EMPLOYMENT TRIBUNALS

Claimant: **Dr K Schopflin**

Respondent: **East London NHS Foundation Trust**

Heard at: **East London Hearing Centre**

On: **14, 15, 16, 17, 21 November 2023**
22, 23 November 2023 (in chambers)

Before: **Employment Judge Gordon Walker**
Members: **Miss S Harwood**
Mr L O'Callaghan

Representation:
Claimant: Ms N Newbegin, counsel
Respondent: Mr A Ross, counsel

RESERVED JUDGMENT

1. The complaint of unfavourable treatment because of something arising in consequence of the claimant's disability (section 15 Equality Act 2010) as set out at paragraphs 4 (m), (n), (o), (q), and (r) of the list of issues is well founded and succeeds.

2. All other claims are dismissed:

    2.1 The complaints at paragraph 21 of the grounds of claim (paragraph 4(c)-(d) of the list of issues) are dismissed upon withdrawal by the claimant pursuant to rule 52 of the Employment Tribunal Rules of Procedure 2013.

    2.2 The complaints at paragraphs 17, 18, 19, 42(b) and 43(b) of the list of issues are dismissed upon withdrawal by the claimant pursuant to rule 52 of the Employment Tribunal Rules of Procedure 2013.

    2.3 The complaint of direct disability discrimination (because of the claimant's and/or her husband's disability) (section 13 Equality Act 2010) is not well founded and is dismissed.

    2.4 The complaint of unfavourable treatment because of something arising in consequence of the claimant's disability (section 15 Equality

Act 2010) as set out at paragraphs 4 (a), (b), (e), (f), (g), (h), (i), (j), (k), (l), and (p) of the list of issues is not well founded and is dismissed.

2.5 The Tribunal does not have jurisdiction to consider the complaint of unfavourable treatment because of something arising in consequence of the claimant's husband's disability (as set out at paragraphs 35-40 of the list of issues).

2.6 The complaint of failure to make reasonable adjustments (sections 20 and 21 Equality Act 2010) as set out at paragraphs 20-23 of the list of issues is not well founded and is dismissed.

2.7 The Tribunal has jurisdiction to consider a complaint of indirect discrimination: same disadvantage. Section 19 Equality Act 2010 is read as if it includes the wording in the (not yet in force) section 19A Equality Act 2010. The claimant does not bring a complaint of indirect discrimination: same disadvantage. If the claimant does bring such a complaint at paragraphs 41-50 of the list of issues, it is not well founded and is dismissed.

2.8 The Tribunal does not have jurisdiction to consider a complaint of indirect discrimination that is based on the claimant's association with a person holding a particular protected characteristic (as set out at paragraphs 41-50 of the list of issues).

2.9 The complaint of harassment related to the claimant's and/or her husband's disability (section 26 Equality Act 2010) is not well founded and is dismissed.

REASONS

1. By claim form dated 9 September 2021 the claimant brought claims of disability discrimination against the respondent.

2. The respondent is an NHS Foundation Trust providing mental health and community healthcare services to people living in the City of London, London Boroughs of Hackney, Tower Hamlets, Newham, and in Luton and Bedfordshire.

3. The claimant was employed by the respondent from 9 March 2020 to 31 October 2021 as the Head of Information Governance ("IG").

The issues

4. The issues were agreed at a preliminary hearing on 25 March 2022. Those issues were updated before and during the hearing. A final version of the agreed list of issues is appended to these reasons. The hearing was listed to deal with the issue of liability only.

The evidence

5. The parties produced an agreed file of evidence. Some additional documents were added to the file during the hearing by consent. The final version of the file consisted of 1474 pages.

6. The Tribunal heard evidence from four witnesses, who produced signed witness statements:

    6.1 The claimant, who produced an impact statement about her alleged disability and a witness statement on the issues of liability.

    6.2 For the respondent:

        6.2.1 Mrs C Kitchener, the claimant's line manager, whose job title is: Associate Director of IG and Data Protection Officer.

        6.2.2 Mrs S Begom, who was employed as an HR Business Partner at the material time.

        6.2.3 Mr S Montague, Redeployment and Careers Advisor – Placements Manager.

The hearing

7. The adjustments requested by the claimant were put in place and kept under review. We took a morning and afternoon break of a duration requested by the claimant (between 10 and 30 minutes). We ended each day at a time to accommodate the claimant's fatigue. On the fourth day it was agreed that the claimant would leave the hearing at the end of the evidence, and that her counsel would remain at the hearing for a short discussion about the list of issues.

8. On the first day, the claimant made an application to amend her claim to include the detriments at paragraphs 4(m)-(r) of the list of issues as part of the harassment related to disability claim. This application was agreed by the respondent and we allowed it. The claimant also withdrew paragraph 21 of her claim (issues 4(c) and (d) of the list of issues). Paragraph 21 was dismissed upon withdrawal. The respondent's uncontested application to amend the amended grounds of resistance at paragraphs 5 and 29 was allowed.

9. On the third day, after the conclusion of the claimant's evidence, the claimant made an application to amend the date at paragraph 4(j) of the list of issues and to amend paragraph 18(a) of the list of issues to read as follows *"did the claimant need to take annual leave on four occasions between 30 September 2020 and 24 November 2020 due to her ongoing fatigue, that could not otherwise be used for its proper purpose"*. The first proposed amendment was agreed by the respondent, and we allowed it, as it reflected the claimant's amendments to her witness statement made at the start of her oral evidence.

10. The second proposed amendment was opposed by the respondent, and we refused it. We concluded that the balance of prejudice fell in favour of the respondent on the amendment application. The claimant's evidence under cross examination and the documents in the bundle that she was taken to under cross examination appeared to be inconsistent with paragraph 18(a) of the list of issues. We considered that, if the claimant was not permitted to amend paragraph 18(a), she may not be able to succeed in that claim. We took this prejudice into account. We also had regard to the fact that (1) the claim was out of time which would present an additional hurdle for the claimant to overcome in proving the paragraph 18(a) claim; and (2) this claim related to four days of annual leave and was therefore relatively minor in the context of her other claims. We found that these two factors reduced the prejudice to the claimant of refusing the amendment. When looking at the prejudice to the respondent, we had regard to the fact that cross examination of the claimant had concluded, and that the respondent had prepared its cross examination based on the pleaded claim. Recalling the claimant to be cross examined on the amended claim would not mitigate this prejudice as the claimant had (quite properly) spoken to her counsel after the conclusion of her cross examination about this issue. She would therefore have been forewarned of the significance of her evidence on this point and the potential inconsistencies with the documents. We also had regard to the fact that allowing the amendment would cause delay to the hearing, as the claimant would need to be recalled and the respondent would need to prepare further cross examination and take instructions.

11. On the fifth day, the claimant withdrew the claims and allegations at paragraphs 17-19 and 42(b) and 43(b) of the list of issues. Those claims were dismissed upon withdrawal. The respondent withdrew paragraphs 8(a)(iii) and 40(a)(iii) of the list of issues. The respondent applied to amend paragraph 8 of the list of issues by deleting the words *"in respect of paragraphs 4(a) to (l)"*. That proposed amendment was agreed by the claimant as it reflected a prior agreement between the parties' solicitors and had not affected the evidence in the case as we had, throughout the hearing, read paragraph 8 as if those words were omitted. We therefore allowed that amendment.

12. We had regard to the parties' written submissions (which speak for themselves), and to their supplementary oral submissions. The written submissions were:

    12.1 For the claimant:
        12.1.1 An opening note
        12.1.2 Closing submissions
        12.1.3 Skeleton argument on associative discrimination.

    12.2 For the respondent:
        12.2.1 Closing submissions
        12.2.2 Skeleton argument on associative discrimination.

    12.3 The parties also produced, at our request, a joint note setting out their areas of agreement and disagreement on the law in respect of the claims based on the claimant's husband's disability.

13. The parties produced, and then updated, an agreed chronology.

Findings of fact

14. We took all evidence that we were referred to into account. We only made findings of fact on those matters relevant to the liability issues in the claim. We reached our findings of fact on the balance of probabilities, based on the evidence. Numbers in square brackets refer to pages of the agreed file of documents.

Brief chronology of the claimant's employment, absence and working hours

15. The claimant was employed by the respondent as Head of IG from 9 March 2020. This is a full time (37.5 hours a week) 8(b) banded role [456-463]. According to the job description, this role had operational responsibility for IG. The job purpose was to provide expert IG advice [405-408].

16. On 18 March 2020 the claimant commenced a period of sickness absence with covid-19 [472-477].

17. The claimant was absent from work commencing 18 March 2020. She returned to work on 1 September 2020. During this period:

    17.1 There were six days when the claimant worked from home: 23 and 24 March 2020 and 1, 2, 3 and 6 April 2020 [502].

    17.2 The claimant was otherwise on sickness absence until 20 August 2020. Fit notes were produced from 18 May 2020 [537; 554; 570; 585; 631].

    17.3 In the period 21 August to 28 August 2020 the claimant was on annual leave [493]. 31 August 2020 was a bank holiday.

18. The claimant was referred to occupational health, who produced six reports, dated:

    18.1 11 May 2020 ("OH 1") [528-530].

    18.2 4 June 2020 ("OH 2") [555-557].

    18.3 12 August 2020 ("OH 3") [620-623].

    18.4 12 November 2020 ("OH 4") [714-716].

    18.5 14 January 2021 ("OH 5") [789-791].

    18.6 27 May 2021 ("OH 6") [946-950].

19. During the claimant's absence to 1 September 2020, she attended occupational health assessments by telephone and video on three occasions. The reports OH1, OH2 and OH3 were then produced.

20. OH 3 advised that the claimant may be able to return to work from 1 September 2020 on a phased basis working two hours a day for the first week until the claimant's condition had stabilised, and thereafter increasing by one hour a day for each week until full time hours were reached [622]. The claimant accepted under cross examination that the recommendation of occupational health at this time was for her to return to full time hours within five weeks. We accept this evidence, which is consistent with OH 3 which states *"recommended length of phased return: 5 weeks"* [621].

21. The claimant attended formal long term sickness absence review meetings with Mrs Kitchener pursuant to the respondent's managing sickness and absence policy [278-279]. The first stage meeting was conducted by Microsoft Teams on 26 June 2020 [574-575]. The second stage meeting was held on 13 August 2020 [628-630].

22. The claimant returned to work on 1 September 2020 on a phased basis, in accordance with occupational health advice. The claimant accepted under cross examination that on 9 September 2020 Mrs Kitchener phoned her after the team meeting telling her to take the day off, as she appeared tired. On 10 September 2020 the claimant informed Mrs Kitchener at a one-to-one meeting that she had been in bed and was not working [647], the claimant suggested that this day should be recorded as sickness absence [1325]. The claimant was absent on annual leave on 11 and 30 September 2020 and 9, 16, 19 and 28 October 2020 [849]. She was absent due to sickness on 8, 12, 13, 14 and 15 October 2020 [466] and from 9 to 20 November 2020 [722].

23. The recommendation from OH 4 dated 12 November 2020 was for the claimant to reduce her hours to 23 hours per week, ideally on no more than two consecutive days, for the next three to six months. The report stated *"my suggestion would be that the length of the shift is reduced to no more than 6 hours to be managed at a time during the day when she feels more able to cope and that she works no more than 4 days a week*" [716].

24. The claimant returned to work on 23 November 2020 working six hours per day on Mondays, Tuesdays, Thursdays, and Fridays. Wednesday was a rest day. At a one-to-one meeting on 26 November 2020, it was agreed that the claimant's adjusted duties would be data protection impact assessments (DPIAs), information sharing agreements (ISAs), ad hoc advice, and management of the IG inbox one week out of every three [747]. These were IG duties, as opposed to information rights work. The claimant's role remained adjusted in this way until she was given notice of redundancy in July 2021.

25. The claimant's employment terminated on 31 October 2021. Her notice entitlement was three months [456]. She was put on paid special leave from 16 July 2021.

26. The claimant was paid throughout her employment as if she was working full-time hours (there was a time when her pay was reduced, but this was then rectified). The claimant was paid for full-time hours as this was consistent with the guidance from NHS England that covid-related absences

were to be recorded as full pay [witness statement of Mrs Begom paragraph 9]. The claimant also accrued annual leave on the basis of working full-time hours. We accept the oral evidence of the respondent's witnesses about the NHS England guidance (also referred to at paragraph 115 below). No documentary evidence of this guidance was produced.

The claimant's alleged disability, the matters arising in consequence of it, and the respondent's knowledge of this

27. The claimant says that she is a disabled person by virtue of the impairments of headaches, fatigue, exhaustion, muscle pain, cognitive problems with memory concentration, tightness in her chest and shortness of breath. The respondent accepts that the claimant was a disabled person by virtue of these impairments from 2 February 2021.

28. We accept the unchallenged evidence in the claimant's impact statement [118-122].

29. In March 2020 the claimant contracted covid-19 [claimant's impact statement paragraph 2]. She received a positive covid antibody test result on 15 June 2020 [567]. Her fitness for work notes after that date referred to covid-19 [585; 597; 731].

30. We find that the claimant experienced headaches, fatigue, exhaustion, muscle pain, cognitive problems with memory concentration, tightness in her chest and shortness of breath from March 2020 until after the termination of her employment [claimant's impact statement paragraphs 2-3].

31. The claimant's GP and the occupational health advisers recorded that she had long covid [claimant's impact statement paragraph 4; 790; 949; 1445].

32. The claimant's symptoms affected her ability to carry out day to day activities as set out in her impact statement, namely:

    32.1 Concentration [claimant's impact statement paragraph 6]

    32.2 Getting dressed [claimant's impact statement paragraph 7]

    32.3 Cooking [claimant's impact statement paragraphs 7, 12 and 13]

    32.4 Walking [claimant's impact statement paragraphs 7-8]

    32.5 Dancing, running and swimming [claimant's impact statement paragraphs 9-10]

    32.6 Climbing stairs [claimant's impact statement paragraph 9]

    32.7 Lifting heavy objects and heavy housework [claimant's impact statement paragraphs 11 and 14]

    32.8 Life administration [claimant's impact statement paragraphs 12 and 17]

32.9 Gardening [claimant's impact statement paragraph 15]

32.10 Reading [claimant's impact statement paragraph 16]

32.11 Socialising [claimant's impact statement paragraph 18]

32.12 Work [claimant's impact statement paragraphs 19-20 and 22]

32.13 Caring for her husband [claimant's impact statement paragraph 23]

32.14 Sleep [claimant's impact statement paragraph 24]

33. The claimant takes the medication set out in her impact statement at paragraphs 25-27. She states that the medication referred to at paragraph 25 is taken in relation to health matters that she does not rely on for the purposes of this claim. The occupational health report of 12 August 2020 records, and we find, that the claimant was using a salbutamol inhaler and taking paracetamol for the impairments set out at paragraph 30 above [622].

34. Once it was set up, the claimant attended the City and Hackney covid rehabilitation service at Homerton University Hospital NHS Trust from 25 May 2021 to 14 April 2022 [1283-1293]. She received treatment from an occupational therapist who provided advice on pacing (amongst other things). The claimant used pacing techniques to manage her symptoms [claimant's impact statement paragraphs 29-30].

35. Each occupational health report provided advice on whether the claimant was likely to be a disabled person within the meaning of the Equality Act 2010 ("EqA"):

35.1 OH 1 said the EqA was not likely to apply. No justification was given for this opinion [529].

35.2 OH 2 said the EqA was not likely to apply. No justification was given for this opinion [556].

35.3 OH3 said the EqA was likely to apply. The justification for this opinion was: *"due to long term condition affecting daily activity"* [621] *"in my opinion [the claimant] is likely to meet the criteria, as long-term condition with substantial impact and abilities to perform daily tasks may apply as anticipated"* [623]. In answer to the referral question: *"is the individual likely to render a reliable service and attendance in future?"* [592] OH3 answered: *"Katharine has underlying conditions which are likely to recur however with treatment/specialist care and work support it is anticipated that this will reduce the risk of further absences"* [623]. The notes of this occupational health consultation record that the claimant disclosed a past medical history of chronic fatigue and chronic depression. The notes state that she was *"on regular medication with good effect and has private counselling"* [1218].

35.4 OH 4 said EqA was not likely to apply. The justification for this was *"recent condition following covid-19 and is unlikely to be considered as a disability in employment terms"* [715]. OH 4 was approximately eight months after the initial absence for covid-19 and advised restricted hours for a further three to six months, with a review after three months [715-716]. OH 4 stated that *"post-viral fatigue is when you have an extended period of feeling unwell and fatigued after a viral infection such as covid-19, and the length of time for individuals to recover varies from person to person, it can take months or years"* [715].

35.5 OH 5 said EqA was not likely to apply. The justification for this was *"a prolonged recovery from covid-19 is currently unlikely to be covered by the Equality Act 2010"* [790]. OH 5 was approximately ten months after the initial absence for covid-19. OH 5 stated *"over the past two weeks [the claimant] reports a further increase in symptoms including extreme fatigue, shortness of breath, headaches and chest tightness. Some individuals are suffering from long covid following the virus which is likely to be what [the claimant] is experiencing. It is difficult to provide managers with a timeframe for an individual's recovery or equally, a timeframe for adjustments"* [790].

35.6 OH 6, which was dated more than a year after the claimant's initial absence, advised that EqA was likely to apply. The justification for this was *"based on the information that [the claimant] provided during the consultation, she has a: Physical condition that has exceeded 12 months and is having an adverse effect on her normal daily activities"* [949].

36. Under cross examination, Mrs Begom confirmed, and we accept, that she received all the occupational health reports. She said, and we accept, that she did not go back to occupational health to query the change of advice between OH 4 to OH 5 about the applicability of the EqA.

37. The respondent was informed of the claimant's impairments as set out at paragraph 30 above, the progression of those symptoms, and their impact on the claimant's day-to-day activities, particularly in relation to her work. We reach this finding of fact because:

37.1 The respondent received the occupational health reports and was aware of their contents. These refer to the impairments, prognosis and effect on work and other activities such as walking [586; 622; 626]; concentration [556]; and sleep [556].

37.2 The respondent was updated by the claimant about her health by email and in meetings [468; 469; 490-491; 494-495; 501; 505; 507; 510; 515; 518; 574-575; 586; 629-630; 694; 747]. The claimant informed the respondent of her impairments and her current symptoms. She explained the impact this had on her ability to work and to walk [510] and to carry out household tasks [515].

37.3 Mrs Kitchener accepted under cross examination that there were a lot of emails up to 1 September 2020 where the claimant informed her of her illness and the impact it was having on her.

38. We find that the matters at paragraph 6 of the list of issues arose in consequence of the claimant's impairments. Namely: periods of sickness absence, the need for reduced hours, the need for flexible working, and an inability to work full time. We find that the claimant's "*need for flexible working*" [paragraph 6(c) of the list of issues] does not add anything to the other three matters said to arise in consequence of the claimant's disability. We reached this finding of fact because:

38.1 It was broadly conceded by the respondent. In their amended grounds of resistance, the respondent admitted that *"the claimant's absence was due to long covid and all adjustments and her phased return were therefore on that basis"* [142 paragraph 62].

38.2 It was corroborated by the contents of the occupational health reports, fit notes, and the claimant's correspondence with the respondent, as detailed above.

<u>The claimant's husband's disability, the matters arising in consequence of it, and the respondent's knowledge of this</u>

39. In September 2019 the claimant's husband was diagnosed with Early Onset Alzheimer's Dementia [117].

40. On 13 March 2020 the claimant emailed Mrs Kitchener stating that she would be in late on 24 March 2020 due to a medical appointment and that she would like to give some background to this when they next met [467]. Mrs Kitchener accepted under cross examination, and we find, that she met with the claimant on 16 March 2020, and that she was informed of the claimant's husband's diagnosis at this time. Mrs Kitchener also accepted under cross examination, and we find, that, by receipt of OH 1 dated 11 May 2020, she was aware that the claimant was the main carer for her husband [529].

41. The occupational health reports provide the following information on this issue:

41.1 OH 1: *"[The claimant] stated that she is the main carer for a family member who has a long standing health issue. She acknowledged that this role can be overwhelming"* [529].

41.2 OH 6: *"[The claimant] stated she is the main carer of her husband who suffers from an ongoing underlying medical condition which requires constant care. She explained that due to her symptoms she is currently not able to care for her husband as required, and she is in the process of arranging for a carer and extra support"* [947].

42. The claimant's GP records state that she was a carer for her husband [1444; 1454] and that she was *"finding it difficult to cope"* [1454].

43. In September, October, and December 2020 the claimant took periods of annual leave to provide respite from her caring responsibilities for her husband. Under cross examination, Mrs Kitchener stated, and we find, that when the claimant took two days of annual leave together, that was often for respite purposes. Further on this point:

    43.1 On 11 September 2020 the claimant informed Mrs Kitchener that she was *"away for a respite weekend this afternoon"* [1325].

    43.2 At a one-to-one meeting on 27 October 2020, the claimant informed Mrs Kitchener that she would book annual leave for a respite weekend [694]. The claimant then took annual leave on 28 October 2020 [493].

    43.3 The claimant took leave on 10 and 11 December 2020 (a Thursday and Friday) [759]. Mrs Kitchener accepted under cross examination that these days were taken for the purpose of respite, although she said she could not confirm this. There is no email or other documentation expressly stating this, but we accept and find that the leave was taken for this purpose.

44. The claimant attended weekly hour-long counselling sessions online with her husband. The claimant stated under cross examination, and we find, that those sessions were attended on the suggestion of the Royal Neurological Hospital and were designed for couples with a recent diagnosis of Early Onset Alzheimer's Dementia [92].

45. In her impact witness statement at paragraph 23 the claimant states, and we find, that she was unable for care for her husband for more that a few hours without resting, and doing so frequently triggered a relapse. From Summer 2020 she had help twice a week from people who would spend time with him and a cleaner once a week.

46. Drawing together this evidence about the claimant's husband's care needs, and the claimant's caring duties, we find that:

    46.1 The claimant's husband needed a substantial amount of care.

    46.2 The claimant was unable to provide this care, due to her impairments and by virtue of the fact of her employment with the respondent.

    46.3 The claimant needed to attend a weekly one-hour counselling session online with her husband. We find that this was part of her caring duties.

    46.4 Save for the counselling sessions, we did not have evidence of the specific caring duties that the claimant undertook at the material time. We find that she did care for her husband a few hours per day, as this is consistent with her evidence in her impact statement.

Allegation A

47. The claimant alleges that, on or around September 2020, on an occasion when the claimant had confided that she was unwell, Mrs Kitchener made a comment to the effect of *"where does that leave us?"*.

48. We do not find that this occurred as alleged.

49. We find that Mrs Kitchener said something similar to this to the claimant on this date. We find that what Mrs Kitchener actually said was: *"what shall we do?"*. We do not find that this statement had the same meaning as the statement attributed to Mrs Kitchener (*"where does that leave us?"*). We therefore do not find that Mrs Kitchener said the alleged words, or words to that effect.

50. We reached this finding of fact for the following reasons:

    50.1 Under cross examination the claimant stated that this allegation related to a one-to-one meeting between the claimant and Mrs Kitchener on 18 September 2020. Mrs Kitchener made handwritten notes of that meeting [663]. Although those notes were not shared with the claimant, we find that they are a reliable, albeit not verbatim, contemporaneous record of what was said. There is no reference to the alleged statement in those contemporaneous notes.

    50.2 Mrs Kitchener's notes record that she said: *"what shall we do?"* [663]. Mrs Kitchener said that she used the word *"we"* to echo the language in the claimant's email to her of 11 September 2020 which says *"I have no idea what we do…"* [1325]. We accept that explanation.

    50.3 When the claimant was asked under cross examination whether she remembered Mrs Kitchener saying: *"where does that leave us?"* her answer was somewhat equivocal, she stated *"I remember leaving that meeting thinking my fatigue was something for me to solve, my memory was she said: "where does that leave us?" but Mrs Kitchener remembers it differently"*.

    50.4 When Mrs Kitchener was cross examined on this point, she was more certain. She said: *"I don't believe that was what I said… I don't accept [that I may well have said that]"*.

51. The claimant submits that this allegation should be viewed in the context of Mrs Kitchener expressing in September 2020 that the claimant's absence and/or phased return to work was having an impact on the rest of the team. On this point, we find that:

    51.1 Mrs Kitchener expressed this sentiment to Mrs Begom by email of 14 September 2020 [651].

    51.2 Mrs Kitchener did not say this to the claimant directly in September 2020. We find that Mrs Kitchener's evidence under cross examination

was that she expressed these concerns to Mrs Begom in September 2020, and not directly to the claimant.

51.3 We do not infer from Mrs Kitchener's email to Mrs Begom of 14 September 2020 [651] that she said to the claimant four days later, on 18 September 2020: *"where does that leave us?"*. We prefer the evidence in the contemporaneous record of the meeting [663].

52. We find that *"what shall we do?"* has a different meaning, tone, and emphasis to *"where does that leave us?"*. We find that the former statement is a softer choice of words that is focused on solutions and outcomes, whereas the latter statement is focused on the perceived problem.

Allegation B

53. The claimant alleges that in early November 2020 in a one-to-one call with Mrs Kitchener, Mrs Kitchener asked her whether she had a *"plan B".* The claimant alleges that the comment was made to the claimant when she mentioned that she may need to reduce her hours ahead of her occupational health appointment on 13 November 2020.

54. We do not find that this occurred as alleged.

55. We find that Mrs Kitchener did ask the claimant whether she had a *"plan B"* but that this was in a different context to that alleged by the claimant.

56. We reached this finding of fact because:

56.1 Mrs Kitchener accepted that she asked the claimant whether she had a *"plan B"*. She said that this was asked in the context of a discussion about the claimant's husband's care and the fact that his two friends, who would ordinarily visit and take him out, were precluded from doing so under the covid-19 restrictions [witness statement of Mrs Kitchener paragraph 44]. Mrs Kitchener stated under cross examination, and we accept, that this was a fair question, given that she had no control over matters relating to the care of the claimant's husband.

56.2 We preferred Mrs Kitchener's account, rather than the claimant's account in her witness statement at paragraph 37 because the claimant's evidence was less certain on this point:

56.2.1 Under cross examination, the claimant initially accepted Mrs Kitchener's account that the *"plan B"* question was said in the context of a discussion about her husband's care.

56.2.2 The claimant also agreed that the last sentence of paragraph 37 of her witness statement: *"I understood this to mean whether I had other job prospects if I could not continue working for the Trust"* was incorrect.

56.2.3 When it was then put to the claimant that Mrs Kitchener did not make the *"plan B"* statement in the context alleged in the

list of issues, the claimant's response was: *"I don't know, I think she may well have done but not noted it"*; *"I remember it happening but can't say it was this meeting…[it was] either in response to the need to reduce hours or the problem with managing my husband's care, but I can't say for certain"*.

Allegations E and F

57. The claimant alleges that on or around 26 November 2020 Mrs Kitchener expressed a concern to her that the claimant's part time working would cause problems for the claimant's colleagues. She says that Mrs Kitchener repeated this concern at subsequent meetings / during subsequent discussions with the claimant each week for four weeks during their one-to-one meetings on Mondays following the beginning of the claimant's reduced hours arrangement.

58. We do not find that this occurred as alleged.

59. We find that the claimant's part time working caused problems for some of her colleagues in the IG team. We do not find that this was communicated to the claimant. We reach these findings of fact because they are consistent with the following evidence:

    59.1 Mrs Kitchener said under cross examination, and we accept, that the duties that were removed from the claimant after her return to work in September 2020 were covered by Ms K Harvey (IG Manager, band 7), Ms A Adediran (IG Coordinator, band 6) and Mrs Kitchener. Mrs Kitchener explained that *"the phased return to work had caused some problems … because they [Ms Harvey and Ms Adediran] were expecting the additional work they had absorbed to be taken from them"*.

    59.2 On 13 May 2020 Mrs Kitchener emailed Mrs Begom upon receipt of OH 1, stating: *"as I expect you can imagine, this is having an impact on the team in general so a way forward is appreciated"* [534].

    59.3 We find that on 25 June 2020 Mrs Kitchener expressed frustration about the claimant's sickness absence and the fact that she had not been informed about the claimant's ill health before her employment commenced. We reach that finding as it is the natural reading of Mrs Kitchener's handwritten contemporaneous note of that meeting which states [1301]:

    CFS [chronic fatigue syndrome] – *did she declare on OH form?*
    Should she have advised line mgr
    Should OH have advised us?
    Off sick since 18/03.
    No attempt at telephone consultation with GP until 15/04. Not helpful
    No testing avail at time
    Results negative

59.4 In the occupational health referral that preceded OH 4 in November 2020, Mrs Kitchener stated *"currently [the claimant] is being supported with twice weekly one to one meetings and a reduced workload in an effort not to overwhelm her. This may be difficult to support on a longer term basis"* [701]. We do not find that Mrs Kitchener found the claimant's part time working arrangement to be *"untenable"* at this time, as submitted by the claimant. Although Mrs Kitchener used the word *"untenable"* in that referral, we find that this referred to the fact that the claimant was using her annual leave to manage her fatigue, a situation which was rectified later that month when the claimant was given Wednesdays as a rest day.

59.5 In the occupational health referral that preceded OH 5 in January 2021, Mrs Kitchener stated: *"I am fully supportive of and appreciate KS' situation but am concerned the current working arrangements are not sustainable in the longer term"* [784].

59.6 As explained at paragraphs 116 and 134 below, we find that a reason for the restructure and the subsequent termination of the claimant's employment was her part-time working and the impact that this had on her colleagues in the IG team.

59.7 Paragraph 51 above is repeated.

60. On 30 November 2020 Mrs Kitchener emailed the claimant a summary of the 26 November 2020 meeting [747]. Mrs Kitchener's notes of the meeting were disclosed but were not shown to the claimant at the time [745-746]. We accept that all Mrs Kitchener's meeting notes and emailed summaries of her meetings are an accurate, albeit not verbatim, summary of what was discussed. We reach that conclusion because:

60.1 They are a contemporaneous record.

60.2 As explained at paragraphs 113-122 below, the handwritten records include entries that are harmful to the respondent's case [726]. We therefore find that they were not written in contemplation of litigation

60.3 We note that the claimant was not asked to verify the accuracy of the email summaries and that she said under re-examination that she "*often did not have a huge amount of mental energy to go through them line by line"*. However the claimant also said under cross examination that, when she felt that Mrs Kitchener's record was potentially misleading, she corrected it. This is what she did on 15 December 2020 [770].

61. We find that Mrs Kitchener did not express a concern to the claimant on 26 November 2020 that her part time working would cause problems for the claimant's colleagues. We reach that finding of fact because:

61.1 There is no record of this in the contemporaneous evidence [745-747].

61.2 Mrs Kitchener's evidence to the Tribunal was consistent with the contemporaneous documents.

61.3 The claimant's evidence was less clear, and her later evidence (set out at paragraph 61.3.2 below) was self-serving:

61.3.1 Under cross examination it was put to the claimant that the problem was not the claimant's part time hours per se but her communications to the IG team about her hours (i.e. when she was and was not working). This question is consistent with the contemporaneous evidence which refers to calendar management and for the claimant to ensure that her calendar is accurate as to her hours and appointments *"to make it easier for anyone in the team to locate you"* [770]. The claimant's response to this question was *"I can't say for certain"*.

61.3.2 When the claimant was then taken to her witness statement at paragraph 48 which said something different, she said that her witness statement *"must be right"*. She accepted that her oral evidence was less certain on this point. She said that she wanted to *"firm up"* her oral evidence.

62. We do not find that Mrs Kitchener raised a concern to the claimant about her part time work and the impact this had on her colleagues at their weekly one-to-one meetings over the following four weeks. This allegation is not corroborated by any documentary or contemporaneous evidence. The claimant first made this allegation in her claim form around nine months after this allegedly occurred.

Allegation G

63. The claimant alleges that Mrs Kitchener insisted on receiving updates from the claimant every Wednesday and Friday stating that she was concerned that otherwise things would *"slip"* during her absences.

64. We do not find that this occurred as alleged.

65. We find that the claimant sent Mrs Kitchener updates by email on Tuesdays and Fridays on eight occasions, but that this was not something that Mrs Kitchener asked the claimant to do, or insisted on, as alleged.

66. We find that the claimant sent Mrs Kitchener eight updates on Tuesdays and Fridays, because this is consistent with the following evidence:

66.1 Under cross examination the claimant stated that it was Tuesdays rather than Wednesdays when she had to update Mrs Kitchener and that paragraph 49 of her witness statement should be amended to that effect.

66.2 The claimant's oral evidence was that she did not always remember to send Mrs Kitchener these updates.

66.3 In the fifteen weeks between 23 November 2020 and 12 March 2021, the claimant did not send Mrs Kitchener an update twice every week (this would have been 30 updates). The claimant sent emails to Mrs Kitchener on eight occasions on Tuesdays or Fridays to update her. Some emails had the subject *"update"* [708; 760; 769; 772; 809; 843] and some did not [738; 764].

67. We find that Mrs Kitchener did not request or insist on this, although the claimant may have believed that Mrs Kitchener wanted to be updated in this way. We reach this finding as it is consistent with the following evidence:

67.1 There is no document that shows that Mrs Kitchener asked the claimant to provide such updates.

67.2 There is no documentary evidence or suggestion that Mrs Kitchener queried with the claimant why she was not updating her as frequently as she had allegedly insisted.

67.3 When it was put to the claimant under cross examination that Mrs Kitchener did not insist on such updates, the claimant's response was *"I believe she did. I took it that she was concerned about work slipping and I needed to ensure that I kept her up-to-date"*. This evidence suggests, and we find, that the claimant inferred that Mrs Kitchener insisted on being updated, although she did not expressly state this.

67.4 We find that this response from the claimant under cross examination was more equivocal than Mrs Kitchener's evidence. Under cross examination Mrs Kitchener said the updates were sent by the claimant at her own instigation, that it was the claimant's choice, and not something that Mrs Kitchener insisted on.

68. The claimant submits that this allegation must be viewed in the context of the email of 14 September 2020 [651] which she says shows that Mrs Kitchener was concerned about things not being turned around fast enough and the impact of the claimant's absence. We find that Mrs Kitchener was expressing concern about missed deadlines in this email as she expressly states this. But we do not infer from this that she insisted on the claimant providing twice weekly updates. We rely on the evidence set out at paragraph 67 above as it is more directly relevant to the factual allegation.

<u>Allegation H</u>

69. The claimant alleges that on 23 November 2020 Mrs Kitchener stated that a counselling session that the claimant had attended with her husband in respect of his dementia diagnosis needed to be undertaken by the claimant in her own time. In her grounds of complaint, the claimant claims at paragraph 23(a) that *"In a conversation [on 23 November 2020] Ms (sic) Kitchener stated that such appointments needed to be undertaken by the claimant in her own time"* [18].

70. Insofar as there is any difference between the allegation in the list of issues and the grounds of complaint, we treat this allegation as being as set out in the grounds of complaint.

71. We find that this allegation is proven as it is admitted by Mrs Kitchener in her witness statement [Mrs Kitchener's witness statement paragraph 50].

72. The following findings of fact are relevant to this issue.

73. The respondent's policy for requesting time off for medical and dental appointments states that staff are entitled to request the following, subject to the needs of the service: flexibility in arrangement of working hours; annual leave; time off in lieu; or unpaid leave [229].

74. The claimant returned to work from sickness absence on Monday 23 November 2020. She emailed Mrs Kitchener from her personal Gmail address at 08:37 informing her that she had an online appointment at 10am so she would probably be logging in about 11:15am [729]. The claimant said under cross examination that she had not yet logged into the respondent's system and did not realise that Mrs Kitchener had booked a catch-up meeting. We accept that evidence as it is consistent with the time the email was sent (before working hours) and the fact it was sent from the claimant's personal email address. The claimant said, and we find, that it did not occur to her to tell Mrs Kitchener about the appointment in advance. The online appointment was a reference to the weekly counselling sessions she had with her husband.

75. Mrs Kitchener responded to say that she had arranged a catch-up for 11am and for the claimant to let her know when she was available, which the claimant agreed to do [729].

76. The catch-up took place at 11:07am, as shown on Mrs Kitchener's handwritten note of the meeting [730]. Whilst there is no reference in that record to Mrs Kitchener informing the claimant about the issue of taking personal appointments outside working hours, Mrs Kitchener accepts that she *"reminded [the claimant] that personal appointments should be taken out of working hours where possible"* [Mrs Kitchener's witness statement paragraph 50].

77. On 25 November 2020 Mrs Kitchener and the claimant spoke on the phone and there was a suggestion that the claimant would use annual leave for her husband's appointments [740]. The claimant did not take annual leave for the appointment on 23 November 2020 [759]. We find that the claimant did not ask for paid time off for counselling appointments, because, when she was asked about this under cross examination she stated: *"I can't say for certain, it is possible that I did ask for it"*.

78. The claimant did not make a complaint about this allegation until her claim form.

Allegation I

79. The claimant alleges that on 26 November 2020 Mrs Kitchener informed the claimant that she would have to *"make up"* any time taken for medical appointments or caring, despite the claimant explaining the difficulty with this in circumstances where her energy was used up by such appointments / caring needs.

80. We find that Mrs Kitchener informed the claimant on 26 November 2020 that she would have to *"make up"* any time taken for routine appointments. We do not find that Mrs Kitchener expressly stated that the claimant would have to make up time that she spent caring. But we accept that the claimant taking her husband to counselling appointments would constitute caring. We reach these findings because they are consistent with the following evidence:

    80.1 The email following the meeting of 26 November 2020 records that the claimant was reminded of the policy about requesting time off for appointments [747].

    80.2 In her witness statement Mrs Kitchener states that she did inform the claimant at this meeting that she would have to make up time for routine appointments [Mrs Kitchener's witness statement paragraph 54]. In the previous paragraph she explained that *"there were times when the claimant had not informed me that she had an appointment or would be off sick"* [Mrs Kitchener's witness statement paragraph 53].

    80.3 In her witness statement Mrs Kitchener states that she did not say that the claimant would have to make up any time that she had had spent caring [Mrs Kitchener's witness statement paragraph 54].

    80.4 Under cross examination Mrs Kitchener accepted that the claimant taking her husband to hospital appointments would constitute caring although she went on to say that the hospital appointments were routine appointments.

81. We do not find that the claimant explained at this meeting that making time up for medical appointments and caring caused her difficulty in circumstances where her energy was used up by such appointments / caring needs. We reach this finding because:

    81.1 The claimant said under cross examination that she was not certain that she had said this at the 26 November 2020 meeting.

    81.2 This is not recorded in the email following the meeting [747].

82. We accept the claimant's oral evidence that she made general statements to Mrs Kitchener on other occasions that she had a limited *"battery"* of energy and that she used pacing as a tool to manage her fatigue.

83. We do not find that the claimant explained to the respondent at any time that making time up for medical or counselling appointments caused her difficulty

in circumstances where her energy was used up by such appointments. There is no evidence that she did so. There is also no evidence that her attendance at such appointments had this effect.

84. We note, and find, that the only evidence about regular medical appointments was for a one-hour counselling session online each week. There was no evidence that the claimant was attending regular or frequent medical appointments for her own impairments. The claimant did not request paid time off for any medical appointments.

85. The claimant did not make a complaint about this allegation until her claim form.

Allegation J

86. The claimant alleges that after 11 December 2020 (most likely on 14 December 2020) Mrs Kitchener stated that the claimant taking days annual leave to enable her to have two days away from caring for her husband whilst carers looked after him had caused problems.

87. The claimant confirmed in closing submissions that this allegation related to an email from Mrs Kitchener of 14 December 2020 [770-771].

88. We find that this factual allegation is broadly proven, for the reasons set out below.

89. We find that Mrs Kitchener informed the claimant in her email of 14 December 2020 that taking annual leave on 10 and 11 December 2020 had caused problems. We find that this is the natural reading of Mrs Kitchener's statement in her email of 14 December 2020: *"given your annual leave for two days last week plus your non working day, you had not been able to address many of the DPIAs you are managing. We agree the following were a priority…"* [771]. We find that Mrs Kitchener was thereby explaining to the claimant that the consequence of her taking annual leave had been that the claimant had not undertaken work allocated to her. We find that by raising this, Mrs Kitchener was informing the claimant of problems that had been caused by her taking annual leave. We find that Mrs Kitchener and the claimant agreed what work would be prioritised moving forward.

90. We do not find that Mrs Kitchener stated that the claimant had taken days annual leave to enable her to have two days away from caring for her husband whilst carers looked after him. That was not mentioned in the 14 December 2020 email.

91. We find that Mrs Kitchener was aware that the claimant's leave was taken for the purpose of respite from caring for her husband. As set out at paragraph 43 above, Mrs Kitchener understood that, when the claimant took two days of annual leave together (as she did on 10 and 11 December 2020) that was often for respite purposes. We also accept the oral evidence of the claimant that, although she did not think she told Mrs Kitchener in advance of this leave that that was the purpose of the leave, she remembered Mrs Kitchener saying to her, when she left for annual leave: *"enjoy your me time"*.

This evidence indicates that Mrs Kitchener was aware that the claimant was taking these days leave for respite purposes.

Allegation K

92. The claimant alleges that on 11 January 2021 in a catch-up meeting when the claimant explained to Mrs Kitchener that not all of her husband's carers were able to travel to them due to rising covid infection rates, Mrs Kitchener was not supportive and instead asked *"what will you do if you do not have a carer for him?"*.

93. We find that this allegation has not been proven. Although it is common ground that Mrs Kitchener said these words to the clamant at a meeting on 11 January 2021 [Mrs Kitchener's witness statement paragraph 59; 787] we do not find that Mrs Kitchener was being unsupportive, as alleged.

94. We accept Mrs Kitchener's evidence that she was expressing concern.

95. We find that the claimant had unrealistic expectations about the support she would receive from her employer. The claimant said under cross examination that Mrs Kitchener had made her feel that this was a problem that she needed to solve. Even if that was correct, we do not find that that was unsupportive. The situation about the claimant's husband's carers was one that was outside of the workplace and outside of the respondent's control. It therefore was a matter for the claimant to address, or a problem for her to solve.

Allegation L

96. The claimant alleges that Mrs Kitchener made repeated comments about the need to increase her hours or put her under pressure to increase her hours, despite her ongoing ill health. Three sub-allegations are made.

97. First, the claimant alleges that on 25 January 2021 Mrs Kitchener stated that if the claimant took no sick leave in the next four weeks, then she would need to increase the claimant's hours. Second, the claimant alleges that Mrs Kitchener informed her that *"if you manage a fortnight without taking sick leave you will need to increase your hours"* despite this not being part of the respondent's policy. Third, the claimant alleges that towards the end of March 2021 Mrs Kitchener again raised the issue with the claimant of needing to increase her hours.

98. We find that the first allegation, about 25 January 2021, is proven because it is consistent with the following evidence:

    98.1 The notes from the one-to-one meeting between the claimant and Mrs Kitchener on 25 January 2021 state *"as advised in the OH report your current adjustments will continue until you have completed 4 weeks without being off sick due to Long Covid"* [801].

    98.2 This is also in the email summary sent to the claimant by Mrs Kitchener on the same day [803].

98.3 Mrs Kitchener accepts in her witness statement that this was said [witness statement of Mrs Kitchener paragraph 61].

99. The context to this allegation is the advice in OH 5 [790]:

I would consider it reasonable to begin to increase [the claimant's] working hours once she has noticed improvement in her symptoms for 304 consecutive weeks with no relapses.

100. Under cross examination, Mrs Kitchener accepted that the advice from occupational health was to increase the claimant's hours not only if she had no relapses over a three-to-four-week period, but also if there was an improvement in her symptoms. She accepted that her statement at the 25 January 2021 meeting therefore did not exactly accord what was written in OH 5, but she said that it was her interpretation of the occupational health report which was just advisory in nature.

101. In her witness statement at paragraph 64, the claimant alleges that the second allegation occurred on 22 February 2021. We find that this allegation is not proven because:

101.1 The alleged statement is not in Mrs Kitchener's email summary of that meeting [824-825].

101.2 It is not in Mrs Kitchener's handwritten notes of the meeting [1319].

101.3 The claimant said under cross examination that she had no issue with Mrs Kitchener's note of that meeting, and she accepted that there was no written record that Mrs Kitchener made this statement.

102. The third allegation, about 22 March 2021, is not proven. We find that Mrs Kitchener asked the claimant if she felt able to increase her hours at that meeting but that she did not say the claimant needed to increase her hours. We reach that finding because:

102.1 We accept what is written in the email summary of that meeting: *"[Mrs Kitchener] asked if [the claimant] felt able to increase [her] hours at all yet. [The claimant] said that [she] continue[d] to need Wednesday as a rest day. [Mrs Kitchener was] happy to support that for the time being"* [871].

102.2 Under cross examination, the claimant was unclear whether Mrs Kitchener said that the claimant *"will need*" to increase her hours.

<u>The deletion of the claimant's role and termination of employment (detriments M-R)</u>

103. The respondent admits that it selected the claimant, and her role, for redundancy (detriments m, n, o) and that it gave the claimant notice of dismissal and terminated her employment (detriments q and r). We also find allegation p proven (not considering alternatives to selecting the claimant for

redundancy, such as merging other roles in order to preserve the claimant's role), for the reasons set out at paragraphs 136-138 below.

104. The findings of fact relevant to the restructure and the termination of the claimant's employment are set out below.

105. Initially the IG team sat within the assurance department [1407-1408]. The IG team was reviewed in 2014 [827; 1399]. In 2017 the Luton and Bedfordshire records functions transferred to the IG team [827]. The Head of IG (band 8(b)) role was created. That role reported to Mrs Kitchener. The IG manager reported to the Head of IG.

106. At some stage prior to the claimant's employment there was a proposed restructure to the Luton based team. It was proposed that some roles would be deleted (although not the band 8(b) Head of IG role) and new roles would be created (including a band 5 role in Luton) to address, amongst other things, that there was no direct day to day line management of the function and no one of sufficient seniority for certain tasks [1411]. Mrs Kitchener confirmed under cross examination that this proposal was not implemented, and that, instead, the information rights officers in Luton and Bedfordshire were re-banded from band 3 to 4. It is unclear when this proposed restructure was drafted, the index to the file of documents for this hearing gives the date as April 2019, but the claimant's understanding, which formed the basis of her cross examination of Mrs Kitchener on this issue, was that this was in 2017.

107. In 2018, in response to the introduction of GDPR, the IG team became a standalone team, separate from the assurance department. Mrs Kitchener was appointed to the role of associate director of IG, a band 8(d) role.

108. The previous incumbent of the Head of IG role was appointed in the summer of 2018 and left in August 2019.

109. In October 2019 the respondent advertised for the Head of IG role [Mrs Kitchener's witness statement paragraph 6; 1396]. The respondent used a recruitment company who identified potentially suitable candidates, including the claimant. The job description for the role states that the key responsibilities of the role are IG, information security, risk and assurance, information sharing, registration authority, budgets, and compliance [405-408].

110. Also in October 2019, the role of IG Manager (band 7) was advertised as a nine-month secondment opportunity [1361-1363]. The job description states that the role reports to the Head of IG, and that the key responsibilities include IG and information rights [1364-1367]. Ms K Harvey was appointed to the secondment role. The role was made permanent in July 2020.

111. The claimant was interviewed for the Head of IG role in 16 December 2019 [1194]. Mrs Kitchener accepted under cross examination, and we find, that, at this stage, she expected the role to be a long-term one.

112. At her interview for the Head of IG, the claimant was told that the smartcard function would be moved to the human resources department. The smart card is similar to an identification card, with a passcode that gives authority to the cardholder to access clinical systems. Mrs Kitchener's evidence under cross examination, which we accept, was that the transfer of the smartcard function was mentioned in all the interviews for the Head of IG post, including the interview for the previous incumbent of the post in summer of 2018. The transfer of the smartcard function occurred in February 2020.

113. The claimant commenced her employment on 9 March 2020 having served her notice period with her previous employer.

16 November 2020 meeting

114. On 16 November 2020 Mrs Kitchener met with Mrs Begom. We accept Mrs Begom's evidence that the purpose of that meeting was to discuss the claimant's occupational health report. We reach that finding because (1) the meeting took place shortly after OH 4 (dated 12 November 2020) and (2) the heading of Mrs Kitchener's handwritten notes of the meeting [726] says *"SB re KS"*, and *"KS"* referred to the claimant.

115. Mrs Kitchener did accept under cross examination that the meeting was to discuss the restructure. However, the question that was put to her was twofold (whether the meeting was to discuss the restructure and whether Mrs Kitchener's notes were at page 726). We accept the submission of the respondent that it was unclear which part of the question Mrs Kitchener was agreeing to.

116. A potential restructure to the IG team was discussed at the meeting. At that stage, NHS England had put in place a restriction precluding restructures in the NHS due to the covid-19 pandemic. Mrs Begom stated under cross examination, and we find, that those restrictions were lifted in 2021 but that other restrictions in relation to capability management processes remained in place until July 2022. Those other restrictions prevented the respondent from moving employees on covid-19 related long term sickness absence to stage three (termination) of the capability process.

117. We find that a restructure of the IG team was first raised at the 16 November 2020 meeting, and that the restructure was put forward as a potential solution to the recommendations in OH 4. We reach that finding because:

    117.1 The purpose of the meeting was to discuss OH 4, but there was also a discussion about the restructure.

    117.2 OH 4 had recommended reduced hours for the next three to six months. No prognosis was given for recovery. The report stated: *"the length of time for individuals to recover varies from person to person, it can take months or years"* [715]. Mrs Kitchener's oral evidence, which we accept, was that at this time the respondent did not know how long the claimant would be off sick or on a phased return to work.

117.3 As set out at paragraph 59 above, Mrs Kitchener had previously expressed frustration about the claimant's absence and had stated that the claimant's part-time hours were causing problems for the IG team. Following OH 4, Mrs Kitchener was aware that that the claimant would need to work part time hours for the foreseeable future (for at least three months, and possibly for years).

118. Mrs Kitchener's notes of the 16 November 2020 meeting state [726]:

"KS – not well enough to come back – hard to move away from 8b – 23 hours/ reduced → what she will be doing. SB to check with JB. CFS. Draft paper re restructure – just those posts. Rationale for changing / specialisms future proofing. Sometime in new year – resolution by now"

119. We find that the handwritten note says: *"rationale <u>for</u> changing…"*. The word that we find says *"for"* is unclear and Mrs Kitchener was not asked about this in evidence. We reached find that this says *"for"* because it is consistent with:

119.1 What is said in that sentence and the context given by Mrs Begom under cross examination: that she had advised Mrs Kitchener to set out the rationale for the restructure; and

119.2 Mrs Kitchener's handwriting at page 730.

120. In answer to questions of cross examination and from the Tribunal, Mrs Kitchener explained what was meant by the passage quoted at paragraph 118 above. We accept Mrs Kitchener's evidence that:

120.1 "*KS*" refers to the claimant.

120.2 "*SB*" refers to Mrs Begom and "*JB*" refers to the deputy director of HR.

120.3 "*CFS*" refers to chronic fatigue syndrome.

120.4 "*Those posts*" is a reference to the existing band 5, 7 and 8(b) roles in the IG team.

120.5 *"Sometime in the new year"* is a reference to the fact that Mrs Begom thought that the NHS England restrictions on restructuring might be lifted in the New Year.

121. The respondent submitted that Mrs Kitchener's evidence under cross examination about the meaning of *"hard to move away from 8b"* was unclear, and that the inference the Tribunal should draw was that Mrs Kitchener could not remember what she meant by that statement. We accept that Mrs Kitchener gave more than one explanation for the statement *"hard to move away from 8b"*. We do not infer that she could not remember what was meant by it.

122. We find that *"move away from 8b"* refers to the deletion of the claimant's role, or, as Mrs Kitchener stated in evidence *"not having the 8(b) post"*. We reach

this finding as this was Mrs Kitchener's evidence in answer to questions from the Tribunal.

123. We find that *"hard to"* meant it was difficult to delete the claimant's role. We find, as Mrs Kitchener said in answer to questions from the Tribunal, that, part of the reason Mrs Kitchener felt it was difficult to delete the claimant's role was because of the claimant's ill health, absence, and phased return to work. Mrs Kitchener stated that this was *"a consideration"*.

Template small consultation document

124. On 25 February 2021 Mrs Kitchener sent Mrs Begom and Dr Amar Shah (SIRO) a draft restructure proposal: *"template small consultation document"* [826-831]. This draft consultation document was not altered during the consultation process. The proposal was to delete the claimant's role and to create two information rights roles in Luton: a band 7 manager and a band 5 coordinator [828].

125. Under cross examination Mrs Kitchener stated, and we accept, that she had drafted the consultation paper at this time because (1) Mrs Begom had advised that the NHS England restrictions might be lifted in the New Year; and (2) she had drafted it over the Christmas period as that was when she had the time to do it. Based on this evidence, we find that between 16 November 2020 and 25 February 2021, nothing material changed in respect of the rationale for the restructure.

126. The respondent accepts, and we find, that the consultation paper provided little rationale for deleting the claimant's post.

127. Mrs Kitchener stated in evidence that the bullet points on the first page of the proposal were background information and the two bullet points on the second page were the reasons for the restructure, namely:

- *Information rights pressures have been identified and managed at the expense of general information governance functions*

- *The removal of Smartcard and Reception functions has resulted in an imbalance in job descriptions*

128. It was not made clear until Mrs Kitchener's answers under cross examination that the other eight bullet points in the consultation document were just background information. We accept that those other eight bullet points do not explain the reasons for the deletion of the claimant's role as they are largely about matters that either predated the claimant's appointment, or would not have impacted on her role to any significant degree.

129. There were two organograms attached to the consultation document [830-831]:

129.1 The current structure chart did not reflect the reporting lines as set out in the job descriptions, as the IG Manager was shown to be reporting into Mrs Kitchener's role, rather than to the Head of IG [830]. Mrs

Kitchener accepted under cross examination, and we accept, that the reason for this was because *"the claimant had not been working and the IG Manager needed a line manager"*. She said, and we accept, that this was an adjusted structure chart, and the reason for the adjustment was because the claimant was not in work full time.

129.2 The proposed new structure chart showed that the Luton and Bedfordshire band 4 roles would be directly line managed by the new band 5 information rights coordinator, who would in turn be managed by the new band 7 information rights manager [831].

130. The consultation document included an equality impact assessment which stated that the claimant was not disabled [829]. Mrs Begom accepted under cross examination, and we accept, that the respondent had not referred the claimant to occupational health for an updated opinion on the applicability of the EqA before they drafted the equality impact assessment. The claimant was referred to occupational health on 13 May 2021 at her own request [930]. The equality impact assessment was not updated following the subsequent occupational health report which advised that the claimant was likely to disabled under the EqA.

Reasons for the restructure

131. We reach the following findings as to the respondent's reasons for restructuring the IG team.

132. The work of the Head of IG 8(b) role, as set out in the job description [405] had not significantly reduced. There is no mention of a significant reduction in this work in either the template document or in any other documentary evidence.

133. The respondent concluded that the majority of the claimant's DPIA and ISA work could be done at a lower band 7 and band 6 level, with oversight by Mrs Kitchener:

133.1 Although this was not mentioned in the template consultation document, it was stated in the respondent's reply to the claimant's response: *"the increase in information rights requests relates to the financial year 2020-21… There is an overlap between the Head of Information Governance, Information Governance Manager and Information Governance Coordinator. The latter both undertake DPIAs and ISAs at less cost than the Head of Information Governance"* [1015-1016].

133.2 The respondent reached this conclusion because the IG team successfully operated in this way whilst the claimant was on sick leave and working part time hours.

134. The respondent decided that it needed band 7 and band 5 information rights posts in Luton because:

134.1 There was an increase in information rights work, particularly SARs [1327-1328].

134.2 To carry out the information rights work under the band 7 IG Manager's job description [389-390]. We find that it is logical that, if, following the restructure, the band 7 IG Manager was going to be responsible for part of the work of the 8(b) Head of IG role, some of the work under the band 7's job description would need to be covered elsewhere.

134.3 To provide local line management of the band 4 information rights officers in Luton. We find that direct line management was to be provided by the band 5 information rights coordinator as that was how the proposed structure chart was drafted [831] and it was the evidence of Mrs Kitchener in her witness statement at paragraph 68.

135. As evidenced by the notes of the 16 November 2020 meeting, the restructure was first proposed as a potential solution to the recommendations of OH 4 and the problems caused by the claimant working part-time. We find that this was part of the reason for the restructure.

Alternatives to selecting the claimant for redundancy

136. We find that the respondent did not consider alternatives to selecting the claimant for redundancy. We reach that conclusion because:

136.1 There is no documentary evidence that this was done. Although we accept that the respondent's procedures did not require this to be written down in a small consultation template (such as the one used in this restructure), the procedures did require consideration of all reasonably practicable steps to avoid compulsory redundancies.

136.2 Mrs Begom said that she believed Mrs Kitchener had done this because Mrs Begom had told Mrs Kitchener at the 16 November 2020 meeting that she needed to be clear on the rationale that she put forward for the restructure. We find that setting out the rationale is different to considering all reasonably practicable steps to avoid compulsory redundancies, particularly given this advice was given by Mrs Begom at such an early stage in the process.

136.3 The oral evidence from Mrs Kitchener was that she did not expressly consider alternatives such as reducing the claimant to a part-time contract – she put the onus on the claimant to come to her with alternative proposals.

136.4 The respondent did not consider any other options after they received OH 6, which advised that the claimant was a disabled person [949]. This is consistent with the oral evidence of Mrs Begom and Mrs Kitchener and the absence of any documentary evidence to the contrary:

136.4.1 Mrs Begom's oral evidence was that, if the equality impact assessment identified the person at risk as disabled, steps would be taken to mitigate that disadvantage (such as adjusting the consultation process or the requirements of a redeployed role) but that such steps would not extend to altering the consultation process itself.

136.4.2 Mrs Kitchener's oral evidence was that she did not consider any other options after receiving that opinion from occupational health. She felt it was for the claimant to present alternative proposals.

137. The following facts are relevant to the respondent's written procedures about considering alternatives to compulsory redundancies:

137.1 On 28 April 2021 the respondent ratified a new redundancy procedure entitled *"management of staff affected by change policy and procedure"* [292-387].

137.2 Mrs Begom's evidence under cross examination was that, as this procedure was ratified after the consultation paper was written, the previous "*management of staff affected by change policy and procedure*" applied [166-198].

137.3 Mrs Begom accepted (and we find) that, if a new policy is in place at the time the consultation is launched, the proposal document should be checked, as far as possible, to ensure that it complies with the new policy.

137.4 Both procedures required the respondent to consider all reasonably practicable steps to avoid compulsory redundancies.

137.5 The 28 April 2021 procedure required the respondent to describe the measures taken to avoid compulsory redundancies in the consultation documents, although it said that a small consultation document (such as the one in place in the present case) may not include every section listed [318-319].

138. Mrs Kitchener and Mrs Begom accepted, and we find, that the consultation paper did not show evidence of the steps taken to avoid compulsory redundancies.

Consultation process

139. Mrs Kitchener presented the proposed restructure at a joint staff committee ("JSC") on 7 April 2021 [879]. The evidence of Mrs Begom was that consultation with the JSC would continue until the restructure was approved. The JSC approved the proposed restructure. They did not ask any questions or make any comments [914]. The JSC was not informed of the advice in OH 6 that the claimant was disabled.

140. The claimant attended a short meeting at 11am on 6 May 2021 about the proposal to place her at risk of redundancy [1321] followed by a longer meeting at 3pm with the IG team [904; 1322]. After that meeting, the claimant was sent the consultation paper [905; 888-892].

141. On 12 May 2021 the claimant was sent an invitation to a consultation meeting on 27 May 2021. The letter informed her that the consultation process would run from 6 May to 5 June 2021 [926-929].

142. The claimant attended a consultation meeting on 27 May 2021, and she was sent a letter with the outcome of that meeting by email on 3 June 2021 [965-969].

143. Prior to sending that letter to the claimant, Ms Baker (People Business Partner - Corporate) and Mrs Begom provided advice as to its contents. On 2 June 2021 Mrs Begom was asked by Ms Baker if she minded *"casting [her] eye over [the letter] following our meeting this morning regarding her disability"* [952].

144. The claimant sent her response to the consultation by email on 4 June 2021 [983-986]:

    144.1 Mrs Kitchener accepted under cross examination that (as stated by the claimant in her document [985]) *"the one thing which has changed since [the claimant's] recruitment is that [she] contracted Covid 19 and [had] been suffering from Long Covid ever since"*. We accept the submission of the respondent that the question put to Mrs Kitchener was imprecise. We do not find that this is the one thing that had changed since the claimant's recruitment, or that this was Mrs Kitchener's evidence. Other things had changed which formed the rationale for the restructure, as set out at paragraphs 131-135 above.

    144.2 The claimant stated that she was prepared to take a salary cut, although she said she had been informed that would not be necessary.

    144.3 The claimant ended her response with the words: *"This is particularly disappointing given [the respondent's] commitment to supporting staff with Long Covid and seems inconsistent with the [respondent's] moto 'We care, We respect, We are inclusive'".*

145. On 14 June 2021 the claimant was provided with a reply to her response [987-988]. This had been checked with the respondent's human resources team first, who provided some suggested amendments [983; 992-1006]. No changes were made to the template small consultation document following the claimant's response.

146. One of the amendments to the respondent's reply proposed by Ms Baker was *"the deletion of one post allows the creation of two additional posts at an appropriate operational level to support processing of requests"* [996]. The consultation document had stated that *"there is no financial impact associated with the new structure"* [890] but had not explained this point.

147. The claimant challenged this in cross examination of Mrs Kitchener, pointing to the pay-scales which show that the creation of the two new roles would cost at least £3,852 more than the amount saved in deleting the claimant's role. The claimant's salary was £59,945 [1470]. The cost of recruiting a band 5 and 7 in Luton, at the bottom two levels of the pay-scale, was £24,907 and £38,890, respectively [1467; 1469]. We accept the evidence of Mrs Kitchener under cross examination that recruitment was only permitted at the bottom two levels of the pay-scale. She said the reason for this was because the posts must be budgeted, and the respondent was required to make efficiency savings of 4% a year. The respondent did not produce any documentary evidence of this. Mrs Kitchener accepted that there was a difference between the salary saving and the cost of recruitment, but she said this was a small differential. We accept Mrs Kitchener's evidence that this was not a significant difference, and we find that a salary difference at this level was acceptable for the purposes of the restructure.

148. Mrs Kitchener stated in evidence that if the claimant had moved permanently to a part time 24-hour contract, and her salary had been reduced accordingly, the saving from that would have allowed the respondent to employ a new band 5 in Luton, but not a new band 7. We accept that evidence as it is consistent with the pay-scale evidence. The pay-scale evidence shows that if the claimant's pay had been reduced to reflect her part time hours, that would have given a £21,580 salary saving per year. There is a small differential between that sum and the cost of employing a band 5 information rights coordinator in Luton (which would have cost £24,907 per year to employ). We find that this small salary differential would not have been viewed as significant and would have been at an acceptable level for the purposes of the restructure, as it is at a similar level to the £3,852 salary differential between the deletion of the claimant's role and the creation of the new band 7 and band 5 roles.

149. The claimant reported that she was unwell to Mrs Kitchener on 5 June 2021 [978] and 25 June 2021 [1026]. When asked under cross examination whether she thought about how this would impact on the claimant's ability to engage with the consultation document, Mrs Kitchener *stated "with hindsight it is easy to say I should have said "did she want to discuss any of it" but I left it for her to approach me".*

150. On 25 June 2021 the claimant was sent an individual and team response to the consultation comments [1015-1028].

151. On 30 June 2021 the claimant was invited to a meeting on 9 July 2021. She was informed that she was likely to be issued with formal notice of termination on the grounds of redundancy [1041-1042].

152. The claimant was given formal notice of termination at a meeting on 9 July 2021, followed by an email of 15 July 2021 and amended outcome letter of 16 July 2021 [1070-1074; 1087-1091; 1324].

153. The claimant did not appeal the decision to terminate her employment.

154. The redeployment process commenced on 16 July 2021 with the assistance of Mr Montague [1100-1101] who spoke to the claimant on one occasion. Mr Montague's evidence was that steps were not taken to extend the redeployment search to the London wide register, as had been mentioned to the claimant in the letter of 15 July 2021 [1073]. No suitable alternative roles at 8(a) or 8(b) level were identified.

Evidence about the proscribed purpose and effect

155. The respondent submits that Mrs Kitchener showed a supportive interest in the claimant's wellbeing. The respondent relies on Mrs Kitchener's communications to the claimant [489; 491; 492; 519-520; 563; 574; 608-610; 1325; 1303].

156. Under cross examination the claimant accepted that Mrs Kitchener was initially supportive and proactive in providing assistance to her [489-492; 519]. Thereafter the claimant said that Mrs Kitchener's communications made her feel that it was her responsibility to solve any problems that were preventing her from being able to work.

157. The claimant relies on her witness statement at paragraphs 96 to 98 as to how Mrs Kitchener made her feel. The claimant therein states that she *"was made to feel more guilty about both [her] illness and caring responsibilities"* and that she felt *"unsupported"*.

Legal principles

Disability status

158. Section 6 EqA provides that:

> *(1) A person (P) has a disability if—*
> *(a) P has a physical or mental impairment, and*
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

159. Paragraph 2 of schedule 1 EqA provides that:

> *(1) The effect of an impairment is long-term if—*
> *(a) it has lasted for at least 12 months,*
> *(b) it is likely to last for at least 12 months, or*
> *(c) it is likely to last for the rest of the life of the person affected.*
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

160. The burden of proof is on the claimant to show that she is a disabled person in accordance with that definition.

161. A substantial adverse effect is one that is "*more than minor or trivial*" (section 212 EqA).

162. "*Likely*" should be interpreted as meaning "*it could well happen*" rather than it is more probable than not that it will happen (**SCA Packaging Limited v Boyle** [2009] ICR 1056).

163. We had regard to the guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) ("Guidance") and the Equality and Human Rights Commission (EHRC) Code of Practice on Employment (2015) and specifically Appendix 1("Code").

164. The Guidance states that the effects are to be treated as long term if they are likely to recur beyond 12 months after the first occurrence (paragraph C6).

165. In **Goodwin v The Patent Office** [1999] IRLR 7, at paragraphs 26-29, it was held that there are four key questions that need to be asked:

    165.1 "Does the claimant have an impairment which is either mental or physical?
    165.2 If so, does the impairment affect the applicant's ability to carry out normal day to day activities?
    165.3 If so, is the effect on the same substantial?
    165.4 If so, is the effect on the applicant's ability to carry out normal day to day activities long term?"

166. In **J v DLA Piper** [2010] IRLR 936, at paragraph 40 it was held:

    "It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin. However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings."

167. The Tribunal adopts a functional not a medical test of disability: it is the effect on the employee that is relevant and not the medical cause of it: paragraph 7 of Appendix 1 to the Code; **Ministry of Defence v Hay** [2008] ICR 1247.

168. The meaning of "normal day-to-day activities" is not set out in statute but helpful guidance found in the Guidance and the Code:

    168.1 Paragraph D3 of the Guidance states that: in general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities.

    168.2 The Code states that day to day activities include – but are not limited to –activities such as walking, driving, using public transport,

cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one's self. Normal day-to-day activities also encompass the activities which are relevant to working life.

169. The material time for considering whether the impairment had (or was likely to have) a long term effect is the date of the alleged discriminatory act (**All Answers Ltd v W** [2021] EWCA Civ 606, CA) and events occurring after the date of the alleged discriminatory act should not be taken into account in considering if the effect of the impairment was long term.

170. Whether an impairment is 'long term' is directed to the effect of the impairment, rather than the underlying impairment itself: **Seccombe v Reed in Partnership Ltd**, UKEAT/0213/20/OO, at paragraph 29.

Knowledge of disability

171. Section 15 EqA provides as follows in the context of discrimination arising from disability claims:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

172. Paragraph 20 of Schedule 8 to EqA provides as follows in the context of reasonable adjustments claims:

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

…

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

173. **Gallop v Newport City Council** [2014] IRLR 211 and **Donelien v Liberata UK Limited** [2018] IRLR 535 provide guidance on the issue of an employer's knowledge in the context of advice from occupational health. An employer is not to rely unquestioningly on the unreasoned opinion of occupational health. But, as clarified by Underhill LJ in **Donelien**: *"that is very far from saying that an employer may not attach great weight to the informed and reasoned opinion of an occupational health consultant"* (paragraph 32).

Burden of proof in discrimination claims

174. Section 136 EqA provides that:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

175. The parties referred us to, and we had regard to, the guidance in **Igen v Wong** [2005] ICR 931 paragraphs 14 and 37; **Talbot v Costain Oil** UKEAT/0283/16/LA paragraph 27; **Country Style Foods Ltd v Bouzir** [2011] EWCA Civ 1519 paragraphs 30-31; **Pnaiser v NHS England** [2016] IRLR 170 paragraphs 45-48; **Ayodele v Citylink Limited** [2018] IRLR 114 paragraphs 92-93; **Essex County Council v Jarrett** EAT/0045/15 paragraph 32. We also had regard to **Base Childrenswear Ltd v Otshudi** [2019] EWCA Civ 1648 at paragraph 18 and **Deman v Commission for Equality and Human Rights** [2010] EWCA Civ 1279 at 19.

Harassment related to disability

176. Section 26 EqA provides, so far as is relevant to this claim:

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

177. A claim of harassment brought under section 26(1) EqA has various constituent parts.

178. The first is whether there is unwanted conduct. This is a separate issue to whether the conduct is related to the protected characteristic, even though the two matters are grouped together in the statute at section 26(1)(a). This is clear from **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** [2020] IRLR 495 at paragraph 20. Conduct means conduct that is unwanted by the employee: **Thomas Sanderson Blinds Ltd v English** EAT 0316/10. A dismissal can amount to an act of harassment: **Urso v DWP** [2017] IRLR 304.

179. The second issue is whether the unwanted conduct was related to the protected characteristic:

179.1 This is an objective test. "*Related to*" is a broad concept, and it is a more easily satisfied test than for section 13 EqA: **Tees Esk** paragraph 24; **Hartley v Foreign and Commonwealth Office Services** UKEAT/0033/15/LA paragraph 23 and 25; **Bakkali v Greater Manchester Buses** [2018] ICR 1481 paragraph 31.

179.2 Although it is a broad concept, it does have its own limits **Tees Esk** paragraph 24; **Unite the Union v Nailard** [2018] IRLR 730 paragraphs 75-79. In **Unite** at the EAT stage (cited in **Unite** at

paragraphs 75-79 and in ***Tees Esk*** at paragraph 22) it was held that the failure to deal with a complaint, due for example to ill health or inefficiency, is not conduct related to a protected characteristic just by virtue of that being the subject matter of the originating complaint.

179.3 A finding about the motivation or perception of the individual concerned is not the necessary or only possible route to the conclusion that the conduct is related to the characteristic in question, but it follows that it is a possible route to the conclusion: **Tees Esk** paragraph 24; **Hartley** paragraph 24; **Bakkali** paragraph 31.

179.4 There must be some feature of the factual matrix which properly leads to the conclusion that the conduct is related to the characteristic: **Tees Esk** paragraphs 25.

179.5 The Tribunal should determine the complaint on the material before it, including evidence of the context in which the conduct of complained of took place: **Bakkali** paragraph 31.

180. As to the proscribed purpose and effect:

180.1 *"Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended*" **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336 paragraph 22.

180.2 It is important for Tribunals not to cheapen the significance of the words at section 26(b) EqA "*they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*" **Land Registry v Grant** [2011] ICR 1390 paragraph 47.

180.3 To decide whether the conduct has the proscribed effect a Tribunal must consider both whether the victim perceives themselves to have suffered the effect in question and whether it was reasonable for the conduct to be regarded as having that effect. If the subjective question is not proven, then the conduct shall not be found to have that effect. Even if the subjective question is proven the conduct will only have that effect if it was objectively reasonably for it to have done so: **Pemberton v Inwood** [2018] IRLR 542 paragraph 88.

181. It is not necessary for a claimant to possess the protected characteristic to bring a claim under section 26 EqA.

<u>Direct discrimination</u>

182. Section 13(1) EqA provides:

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

183. Section 23 EqA provides, so far as is relevant:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include a person's abilities if—
(a) on a comparison for the purposes of section 13, the protected characteristic is disability.

184. Section 39(2)(d) EqA provides:

(2) An employer (A) must not discriminate against an employee of A's (B)—
(d) by subjecting B to any other detriment.

185. Section 212(1) EqA provides:

212 General interpretation
(1) In this Act—
…
"detriment" does not, subject to subsection (5), include conduct which amounts to harassment.

186. We had regard to **Amnesty International v Ahmed** [2009] ICR 1450 paragraphs 33-34; **Nagarajan v London Regional Transport** [1999] ICR 877 at 884-886; **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 paragraphs 8, 10-12, and 34-35; **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065 at 29; **Martin v Devonshires Solicitors** [2011] ICR 352 at paragraph 30; **Reynolds v CLFIS (UK) Ltd** [2015] ICR 1010 at paragraph 36; **No.8 Partnership v Simmons** [2023] EAT 140 at paragraphs 34- The following guidance is taken from these authorities:

186.1 There is a detriment if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. An unreasonable sense of grievance does not fall into that category.

186.2 Discrimination may be inherent in the act complained of, in which case there is no need to inquire into the mental processes of the alleged discriminator.

186.3 In other cases, the act may be rendered discriminatory by the mental processes, conscious or unconscious, of the alleged discriminator. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question about their reasons for acting as they did. The test is subjective, and it is sufficient that the protected characteristic had a '*significant influence'* on the decision to act in the manner complained of. It need not be the sole ground for the decision. The person who did the act complained of must themself have been motivated by the protected characteristic. The motivation may be subconscious, but such a finding must be supported by clear findings of primary fact from which such an inference can properly be drawn.

186.4 The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and then going on to consider whether that treatment is because of the protected characteristic.

186.5 There must be no material difference between the circumstances relating to the claimant and the comparator. If the Tribunal constructs a hypothetical comparator, it must ensure that it is comparing like with like. That will generally be done at an early stage permitting the parties to address the hypothetical comparisons in evidence in submissions. Where that is not done the Tribunal may not be in a position to make findings using those comparisons.

186.6 More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the '*reason why*' the employer did the act or acts alleged to be discriminatory. This approach does not require the construction of a hypothetical comparator. It will not always be necessary or appropriate, particularly where there is no direct comparator to consider the two stage process. It can sometimes be impossible to decide whether there has been less favourable treatment without first determining the reason why.

186.7 When assessing the reason why, the Tribunal must determine why the alleged discriminator acted in the way they did; and what (consciously or unconsciously) was their reason. This is subjective question of fact.

187. It is not necessary for a claimant to possess the protected characteristic to bring a claim under section 13 EqA. In **Coleman v Attridge Law** [2008] IRLR 722 the ECJ held that "associative discrimination" on grounds of disability was unlawful i.e. where a claimant is found to have suffered less favourable treatment not because of a protected characteristic that they possess but because of that protected characteristic possessed by someone they associate with. When **Coleman** was returned to the UK, it was held that the Disability Discrimination Act 1995 must be interpreted to extend to discrimination by association (see **EBR Attridge LLP v Coleman** [2010] ICR 242 EAT; and also the explanation of this in **No.8 Partnership** at paragraph 33).

<u>Discrimination arising from disability</u>

188. Section 15 EA provides:

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

189. "Unfavourable treatment" is a relatively low threshold and means some sort of disadvantage or detriment: **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2018] UKSC 65 paragraph 27.

190. As to the issue of causation: The guidance from **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 and **Pnaiser v NHS England** [2016] IRLR 170 is as follows:

190.1 First, the Tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that

treatment, focusing on the reason in the mind of the alleged discriminator, but keeping in mind that the actual motive of the alleged discriminator in acting as they did is irrelevant. If the "*something*" was a more than trivial part of the reason for unfavourable treatment, then this stage of the test is satisfied.

190.2 Second, the Tribunal must establish whether the reason was '*something arising in consequence of the claimant's disability*', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator. This is a question of objective fact for the Tribunal to decide in light of the evidence. All that is required is a loose connection between the claimant's unfavourable treatment and the '*something*' that arises in consequence of the disability*:* **Risby v London Borough of Waltham Forest** EAT 0318/15*.* It is not a "*but for*" causation test but rather a "*reason why*" test: **Dunn v Secretary of State for Justice** [2019] IRLR 298.

191. On the issue of objective justification:

191.1 In **Homer v Chief Constable of West Yorkshire Police and West Yorkshire Police Authority** [2012] IRLR 601, Lady Hale summarised the position as follows: *"to be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so*".

191.2 Elias J in **MacCulloch v ICI** [2008] IRLR 846 at paragraph 10, set out four legal principles with regard to justification, which have since been approved by the Court of Appeal in **Lockwood v DWP** [2013] IRLR 941:

1. *"The burden of proof is on the respondent to establish justification: see* ***Starmer v British Airways*** *[2005] IRLR 862 at [31].*

2. *The classic test was set out in* ***Bilka-Kaufhaus GmbH v Weber Von Hartz*** *(case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or Tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see* ***Rainey v Greater Glasgow Health Board*** *(HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.*

3. *The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it:* ***Hardy & Hansons plc v Lax*** *[2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].*

> *4. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context:* ***Hardy & Hansons plc v Lax*** *[2005] IRLR 726, CA."*

191.3 Singh J in the EAT in **Hensman v Ministry of Defence** UKEAT/0067/14/DM [2014] EqLR 670 held that when assessing proportionality, while a Tribunal must reach its own judgement, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

191.4 In **Department of Work and Pensions v Boyers** UKEAT/0282/19/AT Tribunals were reminded that in assessing the proportionality of the means of achieving a legitimate aim that it is an error of law to focus on the process by which the outcome was achieved. Its analysis should not be based on the actions and thought processes of the respondent's managers but on a balancing of the needs of the respondent in the context of the legitimate aim found to be pursued by the dismissal and the discriminatory impact on the claimant.

191.5 Guidance from **Chief Constable of West Midlands v Harrod** [2015] ICR 1311 at paragraph 41 is as follows:

> *"When considering justification, a tribunal is concerned with that which can be established objectively. It therefore does not matter that the alleged discriminator thought that what it was doing was justified. It is not a matter for it to judge, but for courts and tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it is achieved. For just the same reasons, it does not ultimately matter that the decision maker failed to consider justification at all: to decide a case on the basis that the decision maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of a tribunal or court. It would be to concentrate instead on subjective matters irrelevant to that decision. This is not to say that a failure by a decision maker to consider discrimination at all, or to think about ways by which a legitimate aim might be achieved other than the discriminatory one adopted, is entirely without impact. Evidence that other means had been considered and rejected, for reasons which appeared good to the alleged discriminator at the time, may give confidence to a tribunal in reaching its own decision that the measure was justified. Evidence it had not been considered might lead to a more intense scrutiny of whether a suggested alternative, involving less or even no discriminatory impact, might be or could have been adopted. But the fact that there may be such an impact does not convert a tribunal's task from determining if the measure in fact taken can be justified before it, objectively, into one of deciding whether the alleged discriminator was unconsidering or irrational in its approach."*

Duty to make reasonable adjustments

192. The duty of make reasonable adjustments is contained in sections 20 and 21 (and schedule 8) EqA, which provide, as is relevant to this claim:

20 Duty to make adjustment

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

…..

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

193. "*Substantial disadvantage*" is defined in section 212 EqA as something more than minor or trivial.

194. The duty to make the adjustment arises by operation of law, it is not essential for the claimant to have identified at the time what should have been done. The Code at paragraph 6.24 says that there is no onus on a disabled person to suggest what adjustments should be made.

195. However, the burden of proving the PCP and the substantial disadvantage before the Tribunal rests on the claimant. There must also be an indication before the Tribunal of what adjustments it is alleged should have been made. Once this is done the burden is on the respondent to show that this could not have reasonably been made. (**Project Management Institute v Latiff** [2007] IRLR 579).

196. The Code at paragraph 6.28 lists factors which might be taken into account when deciding if a step is a reasonable one to take as follows:

196.1 whether taking any particular steps would be effective in preventing the substantial disadvantage;
196.2 the practicability of the step;
196.3 the financial and other costs of making the adjustment and the extent of any disruption caused;
196.4 the extent of the employer's financial or other resources;
196.5 the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
196.6 the type and size of the employer.

<u>"Associative" indirect discrimination</u>

Domestic and EU legislation

197. Section 19 EqA provides:

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

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

198. Article 2 of Directive 2000/43 provides (so far as is relevant):

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
2. For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

199. Article 2 of Directive 2000/78 (the “Framework Directive”) provides (so far as is relevant):

Article 2 Concept of discrimination
1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

200. Article 5 of the Framework Directive provides:

Article 5: Reasonable accommodation for disabled persons
In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

201. The European Union (Withdrawal) Act 2018 (“EUWA”) provides (so far as is relevant):

Section 4 Saving for rights etc. under section 2(1) of the ECA
(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day—
(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
(b)are enforced, allowed and followed accordingly,
continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).
(2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they—
(a)form part of domestic law by virtue of section 3,
(aa)are, or are to be, recognised and available in domestic law (and enforced, allowed and followed accordingly) by virtue of section 7A or 7B, or
(b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case).
(3)This section is subject to section 5 and Schedule 1 (exceptions to savings and incorporation) and section 5A (savings and incorporation: supplementary).

Section 5 Exceptions to savings and incorporation
(1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.
(2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.

Section 6 Interpretation of retained EU law
(1) A court or tribunal—
(a) is not bound by any principles laid down, or any decisions made, on or after IP completion day by the European Court, and
(b) cannot refer any matter to the European Court on or after IP completion day.
(2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.
(3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it—
(a) in accordance with any retained case law and any retained general principles of EU law, and
(b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences.
(4) But—
(a) the Supreme Court is not bound by any retained EU case law,
(b) the High Court of Justiciary is not bound by any retained EU case law when—
(i) sitting as a court of appeal otherwise than in relation to a compatibility issue (within the meaning given by section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995) or a devolution issue (within the meaning given by paragraph 1 of Schedule 6 to the Scotland Act 1998), or
(ii) sitting on a reference under section 123(1) of the Criminal Procedure (Scotland) Act 1995,
*(ba)a relevant court or relevant tribunal is not bound by any retained EU case law so far as is provided for by regulations under subsection (5A),**]** and*
(c) no court or tribunal is bound by any retained domestic case law that it would not otherwise be bound by.
…
(7) In this Act—
"retained case law" means—
(a) retained domestic case law, and
(b) retained EU case law;
"retained domestic case law" means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before IP completion day and so far as they—

(a) relate to anything to which section 2, 3 or 4 applies, and
(b) are not excluded by section 5 or Schedule 1,
(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);
"retained EU case law" means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day and so far as they—
(a) relate to anything to which section 2, 3 or 4 applies, and
(b) are not excluded by section 5 or Schedule 1,
(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);
"retained EU law" means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time);
"retained general principles of EU law" means the general principles of EU law, as they have effect in EU law immediately before IP completion day and so far as they—
(a) relate to anything to which section 2, 3 or 4 applies, and
(b) are not excluded by section 5 or Schedule 1,
(as those principles are modified by or under this Act or by other domestic law from time to time).

Schedule 1, Paragraph 3
(1) There is no right of action in domestic law on or after IP completion day based on a failure to comply with any of the general principles of EU law.
(2) No court or tribunal or other public authority may, on or after IP completion day —
(a) disapply or quash any enactment or other rule of law, or
(b) quash any conduct or otherwise decide that it is unlawful,
because it is incompatible with any of the general principles of EU law.

Schedule 8, Part 4
Paragraph 38
Section 4(2)(b) does not apply in relation to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they are of a kind recognised by a court or tribunal in the United Kingdom in a case decided on or after IP completion day but begun before IP completion day (whether or not as an essential part of the decision in the case).
Paragraph 39(5)
Paragraph 3 of Schedule 1 does not apply in relation to any proceedings begun within the period of three years beginning with IP completion day so far as—
(a) the proceedings involve a challenge to anything which occurred before IP completion day, and
(b) the challenge is not for the disapplication or quashing of—
(i) an Act of Parliament or a rule of law which is not an enactment, or
(ii) any enactment, or anything else, not falling within sub-paragraph (i) which, as a result of anything falling within that sub-paragraph, could not have been different or which gives effect to, or enforces, anything falling within that sub-paragraph.

Interpreting domestic legislation in accordance with EU law following Brexit

202. The **Marleasing** principle is preserved by EUWA section 6. This requires the Tribunal to apply national law as far as possible to give effect to the wording and purpose of EU Directives in accordance with retained EU case law. The Tribunal must continue to follow ECJ judgments handed down before 31 December 2020 and to apply general principles of EU law, subject to section 6(4) EUWA. **Vodafone 2 v Revenue and Customs** [2009] EWCA Civ 446 addresses how far a court can go in reading domestic legislation in accordance with the relevant EU Directive.

203. The supremacy of EU law continues to apply on or after 31 December 2020 so far as relevant to the interpretation, disapplication or quashing of any

enactment or rule of law passed or made before 31 December 2020 (section 5(2) EUWA).

204. The preservation of directly effective rights arising under EU Directives is subject to the limitation at section 4(2)(b) and paragraph 38 of Schedule 8 to the EUWA. A claimant may only continue to rely on provisions under EU Directives of a kind recognised by the European Court or any domestic court before 31 December 2020 (section 4(2)(b) EUWA) or recognised by such a court after 31 December 2020 if the case began before that date. The provisions of the directive must be clear, unconditional, and sufficiently precise in order to be relied upon by a claimant against an emanation of the state: **Foster v British Gas plc** [1990] IRLR 353.

205. Paragraph 39(3) of schedule 8 EUWA states that the limitation at paragraph 3 of schedule 1 EUWA (relating to general principles of EU law) does not apply in cases where proceedings were brought within three years of 31 December 2020 and involve a challenge to matters which occurred before that date, and subsection (b) does not apply. Further on this point:

    205.1 **Jersey Choice Ltd v her Majesty's Treasury** [2021] EWCA Civ 1941 at paragraph 24 *"rights which were saved under this somewhat convoluted regime form part of the body of retained EU case law and retained general principles of EU law in accordance with which domestic courts must decide any questions as to the validity meaning or effect of retained EU law so far as relevant and so far as the law is unmodified on or after IP completion day (sections 6(3) and 6(7))"*.

    205.2 **Secretary of State for Work and Pensions v Beattie and others** [2023] IRLR 13 at paragraph 137: *"in any event, to the extent that the right of non-discrimination/equal treatment existed irrespective of the EU Charter, founded upon the general principles of EU Law, and is still to be treated as retained EU law, it can no longer provide a basis for the disapplication or quashing of any enactment or other rule of law that has been found to be incompatible with such a general principle (Sch 1 para 3(2))"*.

    205.3 **Beattie** paragraphs 138 and 140: the ET's decision to disapply the 2010 order *"fall[s] within sub-paragraph (ii) or paragraph 39(5) Sch 8: it is something that, as a result of s 61(8) 'could not have been different', alternatively, 'which gives effect to, or enforces' s 61(8) EqA".*

Two potential types of associative indirect discrimination

206. The editors of Harvey on Industrial Relations and Employment (at Division L:291.06) have identified two potential types of associative indirect discrimination: (1) same disadvantage; and (2) family and friends.

207. We find this to be a helpful description of, and distinction between, two potential types of indirect discrimination. Namely:

207.1 Same disadvantage: where the victim suffers the same disadvantage by the application of the PCP as the group or person that is discriminated against, irrespective of the relationship between the victim and that group or person. As this does not depend on the association between the victim and the person who has the protected characteristic, the term "associative" indirect discrimination is a misnomer.

207.2 Friends and family: where the victim suffers a disadvantage by the application of the PCP by virtue of their relationship or association with the person who has the protected characteristic.

Same disadvantage indirect discrimination

208. In **Chez Razpredelenie Bulgaria AD v Komisia Za Zashtita Ot Diskriminatsia** C-83/14 [2015] IRLR 746, a case concerning Directive 2000/43, the ECJ found at paragraph 56:

> *56. In that regard, the Court's case law, already recalled in [42] of the present judgment, under which the scope of Directive 2000/43 cannot, in the light of its objective and the nature of the rights which it seeks to safeguard, be defined restrictively, is, in this instance, such as to justify the interpretation that the principle of equal treatment to which that directive refers applies not to a particular category of person but by reference to the grounds mentioned in art.1 thereof, so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds (see, by analogy, judgment in Coleman [2008] 3 C.M.L.R. 27 at [38] and [50]).*

209. Directive 2000/43 Article 2(2)(b) does not contain a requirement that the claimant in an indirect discrimination claim shares the protected characteristic of the disadvantaged group.

210. In **Rollett & others v British Airways Plc** (ET case number: 3315412/2020) the Employment Tribunal held that, "*after **Chez** [section 19 EqA] was not adequate to properly implement what is now the Equal Treatment Directive"* (paragraph 21). The Tribunal interpreted EqA section 19 to give effect to the Framework Directive and found that the Tribunal had jurisdiction to hear claims of indirect discrimination where the claimant suffered the same disadvantage from the application of the PCP, but did not share the same protected characteristic. We are not bound by **Rollett**, but we agree with its rationale and conclusions on this issue.

211. In that **Rollett** *"neither party suggested that [the Framework Directive] made a material difference to the position in **Chez**"* (paragraph 15). In the present case, the respondent submits that the wording in the Framework Directive does make a material difference. The respondent submits that the EqA goes beyond what is required in the Framework Directive and therefore there is no requirement to interpret section 19 EqA in a way that is compatible with the Framework Directive. The respondent submits that sections 20-21 EqA implement Article 5 of the Framework Directive, and therefore Article 2(2)(b)(ii) removes the requirement to prohibit indirect disability discrimination. We reject the respondent's submission for the reasons set out in the following paragraph.

212. We accept the respondent's submission that the Equality Act 2010 (Amendment) Regulations 2023 (which are not yet in force) and the accompanying explanatory note are of assistance in determining the effect of **Chez** on section 19 EqA, even though the planned amendment is not binding on the Tribunal. The explanatory note states that a new section 19A EqA (indirect discrimination: same disadvantage) is to be added by regulation 3 to reproduce the principle in **Chez**. The new section 19A EqA will apply to all protected characteristics, including disability. There is no suggestion there that, as sections 20-21 EqA implement Article 5 of the Framework Directive, Article 2(2)(b)(ii) removes the requirement to prohibit indirect disability discrimination.

213. We find that the Tribunal has jurisdiction to hear a claim of same disadvantage indirect discrimination. Applying the **Marleasing** principle, we apply section 19 EqA to give effect to the wording and purpose of EU Directives in accordance with retained EU case law: namely Article 2(2) of the Framework Directive in accordance with **Chez**. We find that section 19 EqA does not properly implement the Framework Directive. Applying the guidance in **Vodafone 2** any changes must go with the grain or thrust of the legislation, ensuring that any changes do not remove the core meaning or infringe the cardinal principle of the legislation. Adopting this approach, we find that section 19 EqA should be read as if it includes the wording in the, as yet not in force, section 19A EqA. This gives effect to the Framework Directive and is consistent with the purpose of the EqA.

Friends and family indirect discrimination

214. In **Follows v Nationwide Building Society** (ET case number: 2201937/2018) the Tribunal sought to interpret section 19 EqA in a manner consistent with **Chez**. The Tribunal read "*relevant characteristic of B's*" in section 19 EqA as applying to employees who are associated with a person with a relevant protected characteristic (paragraph 99).

215. We are not bound by the case of **Follows** and we do not follow it. **Follows** sought to interpret section 19 EqA to be consistent with **Chez**. However, we prefer the reasoning in **Rollett**, Harvey's, and the explanatory note to Equality Act 2010 (Amendment) Regulations 2023, that **Chez** covers a different situation: of same disadvantage indirect discrimination.

216. The claimant submitted that the Tribunal has jurisdiction to hear a claim of this type of indirect discrimination by association because: (1) the Framework Directive has direct effect; (2) the claimant can rely on the general EU law principle of non-discrimination; and/or (3) section 19 EqA must be interpreted so as to give effect to and/or to be consistent with the Framework Directive and/or the general principles of EU law, applying **Marleasing** principles.

217. We accept that:

    217.1 The Framework Directive has direct effect. The Framework Directive has been held by the EAT to have direct effect (**London Fire Commissioner v Sergeant** [2021] ICR 1057, paragraph 146). EUWA states that this does not have to be an essential part of the decision in

the case. This case was decided after 31 December 2020 but began before that date, therefore EUWA schedule 8, part 4, paragraph 38 applies. The respondent is an emanation of the state. The claimant can therefore rely on the Framework Directive as having direct effect.

217.2 The proceedings began within the period of three years from 31 December 2020 and involve a challenge to things that occurred before 31 December 2020: paragraph 39(5)(a) of schedule 8 EUWA applies. The claimant can rely on the general EU law principle of non-discrimination to decide any question as to the validity, meaning or effect of EU law, but not to disapply or quash section 19 EqA: paragraph 39(5)(b) of schedule 8 EUWA, as explained in **Beattie**.

217.3 The **Marleasing** principles apply (section 6 EUWA).

218. We conclude that the Tribunal does not have jurisdiction to hear a claim of friends and family associative discrimination.

219. Dealing first with vertical direct effect of the Framework Directive. Article 2(b) does not refer to persons being associated with the person who has the protected characteristic. The provisions of the directive are not sufficiently clear, unconditional and precise to have vertical direct effect.

220. Second, if the claimant submits that the Tribunal should disapply section 19 EqA as it is inconsistent with general principles of EU law, that is precluded by paragraph 39(5)(b) of schedule 8 EUWA, as explained in **Beattie**.

221. Third, whilst the Tribunal is required to apply the EqA as far as possible to give effect to the wording and purpose of EU Directives in accordance with retained EU case law, this does not require section 19 EqA to be interpreted to allow this type of indirect discrimination, because:

221.1 Framework Directive Article 2(b) does not require this. It does not refer to persons being associated with the person who has the protected characteristic.

221.2 There is no ECJ jurisprudence that supports this reading of the Framework Directive. **Chez** deals with a different situation (same disadvantage indirect discrimination).

221.3 The Tribunal must decide any question as to the validity, meaning or effect of retained EU law in accordance with the general principle of non-discrimination. But this broad principle, which says nothing about indirect discrimination by association, does not require the interpretation of section 19 EqA proposed by the claimant.

221.4 We agree with the reasoning in **Hainsworth v Ministry of Defence** [2014] IRLR 728 at paragraph 20 and we consider that this type of association is vague and open-ended, and interpreting section 19 EqA in this way would make it hopelessly uncertain.

The salient features of indirect discrimination claims

222. We considered the guidance in **Essop v Home office; Naeem v Secretary of State for Justice** [2017] IRLR 558 which sets out the six salient features of indirect discrimination claims as follows (paragraphs 24-29):

24. The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. Thus there was no requirement in the 1975 Act that the claimant had to show why the proportion of women who could comply with the requirement was smaller than the proportion of men. It was enough that it was. There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

25. A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment—the PCP is applied indiscriminately to all—but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

26. A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various (Mr Sean Jones QC for Mr Naeem called them "context factors"). They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in Chief Constable of West Yorkshire Police v Homer [2012] ICR 704 , where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by Mr Homer and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.

27. A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. The fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age).

28. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be

difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the "particular disadvantage" might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

29. A final salient feature is that it is always open to the respondent to show that his PCP is justified—in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question—fitness levels in firefighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop [2014] ICR 871 , para 30, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result.

Discrimination arising from the claimant's husband's disability

223. We do not find that the Tribunal has jurisdiction to hear a claim of discrimination arising from the claimant's husband's disability.

224. We do not find that we are required to interpret section 15 EqA to cover this type of claim.

225. Dealing first with the vertical direct effect of the Framework Directive. The Framework Directive does not prohibit discrimination arising from disability, this is a provision of domestic law. We reject the claimant's submissions to the contrary. We accept that the directive prohibits all forms of discrimination. But, in the absence of reference to this type of discrimination, we conclude that this does not encompass the type of discrimination in section 15 EqA. We reject the claimant's submission that discrimination arising from disability is a form of discrimination on grounds of disability. Contrary to the claimant's submission, we find that the "something arising" can be separated from the disability itself. It is a consequence of the disability, and is a step removed from it.

226. Second, if the claimant submits that the Tribunal should disapply section 15 EqA as it is inconsistent with general principles of EU law, that is precluded by paragraph 39(5)(b) of schedule 8 EUWA, as explained in **Beattie**.

227. Third, whilst the Tribunal is required to apply the EqA as far as possible to give effect to the wording and purpose of EU Directives in accordance with retained EU case law, this does not require section 15 EqA to be interpreted to allow this type of discrimination, because:

    227.1 Framework Directive Article 2(b) does not require this. The Framework Directive does not prohibit discrimination arising from disability, this is a provision of domestic law.

227.2 There is no ECJ jurisprudence that supports this interpretation of section 15 EqA.

227.3 The Tribunal must decide any question as to the validity, meaning or effect of retained EU law in accordance with the general principle of non-discrimination. But this broad principle, which says nothing about discrimination arising from disability or discrimination arising from disability by association, does not require the interpretation of section 15 EqA proposed by the claimant. That is particularly so given that section 15 EqA is a provision of domestic law.

227.4 We agree with the reasoning in **Hainsworth v Ministry of Defence** [2014] IRLR 728 at paragraph 20 and consider that discrimination arising from disability by association is vague and open-ended, and interpreting section 15 EqA in this way would make it hopelessly uncertain.

Time limits

228. Section 123 EqA states, in so far as it is relevant:

(1) …Proceedings on a complaint within section 120 may not be brought after the end of:
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable. …

(2) For the purposes of this section
(a) conduct extending over a period is to be treated as done at the end of the period
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(3) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

229. As to conduct which 'extends over a period' the Court of Appeal in **Hendricks v Metropolitan Police Commissioner** [2003] IRLR 96, sets out that the burden is on the claimant to prove, either by direct evidence or inference, that the numerous alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'.

230. In **South Western Ambulance Service NHS Foundation Trust v King** [2020] IRLR 168 Chaudhury P in the EAT stated in the context of a continuing act at [36-38] “It will be necessary, in my judgment, for at least the last of the constituent acts relied upon to be in time and proven to be an act of discrimination in order for time to be enlarged.”

Conclusions

Disability

231. The claimant was a disabled person within the meaning of section 6 EqA from 12 November 2020.

232. As set out at paragraph 30 above, we find that the claimant experienced the impairments of headaches, fatigue, exhaustion, muscle pain, cognitive problems with memory concentration, tightness in her chest and shortness of breath ("the impairments") from March 2020 to the termination of her employment. Prior to this date, the claimant experienced symptoms of chronic fatigue syndrome, as referred to in OH 3 and elsewhere. The claimant does not rely on matters before 18 March 2020, which is the date when she was first absent from work with covid-19.

233. The impairments had a substantial adverse effect on the claimant's ability to carry out day to day activities throughout this period, as set out at paragraph 32 above.

234. The key issue is the date on which that effect was long term.

235. Contrary to the advice of occupational health in OH 3 we conclude that the effect was not long term on 12 August 2020. We reach this conclusion because:

235.1 The occupational health adviser made a bare assertion in OH 3 that the claimant's condition was long term, without providing a reasoned explanation or justification for this.

235.2 The medical evidence at that time did not support a conclusion that the effect was long term. By 12 August 2020, the effect had continued for five months. The advice from occupational health was that the claimant could return to work on 1 September 2020 and that she would be back to full time duties within five weeks i.e. by seven months from the start of the effect.

235.3 We considered whether the statement in OH 3 that *"(6) Katharine has underlying conditions which are likely to recur however with treatment/specialist care and work support it is anticipated that this will reduce the risk of further absences"* [623] was evidence that the claimant's impairments were long term by virtue of the likelihood of their recurrence. We conclude that it was not, because:

235.3.1 This statement in OH 3 was not provided as an explanation for the advice that the condition was long term. This information was provided in answer to a separate question posed by the respondent on a different issue. That is clear from the numbering of the answer *"(6)"* which relates to the number of questions asked in the referral document [592].

235.3.2 We conclude that the phrase *"underlying conditions"* refers to the claimant's past medical history of chronic fatigue and chronic depression. That conclusion is consistent with:

235.3.2.1 The words used. First, the use of the plural *"conditions"*. Second the use of the term *"underlying"* which suggests something in the background to the condition in issue.

235.3.2.2 The reference to *"treatment and specialist care".* The claimant had disclosed to occupational health that she was receiving treatment and specialist care for her depression. She was not receiving treatment or specialist care for her impairments at this stage.

235.3.2.3 The absence of any explanation or evidence at this stage to support an opinion that the impairments were likely to recur.

235.3.3 In any event, even if (contrary to our conclusion) this statement was a reference to the effect of the impairments, rather than the claimant's past medical history, this statement from occupational health would not support the conclusion that the impairments were long term. All that is said is that there is a likelihood of recurrence. OH 3 does not state (and there is no other evidence of this) that the recurrence is likely to recur beyond 12 months after the first occurrence, which is what would be required to prove that it was long term within the meaning of the EqA.

236. OH 4 is the first point where there is evidence to support a conclusion that the effect was likely to last for at least 12 months. We conclude that the effect was long term from 12 November 2020 because:

236.1 OH 4 states: *"post-viral fatigue is when you have an extended period of feeling unwell and fatigued after a viral infection such as covid-19, and the length of time for individuals to recover varies from person to person, it can take months or years."* We conclude that this advice proves that the effect could well last for at least twelve months, as that is consistent with this advice that it can take years to recover.

236.2 OH 4 was almost eight months after the start of the effect on 18 March 2020. The advice was for adjusted duties for three to six months. Even taking the midpoint between this time period, the advice in OH 4 is that the claimant would still be on significantly reduced hours on the anniversary of 18 March 2020.

Knowledge of disability

237. We conclude that the respondent had constructive knowledge of the claimant's disability on 12 November 2020 i.e. the date when they received OH 4.

238. The respondent cannot rely on the advice about the applicability of the EqA in OH 4 to absolve them of constructive knowledge, because they

unquestioningly accepted the unreasoned advice of occupational health. We reach that conclusion because:

238.1 The advice on the applicability of EqA in OH 4 is unreasoned. The adviser justifies their advice by saying: *"recent condition following covid-19 and is unlikely to be considered as a disability in employment terms"*. The adviser does not explain why a condition of ten months duration is a *"recent"* one. Nor do they explain or consider why the effect would not be long-term given the information in OH 4 about duration of the effect (ten months); prognosis (*"can take years"*); and the recommendations (three to six months of significantly reduced hours).

238.2 The respondent did not question that advice, even though it was aware of the contents of OH 4 about duration, prognosis and recommendations. Further, the respondent did not question the fact that OH 3 had advised that the EqA applied, and the claimant's condition had deteriorated in the intervening period. Whilst the OH 3 EqA advice was also unreasoned, it still should have alerted the respondent to the fact that the EqA might well apply, and to have prompted them to question the advice in OH 4, given the contents of OH 4.

The claimant's husband's disability and knowledge thereof

239. The respondent admits, and we conclude, that the claimant's husband was, at all material times, disabled for the purposes of section 6 EqA by virtue of Early Onset Alzheimer's Disease.

240. The respondent knew of the claimant's husband's disability from 16 March 2020 when the claimant disclosed this to Mrs Kitchener.

Harassment related to disability

241. We address the harassment claims first because, if the acts amount to harassment, they would not be detriments (section 212(1) EqA).

242. The claimant claims that all allegations in paragraph 4 of the list of issues were harassment related to her disability, and that allegations (h), (i), (j) and (k) were also harassment related to her husband's disability. The claimant can bring a claim of harassment related to her husband disability.

243. Allegations (a), (b), (e), (f), (g), (k), (l)(ii), and (l)(iii) are not proven and are dismissed on the facts.

244. The claims of harassment related to disability in relation to the allegations found proven are dismissed for the reasons set out below.

Allegation (h)

245. The claim of harassment related to the claimant's disability fails for the following reasons.

246. First, there was no unwanted conduct. Mrs Kitchener was simply reminding the claimant about the policy for attending medical appointments. The policy provided that the claimant could request annual or unpaid leave for such appointments. Given that the claimant was at this stage working 24 hours but being paid as if she was working full time hours, and she was also accruing leave on a full-time basis, we conclude that taking unpaid or annual leave for these weekly one-hour sessions was something that the claimant could reasonably accommodate even with her disability. We conclude that the fact that the claimant made no specific request for paid time off for these appointments, and that she did not raise a complaint about this until her claim form, indicates that she accepted that the policy was a reasonable one and she did not take issue with being reminded about it: this reminder was not unwanted.

247. Second, even if there was unwanted conduct, the conduct was not related to the claimant's disability. The appointment was for counselling with the claimant's husband and did not relate to the claimant's disability. We have found that the claimant did not explain to Mrs Kitchener about the alleged impact that attending the appointment would have on her own energy levels. We have found that she has not proven this alleged impact either.

248. Third, even if there was unwanted conduct related to the claimant's disability, it did not have the proscribed purpose of effect:

    248.1 The purpose of the conduct was to remind the claimant of the respondent's procedure.

    248.2 The conduct did not have the proscribed effect:

        248.2.1 As to the subjective element. At most, the claimant's evidence was that she felt "*guilty*" and "*unsupported*" by Mrs Kitchener in general. This does not meet the threshold of violating her dignity or creating an intimidating, hostile, degrading, humiliating, or offensive for the claimant (the guidance on which is set out in the law section above at paragraph 180). We therefore conclude there is no evidence that the claimant perceived the conduct to have the proscribed effect.

        248.2.2 Even if the claimant had had that perception, we would have concluded that it was not objectively reasonable given the nature of and context to the conduct. Mrs Kitchener was merely reminding the claimant of the respondent's policy in circumstances where the claimant could reasonably take annual or unpaid leave for such appointments, given she was being paid and accruing leave as if she was a full time employee.

249. The claim of harassment related to the claimant's husband's disability fails. Although we accept that the conduct was related to the claimant's husband's disability, as that was the context for the counselling sessions, the claim fails

as there was no unwanted conduct or proscribed purpose or effect, for the same reasons as set out at paragraphs 246 and 248 above.

Allegation (i)

250. The claim of harassment related to the claimant's disability fails. Our conclusions on the constituent parts of section 26 EqA are set out below.

251. First there was no unwanted conduct, for much the same reasons as for allegation (h). Mrs Kitchener was simply reminding the claimant about the policy for attending medical appointments. The policy provided that the claimant could request annual or unpaid leave for such appointments. Save for the weekly counselling sessions, the claimant was not attending regular or frequent medical appointments. Given that the claimant was at this stage working 24 hours but being paid as if she was working full time hours, and she was also accruing leave on a full-time basis, we conclude that taking unpaid or annual leave for the weekly one-hour counselling sessions, or any other ad-hoc medical appointments, was something that the claimant could reasonably accommodate even with her disability. We conclude that the fact that the claimant made no specific request for paid time off for medical appointments, and that she did not raise a complaint about this until her claim form, indicates that she accepted that the policy was a reasonable one and she did not take issue with being reminded about it: this reminder was not unwanted.

252. Second the conduct was related to the claimant's disability. Mrs Kitchener's witness statement at paragraph 53 explains that the claimant's own sickness absence was part of the context to the conduct.

253. Third, the conduct did not have the proscribed purpose or effect:

253.1 The purpose of the conduct was to remind the claimant of the respondent's procedure.

253.2 The conduct did not have the proscribed effect:

253.2.1 As to the subjective element. At most, the claimant's evidence was that she felt "*guilty*" and "*unsupported*" by Mrs Kitchener in general. This does not meet the threshold of violating her dignity or creating an intimidating, hostile, degrading, humiliating, or offensive for the claimant (the guidance on which is set out in the law section above at paragraph 180). We therefore conclude there is no evidence that the claimant perceived the conduct to have the proscribed effect.

253.2.2 Even if the claimant had perceived the conduct to have this effect, we would have concluded that it was not reasonable for it to have that effect. Mrs Kitchener was merely reminding the claimant of the respondent's policy in circumstances where the claimant could reasonably take annual or unpaid leave for medical appointments, given she was being paid and accruing leave as if she was a full time employee.

254. The claim of harassment related to the claimant's husband's disability also fails. For the same reasons as set out at paragraph 251 and 253 above we conclude that the conduct was not unwanted and did not have the proscribed purpose or effect. We conclude that the conduct was related to the claimant's husband's disability. Although this was not expressly referred to in the contemporaneous evidence of the meeting, the background and context to the conversation was that the claimant was attending regular counselling sessions relating to her husband's disability.

Allegation (j)

255. The claim of harassment related to the claimant's disability fails. Our conclusions on the constituent parts of section 26 EqA are set out below.

256. First, we conclude that there was unwanted conduct as we find that the statement in the 14 December 2020 email informed the claimant that she had not completed her work, as she had taken annual leave. We conclude that this was a mildly negative statement and therefore unwanted.

257. Second, the conduct was not related to the claimant's disability as the context was the leave that she took as respite from caring for her husband, rather than leave related to her own disability.

258. Third, the conduct did not have the proscribed purpose or effect:

    258.1 We conclude that the conduct did not have the proscribed purpose; there was no evidence on which to make such a conclusion. We conclude that Mrs Kitchener's purpose was to ensure that work allocated to the claimant was completed, to ensure the effective operation of the IG team.

    258.2 We conclude that the conduct did not have the proscribed effect:

        258.2.1 As to the subjective element. Again, at most, the claimant's evidence was that she felt "*guilty*" and "*unsupported*" by Mrs Kitchener in general. This does not meet the threshold of violating her dignity or creating an intimidating, hostile, degrading, humiliating, or offensive for the claimant (the guidance on which is set out in the law section above at paragraph 180). We therefore conclude there is no evidence that the claimant perceived the conduct to have the proscribed effect.

        258.2.2 Even if the claimant had perceived the conduct to have this effect, we would have concluded that it was not reasonable for it to have that effect. Mrs Kitchener's email was factual and only mildly negative.

259. The claim of harassment related to the claimant's husband's disability fails. Although we accept that the conduct was related to the claimant's husband's disability (as that was the purpose of the annual leave was for respite from providing care for the claimant's husband's disability), the claim fails as there

was no unwanted conduct or proscribed purpose or effect, for the reasons set out at paragraphs 256 and 258 above.

Allegation (l)(i)

260. The claim of harassment related to the claimant's disability fails. Our conclusions on the constituent parts of section 26 EqA are set out below.

261. First, there was no unwanted conduct. We conclude that Mrs Kitchener's statement to the claimant on 25 January 2021 was broadly consistent with the advice of OH 5. We find that, if the claimant was not sick for three to four weeks, that would imply that her symptoms had improved. We therefore conclude that Mrs Kitchener's interpretation of OH 5, as expressed to the claimant on 25 January 2021, was a fair and reasonable interpretation of OH 5. Given that the claimant made no complaint about this until her claim form, we conclude that she was not unduly concerned by this statement at the time, and it was not an unwanted one.

262. Second, we conclude that the conduct was related to disability because the context to it was OH 5 and the claimant's disability related reduced hours.

263. Third, the conduct did not have the proscribed purpose or effect:

263.1 There was no evidence on which to conclude that Mrs Kitchener had the proscribed purpose. We conclude that her purpose was to put in place the recommendations of OH 5 and balance these against the needs of the respondent.

263.2 We conclude that the conduct did not have the proscribed effect:

263.2.1 As to the subjective element. Again, at most, the claimant's evidence was that she felt "*guilty*" and "*unsupported*" by Mrs Kitchener in general. This does not meet the threshold of violating her dignity or creating an intimidating, hostile, degrading, humiliating, or offensive for the claimant (the guidance on which is set out in the law section above at paragraph 180). We therefore conclude there is no evidence that the claimant perceived the conduct to have the proscribed effect.

263.2.2 Even if the claimant had perceived the conduct to have this effect, we would have concluded that it was not reasonable for it to have that effect. Mrs Kitchener's statement was based on a fair and reasonable interpretation of OH 5.

Allegations (m)-(o)

264. These three allegations are about the selection of the claimant, and her role, for redundancy.

265. The claim of harassment related to the claimant's disability fails because the conduct did not have the proscribed purpose or effect.

266. Our conclusions on the constituent parts of section 26 EqA are set out below.

267. First, selection for redundancy is clearly unwanted conduct, as admitted by the respondent.

268. Second, the selection for redundancy was related to disability, because:

    268.1 The proposed restructure was first raised in response to OH 4 and the recommendations for part time working due to the claimant's disability. The background to this was Mrs Kitchener's frustration about the claimant's sickness absence and the difficulties that the claimant's part time hours were causing for the team.

    268.2 The claimant's disability related absence and the transfer of her work to others was the context that made the respondent realise that they could restructure the team by deleting the 8(b) role.

    268.3 The selection for redundancy was justified on the basis of structure charts that reflected the claimant's disability related amended role.

269. Third, the conduct did not have the proscribed purpose or effect:

    269.1 We conclude that the conduct did not have the proscribed purpose, there was no evidence on which to make such a conclusion. Whilst the respondent had initially proposed the restructure to avoid difficulties with the claimant's part time working, that is quite different from saying that they had the proscribed purpose. Further, the respondent did have genuine operational reasons for the restructure (as set out at paragraphs 131-134 above).

    269.2 The conduct did not have the proscribed effect:

        269.2.1 As to the subjective element. We do conclude that the claimant did not have the required perception. The claimant does not expressly deal with this point in her witness statement, and she did not give any oral evidence about it. Her witness statement says that she perceived that she was made to feel guilty and unsupported. Even if that perception related to her selection for redundancy, this does not meet the threshold of violating her dignity or creating an intimidating, hostile, degrading, humiliating, or offensive for the claimant (the guidance on which is set out in the law section above at paragraph 180). The claimant did not express this perception in the consultation process either. The most she said was that the decision was *"disappointing"* and *"inconsistent with the [respondent's] moto 'We care, We respect, We are inclusive'".*

        269.2.2 Even if the claimant had perceived the conduct to have this effect, we would have concluded that it was not reasonable for it to have that effect. Whilst we accept that the claimant would reasonably be upset and aggrieved to be selected for

redundancy, we conclude that it would not meet the threshold of section 26(1)(b) EqA.

Allegation (p)

270. The claim of harassment related to the claimant's disability fails. Our conclusions on the constituent parts of section 26 EqA are set out below.

271. First, not considering alternatives to selecting the claimant for redundancy was unwanted conduct because, if such alternatives had been considered they may have avoided the claimant's selection for redundancy and the termination of her employment.

272. Second, the conduct was not related to disability. We conclude that the failure to consider alternatives was an omission on the part of Mrs Kitchener, and Mrs Begom, that arose because (1) this was a small template redundancy which did not require these considerations to be documented; (2) Mrs Kitchener assumed that there were no alternatives to redundancy given the need she had identified for lower grade posts outside of London and the fact that the claimant was the only one in the small team at her senior level; and (3) Mrs Begom failed to ensure that Mrs Kitchener had carried out this step of the process, and had simply informed her early on in the process to ensure that she set out the rationale for the restructure. Although the claimant's disability related part time hours were part of the background to the restructure, we conclude that this was not sufficiently closely related to this issue. We conclude that this is similar to the situation in **Unite**, where failure to take a necessary step in a process was not conduct related to a protected characteristic just by virtue of that being the subject matter of the originating complaint.

273. Third, the conduct did not have the proscribed purpose or effect:

    273.1 We conclude that the conduct did not have the proscribed purpose. As explained at paragraph 272 above we conclude that this was an omission by the respondent caused by Mrs Kitchener making assumptions about the restructure and Mrs Begom not giving closer oversight of the process.

    273.2 We conclude that the conduct did not have the proscribed effect for the same reasons as set out at paragraph above 269.2, which apply equally to the respondent's failure to consider alternatives to dismissal.

Allegations (q) and (r)

274. These allegations relate to the termination of the claimant's employment.

275. The claim of harassment related to the claimant's disability fails. Our conclusions on the constituent parts of section 26 EqA are set out below.

276. First, plainly this was unwanted conduct, and the respondent does not dispute that. A dismissal can be an act of harassment.

277. Second, we conclude that the conduct was related to disability for the same reasons as set out at paragraph 268 above. Serving the claimant with notice of her dismissal and terminating her employment were the last stages in the restructure process. The rationale for the restructure remained the same. Part of the reason for terminating the claimant's employment was her disability related need to work part time. Her sickness absence was also part of the context.
278. Third, the conduct did not have the proscribed purpose or effect:

    278.1 We conclude that the conduct did not have the proscribed purpose, for the same reasons as set out at paragraph 269.1 above.

    278.2 We conclude that the conduct did not have the proscribed effect for the same reasons as set out at paragraph 269.2 above, which apply equally to this conduct. Further, given that the claimant was placed on special leave from 16 July 2022 we conclude that it did not create the proscribed environment for the claimant after that date.

Direct disability discrimination

279. The claimant claims that all allegations at paragraph 4 of the list of issues were direct discrimination because of her disability or her husband's disability. The claimant can bring a claim of direct discrimination because of her husband disability.

280. Allegations (a), (b), (e), (f), (g), (k), (l)(ii), and (l)(iii) are not proven and are dismissed on the facts.

281. The claims of direct disability discrimination in relation to the allegations found proven are dismissed for the reasons set out below.

Actual comparators

282. The actual comparators (Ms Harvey and Ms Adediran) are in materially different circumstances to the claimant and therefore not valid comparators. They were at a lower grade to the claimant and at a lower level on the pay-scale. One of the reasons for the restructure was that the claimant's work could be done at their lower band, at a lower cost to the respondent. They also worked full time and there is no evidence that they had any or extended periods of sickness absence. They are of no assistance for the associative direct discrimination claim. There is no evidence or suggestion that they cared for someone with similar needs to that of the claimant's husband.

283. We considered whether it was appropriate to construct a hypothetical comparator, or whether we should move to the reason why question. The issue of the correct comparator was addressed by the parties in their submissions. The respondent made written submissions on the point and the claimant had the opportunity to reply to those submissions orally. There was no evidence adduced on this issue. We concluded that it was appropriate to address the reason why question, which we have done at paragraphs 287 below. However, we have also, for completeness, made conclusions about

the hypothetical comparators, and whether there was less favourable treatment.

284. We constructed the hypothetical comparators as follows:

284.1 For the purposes of the claim about the claimant's disability, we considered a person with the claimant's abilities but without her specific disability. The hypothetical comparator would also require time away from work for medical appointments, sickness absence, and would need to work part-time.

284.2 When constructing a hypothetical comparator for the purposes of the claim about the claimant's husband's disability, we considered a person who was the main carer for a person with different health needs to the claimant's husband, but of the same gravity, such that the caring responsibilities of the hypothetical comparator would be the same as those of the claimant.

Less favourable treatment

285. There are no findings of fact, or evidence, that support the conclusion that the claimant was treated less favourably than a hypothetical comparator.

286. Considering the allegations found proven:

286.1 Allegations (h) and (i): we conclude that a hypothetical comparator who had appointments for their own health needs, or to care for someone else, would also have been referred to, and reminded of, the respondent's policy about attending medical appointments.

286.2 Allegation (j): we conclude that a hypothetical comparator who had not completed their work due to taking annual leave for respite from their caring responsibilities, would also have been informed of the issue and priorities would similarly have been agreed with them to address the issue.

286.3 Allegation l(i): we conclude that a hypothetical comparator with the same occupational health recommendations as those in OH 5 would have been asked the same question, as it was broadly consistent with that advice and a fair and reasonable interpretation of it.

286.4 Allegations (m)-(r): we conclude that a hypothetical comparator in the same 8(b) role and with the same requirement to work part-time, and the same amount of sickness absence, would also have been selected for redundancy and their employment terminated. We conclude that their part time working would also have caused difficulties for the team, and this, and their sickness absence, would have created the context for the respondent to identify that the team could operate without their role. We also conclude that there would have been a similar failure to consider alternatives to selection for redundancy, as the same factors about the small restructure and human resources oversight as set out at paragraph 272 above would have existed.

Reason why

287. When looking just at the reason why question, we conclude that this was not because of the claimant's disability, or because of her husband's disability. There is evidence on which we can conclude why the alleged discriminator(s) acted in the way that they did. Considering the allegations found proven in turn:

287.1 Allegations (h) and (i): we conclude that the reason for the treatment was to ensure compliance with the respondent's policy for requesting time off for medical appointments.

287.2 Allegation (j): we conclude that the reason for the treatment was to ensure that work allocated to the claimant was completed, to ensure the effective operation of the IG team.

287.3 Allegation l(i): we conclude that the reason for the treatment was to put in place the recommendations of occupational health and to balance these against the needs of the respondent.

287.4 Allegations (m)-(o) and (r): we conclude that the reasons for the restructure, which lead to the claimant being served notice, and her employment terminated, are those set out at paragraphs 131-135 above. Whilst the claimant's part time working and sickness absence was part of the reasoning / context, her own disability, or that of her husband's was the reason why.

287.5 Allegation (p): we conclude that that the reasons why the respondent failed to consider alternatives were: (1) this was a small template redundancy which did not require these considerations to be documented; (2) Mrs Kitchener assumed that there were no alternatives to redundancy given the need she had identified for lower grade posts outside of London and the fact that the claimant was the only one in the small team at her senior level; and (3) Mrs Begom failed to ensure that Mrs Kitchener had carried out this step of the process, and had simply informed her early on in the process to ensure that she set out the rationale for the restructure. We note that the claimant's disability related part time hours and absence were part of the background to the restructure. That is a separate issue. We conclude that the claimant's own disability, or that of her husband's, was not the reason why.

<u>Discrimination arising from the claimant's disability</u>

288. Allegations (a), (b), (e), (f), (g), (k), (l)(ii), and (l)(iii) are not proven and are dismissed on the facts.

289. We found that the claimant's sickness absence, the need for reduced hours, flexible working, and inability to work full time were matters arising in consequence of her impairments (see paragraph 38 above). We conclude that these were matters arising in consequence of her disability, which is based on the same impairments.

290. Turning to the allegations found proven. We conclude that the claims relating to allegations (m)-(o) and (q)-(r) succeed, but all other claims fail. The reasons for our conclusions are set out below.

Allegation (h)

291. The claim of discrimination arising from the claimant's disability fails, for the reasons set out below.

292. First, there was no unfavourable treatment. Mrs Kitchener was simply reminding the claimant about the policy for attending medical appointments. The policy provided that the claimant could request annual or unpaid leave for such appointments. Given that the claimant was at this stage working 24 hours but being paid as if she was working full time hours, and she was also accruing leave on a full-time basis, we conclude that taking unpaid or annual leave for these weekly one-hour sessions was something that the claimant could reasonably accommodate even with her disability. We conclude that the fact that the claimant made no specific request for paid time off for these appointments, and that she did not raise a complaint about this until her claim form, indicates that she accepted that the policy was a reasonable one and she did not take issue with being reminded about it: this reminder was not unfavourable treatment.

293. Second, the treatment was not something arising in consequence of the claimant's disability. The reason for the treatment was to ensure compliance with the respondent's policy for requesting time off for medical appointments. There was not even a loose connection with the something arisings. The appointment was for counselling with the claimant's husband. We have found that the claimant did not explain to the respondent, or prove, the alleged impact of attending the appointment on her own energy levels.

294. Given these conclusions, it was not necessary to consider the justification defence.

Allegation (i)

295. The claim of discrimination arising from the claimant's disability fails for the reasons set out below.

296. First there was no unfavourable treatment. Mrs Kitchener was simply reminding the claimant about the policy for attending medical appointments. The policy provided that the claimant could request annual or unpaid leave for such appointments. Save for the weekly counselling sessions, the claimant was not attending regular or frequent medical appointments. Given that the claimant was at this stage working 24 hours but being paid as if she was working full time hours, and she was also accruing leave on a full-time basis, we conclude that taking unpaid or annual leave for the weekly one-hour counselling sessions, or any other ad-hoc medical appointments, was something that the claimant could reasonably accommodate even with her disability. We conclude that the fact that the claimant made no specific request for paid time off for medical appointments, and that she did not raise

a complaint about this until her claim form, indicates that she accepted that the policy was a reasonable one and she did not take issue with being reminded about it: this was not unfavourable treatment.

297. Second, we conclude that the reason for the treatment was to ensure compliance with the procedure. We conclude that there was a causal connection with something arising in consequence of the claimant's disability, namely her sickness absence. Mrs Kitchener's witness statement at paragraph 53 explains that the claimant's sickness absence was part of the context to the conduct.

298. Given the conclusion on unfavourable treatment, it was not necessary to consider the justification defence.

Allegation (j)

299. The claim of discrimination arising from the claimant's disability fails for the reasons set out below.

300. First, we conclude that there was no unfavourable treatment. We conclude that the statement in the 14 December 2020 email was mildly negative and was unwanted. But we do not conclude that that meets the (low) threshold of being a disadvantage or detriment. This was simply raised with the claimant and priorities were set. There was no disadvantage or detriment to her. Mrs Kitchener was just informing the claimant of the facts. If, contrary to this conclusion, this was unfavourable treatment, the complaint would still fail as it did not arise in consequence of the claimant's disability.

301. Second, the treatment was not something arising in consequence of the claimant's disability. The reason for the treatment was to inform the claimant that her work had not been completed, and to set priorities to ensure the smooth operation of the IG team. We conclude that this was not even loosely connected with the claimant's disability. The pleaded case as set out in the list issues was that this was to do with annual leave that the claimant took as respite from caring for her husband, rather than in relation to her own disability.

302. Given the conclusion on something arising, it was not necessary to consider the justification defence.

Allegation (l)(i)

303. The claim of discrimination arising from the claimant's disability fails for the reasons set out below.

304. First, there was no unfavourable treatment. We conclude that Mrs Kitchener's statement to the claimant on 25 January 2021 was broadly consistent with the advice of OH 5. We conclude that, if the claimant was not sick for three to four weeks, that would imply that her symptoms had improved. We therefore conclude that Mrs Kitchener's interpretation of OH 5, as expressed to the claimant on 25 January 2021, was a fair and reasonable interpretation of OH 5. Given that the claimant made no

complaint about this until her claim form, we conclude that she was not unduly concerned by this statement at the time, and it was not unfavourable treatment.

305. Second, the treatment was because of something arising in consequence of the claimant's disability, namely her need for reduced hours and her inability to work full time. This was the precise issue that Mrs Kitchener spoke to the claimant about.

306. Given the conclusion on unfavourable treatment, it was not necessary to consider the justification defence.

Allegations (m), (n) and (o)

307. There was unfavourable treatment. Selection for redundancy is clearly unfavourable treatment, as admitted by the respondent.

308. The treatment was because of something arising in consequence of the claimant's disability, namely her sickness absence, need for reduced hours and her inability to work full time:

    308.1 The proposed restructure was first raised in response to OH 4 and the recommendations for part time working due to the claimant's disability. The background to this was Mrs Kitchener's frustration about the claimant's sickness absence and the difficulties that the claimant's part time hours were causing for the team.

    308.2 The claimant's disability related absence and the transfer of her work to others was the context that made the respondent realise that they could restructure the team by deleting the 8(b) role.

    308.3 The selection for redundancy was justified on the basis of structure charts that reflected the claimant's disability related part-time role.

309. The justification defence is considered separately below.

Allegation (p)

310. The claim of discrimination arising from the claimant's disability fails for the reasons set out below.

311. First, not considering alternatives to selecting the claimant for redundancy was unfavourable treatment because, if such alternatives had been considered, they may have avoided the claimant's selection for redundancy and the termination of her employment.

312. The unfavourable treatment was not something arising in consequence of the claimant's disability:

    312.1 We conclude that the failure to consider alternatives was an omission on the part of Mrs Kitchener, and Mrs Begom, that arose because (1) this was a small template redundancy which did not require these

considerations to be documented; (2) Mrs Kitchener assumed that there were no alternatives to redundancy given the need she had identified for lower grade posts outside of London and the fact that the claimant was the only one in the small team at her senior level; and (3) Mrs Begom failed to ensure that Mrs Kitchener had carried out this step of the process, and had simply informed her early on in the process to ensure that she set out the rationale for the restructure itself.

312.2 Although the claimant's disability related part time hours and sickness absence were part of the background to the restructure, we conclude that there was not a sufficiently close connection for this to be something arising in consequence of her disability. Just because the restructure itself was something arising in consequence of disability, does not mean that every act or omission in that process is also something arising in consequence of disability.

313. Given the conclusion on something arising, it was not necessary to consider the justification defence.

Allegations (q) and (r)

314. Serving the claimant with notice and terminating her employment was plainly unfavourable treatment, and the respondent did not dispute this,

315. The treatment was because of something arising in consequence of the claimant's disability, namely her sickness absence, need for reduced hours and her inability to work full time, for the reasons set out at paragraph 308 above. Serving the claimant with notice of her dismissal and terminating her employment were the last stages in the restructure process. The rationale for the restructure remained the same. Part of the reason for terminating the claimant's employment was her disability related need to work part time. The context to the restructure was her disability related part time working and sickness absence.

316. The justification defence is considered separately below.

The justification defence

317. We conclude that the aim at paragraph 8(a)(i) of the list of issues: *"meeting operational requirements and maximising service levels"* is a legitimate one. We conclude that it represents a real, objective consideration.

318. We conclude that the aim at paragraph 8(a)(ii) of the list of issues: *"maintaining a stable workforce of employees who remain in and are fit for work"* is not a legitimate aim. We conclude that the reference to employees being *"fit for work"* is potentially discriminatory. In any event, we conclude that the respondent did not have this aim as the evidence relied upon by the respondent does not relate to this aim.

319. The respondent relies on paragraphs 65 to 68 and 89 to 91 of Mrs Kitchener's witness statement which set out matters relating to financial and operational efficiency, which relate to the 8(a)(i) aim.

320. We have found, as set out at paragraphs 131-134 above, that the reasons for the restructure included financial and operational factors. We conclude that the respondent restructured the IG team to provide line management in Luton and to have further information rights resource at a lower grade than 8(b). The respondent needed to restructure with no or limited financial impact. A financial impact at or below £5,000 was acceptable: that is consistent with Mrs Kitchener's evidence that the £3,852 cost of the restructure was a small differential.

321. We conclude that the respondent's treatment of the claimant at allegations (m)-(o) and (q)-(r) was in pursuit of the legitimate aim at paragraph 8(a)(i).

322. We conclude that this treatment was not a proportionate means of achieving that legitimate aim.

323. We have concluded that the respondent did not consider alternatives to selecting the claimant for redundancy. In accordance with the guidance from **Harrod** at paragraph 41, we have scrutinised whether suggested alternatives, involving less or even no discriminatory impact, might be, or could have been, adopted.

324. First, we considered the alternative of moving the claimant to a part time role working 24 hours on a permanent basis:

    324.1 The claimant stated in her response to the consultation that she was prepared to take a salary cut.

    324.2 If the claimant's pay had been reduced to reflect her part time hours this would have enabled the respondent to recruit a band 5 information rights role in Luton.

    324.3 This would have achieved the operational aim of having line management in Luton as the structure charts showed that it was the band 5 who had immediate line management responsibility for the team in Luton.

    324.4 This alternative would also have provided the respondent with increased information rights resource at a lower grade. First, in terms of the new band 5 information rights role in Luton. Second, by retaining a part time 8(b) post, the band 7 IG Manager would have had capacity to perform more information rights work as set out in their job description, rather than having to pass these duties to a new band 7 information rights post to enable them to carry out some to the 8(b) IG tasks.

325. Second, we considered the alternative of moving the existing band 5, 6 or 7 from London to Luton. We conclude that this was a less realistic proposal as it would have been more disruptive. But, as this was not considered as an

alternative, we had no evidence about whether the post holders would have consented to be relocated, and the practicable feasibility of this proposal.

326. The burden of proof is on the respondent. We weigh and balance the needs of the respondent against the discriminatory effect. We note that the more serious the disparate adverse impact, the more cogent must be the justification for it.

327. We conclude that there were alternatives available to the respondent that it did not consider at the time. We conclude that those would have involved less or no discriminatory impact. We conclude that although those alternatives may not have produced exactly the structure that the respondent desired, there were viable alternatives to achieve the respondent's legitimate operational needs, that might have been, or could have been adopted.

328. We therefore conclude that the respondent has not proven that the treatment in allegations (m), (n), (o), (q) and (r) was a proportionate means of achieving a legitimate aim. Accordingly, these claims succeed.

Failure to make reasonable adjustments

PCP

329. We conclude that the respondent had the PCP at paragraph 20(a) of the list of issues. Although this PCP does not use precisely the same wording as the respondent's procedure for requesting time-off for medical and dental appointments [229], we conclude that they both mean the same thing. Employees were not given paid time off to attend appointments. Therefore, they had to attend the appointments in their own time, whether that was outside of working hours, by rearranging working hours, whilst on annual leave, or on unpaid leave.

330. Insofar as paragraph 20(b) goes any further than paragraph 20(a) we conclude that this was not applied by the respondent. We note that the claimant was given paid time to attend counselling appointments on 23 November 2020.

Substantial disadvantage

331. We conclude that the claimant was not disadvantaged by the PCP. The claimant was working 24 hours a week but being paid for 37.5 hours. She was also accruing annual leave on a full time basis. The respondent's procedure enabled the claimant to take annual leave or unpaid leave to attend medical appointments. We conclude that the claimant had more than sufficient additional paid personal time to use to attend the weekly one-hour counselling sessions. The small reduction in personal time was ameliorated by the additional personal time, or paid time away from work, afforded to the claimant.

332. Even if the claimant was disadvantaged, she has not proven that this was at a more than minor or trivial level. The claimant has not proven that the one-

hour counselling appointment caused her significant (i.e. more than minor or trivial) increased fatigue.

Proposed adjustments

333. We conclude that the proposed adjustments were not reasonable, given the amount of paid time off that the claimant was afforded by virtue of working 24 hours per week whilst being paid full time hours and accruing annual leave as a full time employee. We conclude that the claimant's working pattern was a reasonable adjustment which addressed any (minor or trivial) disadvantage. It was not reasonable to make any further adjustments.

Knowledge of substantial disadvantage

334. Even if we had found that the claimant was substantially disadvantaged by the PCP, we would have found that the respondent did not know, and ought not reasonably to have known, about this. The claimant made general expressions to Mrs Kitchener about her reduced energy levels, but this specific disadvantage was not expressed by the claimant or occupational health.

<u>Discrimination arising from the claimant's husband's disability</u>

335. We have found that the Tribunal does not have jurisdiction to hear this claim.

336. Even if we had found that the Tribunal had jurisdiction, we would have dismissed the claims, for the reasons set out below.

337. First, allegations (a), (b), (e), (f), (g), (k), (l)(ii), and (l)(iii) are not proven and are dismissed on the facts.

338. Second there was no unfavourable treatment in respect of allegations (h), (i), (j) and (l)(i), as set out at paragraphs 292, 296, 300 and 304 above. Those allegations would therefore be dismissed on that basis.

339. Third, turning to the something arisings at paragraph 39 of the list of issues. There was very little evidence about the amount of care that the claimant provided for her husband and the way that this affected her tiredness and disability. We conclude that:

    339.1 We have found that the claimant attended weekly counselling sessions with her husband and provided a few hours of daily care to him. We conclude that the something arising at paragraph 39(a) is proven.

    339.2 We accept that the claimant's caring responsibilities would have caused her fatigue, particularly in the context of her disability. This is also consistent with her need for respite weekends and the medical evidence in the occupational health reports and GP records. We conclude that the something arising at paragraph 39(b) is proven.

339.3 Insofar as the something arising at paragraph 39(c) (the exacerbation of the claimant's own disability by caring for her husband) relates to the claimant's increased fatigue, it adds nothing to the something arising at paragraph 39(b). Insofar as paragraph 39(c) goes further than that, there was no evidence to support that conclusion and we therefore reject it.

339.4 We conclude that the something arising at paragraph 39(d) is not proven. The medical evidence was that it was the claimant's own disability that caused her to be absent and unable to work full time, rather than her caring responsibilities.

340. Further in respect of allegation (j):

340.1 We have concluded that there was no unfavourable treatment. Even if there was unfavourable treatment the claim still would have failed for the following reasons.

340.2 The context of this allegation was the claimant not completing her allocated work as she had taken annual leave for the purpose of respite from caring for her husband. This does not directly relate to the something arisings set out at paragraph 39 of the list of issues. It is arguable that this falls within the something arising at paragraph 39(b) of the list of issues. But, even if we had reached that conclusion, we would have found that the treatment was objectively justified. The respondent had a legitimate aim to meet operational requirements and service levels. Ensuring that work tasks were completed was treatment in pursuit of that aim. Mrs Kitchener informed the claimant of the work that had not been completed and worked with her to set priorities to ensure that her tasks were completed. We conclude that this was reasonable, appropriate, and proportionate management action, particularly given the claimant's seniority. We conclude that there was no a less discriminatory alternative.

341. Turning to the remaining allegations at (m)-(r):

341.1 We conclude there was unfavourable treatment.

341.2 Allegation (p) was not something arising in consequence of the claimant's husband's disability. We conclude that the failure to consider alternatives was an omission on the part of Mrs Kitchener, and Mrs Begom, that arose because (1) this was a small template redundancy which did not require these considerations to be documented; (2) Mrs Kitchener assumed that there were no alternatives to redundancy given the need she had identified for lower grade posts outside of London and the fact that the claimant was the only one in the small team at her senior level; and (3) Mrs Begom failed to ensure that Mrs Kitchener had carried out this step of the process, and had simply informed her early on in the process to ensure that she set out the rationale for the restructure. Although the claimant's disability related part time hours and sickness absence were part of the background / context to the restructure, we conclude

that this was not something arising in consequence of the claimant's husband's disability.

341.3 In respect of the remaining allegations, we conclude that these were matters arising in consequence of the claimant's disability. But we conclude that the claimant's sickness absence and inability to work full time were not matters arising in consequence of her husband's disability.

Indirect discrimination: same disadvantage

342. We have found that the Tribunal has jurisdiction to hear this claim.

343. We conclude that the claimant has not advanced or proven a claim of indirect discrimination: same disadvantage.

344. The claimant submitted at paragraph 19 of the parties' joint note that *"alternatively, C's position is that her claim would succeed under the amended s.19A EqA 2020 as all constituent parts of it are met in this case"*.

345. The claim as presented in the list of issues and at the hearing was not of this nature. The claimant did not allege that she suffered the same disadvantage by the PCP as those who share a relevant protected characteristic.

346. Even if that was the claim that was presented, we would have dismissed that claim for the reasons set out below.

347. As to the PCP at paragraph 42(a) of the list of issues:

347.1 We conclude that this is insufficiently precise and therefore not proven. The pleaded PCP does not specify the minimum number of hours or the consequence of not working such hours. If the claimant asserts that employees had to work a minimum number of hours or be dismissed, that is not proven. The guidance from NHS England at the material time prevented the respondent from dismissing employees who were absent with covid-related illness.

347.2 Even if this PCP were proven, we had no evidence about the effect of Early Onset Alzheimer's Disease on the person with the condition, or their carer, to make any conclusions about the group disadvantage set out at paragraph 43 of the list of issues:

347.2.1 We presume that there would come a point when those suffering from Early Onset Alzheimer's Disease would be unable to continue working, but we had no evidence about that, or the way in which the disease affects different individuals.

347.2.2 We had no evidence about general caring responsibilities for those with Early Onset Alzheimer's Disease. We had no evidence on which to conclude that those caring for someone with Early Onset Alzheimer's Disease would be substantially

disadvantage by a requirement to work a minimum number of hours.

347.2.3 We reject the argument that those with Early Onset Alzheimer's Disease would be subject to unfavourable comments, as there was no evidence of this.

347.2.4 We reject the argument that carers for those with Early Onset Alzheimer's Disease would be subject to unfavourable comments. We accept that they may be reminded about the respondent's procedure for attending medical appointments outside of working time, but that does not (in our conclusion) amount to an unfavourable comment.

347.3 The acts found proven at paragraph 4 of the list of issues did not amount to the substantial disadvantage at paragraph 43 of the list of issues:

347.3.1 Allegations l(i) and (m)-(r) were related to the claimant's inability to work full time. However, this inability to work full time was caused by her own disability, rather than her caring responsibilities.

347.3.2 Allegations (h) and (i) were about the claimant taking time off work for counselling appointments, which we have found was part of her caring responsibilities. We reject the allegation that the claimant was subject to unfavourable comments. She was merely reminded of the respondent's procedures.

347.3.3 We have found that the claimant was not subject to unfavourable treatment in respect of Mrs Kitchener's email that forms the basis of allegation (j). The background to this was the claimant's annual leave for respite purposes. Even if that was enough to amount to an unfavourable comment, as alleged, the claim would still fail as the claimant has not proven the PCP or group disadvantage.

348. As to the PCPs at paragraph 47 of the list of issues:

348.1 The PCP at paragraph 47(a) was applied by the respondent (see paragraph 329 above). Insofar as the PCP at paragraph 47(b) goes further than the PCP at paragraph 47(a), we conclude that it was not applied by the respondent, for the reasons set out at paragraph 330 above.

348.2 We had no evidence about the amount of care required for someone with Early Onset Alzheimer's Disease and therefore paragraph 48 is not proven.

348.3 The claimant was not placed at a substantial disadvantage by the PCPs, for the same reasons as set out at paragraph 331-332 above.

Indirect discrimination: family and friends association

349. We have found that the Tribunal does not have jurisdiction to hear this claim. Even if the Tribunal had had jurisdiction, we would have dismissed the claim for the reasons set out at paragraphs 347-348 above.

Jurisdiction: time limits

350. ACAS early conciliation commenced on 5 August 2021. Any act that took place before 6 May 2021 is therefore potentially out of time.

351. Allegations (n), (o), (q) and (r) took place after 6 May 2021 and are therefore in time.

352. Turning to allegation (m): provisionally selecting the claimant's role for deletion. The claimant's pleaded case relates to acts on or after 6 May 2021 [19 paragraphs 25-27] and is therefore in time. Insofar as this relates to earlier acts (such as the meeting of 16 November 2020) we conclude that there was conduct extending over a period within the meaning of section 123(1)(a) EqA as this was part of a restructure process that culminated in the termination of the claimant's employment. Alternatively, we would have found that it was just and equitable to extend time pursuant to section 123(1)(b) EqA because (1) the claim is meritorious; (2) the delay is short and has not prejudiced the respondent; and (3) the claimant's disability caused her fatigue which would have made it more difficult for her to present her claim on time.

353. All other allegations have been dismissed and it is therefore not necessary to consider jurisdiction.

Employment Judge Gordon Walker
Dated: 14 December 2023

AMENDED AGREED LIST OF ISSUES

Claims relating to C's Disability
Disability – section 6 Equality Act 2010

~~It is not disputed that C was disabled from approximately April 2021.~~

1. ~~Prior to approximately April 2021, was~~ Was C disabled ~~by long covid~~ for the purposes of s6 EqA 2010 ~~by having a particular disability? Prior to April 2021 At~~ at the material times by virtue of the following impairments: headaches, fatigue, exhaustion, muscle pain, cognitive problems with memory concentration, tightness in her chest and shortness of breath?
   a. Did those impairments have a substantial and long term adverse effect on her ability to carry out normal day to day activities?
   b. With regard to whether the effect was long term:
      i. had it lasted for at least 12 months?
      ii. if not, was it likely to last for at least 12 months?
   c. If there were periods where it ceased to have a substantial effect, was it likely to reoccur?

2. R accepts that C was disabled by virtue of these impairments from 2 February 2021.

R's knowledge of C's disability

3. From what date did R have actual or constructive knowledge of C's disability? R accepts that it had constructive knowledge of C's disability from 8 February 2021, and actual knowledge from 18 March 2021.

Discrimination arising from a disability contrary to section 15 Equality Act 2010

4. Did the following acts occur?

   a. on or around September 2020, on an occasion when C had confided that she was unwell, Ms Kitchner making a comment to the effect of "*where does that leave us*"? [ET1, §20(a)];

   b. Ms Kitchner asking C whether she had a "*plan B*". This comment was made in a one-to-one call between C and Ms Kitchener which C believes took place in early November 2020. The comment was made to C when she mentioned that she may need to reduce her hours ahead of her Occupational Health appointment on 13 November 2020 [ET1, §20(b)];

c. ~~on one of C's rest days, Ms Kitchener failed to support C and instead sent C an angry email relating to an incident where C had been informed that a particular person (Ben Wright – Senior Doctor) would review a draft Data Protection Impact Assessment and that person denied having knowledge of the project. C submits that Mr Wright was wrong and that C had sent the DPIA to him prior to 28 October 2020. C submits that a more supportive approach would have been to give C the benefit of the doubt that the email had been lost within Dr Wright's inbox. Indeed when C called Dr Wright following the agitated email from Ms Kitchener he readily accepted that the DPIA was his responsibility and said he was happy to assist. [ET1, §21(b)];~~

d. ~~Ms Kitchener failed to support C and intervene on C's behalf when a colleague had been unwilling to speak to C / run their policy past C on the basis that they did not know who C was. Ms Kitchener expressed her displeasure to the Claimant about unresolved situations. C experienced significant problems with getting Caroline Ogunsola (Senior Nurse) to meet her in September 2020. When the meeting was eventually arranged in late September/Early October Ms Ogunsola said "I don't know who you are and I don't need your approval for my policy". Rather than explaining directly to Ms Ogunsola what C's role was and why she did need her approval, Ms Kitchener insisted that C arrange a further meeting with Ms Ogunsola to discuss the same policy. C submits that on first hearing of Ms Ogunsola's hostile resistance to C's approach Ms Kitchener should have stepped in and used her seniority to ensure that Ms Ogunsola complied with C's requests. Instead C was knowingly further exposed to dealing with a colleague who was hostile and disrespectful towards C. [ET1, §21(a) and (c)];~~

e. on or around Thursday 26 November 2020 Ms Kitchener expressed a concern to the Claimant that C's part time working would cause problems for C's colleagues [ET1, §22(a)];

f. Ms Kitchener repeated her concern that C's part time working would cause problems for C's colleagues at subsequent meetings / during subsequent discussions with the Claimant each week for four weeks during their one-to-one meetings on Mondays following the beginning of the Claimant's reduced hours arrangement [ET1, §22(b)];

g. Ms Kitchener insisted on receiving updates from C on the position of all of C's matters every Wednesday and Friday stating that she was concerned that otherwise things would "slip" during C's absences [ET1, §22(c)];

h. on 23 November 2020 Ms Kitchener stated that a counselling session that C attended with her husband in respect of her husband's dementia diagnosis needed to be undertaken by the Claimant in her own time [ET1, §23(a)];

i. On 26 November 2020 Ms Kitchener informed C that she would have to "make up" any time taken for medical appointments or caring, despite C

explaining the difficulty with this in circumstances where her energy was used up by such appointment / caring needs [ET1, §23(a)];

j. ~~in or around the end of November 2020 / beginning of~~ After 11 December 2020 (most likely on ~~7~~ 14 December 2020), Ms Kitchener stated that C taking days annual leave to enable C to have two days away from caring for her husband whilst carers looked after him had caused problems [ET1, §23(b)];

k. on 11 January 2021 in a catch-up meeting, when C explained to Ms Kitchener that not all of her husband's carers were able to travel to them due to rising COVID infection rates, Ms Kitchener was not supportive and instead asked "*What will you do if you don't have a carer for him?*" [ET1, §23(c)]

l. Ms Kitchener made repeated comments about the need to increase the Claimant's hours / putting C under pressure to increase her hours, despite C's ongoing ill health, including:

    i. on 25 ~~February~~ January 2021 Ms Kitchener stated that if C took no sick leave in the next four weeks then Ms Kitchener would need to increase C's hours;

    ii. Ms Kitchener informed the Claimant that "*if you manage a fortnight without taking sick leave you will need to increase your hours*", despite this not being part of R's policy;

    iii. towards the end of March 2021 Ms Kitchener again raised the issue with C of needing to increase C's hours [ET1, §24].

m. provisionally selecting C's role for deletion [ET1, §§25-27];

n. confirming the decision to select C's role for deletion [ET1, §§28-29];

o. the selection of C for redundancy [ET1, §§25-30];

p. not considering alternatives to selecting C for redundancy, such as merging other roles in order to preserve C's role [ET1, §33(g)];

q. giving the Claimant notice of dismissal [ET1, §30];

r. terminating C's employment [ET1, §30].

5. Did the acts referred to above at paragraph 4 above amount to unfavourable treatment?

6. Did the following matters arise from C's disability?

    a. C's periods of sickness absence; and/or
    b. C's need for reduced hours; and/or
    c. C's need for flexible working; and/or
    d. C's inability to work full time.

7. If yes, was that unfavourable treatment because of something arising from C's disability?

8. If yes~~, in respect of §§4(a) to (l)~~:

   a. Did R have the following aims:
      i. meeting operational requirements and maximising service levels?
      ii. maintaining a stable workforce of employees who remain in and are fit for work?
      ~~iii. compliance with R's duty of care towards its employees?~~

   b. If yes, were those aims legitimate?

   c. If yes, were R's acts a proportionate means of achieving those legitimate aims?

Direct Discrimination contrary to s 13 Equality Act 2010

9. Did the acts set out at §4 above occur?

10. If yes, did they amount to less favourable treatment?

11. If yes, was that less favourable treatment because of C's disability?

12. The Claimant relies upon a hypothetical comparator. In addition, or in the alternative she relies upon two named comparators, Keshia Harvey and Ayomide Adediran, whose roles were not selected for deletion.

Harassment related to disability contrary to s 26 Equality Act 2010

13. Did the acts set out at §§4 ~~(a) to (4.l)~~, above occur?

14. If yes, did they amount to unwanted conduct?

15. If yes, was that unwanted conduct related to C's disability?

16. If yes, did that unwanted conduct have the purpose or effect of violating C's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

Failure to make reasonable adjustments contrary to s 20 Equality Act 2010

~~17. Did R apply the following PCPs?~~
~~a. a requirement to work a minimum number of hours?~~
~~b. a requirement to take annual leave in order to be well enough to attend work?~~

~~18. If yes, was C placed at a substantial disadvantage compared with others not suffering from her disability as a result of that PCP? Namely:~~

~~a. Did C need to take annual leave every Wednesday from 1 September 2020 until 14 January 2021 due to her ongoing fatigue that could not otherwise be used for its proper purpose?~~

~~19. If yes, did R take such steps as were reasonable to avoid that disadvantage. C alleges it would have been appropriate to:~~

~~a. allow C to have Wednesdays as a paid rest day;~~

~~b. alternatively, to allow C to have Wednesdays as an unpaid rest day;~~

~~c. sufficiently reduce C's hours (but maintain pay) in order that she did not need to take annual leave in order to recover from the effects of her disability;~~

~~d. alternatively, sufficiently reduce C's hours in order that she did not need to take annual leave in order to recover from the effects of her disability (without maintaining pay).~~

20. Did R apply the following PCPs?

a. a requirement to attend counselling appointments in the employee's own time? ~~[dates to be provided]~~ The dates relied upon are those set out at p.92 of the Tribunal Bundle.

b. a refusal to allow paid time off to attend counselling appointments?

21. If yes, was C placed at a substantial disadvantage as a result of that PCP compared with others not suffering from her disability, namely did she suffered a reduction in the personal time available to her to recover from such appointments, related to her tiredness.

22. If yes, did R take such steps as were reasonable to avoid that disadvantage. C alleges it would have been reasonable to:

a. permit C to attend counselling appointments during work time.

b. permit C to take paid time off to attend counselling appointments.

23. In respect of the above PCPs and disadvantages:

a. did R know that C's disability was liable to place her at a substantial disadvantage?

b. if not, ought R to have known that C's disability was liable to place her at a substantial disadvantage?

Claims relating to C's Husband's Disability

C's Husband's Disability

24. At all material times, ~~was~~ C's husband was disabled for the purposes of s6 EqA 2010 by virtue of suffering from Early Onset Alzheimer's Disease~~?~~.

25. If yes, at all material times, did R know or could it reasonably have known that C's husband was disabled?

Direct Associative Disability Discrimination because of the Claimant's husband's disability contrary to s 13 Equality Act 2010

26. Was C subjected to less favourable treatment because of her husband's disability.

27. Did the acts set out at §4 above occur?

28. If yes, did they amount to less favourable treatment?

29. If yes, was that less favourable treatment because of C's husband's disability?

30. C relies upon a hypothetical comparator. In addition, or in the alternative she relies upon two named comparators, Keshia Harvey and Ayomide Adediran, whose roles were not selected for deletion.

Harassment related to the Claimant's husband's disability contrary to s26 Equality Act 2010

31. Did the acts set out at §§4 (h) to (4.k), above occur?

32. If yes, did they amount to unwanted conduct?

33. If yes, was that unwanted conduct related to C's husband's disability?

34. If yes, did that unwanted conduct have the purpose or effect of violating C's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

Discrimination arising from the Claimant's husband's disability contrary to s 15 Equality Act 2010

35. Does the Employment Tribunal have jurisdiction to hear a claim of discrimination arising from associative disability?

36. If yes, was C subject to discrimination arising from a disability as a result of her husband's disability contrary to s15 Equality Act 2010, as interpreted in according with EU law and/or contrary to EU law, in both cases as preserved by the European Union (Withdrawal) Act 2018?

37. Did the acts referred to above at paragraph 4 above occur?

38. If yes, did the acts referred to above at paragraph 4 above amount to unfavourable treatment?

39. If yes, was that unfavourable treatment because of something arising from C's husband's disability, namely:

    a. C's need to care for her husband?
    b. the exacerbation of C's tiredness by caring for her husband?
    c. the exacerbation of C's own disability by caring for her husband?

d. the impact of the above in C's sickness absence / ability to work full time?

40. If yes:
    a. Did R have the following aims:
        i. meeting operational requirements and maximising service levels?
        ii. maintaining a stable workforce of employees who remain in and are fit for work?
        ~~iii. compliance with R's duty of care towards its employees?~~

    b. If yes, were those aims legitimate?

    c. If yes, were R's acts a proportionate means of achieving those legitimate aims?

Indirect Discrimination relating to the Claimant's husband's disability contrary to s 19 Equality Act 2010

41. Was C subject to indirect discrimination contrary to s 19 Equality Act 2010 as a result of her husband's disability, as interpreted in accordance with EU law and/or contrary to EU law, in both cases as preserved by the European Union (Withdrawal) Act 2018?

42. Did R apply the following PCPs?

    a. a requirement to work a minimum number of hours?
    ~~b. a requirement to take annual leave in order to be well enough to attend work?~~

43. If yes, did that place people with disabilities whose disabilities were the same as those of C's husband and/or those with caring responsibilities for people with the same disability as C's husband at a substantial disadvantage, namely (a) unfavourable comments and ultimately dismissal due to the inability to work for a minimum number of hours and ~~(b) the need to take annual leave that could not otherwise be used for its proper purpose and~~ (c) the inability to comply with the PCPs?

44. Did the acts referred to above at paragraph 4 above occur?

45. If yes, did those acts amount to the substantial disadvantage set out at §43 above?

46. If yes:
    a. Did R have the following aims:
        i. meeting operational requirements and maximising service levels?
        ii. maintaining a stable workforce of employees?
        iii. compliance with R's duty of care towards its employees?
    b. If yes, were those aims legitimate?
    c. If yes, were R's acts a proportionate means of achieving those legitimate aims?

47. Did R apply the following PCPs?

    a. a requirement to attend counselling appointments in the employee's own time?
    b. a refusal to allow paid time off to attend counselling appointments?

48. If yes, did that place those with caring responsibilities for people with the same disability as C's husband at a substantial disadvantage, namely a reduction in the personal time available to her to recover from such appointments?

49. If yes, was C placed at that disadvantage?

50. If yes:
    a. Did R have the following aims:
        i. meeting operational requirements and maximising service levels?
        ii. maintaining a stable workforce of employees?
        iii. compliance with R's duty of care towards its employees?
    b. If yes, were those aims legitimate?
    c. If yes, were R's acts a proportionate means of achieving those legitimate aims?

Jurisdiction – Section 123 EqA 2010

51. Were C's claims brought within three months of the date of the act complained of?

52. If not, did they form part of conduct extending over a period so as to fall within section 123(1)(a) EqA 2010?

53. If not, is it just and equitable to extend time pursuant to section 123(1)(b) EqA 2010?

~~**Remedy**~~

~~54. To what remedy, if any, is C entitled? In particular, is C entitled to:~~
~~a. a declaration?~~
~~b. a recommendation?~~
~~c. compensation for loss of earnings and pension?~~
~~d. compensation for injury to feelings?~~
~~e. Interest?~~