 'under her breath', *"I've been doing your job for a year"*. The Claimant was 'unable to confirm or deny' whether she had said this. We find that the Claimant did say this because it is consistent with remarks she says she made to others, such as Mr Cowie and her case in these proceedings that she was really doing the Associate job. Also, she did not in fact deny it. Mr Hymers on the other hand has given consistent evidence about this in both his disciplinary investigation statement and his evidence in these proceedings. The Claimant says they had arranged to meet at 8.30am, but the meeting did not happen because Mr Hymers ran late. However, we have been shown no evidence that there was an arrangement to meet at 8.30am and we find there was no such arrangement. 9.30am was Mr Hymers' agreed start time as he has childcare responsibilities and that was when he arrived and spoke to the Claimant.

126. At 10:45 on 21 May 2019 the Claimant emailed the London team inviting everyone, including Mr Hymers to drinks. She scheduled it for 7 June when Mr Hymers was on study leave. Outlook calendars are visible to all employees so the Claimant would have been able to see Mr Hymers' calendar, but she said in answer to a question in re-examination that she did not know he was otherwise engaged. We accept the Claimant's evidence that she did not know that Mr Hymers would not be able to attend because even if she did look at his calendar it is does not follow from the fact that someone is on study leave that they will not be able to attend drinks. This particular point was not put to the Claimant in the disciplinary

investigation (although it features in the dismissal letter sent after she resigned) and was not put to her in cross-examination. The Claimant relies on this evidence to demonstrate that she was being friendly towards Mr Hymers, but it is a group invitation, which makes no special reference to him. We take it into account alongside the other evidence.

127. Also on 21 May the Claimant obtained a copy of a fee proposal that Mr Hymers had drafted. In her witness statement she described this as 'standard peer review' by her and Mr McNally, but it clearly was not that as none of the Respondents knew how she had obtained the fee proposal, or whether it was a draft, or whether it had been sent to clients or not. At 16.57 on 21 May 2019 the Claimant emailed Mr Cowie copying in Mr Sharp and Mr McNally saying: *"As discussed, the fee proposal James has done today is incorrect. The Client has asked for Principal Designer. James has quoted a client advisor schedule of services and the references are also client advisor. Please can you look into this. I suggest the proposal is also reviewed by another person"*. Mr McNally added at 17:15: *"Noticeable that the issue date box is incorrect (should be 2019). Header refers to PD Proposal, however, body text refers to Construction H&S Advisor. We usually state attendance at a set amount of progress meetings as PD or H&A Advisor at an agreed frequency (additional meeting attendance charged extra). Without knowing the background to the bid it highlights the importance of team input to PE documentation as you have correctly observed."*

128. The Claimant followed this up with a further email at 19.28 to Mr Cowie and Mr Sharp which said:

"I was expecting to meet James today at 8.30am and he did not arrive into the office until 9.30am. He also left the office at 4.55pm.

When I met James this morning he asked some odd questions regarding fee proposals. From his comments to me and his comments to Paul yesterday I doubt he has any real experience preparing bids and proposals. James appears to think he can simply cut and paste documents and one proposal fits all.

This is a major concern as we don't want our reputation damaged through lack of experience and ability."

129. Mr Sharp responded on 22 May indicating that he hoped that both the Claimant and Mr McNally had offered advice to Mr Hymers on the proposal and saying that he could not see the relevance of Mr Hymers' arrival and departure time to the issue. Consistent with Mr Sharp's email at the time, the Respondent's witnesses considered it inappropriate that the Claimant had obtained this fee proposal and sent it to Mr Cowie and Mr Sharp identifying errors in it rather than discussing it first with Mr Hymers. The Claimant was vague in cross-examination as to where she had got the fee proposal from, saying it might have been Mr McNally or an unidentified 'other person' and she said that the reason she had not discussed it with Mr Hymers first was because *"he had left the office early"*. When the Judge put to her that her own email said that he left at 4.55pm while her email to Mr Cowie and Mr Sharp criticising the proposal was sent two minutes later, which suggested she could have raised it with him before he left, she said

that she thought she must have misquoted the time that he left in her email. When asked why she could not have waited to speak to him about it the next day, she said she could not recall, but she thought it was because she and Mr McNally were not going to see him the next day. That does not, however, explain why she could not have emailed him. We find it is clear from her evidence that the Claimant accepts that the appropriate thing would have been to discuss the fee proposal with Mr Hymers rather than writing direct to Mr Cowie and Mr Sharp and we infer that she did not do this because she was seeking to discredit Mr Hymers with senior managers and show him to be incompetent. Although Mr McNally adds his criticisms to those made by the Claimant, his are quite different because he is joining in rather than starting it and he does not also send an email designed to suggest that Mr Hymers started late and finished early, or directly question his competence, experience and suggest that Mr Hymers actions are a 'major concern' that might damage the Respondent's reputation.

130. On 22 May 2019 the Claimant decided to work from home. Mr Hymers was trying to arrange a team meeting and sent a meeting invitation to the Claimant. On 22 May 2019 at 15.20 the Claimant replied indicating that as she was on annual leave for three days that week she had limited availability for a team meeting and had therefore accepted Mr Hymers' meeting invitation for 29 May when both she and Mr McNally were available. In a private email to Mr Hughes-Jones Mr Hymers mischaracterised this as her being 'indisposed', which the Claimant then complained to John Sharp about by sending an image that showed that she had accessed Mr Hughes-Jones Mailbox Calendar without authorisation.

131. On 23 and 24 May 2019 the Claimant was on annual leave and 27 May was the Bank Holiday.

132. On 28 May the Claimant was in the office and Mr Hymers was on annual leave.

133. The planned first meeting of the new London team took place on 29 May 2019. The Claimant prepared notes of this meeting some time after the meeting. Mr Hymers did not ask her to produce notes and does not accept that they are an accurate reflection of the meeting. We accept his evidence as to what happened at that meeting because he has proved to be the more reliable witness, because his evidence is supported by that of Mr Sharp who observed the meeting through the glazed office walls, because of the way the Claimant answered questions about this meeting in cross examination and because of the way she behaved during the course of cross-examination which was very similar to the way Mr Hymers said she behaved at this meeting. We have in mind in particular that when angry about the questions she was being asked in cross-examination or a decision taken by the Tribunal she would refuse to answer a question and turned right away from the screen with her head in her hands (much further round than was her position when reading the documents in her bundle). Although the Claimant told us that she had been in pain during the hearing and had had to contact the emergency doctor for an increase in her

medication, for the reasons we have set out in our observations about the witness evidence towards the beginning of this judgment we do not consider that this explains her conduct in this respect. Our findings in relation to the meeting on 29 May are therefore as follows:-

134. The Claimant began the meeting by saying that it was unnecessary and that Mr Hughes-Jones ought already to have covered the points to be discussed with Mr Hymers. She looked at the floor or out the window, and gave monosyllabic answers to Mr Hymers' questions. The Claimant in cross-examination would 'not confirm or deny' whether this was how she behaved at this meeting. She said in answer to the question that she had begun the meeting by saying that she did not consider the meeting to be necessary: *"I don't remember and it is unreasonable to expect me to remember trivia from three years ago"*. She then said that the problem was that at the start of the meeting Mr Hymers had forgotten some equipment and had to go and get it so she was looking away and disengaged while he was getting this. We do not accept that this explains the Claimant's conduct at this meeting. If there was equipment missing at the start, that does not explain why she remained disengaged for the whole meeting as Mr Hymers and Mr Sharp say was the case. She appeared in cross-examination still to be very cross about this meeting. Towards the end of the meeting the Claimant made some comments that Mr Hymers perceived (reasonably in our judgment) to be threatening and patronising. She said to Mr Hymers that the Respondent generally prolongs probationary periods and that he needed to bring in money within that period or there would be consequences. Mr Hymers discussed the degree he was studying for. The Claimant sought to compare the degree for which Mr Hymers was studying with her own qualifications in a way that suggested she considered she was more qualified than he was.

135. The Respondent witnesses gave evidence (also reflected in the disciplinary investigation statements) that from the time of the Associate recruitment process onwards the Claimant frequently sought to have 1:1 chats with individuals in the office and that she was spending a lot of time on her personal mobile phone. Mr Sharp gave evidence that he personally had noticed a significant increase in the Claimant's use of her personal mobile phone from this point onwards and other staff had commented to him about it. In late May/early June 2019 Mr Sharp he met with the Claimant in a meeting room to discuss the fact that it had been noticed that she was spending a lot of time on her personal mobile phone and to caution her about excessive use of her phone during working hours. The Claimant denied that any such meeting had taken place, but we accept Mr Sharp's evidence of this because he was able to describe the meeting room, and the fact that he had his back to the whiteboard and the Claimant was on his right, and because the Claimant has not been a reliable witness. He said that the Claimant did not when he challenged her about her personal phone use say any of the things that she has said in these proceedings about her phone use, including that she needed it because of her disability, or that she had transferred her work SIM card into her personal phone. He said if she had done the latter it would have been a breach of the Respondent's

security procedures. (The Claimant's evidence about transferring her work SIM card into her personal phone was given when she had complained, with reference to this allegation about phone use that the Respondent had failed to disclose her telephone records to prove that she was using her phone a lot. The Judge asked her how that would help as she would be the holder of her personal phone records, not the Respondent. At this point the Claimant said for the first time that she had transferred her work SIM card into her personal mobile phone. As this point was not mentioned by the Claimant to Mr Sharp (or anyone else at the Respondent) while she was employed, we do not need to resolve whether she is telling the truth about this. In our judgment it was not necessary for Mr Sharp to check phone records before challenging her as it was reasonable to raise with her what he had himself seen of her phone use, particularly as others had commented about it to him too.)

136. On 30 May 2019 the Claimant decided to work from home. In the afternoon of 30 May she cancelled her annual leave for the next day and worked from home again as she had the flu.

137. Mr Hymers was on study leave the whole of the w/c 3 June and on Monday 10 June. The Claimant was in the London office for the w/c 3 June and worked from home on 10 June.

138. On 11 June the Claimant was in the London office and said she was expecting to see Mr Hymers in. The Claimant emailed him at 09.24 to ask him if he was coming into the office and he replied that he was not as he was going to Leicester that evening for his company induction the next day. The Claimant emailed asking him to update his diary showing he was on annual leave or working from home *"as staff will ask where you are"* (278). Mr McNally added *"For your benefit James, the timesheets need to be approved by 10am Monday morning going forward as per company policy and as a team – entries should be updated on calendars for cover as required"*. Mr Hymers felt that the Claimant was trying to catch him out and embarrass him. Taken in isolation there was nothing untoward in the Claimant's communication in this email chain, which is not dissimilar to that by Mr McNally, but this was not an isolated communication.

139. Also on 11 June the Claimant took John Sharp into a meeting room for an 'off the record' chat about Mr Hymers' poor performance at a meeting with Guys and St Thomas' NHS Trust. He says that she was doing this with other members of staff too in order to discredit Mr Hymers. John Clarke in his investigation interview described a similar experience with the Claimant speaking to him and calling into question Mr Hymers' qualifications, saying that she was more qualified and finding fault with his work. The Claimant did not deal with these conversations in her witness statement, nor was she cross-examined on them, but her response to the disciplinary investigation (326) contains three paragraphs on her superior experience regarding radiation and Guys' Hospital and Mr Hymers' incompetence in that respect, so it seems likely that she also raised this with Mr Sharp and Mr Clarke at

the time. From this and the other evidence it is apparent that the Claimant was engaging in a concerted campaign in order to discredit Mr Hymers.

140. On 12 June 2019 the Claimant advised Ms Hardwick-Smith that she was moving house and may receive a reference request. The Claimant alleges that Ms Hardwick-Smith passed this information on to Mr Hughes-Jones and Mr Hymers without the Claimant's consent. This point was not dealt with in the Respondent's witness statements and not explored in cross-examination.

141. On 13 June 2019 the Claimant and Mr Hymers were both in the office. Mr Cowie was organising a team to support a client with an issue. Mr Hymers asked the Claimant if she was available to support. She responded, indicating Mr Hymers, *"We expect you to go you're the job lead"*. Mr Hymers described this as an uncomfortable moment as it was a direct challenge to his authority in front of senior management. Mr Cowie responded promptly *"I just need someone to go, James is busy can you do it",* to which the Claimant then assented. A broadly consistent account of this incident was given by Mr Hymers in his statement for the disciplinary investigation, in his email of 13 June 2019 and in these proceedings. Mr Cowie in his statement for the disciplinary investigation also gave a broadly consistent account (albeit he got the date wrong) and described the incident as *"an unpleasant moment"*. This incident was not put to the Claimant in cross-examination, but nor was it suggested to Mr Hymers that she had not said that. It was put to Mr Hymers that it was a reasonable comment in the circumstances, but he replied: *"no, it was a highly sarcastic condescending comment, it was undermining and disrespectful"*. We accept the evidence of Mr Hymers on this point, which is supported by the evidence of Mr Cowie to the disciplinary investigation.

142. Later that morning the Claimant was passing a meeting room that Mr Hymers was in and he asked if she had 10 minutes as he felt it was important to address the tension between them. He recorded what happened in this meeting in an email to Ms Hardwick-Smith shortly thereafter and we accept what he wrote there was an accurate account of the meeting as he wrote the account immediately and gave answers in cross-examination that were consistent with it. It is apparent from that email that Mr Hymers indicated to the Claimant that comments such as she had made that morning in front of Mr Cowie were not very helpful, but also that he tried very hard in that meeting to set the Claimant at ease and to move forward positively. He expressed sympathy for her situation and said that he would love to support her to achieve the Associate role. She made clear that she felt he had been given her job, that she had been discriminated against and was not going to stand for it. She left the room looking distressed and took Mr McNally away for a private conversation.

Disciplinary investigation

143. In early to mid June 2019 Mr Hamilton, Mr Hughes-Jones and Ms Hardwick-Smith had many conversations about the Claimant's behaviour and whether

any further informal steps should be taken before resorting to a disciplinary process. Mr Sharp and Mr Hymers also brought their concerns to Ms Hardwick-Smith. Ms Hardwick-Smith gave evidence, which we accept, that Mr Hamilton and Mr Hughes-Jones felt that they had exhausted the informal route and decided to initiate the formal disciplinary process. It was suggested to the Respondent's witnesses that it was Mr Hughes-Jones alone who instigated the formal disciplinary process, but this was not accepted by the Respondent's witnesses and the Claimant is not in a position to provide evidence as to what discussions went on between them. We therefore accept their evidence that it was a joint decision between Mr Hughes-Jones and Mr Hamilton. In any event, it is clear from the evidence that each of the witnesses from whom we have heard (Mr Hamilton, Mr Hughes-Jones, Mr Sharp and Mr Hymers) that they each had experience of the Claimant behaving inappropriately and were all individually concerned about her behaviour. Even if the Claimant is right that it was Mr Hughes-Jones who was the principal decision-maker, we observe that that would have been appropriate as he was her line manager.

144. On 12 and 13 June 2019 investigation meetings were held with Mr Hymers and Mr Sharp, and around this time Mr Hughes-Jones and Alastair Hamilton also provided statements that they prepared themselves. The Claimant complains that Mr Sharp in his statement unfairly criticised her for constantly being on her mobile phone and for comments she made regarding the fee proposal document prepared by Mr Hymers. In his statement Mr Sharp said *"her focus has not been on supporting James as a new starter, instead she is constantly on her mobile phone (texting and calls) I am sure is not work related"*. The Claimant says the criticism was unfair because he failed to verify the information with Olive or Vodafone and no disclosure has been provided to support the claim. Mr Sharp's statement in this respect obviously relates to his conversation with her a short time previously, our findings on which are set out at paragraph 135. It follows from those findings that we do not find Mr Sharp's criticisms to be unjustified: he was entitled to raise with the Claimant what appeared to him (and others) to be a significant increase in her personal mobile phone use during work time. He did not need to check phone records to verify his own impressions and the Claimant had not when he challenged her about it offered any explanation. As to his comments about her criticism of Mr Hymers' fee proposal, she says it was unfair because Mr McNally had also criticised the proposal but no action was taken against him, but our findings in that regard at paragraph 129 above as to the differences between Mr McNally's conduct and that of the Claimant regarding this render his criticism fair.

145. The Claimant suggests (para 120) that Ms Hardwick-Smith undertook the investigation in retaliation for her complaining that her complaint against Mr Hughes-Jones regarding telephone calls had not been investigated. However, there is no evidence to support this allegation. The Claimant's complaint in that regard was made on 13 June 2019 after she had been informed by Ms Hardwick-Smith that a disciplinary investigation had commenced. The evidence from Mr Hymers, Mr Hamilton and Mr Hughes-

Jones as to their concerns, and the Respondent's reasons for commencing a disciplinary investigation adequately explain why a formal investigation process was commenced without recourse to the telephone calls complaint.

146. On 13 June 2019 Mr Hymers asked the Claimant to telephone Ms Hardwick-Smith, which she did and Ms Hardwick-Smith informed her that she was under disciplinary investigation. Ms Hardwick-Smith made a file note of this conversation. The Claimant alleges that Ms Hardwick-Smith *"in a cocky and overly confident tone"* stated *"the disciplinary investigation has already been undertaken and we have the evidence against you. We have already taken witness statements. You're going"*. These words are not in the file note. The allegation that Ms Hardwick-Smith said *"You're going"* was not mentioned by the Claimant in her emails of that date or response to the disciplinary investigation at the time, or in her claim form. It is denied by Ms Hardwick-Smith and it is implausible that she would have said such an unprofessional thing given her extensive experience. We so find even though we were not persuaded by Ms Hardwick-Smith's evidence in relation to the allegation of sharing the Claimant's disciplinary response with Mr Hymers and Mr Sharp. While it was understandable that that document remained on the table in front of Mr Hymers and Mr Sharp (and was not necessarily improper given that the points the Claimant had made in that document concerned them and needed to be considered), this allegation of Ms Hardwick-Smith saying *"You're going"* is an allegation of serious unprofessionalism of the sort that is implausible.

147. There were further emails exchanged between the Claimant and Ms Hardwick-Smith on 13 June following this conversation. In those the Claimant asked Ms Hardwick-Smith what she had done regarding her complaint about Mr Hughes-Jones' phonecalls and Ms Hardwick-Smith responded to say that the Claimant had not yet sent through the image evidencing the calls that she had promised and been asked about. Ms Hardwick-Smith also indicated that she was just completing the disciplinary investigation letter, which she sent out later that day. In that letter the Claimant was invited to a disciplinary investigation on 17 June 2019 to discuss:

    a. Failure to follow a reasonable management request/minor incidents of insubordination;
    b. Minor breach of, or failure to observe, the firm's policies and procedures;
    c. Unprofessional attitude towards colleagues or clients.

148. Specific examples of the conduct relied upon were given on a continuation page. The matters included the Claimant's failure to attend the London office to meet Mr Hymers on at least 8 occasions despite a reasonable request from Mr Hughes-Jones; incorrect saving of electronic documents despite being asked on several occasions; working from home with no formal request; not being clear on when she would be in the office, on annual leave, working from home or taking sickness; attempting to discredit Mr Hymers regarding his timekeeping in the office, the fee proposal, in 1:1s

with various members of staff; saying to Mr Hymers on 21 May that she had been doing his job for over a year; her conduct at the team meeting on 29 May; viewing and forwarding a message from Mr Hymers to Mr Hughes-Jones on 22 May.

149. On 14 June 2019 the Claimant was off sick [348]. She said that she had flu. She consulted her GP and reported stress at work and requested a letter the contents and evidence about which we have dealt with above (paragraph 40). We do not make any findings about whether that letter was posted direct to Ms Hardwick-Smith by the GP, but we accept her evidence that it was not received by her direct from the GP but was sent by the Claimant on 17 June 2019. There is no reason not to accept Ms Hardwick-Smith's evidence that the letter was not received by her direct from the GP. Even if the letter was sent direct, it may have got lost in the post, but the likelihood is that it was not sent direct by the GP as it was not addressed by the GP to Ms Hardwick-Smith but is provided in a 'To whom it may concern form' which is the norm for a letter that is given to the patient to provide to their employer themselves. The further letter that the Claimant obtained from the GP on 10 June 2020 apparently confirming that it was sent direct also contains the carefully-worded statement of 'belief' about enclosure of the education psychology report, which strongly suggests that it was a letter written at the Claimant's insistence and based on her assertions as to what the GP had done the previous year rather than any independent recollection of the GP.

150. The GP's letter of 14 June 2019 confirmed the Claimant's dyslexia diagnosis and supported an unspecified request for reasonable adjustments at work and recommended involvement of OH or Access to Work.

151. On 17 June 2019 the Claimant was still off sick and there was an email exchange between Mr Hymers and Ms Creasey about her not having telephoned him to notify him (as she said she had).

152. The Claimant did not attend the investigation meeting on 17 June 2019 but submitted a written response (322). She answered each of the allegations. Regarding working from home, she said that she had marked it in the diary and that Mr Hughes-Jones had not told her she could not. She also said that she had taken annual leave (booked on Focal Point) and had been ill. She said her Outlook calendar was always up to date with her movements. In her response to the disciplinary investigation the Claimant referred to Mr Hymers not being competent to advise on radiological protection in relation to a team working at Guys Hospital and said that Mr Hymers ought to have sought advice from her and that *"Other key issues on this project have also been missed which I have had to address"* (C253). She also suggested that Mr Hymers had wrongly claimed to have completed his degree when he was still studying for it. She signed her response with all seven of her qualifications.

153. On 19 June 2019 Mr Hymers emailed the Claimant at 10.08am to ask if she was OK as he had not heard from her and wondered whether she was

returning to work. The Claimant responded that she had tried to contact him on two separate occasions by phone but she would be returning to work on Friday.

154. On 19 June 2019 Ms Creasey spoke to the Claimant to ask her for a copy of her consultant's report on dyslexia. The Claimant responded that it was extremely personal, her parents have not even seen it, so she would not be sharing it with the Respondent. We have accepted Ms Creasey's evidence of this conversation even though it was denied by the Claimant for the reasons set out at paragraph 40 above.

155. On 20 June 2019 Glenda Creasey (Senior HR Advisor) asked the Claimant for further details on three points relating to the investigation, including what reasonable adjustments she required. The Claimant responded the same day (R311) saying that she required only two reasonable adjustments, being a laptop and *"To save documents in my personal drive and transfer them periodically into the main job folders. This was authorised by Jo Morrish however since she left it has now become a problem … I have received no complaints for the past year from anyone in the company other than Jeff Hughes-Jones"*.

156. Also on 20 June 2019 the Claimant spoke to Ms Creasey indicating that she had concerns she wanted to raise about Mr Hymers' technical abilities. Ms Hardwick-Smith went on to explain that review of Mr Hymers' performance was separate to the conduct issues being investigated with her and would be considered at the end of his probationay period at 10 weeks' employment. Mrs Hardwick-Smith sent the Claimant a copy of the grievance procedure (R308).

157. The Claimant was absent from work sick 14 June to 21 June 2019. There was a return to work meeting with Mr Sharp. It was noted that absence reason was *"flu and bad chest"* and reference was made to the GP letter. The paperwork was sent to Ms Hardwick-Smith who took no further action.

158. On 25 June 2019 the Claimant was invited to a disciplinary meeting in respect of the same charges. She was given the right to be accompanied. She was sent a copy of all relevant information and supporting documentation, including a "Summary of Investigation" prepared by Ms Creasey, all the statements taken and various emails. The pack included information from the NHS website about dyslexia which Ms Creasey had obtained. It was listed on the contents page for the pack (R315) as *"NHS Dyslexia Overview"*. Ms Hardwick-Smith considered it appropriate to include this information in the pack so that the disciplinary officer, Mr Seaman, would have an overview of dyslexia as the Claimant had refused to provide her own report. What was included in the pack was all the information on the NHS website about dyslexia in both children and adults. The Claimant was offended by being sent information about diagnosing dyslexia in children and said in her statement that she regarded the material as *"the equivalent of sending someone in a wheelchair a booklet on how to use your wheelchair"*.

159. The disciplinary hearing took place on 1 July. It was conducted by Andrew Seaman, with support from Ms Hardwick-Smith. Mr Seaman had worked with Mr Hughes-Jones for many years, but had no knowledge of the Claimant and had never met her before. Ms Creasey was also present. The Claimant attended with her colleague and companion Sophia Rossi. Mr Seaman started to go through the initial part of the script he had prepared when the Claimant interrupted to say *"I won't be answering any further questions"* and she handed over a written statement (R456-461). Ms Hardwick-Smith asked the Claimant if she would be prepared to wait while Mr Seaman read the script so that he could ask her any questions if she wished, but the Claimant refused to wait and simply walked out of the meeting. The meeting therefore concluded after 3 or 4 minutes. Mr Seaman, Ms Creasey and Ms Hardwick-Smith all gave evidence to the effect that they perceived the Claimant to have been rude in this meeting.

160. The Claimant walked past the meeting room later that day and noticed that Ms Hardwick-Smith had apparently provided a disciplinary response to John Sharp and James Hymers. She emailed immediately asking why this had been provided to third parties with no permission under GDPR from her. Ms Hardwick-Smith in response (R465) asked why the Claimant was looking in to a confidential meeting but did not specifically deny having shared the document. She said that they were reviewing the questions that Mr Seaman would have asked you so as to draw a conclusion to the process. In her witness statement (para 21) Ms Hardwick-Smith denied 'sharing details of Lydia's response' and stated that the Claimant had *"misconstrued this meeting as me sharing her personal data"*. However, we note that Ms Hardwick-Smith did not in her email of 1 July or in her witness statement specifically deny having the Claimant's response on the table in front of Mr Hymers and Mr Sharp. We find on the balance of probabilities that it was there in front of them, or Ms Hardwick-Smith would have denied it at the time and now. It is plausible that the document would have been there on the table because the Claimant had presented it in the meeting in that room earlier that day and there is no evidence that Ms Hardwick-Smith removed documents or hid them before meeting with Mr Hymers and Mr Sharp. It follows that Ms Hardwick-Smith has not told the whole truth about this incident and we have taken that into account when considering her credibility on other issues.

161. By letter of 2 July 2019 Mr Seaman informed the Claimant that the disciplinary hearing was adjourned and that he was working through the documents to consider his decision and would notify her within 1 week. This letter records that Ms Hardwick-Smith had asked the Claimant to stay in the meeting but she had been unco-operative and left.

162. By letter of 3 July 2019, the Claimant complained about the disciplinary process, about the inclusion of the NHS information on dyslexia diagnosis and management in children in the disciplinary pack and about security breaches regarding her personal data (R468).

163. Mr Seaman then reviewed the papers and decided that the Claimant had engaged in a pattern of unprofessional behaviour and he did not think they would ever get to a point when she would work constructively with Mr Hymers. He therefore concluded that dismissal was the only option. He took into account in reaching that decision her conduct at the meeting on 1 July 2019. The Claimant alleges that the dismissal decision was pre-determined, but Mr Seaman maintains that he approached the case with an open mind, was quite prepared to be persuaded that these were minor issues which the Claimant would put behind her, but the opposite happened. He did not discuss the case with Mr Hamilton or Mr Hughes-Jones in advance, nor did Ms Hardwick-Smith push him in any particular direction. We accept his evidence on this point as there is no direct evidence to contradict or from which it could be inferred he was being 'pushed'. On the contrary, at the meeting on 1 July, the Claimant had demonstrated to him personally a degree of unreasonable conduct.

164. It was suggested to Mr Seaman that he had made his decision to dismiss the Claimant immediately following her departure from the meeting on 1 July but that is not his evidence. Although he describes at paragraph 9 reaching a point on 1 July that it 'looked as though there were no alternatives other than dismissal', it is apparent from the subsequent paragraphs of his statement that he did consider the matter further over the next few days. If he had already reached a decision, it is implausible that he would have sent the letter of 2 July 2019 adjourning the meeting rather than merely issued a decision letter at that point.

Resignation

165. The Claimant resigned by email on 4 July 2019 before being told the outcome of the disciplinary process. In her witness statement she says this is because Ms Hardwick-Smith had told her on 13 June 2019 *"your going"* and that the outcome of the disciplinary was therefore predetermined. In her email she said that her resignation *"is due to sexual/disability discrimination from Liz Hardwick Smith, James Hymers and Jeff Hughes Jones"*.

166. On 5 July 2019 Mr Seaman wrote to the Claimant informing her that he had decided to dismiss her on notice for her conduct. He upheld all the allegations apart from that relating to the minor breach of the Respondent's policies in relation to saving of documents. He added a further point in relation to her conduct not identified in the schedule of allegations, being that she had *"organised social events at times when you know he isn't in the office"*.

167. Shortly after leaving employment the Claimant was offered a Director CDM/H&S role at a competitor's organisation at a package of over £70,000, which she accepted.

Annual appraisal

168. The Respondent's annual appraisals had prior to the Claimant joining been conducted in the summer. The Claimant did not receive an appraisal in 2018 because she had only just joined and was in her probationary period. She did not receive an appraisal in the summer of 2019 because the appraisal process that year did not start until August 2019 as there was a delay following Mrs Morrish's departure and Ms Hardwick-Smith's arrival. The Claimant suggested in cross-examination that appraisals at the Respondent normally happened in May, then she said she could have had an appraisal in April/May 2019 and in any event the point was that her comparator would have had an appraisal. However, we accept the Respondent's evidence that, as is in our experience normal business practice, she would not have had an appraisal immediately after joining while in her probationary period, and there is no evidence to contradict Ms Hardwick-Smith's evidence that in 2019 the appraisal process commenced in August 2019 after the Claimant had left.

Additional facts relevant to the equal pay claim

169. The Claimant's salary was increased during her employment from £60,000 to £62,000, plus £2,400 stakeholder pension. Mr Hymers was paid £67,500, plus £1,500 pension. He was subject to a probationary period of 6 months, and a notice period of 12 weeks. She was subject to a probationary period of 13 weeks and notice period of 8 weeks. Otherwise, their terms and conditions of employment were similar.

170. A table in the Claimant's witness statement compares her qualifications and experience with Mr Hymers, demonstrating that she had more qualifications (and higher grades) and more years' experience than him.

171. Another table in the Claimant's witness statement shows that she was the highest-paid Senior Consultant in the team, paid £2,000 more than Mr McNally and significantly more than the other Senior Consultants (male and female) who were based outside of London. Her charge-out rates on some projects were higher than the other Senior and Principal Consultants in and out of London and only £2 less than Mr Hughes-Jones. The Respondent has provided other salary information which shows that a range of different salaries were paid to employees at Senior Consultant, Principal and Associate levels. The Respondent's evidence was that salaries are determined by reference to a variety of factors, including area of expertise, employment location (with London salaries being substantially higher), experience and market factors. The Claimant also referred to the Gender Pay Gap report, but this data compares only the percentage difference between average hourly earnings for men and women within a business and does not take into account job roles, experience or seniority of the individuals.

Conclusions

Knowledge of disability

The law

172. Although the Respondent conceded that the Claimant was a disabled person by reason of her dyslexia within the meaning of s 6 of the EA 2010, the Respondent denies that it had the requisite knowledge of her disability, both for the purposes of the claims under s 15 of the EA 2010 and for the purposes of the direct disability discrimination claims under s 13. By s 15(2) of the EA 2010, s 15(1) does not apply if the employer shows that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability. There is no 'lack of knowledge' defence to direct discrimination in s 13 and in some cases knowledge would not be relevant (for example where a remark is made that is on its face insulting to the disabled), but in this case the parties are agreed that, given the nature of the allegations, knowledge of disability is a necessary ingredient of liability.

173. The parties are agreed that the relevant principles regarding knowledge are as set out in *Gallop v Newport City Council* [2013] EWCA Civ 1583, [2014] IRLR 211 and *A Ltd v Z* (UKEAT/0273/18). At [36] in the judgment of the Court of Appeal in *Gallop*, the Court held:

> 36. I come to the central question, namely whether the ET misdirected itself in law in arriving at its conclusion that Newport had neither actual nor constructive knowledge of Mr Gallop's disability. As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2) . I agree with counsel that this is the correct legal position.

174. In *A Ltd v Z* the EAT (Eady J) observed that in deciding whether the employer had the requisite knowledge it was necessary not only to ask what the employer actually knew but what they would have found out if they had made reasonable enquiries (ibid at [23]):

> 23. In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:
>
> (1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment: see *York City Council v Grosset* [2018] ICR 1492, para 39.

(2) The respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect: see *Donelien v Liberata UK Ltd* (unreported) 16 December 2014 , para 5, per Langstaff J (President), and also see *Pnaiser v NHS England* [2016] IRLR 170, para 69, per Simler J.

(3) The question of reasonableness is one of fact and evaluation: see Donelien v Liberata UK Ltd [2018] IRLR 535, para 27; none the less, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes (see *Herry v Dudley Metropolitan Borough Council* [2017] ICR 610, per Judge David Richardson, citing *J v DLA Piper UK llp* [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already] done so", per Langstaff J in *Donelien* 16 December 2014, para 31.

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the code, which (relevantly) provides as follows:

> "5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.
> "5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so: *Ridout v TC Group* [1998] IRLR 628; *Secretary of State for Work and Pensions v Alam* [2010] ICR 665.
(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code.

175. We have also reminded ourselves that in deciding whether or not the employer had the requisite knowledge of the elements of the Claimant's disability, an impairment has a 'substantial' effect on day-to-day activities if its effect is 'more than minor or trivial': EA 2010, s 212(1).

Conclusions

176. We have considered the question of knowledge in relation to each of the Respondent's witnesses and what they knew at the relevant time. The knowledge of each witness would be attributable to the employer by virtue of EA 2010, ss 109 and 110, but in accordance with the usual principles in discrimination claims, we cannot 'add together' the knowledge of different individuals to attribute more knowledge to the employer than we attribute to any particular individual.

177. *Mrs Morrish* – Mrs Morrish knew from the start of the Claimant's employment that the Claimant had dyslexia and that she had declared this as a disability for which in the pre-employment medical questionnaire she requested provision of a laptop by way of adjustment. Although the Claimant on 11 June said that it did not cause her too much concern any more and did not really have a substantial adverse effect on her day-to-day activities, that was in the context of a discussion about adjustments that had effectively been made for her by modern technology or which she was seeking (in terms of continuing to use her iphone) and therefore it is implicit in this conversation that Mrs Morrish understood that the Claimant's dyslexia would have a substantial (more than minor or trivial) effect on her day-to-day activities without these adjustments and thus met the definition of disability under the EA 2010.

178. *Mr Hughes-Jones* – We find that Mr Hughes-Jones had the same knowledge as Mrs Morrish about the Claimant's disability as she shared with him the information that she had.

179. *Mr Sharp* – We have found that Mr Sharp did not actually know about her disability until around May 2019. We also find that he could not reasonably have been expected to know that she had a disability based on his observation of her using her iphone as the only special app she said she used (the calculator) appeared to him to be the same as the one he used. Mr Sharp was entitled to assume that HR (or the Claimant) would have informed him of any disability about which it was considered he needed to know. It was reasonable for Mr Sharp not to make any enquiries himself. We find that Mr Sharp did not have actual or constructive knowledge of the Claimant's disability until around 12 June 2019 when he was asked to give a statement as part of the disciplinary investigation and was informed about the Claimant's disability by HR.

180. *Mr Hamilton* - We find that he had the same knowledge as Mrs Morrish and Mr Hughes-Jones as he was informed that she had a disability at the outset of employment.

181. *Ms Hardwick-Smith* – We find that as she picked up the Claimant's HR file on handover from Mrs Morrish that she had the same degree of knowledge as Mrs Morrish and thus knew of the Claimant's disability.

182. *Mr Seaman* – We find that he had the requisite knowledge as the Claimant had put her disability in issue in relation to the disciplinary investigation and HR passed the information that they had to him.

183. *Mr Hymers* – We find that Mr Hymers did not know, and could not reasonably have been expected to know, that the Claimant has dyslexia before he was informed of this as part of the disciplinary investigation, so around 12 June 2019. Nobody told Mr Hymers prior to that date, and there was nothing about the way that the Claimant conducted herself with him that should have led him to understand she had a disability. As a result of his father and brother having dyslexia, Mr Hymers was familiar with dyslexia but noticed no signs of it in the Claimant.

184. *Ms Creasey* – As a member of HR we find she had the same knowledge as Mrs Morrish.

Direct sex and direct disability discrimination (Issues a-o)

The law

185. Under ss 13(1) and 39(2)(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, in subjecting the Claimant to any other detriment, discriminated against the Claimant by treating her less favourably than it treats or would treat others because of a protected characteristic. The protected characteristics relied on by the Claimant are her sex and disability.

186. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at paras 34-35 *per* Lord Hope and at paras 104-105 *per* Lord Scott. (Lord Nicholls (para 15), Lord Hutton (para 91) and Lord Rodger (para 123) agreed with Lord Hope.

187. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). The Claimant relies on a number of comparators. However, if we consider that their circumstances are not materially the same, he invites us to consider how a hypothetical comparator would have been treated. We bear in mind in this regard that evidence about an alleged comparator may still be of important evidential value even if their circumstances are not materially the same so as to bring them within s 23(1) EA 2010.

188. The Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at para 29 *per* Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at paras 78-82).

189. If a decision-maker's reason for treatment of an employee is not influenced by a protected characteristic, but the decision-maker relies on the views or actions of another employee which are tainted by discrimination, it does not follow (without more) that the decision-maker discriminated against the individual: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 especially at [33]-[36] *per* Underhill LJ. What matters is what was in the mind of the individual taking the decision. It is also important to remember that only an individual natural person can discriminate under the EA 2010; the employer will be liable for that individual's actions, but the legislation does not create liability for the employer organisation unless there is an individual who has discriminated.

190. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at paragraph 56). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931.

191. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at para 32 *per* Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at paragraph 32), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 *per* Mummery J at 874C-H and 875C-H.

Conclusions

192. We take each of the allegations a.-o. in turn and set out our findings in relation to both sex and disability direct discrimination claims. By way of preliminary we record here that we have not been presented with any evidence from which it might be inferred that Mr Hughes-Jones generally

treated women differently to men. The evidence that the Claimant sought to present on that, in respect of Ms Mayo, Ms Dewar and Ms Marshall, did not show that Mr Hughes-Jones generally treated women worse than men, or that there was any pattern of him retaliating against women who complained about him. The evidence was that he had, until he was spoken to by Mr Hamilton on 1 November 2018, an abrasive, 'micro-managing' management style which upset many of his subordinates, including both males (Mr Whyte, Mr McNally, an unnamed other) and female alike. Mr Hughes-Jones moderated that management style after he was spoken to. Nonetheless, in our findings below we have considered each allegation separately, but also have stood back to consider the larger picture and whether there is any inference of discrimination to be drawn from that.

a. Mr Hughes-Jones ignoring the Claimant at the summer party (June 2018)

193. We find that Mr Hughes-Jones was unaware that the Claimant was at the summer party. Although he accepted that he should have checked who from his teams in other regions was going to be at the party, he did not and so did not speak to anyone from the other regions, staying with his Leicester team on their table. In the circumstances, while we accept that the Claimant could reasonably regard this as a detriment given that she could reasonably have expected to be spoken to by her line manager at the party, it has nothing to do with her sex as Mr Hughes-Jones did not speak to any team members other than his Leicester colleagues and this was because of the lay-out of the room. It also has nothing to do with her disability.

b. Mr Hughes-Jones failing to support the Claimant in her role, in particular by failing to have face-to-face meetings with her

194. We are not satisfied that this was a detriment. The Claimant knew when accepting the job that her line manager was not based in London. Although they did not have many face-to-face meetings, they did communicate regularly, in particular by phonecalls on Fridays. The Claimant was considered at her probation review to have settled in well and quickly in terms of getting to grips with the Respondent's systems. She was in the same position as Mr McNally in terms of having a line manager not based in the same office as her. It was not reasonably a detriment. Even if it was, it was nothing to do with either her disability or her sex. In this regard, the Claimant seeks to compare herself to Mr Hymers, but we do not accept that Mr Hymers is an appropriate comparator. His circumstances were materially different for three reasons: first, he was joining the organisation at two levels above the Claimant and was taking over line-management responsibility for the Claimant and Mr McNally from Mr Hughes-Jones, so there was more need for Mr Hughes-Jones to liaise with Mr Hymers than with the Claimant when she started given that he was handing over that line management role to Mr Hymers. Secondly, by the time Mr Hymers' joined, the situation with the Claimant was becoming difficult as a result of her unhappiness at the outcome of the Associate recruitment process and it was appropriate that Mr Hughes-Jones should give Mr Hymers more support with that. Thirdly, the week that Mr Hymers started the Claimant

was refusing to assist with his induction (and not returning Mr Hughes-Jones' calls) and Mr McNally was on annual leave so that if Mr Hughes-Jones had not attended the office, there would have been no one else in the Health & Safety team to welcome Mr Hymers. That was not the position when the Claimant joined when Mr McNally and Mr Corbett were around to welcome her. Mr McNally was we find the better comparator for the Claimant so far as treatment by Mr Hughes-Jones is concerned (since he was the other Senior H&S Consultant in the London office) and there is no evidence before us that he was treated any differently in relation to support and face-to-face meetings. Even if we accepted that Mr Hymers was a valid comparator for the Claimant, we can see no significant differential treatment in terms of face-to-face meetings. Although they met on Mr Hymers' first day (unlike the Claimant and Mr Hughes-Jones) that was for the reasons we have just set out and after that we have received no evidence that they met face-to-face again before the Claimant resigned.

195. There is also no evidence of any difference in treatment being related to the Claimant's disability.

c. Mr Hughes-Jones failing to conduct an annual appraisal

196. This was not a detriment. The Claimant was not due an annual appraisal in 2018 because she had only just joined the Company and she had left before appraisals for 2019 happened. It has nothing to do with her sex or disability.

d. Mr Hughes-Jones insisting that the Claimant should work on his projects rather than attend project meetings, specifically: (i) Mr Hughes-Jones insisting that the Claimant should cancel a RIBA Risk Management workshop she had arranged for a client on the 13 May 2019 and instead attend the Respondent's London office to provide training to James Hymers; (ii) Mr Hughes-Jones asking the Claimant to cancel all of her meetings diarised for 18 July 2018 and instead travel to Carlisle to attend RIBA stage 3 meeting that Mr Hughes-Jones allegedly did not want to attend, due to travel time; (iii) Mr Hughes-Jones instructing the Claimant to either not go to a project meeting and/or stop the work she was doing to undertake his work instead immediately.

197. We have not had any evidence on (iii). As to (i), the 13 May 2019 meeting, this was not a detriment. Although Mr Hughes-Jones asked her to cancel the meeting, he did not 'insist' and she did not cancel it. In any event, this was nothing to do with her sex or disability. The request was a reasonable request made because she was only person in the Health & Safety Team who was scheduled to be in London on the day that Mr Hymers was starting. As to (ii), the 18 July 2018 meeting, that allegation was not made out on the facts and we do not deal with it further.

e. Mr Hughes-Jones not giving the Claimant access to FocalPoint in order to complete tasks

198. There is no detriment here. The Claimant had from the outset access to FocalPoint appropriate to her grade, and the same access as Mr McNally (whose position, so far as this is concerned, was materially the same as hers). She did not need access to it prior to beginning of September 2018 for her role as access was not required for preparing WIP reports. Once she did need access to it for managing projects she had brought from her previous employment, it was granted. In any event, this is nothing to do with sex or disability. The Claimant was treated the same as Mr McNally, who is an appropriate comparator for her. She was treated differently to Mr Hymers because he was an Associate and she was a Senior, not because he is a man or she is a woman, or because of her disability.

f. Mr Hughes-Jones harassing the Claimant by telephone and HR failing to take appropriate action in response to the Claimant's complaint

199. We find that the telephone calls were not a detriment. The number of calls that we have found on the evidence were not unreasonable. Mr Hughes-Jones had good reason for trying to get hold of the Claimant around this time because she was not co-operating with regard to arrangements for Mr Hymers' arrival, but Mr Hughes-Jones did not call her 17 or 21 times on the same day, and the Claimant did not answer any of his calls. That was not reasonable of her as he was her line manager. Although her perception is that Mr Hughes-Jones was harassing her, that is because she was so upset about the Associate role and angry about Mr Hymers' appointment, but there was no objective basis or justification for her feelings in that respect and if she had been acting reasonably she would not have seen Mr Hughes-Jones' actions as being unreasonable either. In any event, this was nothing to do with sex or disability but to do with the Claimant's reaction to Mr Hymers' appointment. Finally, although HR did not investigate the Claimant's complaints about Mr Hughes-Jones' calls, this was in the first instance because she had not provided the image of the office phone in a format that HR could read and, despite saying that she was going to provide it, she did not do so until 17 June. Nor did she chase HR up about her complaint until 13 June after she had been informed that the disciplinary investigation was being commenced. After that, we infer that the reason the complaint was not progressed was because the disciplinary took precedence. While the failure to investigate constituted a detriment, it was nothing to do with her sex or disability, but to do with her own communications, and the timing of the commencement of the disciplinary investigation.

g. The Respondent overlooking the Claimant for the role of "Associate Construction Health and safety consultant": The Claimant will contend she was not given the equal opportunity to be considered for the role and that her application was not genuinely or fairly considered.

200. We find that the Respondent did not 'overlook' the Claimant for the role of Associate Construction Health & Safety Consultant. The Respondent wished to advertise externally as it did not consider that it would necessarily get the best candidate if it only looked internally. Everyone in the Health &

Safety Team, including the Claimant, was given the same opportunity to apply for the role. The Claimant's application was, we find, genuinely and fairly considered alongside those of the external candidates. It is reasonable not to require an internal candidate to have a first-round interview. She had materially the same second-round interview as the external candidates. She was asked some different questions, but these were appropriate either to test the information on her CV, or because as an internal candidate she could be asked questions about the Respondent's business that could not be asked of external candidates. This was not inherently disadvantageous and could, in principle, have been advantageous. She was marked fairly against the same criteria as external candidates. All second-round candidates scored the same for technical ability. The difference in other scores was explained, in the case of the score for previous experience, by the Claimant's relative lack of management and business development experience and her brief answers in interview and, in the case of the score for behavioural competencies, by her poor performance in the interview. The Claimant's interview was all by video, whereas the second interviews for Mr Hymers and Ms Fahey were part-video, part-in-person, but is not inherently worse to be all on video rather than half and half; indeed, some people would say the hybrid version was worse. We found the interview was not a charade and that if the Claimant had behaved better in it she would have been in with a chance of appointment. We also found that there was always an intention to give the Claimant feedback, and this was done the day after the other candidates had been informed they were successful, which was entirely reasonable. In the circumstances, we do not find that the Claimant was subjected to a detriment in relation to the recruitment process. She was treated genuinely and fairly with all other candidates.

201. In any event, we do not find that the Claimant's sex or disability influenced in any way how she was treated by the Respondent in relation to the recruitment process. The appropriate comparator for the Claimant at this point is Mr McNally and he was treated exactly the same as the Claimant. His circumstances were, so far as the Respondent was concerned, materially identical to those of the Claimant as he was the other Senior Health & Safety Consultant in the London office who might have been interested in the role. The fact that he was not, and the Claimant was, is immaterial. There is no evidence (which we have accepted) that the Respondent knew before advertising the Associate role that the Claimant either thought she was doing that role or had been promised it or otherwise expected just to be promoted into it. Further, there is no evidence of any discriminatory influence affecting the recruitment process more generally. A man and a woman were ultimately both scored the same and selected for appointment, and offered the same salary for that appointment. Mr Hughes-Jones' comment following the first-round interviews that Mr Hymers was *"of strong character"* is unfortunate terminology and might in some cases provide a basis for an inference of sex discrimination, but in this case we find it does not. Mr Hymers was not scored 27 because he was 'of strong character' but for the detailed objective reasons set out in the notes of his first-round interview. Further, from our own observation of Mr Hymers giving evidence, he does have a certain presence, confidence and measured style

which is remarkable and provides an understandable basis for the adjective that Mr Hughes-Jones chose for him and which has nothing to do with his sex, but is a personal quality that might be found in anyone of any sex. For example, in this hearing we noted that Mrs Morrish displayed similar qualities.

h. The Respondent raising unjustified disciplinary charges against the Claimant and undertaking an investigation behind her back

202. We find that the disciplinary charges raised against the Claimant were not unjustified but were all matters that could reasonably be raised as disciplinary charges. As is clear from our findings of fact, the Claimant had begun behaving in an unprofessional manner towards Mr Hughes-Jones and Mr Hymers from the point at which she believed she was not going to be appointed to the Associate role. She did engage in a campaign seeking to discredit Mr Hymers. There was ample evidence from which the Respondent could have formed the view that she was trying to avoid meeting with Mr Hymers, including: the change in her pattern of work in the office before and after his arrival; the fact that she told Ms Hardwick-Smith on 13 May that she would not be meeting with him; her failure to attend the London office at all in the first week of his employment despite not being on annual leave for at least the first four days and despite being due in the office on Wednesday 15 for the London Management Team meeting; and thereafter her apparent organisation of her diary so as to avoid coinciding with Mr Hymers in the office as much as possible. There was nothing unreasonable in the Respondent commencing its investigation before informing the Claimant. That is normal. Something has to be investigated before it can be seen that there might be a need for formal disciplinary procedures. Neither the Respondent's disciplinary policy nor the ACAS Code of Practice requires that an employer inform an employee before commencing a disciplinary investigation. Indeed, the ACAS Code does not even require that there be an investigation meeting with the employee. The notification requirements apply to the disciplinary meeting not the investigation meeting. In any event, the disciplinary charges and investigation were nothing to do with the Claimant's sex or disability but were raised because of her conduct. The Claimant's conduct was unique and nothing like that of Mr McNally's or Mr Hughes-Jones or Mr Hymers and so they are not valid comparators for her.

i. R criticising C for the way she filed electronic documents and characterising this as a disciplinary charge

203. We find that it was reasonable for the Respondent to include this as a disciplinary charge. The Respondent's policy in relation to saving documents was an important policy because of its security implications. The Claimant had been asked numerous times prior to May 2019 to follow the Respondent's policy, without ever previously asserting that the reason she was not doing so was because of her disability. She had not agreed such an adjustment at the outset. The fact that the Claimant in her conversation with Mr Hamilton on 15 May 2019 in which he sought to warn her that her

behaviour generally was becoming a conduct issue started saying that this was a reasonable adjustment she required because of her disability, does not in our judgment mean, given the long history of the matter, it was unreasonable for the Respondent to be sceptical of that claim and to include this issue as a disciplinary charge. (Equally, it was reasonable for the Respondent not to include it in the reasons for dismissal, but that is a different point.) This charge was not included because of her sex or disability, but because of the importance of the Respondent's policy and the Claimant's failure to comply with it over a long period, without having until very late in the day asserted that the reason for that was her disability.

j. John Sharp criticising C for constantly being on her mobile phone

204. We have already set out in our findings of fact that we considered Mr Sharp was justified in raising with the Claimant the fact that she had significantly increased her personal mobile phone use. This was not a detriment as there was just cause for it. It also had nothing to do with her sex or disability, but was a response to her conduct. When Mr Sharp first raised it with her he did not know of her disability in any event. The Claimant offered no explanation for her increased mobile phone use, so it was reasonable for Mr Sharp to refer to this again in his statement for the disciplinary investigation.

k. Mr Sharp unfairly criticising the Claimant for comments she made on a fee proposal document made by James Hymers

205. We have already set out in our findings of fact that we consider Mr Sharp's criticism of the Claimant regarding her conduct in relation to this fee proposal was reasonable. The Claimant's conduct in this respect was significantly different to that of Mr McNally. Although Mr McNally adds his criticisms to those made by the Claimant, his are quite different because he is joining in rather than starting it and he does not also send an email designed to suggest that Mr Hymers started late and finished early, or directly question his competence, experience and suggest that Mr Hymers actions are a 'major concern' that might damage the Respondent's reputation. The Claimant was attempting to discredit Mr Hymers and it was reasonable for Mr Sharp to criticise her actions in this regard. This had nothing to do with sex or disability but was a response to her conduct.

I. HR sending the Claimant information on how to recognise dyslexia in children

206. We find that this was not a detriment. The Claimant had refused to provide the education psychology report that related to her personally. It was reasonable in those circumstances for the Respondent to obtain information from the official NHS website in order to include it in the disciplinary pack to inform Mr Seaman about dyslexia. It was equally reasonable for the Respondent to include that in the pack that went to the Claimant as fairness required that she should see whatever Mr Seaman had seen. It was clear from the Contents page of that pack that it was being included as an overview. The information in it relating to dyslexia in children was not

directly relevant to the Claimant now, but it was nonetheless informative to someone unfamiliar with the condition. While we acknowledge the Claimant's strength of feeling about the inclusion of this document, we do not consider that it was reasonable for her to be offended by it. Its inclusion clearly did not indicate that the Respondent thought she was a child or intended to treat her as such. It is nothing like sending a wheelchair user information about how to use their wheelchair. In any event, the inclusion of the document in the pack was nothing to do with her sex. Nor was it included 'because of' her disability in the relevant sense. It was included because she had not provided any medical evidence about her dyslexia and its effects that was specific to her.

m. Dismissing the Claimant or effectively causing her to resign (constructive dismissal)

207. The Claimant resigned before she was dismissed. As we have found the Claimant's other allegations not made out, it follows that she was not constructively dismissed or otherwise caused to resign.

n. Presenting the Claimant with a new job description without prior consultation

208. This allegation was not made out on the facts.

o. Ms Hardwick-Smith failing to respond to the Claimant's GP letter dated 14 June 2019 and sharing the Claimant's sensitive personal data with third parties

209. We do not find that there was any need for Ms Hardwick-Smith to obtain an Occupational Health report in response to the letter from the GP of 14 June 2019. The GP letter was non-specific as to what problems the Claimant was encountering or why a referral to Occupational Health might be required. The Claimant was subsequently asked by Ms Creasey to identify what reasonable adjustments she needed and on 20 June 2019 the Claimant said she only needed two adjustments. In those circumstances, there was no need to obtain a further report, particularly given that disciplinary proceedings concerning conduct which was, for the most part, clearly unrelated to the Claimant's disability, were ongoing. There is no detriment to the Claimant from not getting a report at this stage because it could have made no difference to the outcome. The only disciplinary allegation that was potentially relevant to the Claimant's disability was that relating to saving of electronic files and that was not one of the grounds of dismissal. In any event the not getting of a report had nothing to do with the Claimant's sex. Nor was it 'because of' her disability, but simply because it was not necessary.

210. As to the sharing of personal data with third parties, the only allegation made out on the facts was that relating to showing Mr Hymers and Mr Sharp the Claimant's disciplinary response. This was personal data but not 'sensitive' personal data as it was not her medical records. While we are prepared to accept this was a detriment, it had nothing to do with her sex or disability, but was because the issues in relation to the Claimant's

disciplinary were being discussed with Mr Hymers and Mr Sharp prior to the decision being made, which is not unreasonable.

211. For these reasons, all the claims of direct discrimination fail.

Discrimination arising from disability (Issues h, I, j and m)

The law

212. In a claim under s 15 of the EA 2010, the Tribunal must consider:
    a. Whether the claimant has been treated unfavourably;
    b. Whether the unfavourable treatment is because of something arising in consequence of the employee's disability;
    c. Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.

213. There are two aspects to causation under s 15. First, the Tribunal must identify what caused the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator. Secondly, the Tribunal must determine whether that reason was something arising in consequence of the Claimant's disability. That is an objective question and does not involve consideration of the mental processes of the alleged discriminator: *Pnaiser v NHS England and anor* [2016] IRLR 170, EAT.

214. An employer has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment on the employee and the reasonable needs of the party responsible for the treatment: *Hampson v Department of Education and Science* [1989] ICR 179, CA and other cases summarized recently in *Department of Work and Pensions v Boyers* (UKEAT/0282/19/AT) at para 29 *per* Matthew Gullick (sitting as Deputy High Court Judge).

215. If there is a link between reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and/or discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification' and it is unlikely that a disadvantage that could be alleviated by a reasonable adjustment will be justified: *Dominique v Toll Global Forwarding Ltd* (UKEAT/0308/13/LA) at [51] *per* Simler J.

216. Again, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not unlawful.

Conclusions

217. We have considered each of the four issues (h, I, j and m from the list above) by reference to s 15 of the EA 2010 and conclude as follows:-

h. The Respondent raising unjustified disciplinary charges against the Claimant and undertaking an investigation behind her back

218. The disciplinary charges other than that related to saving of electronic documents did not have anything to do with her disability, but were raised because of the Claimant's conduct. In any event, the Respondent was justified in raising all those charges for the reasons we have already set out above in our findings on direct discrimination. It was a proportionate means of achieving the legitimate aim of maintaining staff discipline and professional conduct in the office.

i. R criticising C for the way she filed electronic documents and characterising this as a disciplinary charge

219. For the reasons we set out in relation to the reasonable adjustments claim (below) regarding this issue, we find that the Claimant has not shown that the reason why she was not following the Respondent's policy with regard to saving documents was because of her disability or arose in consequence of her disability rather than as a matter of personal preference. In any event, even if the reason she was not following the Respondent's policy was because of her disability, we find that the Respondent was justified in including it in the disciplinary charges given that the matter had been raised with the Claimant multiple times prior to 15 May 2019 without her suggesting that this was a disability-related issue. She only raised the link with disability in the context of a conversation in which Mr Hamilton warned her that her behaviour generally was becoming a conduct issue. For the reasons also set out below in relation to the reasonable adjustments claim, we find that it was reasonable for the Respondent to be sceptical of the claimed link to disability and to raise the issue of failure to follow the Respondent's procedures as a disciplinary charge. Raising the matter as a disciplinary charge was a proportionate means of pursuing the legitimate aim of maintaining document security within the Respondent and enabling continuity of work on projects as between team members. It was proportionate to raise it, even though the allegation was not in the end upheld (or, at least, was not relied on as part of the reasons for dismissal).

j. John Sharp criticising C for constantly being on her mobile phone

220. We find that the Claimant's increased mobile phone use for which she was criticised by Mr Sharp had nothing to do with her disability, but was simply because he had noticed that she had increased her use of her personal mobile phone. We infer that her increase in personal mobile phone use was because she was unhappy with the recruitment process and was pursuing lines of enquiry and/or communicating with people about that. We have

seen evidence that she had obtained information about the recruitment process and interviews of other candidates that she must have obtained from other people. There is also evidence that she was engaging in more 1:1s with other people complaining about her treatment and about Mr Hymers. In any event, Mr Sharp was unaware of her disability when he first raised this with her and she did not tell him that her personal mobile phone use was anything to do with her disability. Further, even if it was something arising in consequence of disability, Mr Sharp was justified in raising it with her because of what he himself had seen of her increased use of her personal mobile. Challenging her was a proportionate means of achieving the legitimate aim of ensuring that employees are focused on their work and not engaging in excessive personal phone use during working hours.

m. Dismissing the Claimant or effectively causing her to resign (constructive dismissal)

221. The Claimant resigned before she was dismissed. As we have found the Claimant's other allegations not made out, it follows that she was not constructively dismissed or otherwise caused to resign.

222. It follows that all the discrimination arising from disability claims fail.

Failure to make reasonable adjustments

The law

223. Under s 20 of the EA 2010, read with Schedule 8, an employer who applies a provision, criterion or practice (PCP) to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person. By section 212(1), 'substantial' means 'more than minor or trivial'.

224. In considering a reasonable adjustments claim, a Tribunal 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: *Environment Agency v Rowan* [2008] ICR 218, EAT at [27] *per* Judge Serota QC. The Tribunal must also identify how the adjustment sought would alleviate that disadvantage: *ibid,* at [55]-[56]. However, an adjustment will be reasonable if it provides a prospect of removing the disadvantage; it does not have to be a 'good' or 'real' prospect: see *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10, [2011] EqLR 1075 at [17] *per* Keith J.

225. What is reasonable is a matter for the objective assessment of the Tribunal: cf *Smith v Churchills Stairlifts plc* [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments, nor with the employer's reasoning: *Royal Bank of Scotland v Ashton* [2011] ICR 632, EAT. Carrying out an assessment or consulting an employee as to what adjustments might be required is not of itself a reasonable adjustment: *Rider v Leeds City Council* [2013] Eq LR 98, EAT, *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664, EAT.

226. Although the EA 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should generally have regard, including but not limited to:

    a. The extent to which taking the step would prevent the effect in relation to which the duty was imposed;
    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 it would disrupt any of its activities;
    d. The extent of the employer's financial and other resources;
    e. The availability to the employer of financial or other assistance in respect of taking the step;
    f. The nature of the employer's activities and the size of its undertaking;
    g. Where the step would be taken in relation to a private household, the extent to which taking it would: (i) disrupt that household or (ii) disturb any person residing there.

227. Paragraph 20(1)(b) of Schedule 8 to the EqA provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know that the claimant has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). In view of this, the EAT in *Secretary of State for Work and Pensions v Alam* [2010] ICR 665 held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions: first, did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially? Secondly, if not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially? It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments. In considering this issue of knowledge, we accept the

submission of Ms Mallick that the guidance given by Eady J in *A Ltd v Z* and set out above is relevant to s 20 claim as it is to a s 15 claim.

228. Under s 136 EA 2010, 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, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may even be as late as the tribunal hearing itself, but it must be identified at that stage: *Project Management Institute v Latif* [2007] IRLR 579, EAT.

Conclusions

229. As amended in her closing submissions, the Claimant complains about the following (alleged) PCPs:
    a. Mr Hughes-Jones's practice of giving instructions about work orally (without recording them in writing); and,
    b. The Respondent's policy regarding the saving of electronic files.

230. As to Mr Hughes-Jones' practice of giving instructions about work orally, he accepted in cross-examination that he preferred to use the telephone rather than email, but in fact his evidence (which we accept as it makes sense) was that despite his preference because he and the Claimant were in different offices most instructions were in writing. The Claimant did not give specific evidence about Mr Hughes-Jones' practices in this regard. In the circumstances, we are not satisfied that she has shown the alleged PCP existed. Even if it did, there is no evidence that this practice put the Claimant at a substantial disadvantage because of her disability. The Claimant did not give any evidence about this and the only evidence of her requesting that Mr Hughes-Jones communicate in writing was on 8 May 2019 when they had had a disagreement about what was said in the meeting on 7 May 2019. The Claimant did not suggest then that it was anything to do with her disability, and the context strongly suggests otherwise, and we accordingly find that the Claimant has not shown that she was at a substantial disadvantage because of this PCP (if PCP it was). Moreover, there is no evidence on the basis of which it could be said that Mr Hughes-Jones knew or ought to have known that any practice of giving oral instructions put the Claimant at a disadvantage by reference to her disability. There is no evidence that the Claimant told him this, and there is nothing that could lead us to conclude that he ought to have known.

231. As to the Respondent's policy on saving files and emails, it is accepted that this was a PCP and we have considered whether the Claimant was placed at a substantial disadvantage because of her disability in this regard. We know from Mr Hamilton that it takes slightly longer, and is slightly more difficult, for anyone to save documents and emails onto the Respondent's system rather than leaving them in their personal files. The Claimant's evidence was that it takes her longer to file documents generally because of

her disability, but she gave this evidence by reference to 'library systems' generally and she gave no evidence about the extent of her difficulties or what difficulties she experienced complying with the Respondent's specific policy. There was no expert evidence to assist as the Open University report deals with physical libraries, not electronic document systems. There was evidence in her witness statement that she has difficulties with orientation, organisation and visual input which she said made it difficult to use a library and was compounded when trying to organise books/files and that she has difficulty remembering numeric codes. However, as noted in our findings of fact, this does not assist us with the question of whether her disability made it more difficult for her to comply with the Respondent's requirements that documents be saved on its servers. On the face of it what the Claimant was doing instead of complying with the PCP involved more work rather than less as she was first saving everything on her personal computer and then later (she says, laboriously) moving everything across to the Respondent's servers. The fact that it is more difficult for everyone to save onto the Respondent's servers does not mean that she is substantially disadvantaged. Everyone is 'disadvantaged' in that way. The fact that it is a more difficult process to save onto the Respondent's servers might explain why the Claimant chose to do something different, but it does not show that she was at a more than minor or trivial disadvantage because of her disability in relation to the Respondent's policy. The burden is on the Claimant in this regard and she has not provided the evidence from which we could conclude that this element of her claim is made out.

232. Even if we are wrong about that, however, there is no evidence (which we have accepted) that the Respondent knew or ought to have known that its policy in relation to saving files placed the Claimant at a substantial disadvantage because of her disability. Mr Hughes-Jones had spoken to her numerous times without her raising this. She only mentioned for the first time in the telephone call with Mr Hamilton on 15 May 2019 when he sought to warn her that her behaviour was becoming a conduct issue. Given the way in which the link to disability was raised by the Claimant, we do not consider that the Respondent is immediately from 15 May 2019 to be imputed with knowledge that its PCP was putting the Claimant at a substantial disadvantage because of her disability. It was reasonable for the Respondent to be sceptical and to raise this as a disciplinary charge for the reasons we have set out above.

233. We have not gone on to consider what reasonable adjustments might have been necessary if she was substantially disadvantaged by the file-saving PCP because of the absence of evidence as to the respects in which she may have been disadvantaged, which would be necessary to any understanding of what a reasonable adjustment might have been. The possible adjustment identified by the Claimant in the list of issues (*"be flexible in the way it permitted C to file her saved work to a drive backed up by IT daily"*) is not an adjustment about which the Claimant has provided any evidence, nor was it put to the Respondent's witnesses. What the Claimant was doing was saving work on her personal drive and only transferring it to the Respondent's files every week or so.

234. Finally, in reaching the above conclusions, we have taken into account the Claimant's submission that the Respondent ought to have obtained more medical evidence relating to the Claimant at some point and that having failed to do so they should somehow be 'fixed' with knowledge of her disability, the disadvantage she claims to have suffered and the reasonable adjustments that ought to have been made. However, this is a hopeless submission on the facts of this case for three reasons:-

235. First, the Claimant has even now not produced any medical evidence to support her claims that the PCPs about which she complained put her at a substantial disadvantage or required the adjustments that she sought to have been made. There is thus nothing here from which we could conclude that if enquiries had been made they would have shown the matters that the Claimant now claims.

236. Secondly, given that the Claimant refused to provide a copy of her education psychology report when it was requested on 20 June 2019 because it was 'deeply personal and had not even been seen by her parents', we infer that if the Respondent had asked her for further medical evidence, the Claimant would not have co-operated with that request.

237. Thirdly, there is no need for an employer routinely to obtain an occupational health report about every employee who declares they have a long-standing condition such as dyslexia. On the contrary, requests for medical evidence are intrusive and should only be made where necessary. In this case, at the outset of employment the Claimant made clear in her conversation with Mrs Morrish on 11 June that her disability had no substantial affect on her and she needed no further adjustments than those that were discussed and noted on that date in Mrs Morrish's file note. Even later in July when the Claimant was noted to be 'struggling' and an iphone and surface device were requested, those were specific requests which were dealt with. Although the Claimant was not given the iphone she requested she did not, when informed of this and that the reason for it was that it was more expensive and did nothing different to the company mobile, seek to argue her case or explain that there was something the iphone could do that the company mobile did not. (Indeed, we have heard such evidence in these proceedings either.) Thereafter the Claimant did not mention to anyone that her disability was causing her any difficulties until the question of saving files was raised with her by Mr Hamilton on 15 May 2019 in the context of conversation in which he warned her that her behaviour generally was becoming a conduct issue. Between the Claimant's start date and 15 May 2019 there was thus nothing that could possibly be said to trigger the need for a referral to Occupational Health. The position after 15 May 2019 is less clear-cut, but we find that given that the Claimant did not raise her disability on the numerous previous occasions that she was challenged about her failure to save documents on the Company server, the Respondent was entitled to treat that with some circumspection, particularly as she was alleging it was an adjustment agreed at the outset with Mrs Morrish, a contention denied by Mrs Morrish and which we have found to be untrue.

Once the GP's letter of 14 June 2019 had been received on 17 June 2019, the question of whether or not to make a referral to Occupational Health or obtain further medical evidence was a 'live' issue, but the GP's letter was non-specific and in our judgment the Respondent acted reasonably in asking the Claimant what adjustments she said that she required as Ms Creasey did on 20 June. Given the narrow scope of the Claimant's response (two specific adjustments), it was again in our judgment reasonable for the Respondent not to look further than that and seek to make a referral to Occupational Health, particularly given the many other concerns that the Respondent had about the Claimant's conduct at that point which were entirely unrelated to her dyslexia. If the Claimant had returned to work following the disciplinary process, that would have been the time when it may have been reasonable to refer to Occupational Health, but that did not happen. Likewise, it would have been reasonable to refer to Occupational Health before deciding whether to uphold any disciplinary charge against the Claimant concerning saving of files, but in the event that charge was dropped. The Claimant resigned in our judgment before the point at which the Respondent could reasonably have been expected to make a referral to Occupational Health.

238. For all these reasons, the claims of failure to make reasonable adjustments fail.

Equal pay

The law

239. To succeed on a claim for equal pay, it first must be established that the Claimant and her comparator are doing equal work. The Claimant in this case contends that her work is 'like' her comparator Mr Hymers' work. By s 65(2) a woman is regarded as employed on like work if her work and her comparator's is of the same or broadly similar nature and the differences between the things she does and the things they do are not of practical importance in relation to the performance of the contract. If the Claimant establishes she is employed on like work, the burden shifts to the Respondent to prove that the difference is because of a material factor reliance on which does involve direct or indirect sex discrimination (EA 2010, s 69).

240. Given the nature of the Claimant's case in these proceedings, we drew the parties' attention to the decision of the High Court in *Beal and ors v Avery Homes (Nelson) Limited and ors* (Case No. HQ16X01000) Lavender J which contain some helpful guidance as to what 'work' is for the purposes of the equal pay provisions, albeit that that case was concerned with an 'equal value' claim rather than a 'like work' claim. The parties agreed we should consider the following matters as set out at [30]-[33] of that case:

> 30. There was some common ground. In particular, it was agreed that it was appropriate to look at what the employee actually did, and not simply at documents (such as contracts, job descriptions or work manuals), even if they had contractual force. Such

> documents are relevant, but not necessarily determinative, when considering what constitutes someone's work. Likewise, what the employee actually did is an important consideration, but is not necessarily determinative. To take an obvious example, an employee who loafs around during work hours does not thereby convert loafing into part of their work. Likewise, as the parties agreed, if an employee refused or neglected to do something which they were supposed to do, that activity would remain part of their work.
>
> 31. Another relevant consideration is whether a particular activity was a "requirement or expectation". This was a term used by the Defendants, but Mr Linden denied the suggestion that he was seeking to elevate it to the status of a test for what constitutes "work".
>
> 32. Of course, where an employee is contractually required to do something (and that requirement has not fallen into desuetude or otherwise been varied), then that activity will form part of their work (even if, in practice, they neglect or refuse to perform it). But most of the issues in the present case concerned activities where the contractual position was not so clear-cut. On the whole, the dispute was not as to what the employee did, but as to whether it formed part of their work. I will deal with the individual issues later, but it may be helpful to set out in general terms what seems to me to be the appropriate approach. In general terms, therefore:
> (1) Where an employee is instructed by their manager to do something, then, if they do it, that is surely part of their work. Moreover, that is so, even if they might have been entitled to say, "But that is not something I am obliged to do."
> (2) The same is likely to be the case where the manager does not instruct, but requests or encourages, the employee to perform the activity in question. On the other hand, in such a case, it may be relevant to note for the expert's benefit (if it is the case) that the employee could not be required to perform that activity.
> (3) Where an employee does something which they have not been instructed, requested or encouraged to do, it may still constitute work if, for instance:
> (a) it is simply a way of doing something which forms part of their work; and/or
> (b) their manager knows that they are doing it, but does not object and thereby tacitly approves of their doing it.
>
> (4) On the other hand, something may not be part of an employee's work if they have not been instructed, requested or encouraged to do it, their do ing it has not been approved by their employer and it does not simply constitute a way of doing something which forms part of their work.
>
> 33. I stress that these are merely general considerations, which are not intended to place a gloss on the Act and that each disputed issue has to be considered on the basis of its own particular facts.

Conclusions

241. The Claimant accepted in these proceedings that the role of Senior Health & Safety Consultant was not 'like work' with that of Associate Health & Safety Consultant. Her case was that she was doing 'like work' to Mr Hymers because she was effectively doing the Associate role for the year before Mr Hymers arrived. However, we have found in our findings of fact that she was not doing the Associate role.

242. She suggested that the Respondent accepted the two roles were 'like work' because she was scored 8/10 at the interview for the Associate role for

having relevant work experience in a 'similar' role, albeit not at Associate level, because of what Mr Cowie said about her effectively heading up the London team in his statement for the disciplinary and because her charge-out rate was also only £2 per hour less than Mr Hughes-Jones. In our findings of fact we have noted that when the whole of Mr Cowie's statement for the disciplinary investigation is considered it is clear that he does not consider she has been doing the Associate role. The Claimant's scoring of 8/10 for the interview is a scoring for the purposes of an interview, rather than assessment of the nature of the differences between the two jobs. The value of the work to clients does not tell us very much because the main differences between the two roles are not the operational provision of services to clients, but the internal management aspects and business development function.

243. However, we have to focus on the nature of the work done by the Claimant and her comparator. In this respect, the line management responsibility (or, rather, lack of it) is key. A managerial role is different to a non-managerial role. The operational aspects of the Senior and Associate roles, in a small team, were similar, but the two roles were quite distinct. The Claimant had no line-management responsibility and, in her own words, was also (as is to be expected given that her role was two ranks below that of Associate) not given the autonomy that would be given to an Associate in terms of business development. These differences between the two roles were of significant practical importance in relation to the performance of the contract. We find that the Claimant's role was not the same or broadly similar to that of the Associate, including as that role was done by Mr Hymers.

244. Even if we are wrong about that, the differences in the responsibilities of the two roles, together with the fact that the Associate role is two grades higher than that of Senior in the Respondent's hierarchy, are genuine material factors that differentiate the roles and have nothing to do with the sex of the individuals concerned.

245. For the avoidance of doubt, we have not seen any evidence that would support a case that the Respondent has a PCP in relation to pay that systematically disadvantages women. Two points stand out starkly in this respect: (i) the Associate role was offered to a man and a woman at the same time at the same rate of pay; and, (ii) the Claimant was paid more than any other Senior Consultant at the Respondent, including more than the other male employee in the London office who was in the same role as she was.

246. In the circumstances, the equal pay claim fails.

Time limits

247. The general rule under s 123(1)(a) EA 2010 is that a claim concerning work-related discrimination under Part 5 of the EA 2010 (other than an

equal pay claim) must be presented to the employment tribunal within the period of three months beginning with the date of the act complained. This is subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 140B of the EA 2010, any period of ACAS Early Conciliation is to be ignored when computing the primary time limit, and if the primary time limit would have expired during the ACAS Early Conciliation period, it expires instead one month after the end of that period. If a claim is not brought within the primary time limit, the Tribunal has a discretion under s 123(1)(b) to extend time if it considers it is just and equitable to do so.

248. In computing the primary time limit, conduct extending over a period is to be treated as done at the end of the period (s 123(3)(a)). For this purpose conduct extends over a period if it amounts to a 'continuing state of affairs': see *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686, [2003] ICR 530. An in-time act that is not unlawful cannot provide the 'link' to an unlawful out-of-time act: see South Western Ambulance Service NHS Foundation Trust v King (UKEAT/0056/19/OO) at paras 32-33.

249. The burden is on the Claimant to convince the Tribunal that it is just and equitable to extend time. In *Robertson v Bexley Community Centre t/a Leisure Link* [2003] EWCA Civ 374, [2003] IRLR 434, CA, the Court of Appeal stated (para 24) that when employment tribunals consider exercising the discretion under what is now s 123(1)(b) EA 2010, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'

Conclusions

250. As we have not found any of the Claimant's claims to be made out and therefore there can be no 'continuing act' (see *South Western Ambulance Service*), and we received no evidence that might provide the basis for a 'just and equitable' extension of time (despite the burden being on the Claimant), we conclude that all alleged acts of discrimination present outwith the primary time limit in s 123(1)(a) as extended by s 140B were presented out of time.

Overall conclusion

251. For the reasons set out above, our judgment is as follows:-

(1) The Respondent did not discriminate against the Claimant because of her sex or disability contrary to ss 13 and 39 EA 2010;
(2) The Respondent did not discriminate against the Claimant because of something arising in consequence of her disability contrary to ss 15 and 39 EA 2010;
(3) The Respondent did not fail to comply with the duty to make reasonable adjustments in ss 20 and 39 EA 2010;

(4) The Respondent did not fail to pay equal pay to the Claimant for like work in breach of ss 65 and 69 of the EA 2010; and,
(5) All claims presented outwith the primary time limit in s 123(1)(a) of the EA 2010 as extended by s 140B EA 2010 are outside the jurisdiction of the Tribunal.

252. Accordingly all the claims are dismissed and we vacate the dates reserved for a provisional remedy hearing.

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Employment Judge Stout
Date: 25/05/2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

26/05/2021.

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FOR THE TRIBUNAL OFFICE

Where reasons were given orally at the hearing on any matter, written reasons will not be provided unless they are asked for by a request in writing presented by any party under Rule 62(3) within 14 days of the sending of this judgment.