EMPLOYMENT TRIBUNALS

Claimant: **Miss Z Lu**

Respondent: **KPMG UK Ltd**

Heard at: **East London Hearing Centre**

On: **26-29 November, 3 December & (in chambers) 4 December 2019**

Before: **Employment Judge C Lewis**
Members: **Mr T Burrows**
Mrs B K Saund

Representation

Claimant: In person

Respondent: Mr K Wilson (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The Claimant's claim for unfair dismissal fails and is dismissed.

(2) The Claimant's claim for disability discrimination contrary to section 15 of the Equality Act discrimination arising from disability fails and is dismissed.

(3) The Claimant's claims for failure to make reasonable adjustments contrary to section 20 of the Equality Act 2010 fail and are dismissed.

(4) The Claimant's claim for disability related harassment contrary to section 26 of the Equality Act 2010 fails and is dismissed.

(5) The Claimant's claim for direct race discrimination contrary to section 13 of the Equality Act 2010 fails and is dismissed.

(6) The claims for direct discrimination because of religion or belief, and sex discrimination are dismissed on withdrawal by the Claimant

REASONS

1 By a claim form presented on 16 September 2018 (case number 3202004/2018) the Claimant brought complaints of discrimination, and harassment. The Claimant's employment terminated on 14 November 2018 and she presented a second claim on 10 February 2019 (case number 3200343/2019) bringing complaints of unfair dismissal, disability discrimination and claims for notice pay and holiday pay.

2 The combined claims were considered at a preliminary hearing on 23 May 2019 before Regional Employment Judge Taylor where the issues were clarified and following that discussion a draft list of issues were prepared by the Respondent and sent to the Claimant. The Respondent's position at this hearing was that having not received anything to the contrary from the Claimant it had understood this list of issues to be agreed. On the first day of this final hearing the Claimant confirmed that she wished to withdraw the claims for discrimination because of religion or belief and the claim for sex discrimination and clarified that the matters raised as sex discrimination were simply background in respect of which she relied on to support her claim for race discrimination. She confirmed that in respect of her claim for direct discrimination under section 13 she was comparing herself to Mr James Finnegan, a male non-Chinese employee not to Mr Elvin Zhao, other than that she confirmed that the list of issues stood as drafted by the Respondent.

3 Those issues were as follows:

UNFAIR DISMISSAL – s.94 ERA 1996

3.1 What was the reason for the Claimant's dismissal? The Respondent asserts that the dismissal was for a potentially fair reason namely conduct. The Claimant asserts that there was no potentially fair reason.

3.2 Did the Respondent, at the relevant time, have a genuine belief that the Claimant was guilty of the alleged misconduct?

3.3 If so, was that belief reasonably held?

3.4 At the time the belief was formed, had the Respondent carried out as much investigation into the matter as was reasonable in all the circumstances?

3.5 Alternatively, if the reason for the Claimant's dismissal was not conduct, was the reason for the Claimant's dismissal some other substantial reason ["**SOSR**"] due to the breakdown of trust and confidence between the Claimant and the Respondent?

3.6 Did the Respondent, in all the circumstances, act reasonably or unreasonably in treating that as sufficient reason for dismissing the employee? In particular, was dismissal within the band of reasonable responses? The Claimant relies on the following particular matters in support of the contention that the dismissal was unfair:

3.6.1 She could not sign the form updating her health status (AXA form).

3.6.2 The Respondent did not recognise or accept that she had depression when making its decision to dismiss.

3.6.3 The Respondent demanded that the Claimant sign a consent form in order to update them on her health status.

3.6.4 During the disciplinary process the Claimant received no help in regards to her health. For example, she was supposed to have a face-to-face meeting with the case manager from the insurance company and should have had cognitive behavioural therapy in 2018.

3.6.5 The disciplinary hearing was not long enough for all matters to be considered.

3.6.6 The start of the disciplinary process was delayed [by three weeks].

3.6.7 The investigation did not include matters raised during the grievance procedure.

3.6.8 The Respondent refused to change [or remove] Ms Angela Katsi as the investigation officer.

3.6.9 The Claimant did not receive the full investigation file before the disciplinary hearing.

3.6.10 Ms Katsi did not interview relevant witnesses, for example she should have interviewed Jonathan Bingham and the Banking Audit class of 2015 sponsor (who was involved in the learning with leaders mentorship programme).

3.6.11 The Claimant did not receive timely updates of the progress of the disciplinary procedure.

3.6.12 The disciplinary hearing did not take into account that the Claimant attended an informal meeting on 27 March 2018 with Ms Ginty, Ms Claridge and Mr Brunton (by telephone) to discuss a breakdown of communication. The Claimant will say that that was an important omission because it would have demonstrated that there were improvements being made towards the working relationships.

DISABILITY DISCRIMINATION

3.7 Was the Claimant a disabled person in accordance with the Equality Act 2010 [“**EQA**”] at all relevant times because of the mental impairment of low mood and/or depression and/or stress?

Discrimination arising from disability – s.15 EQA

3.8 Did the Respondent treat the Claimant unfavourably as follows:

3.8.1 October 2017: the Claimant did not receive a promotion or fixed bonus for performance in the financial year 2016/17.

3.8.2 19 October 2017: Mr Brunton reported the Claimant to the police.

3.8.3 20 October 2017: Mr Brunton followed the Claimant around the office and/or a female HR employee followed her into the ladies’ lavatory.

3.8.4 20 October 2017: compelling her to attend a meeting with Mr Wilson, whom she did not know.

3.8.5 20 October 2017: in the meeting, Mr Wilson failed to explain why the police had been called, failed to answer the Claimant’s questions and did not take notes.

3.8.6 In mid-December 2017: failing to carry out the pay/performance review which the Claimant had missed.

3.8.7 On 5 & 27 February 2018, and end of March 2018: restricting the Claimant’s card access to the office. In respect of the March 2018 restriction, the Claimant asserts that the person responsible was Ms Emily Ginty.

3.8.8 In April 2018: Mr Brunton and Ms Gills followed the Claimant around the office.

3.8.9 Following the Claimant’s suspension on 3 April 2018, not handling the disciplinary investigation properly because of: (a) a 3-week delay at the outset; (b) the appointment of Ms Angela Katsi as investigating officer; (c) separating the grievance and disciplinary processes; (d) not investigating the grievance and/or (e) including disciplinary allegations which were untrue and unsubstantiated by evidence.

3.9 If so, was it because of something arising in consequence of disability? The Respondent states that it acted because of concern for the Claimant’s safety due to her behaviour and health. The Claimant will say that the Respondent’s conduct generally was because they were aware of her mental fragility and her increased susceptibility to stress.

3.10 If so, has the Respondent shown that any unfavourable treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on its duty of care to employees (including the Claimant).

3.11 Did the Respondent know, or could it reasonably be expected to have known, that the Claimant was a disabled person?

Failure to make reasonable adjustments – s.20 EQA

3.12 Did the Respondent know, or could it reasonably be expected to have known, that the Claimant was a disabled person?

3.13 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP(s):

3.13.1 A requirement to "hot desk".

3.13.2 A requirement to use standard office equipment/laptop.

3.13.3 Seeking to resolve workplace difficulties internally in the first instance.

3.13.4 A requirement to go through telephone triage to access Occupational Health and/or a requirement to return company property on suspension?

3.14 Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at the relevant time, in that:

3.14.1 She needed a stable working environment to feel safe.

3.14.2 She encountered difficulties concentrating and could not work as effectively between multiple documents on a single laptop.

3.14.3 Her panic attacks and mental health problems made an independent person necessary.

3.14.4 The Claimant has a phobia about use of the telephone and without her laptop found it more difficult to access occupational health.

3.15 If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

3.16 If so, would it have been reasonable for the Respondent to take the following steps:

3.16.1 An allocated desk on level 6?

3.16.2 Providing the Claimant with multiple computer screens?

3.16.3 Appointing an independent mediator?

3.16.4 Arranging a face to face meeting with Occupational Health?

Disability-related harassment – s.26 EQA

3.17 Did the Respondent engage in unwanted conduct as follows:

3.17.1 19 October 2017: Mr Brunton reported the Claimant to the police.

3.17.2 20 October 2017: Mr Brunton followed the Claimant around the office and/or a female HR employee followed her into the ladies' lavatory.

3.17.3 3 April 2018: Mr Brunton and Ms Gills followed the Claimant around the office.

3.18 If so, did it relate to the protected characteristic of disability?

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

RACE DISCRIMINATION

Direct race discrimination – s.13 EQA

3.20 Was the Claimant treated in the following way:

3.20.1 Being paid less than Mr James Finnegan, a male non-Chinese employee with a UK/EU passport?

3.21 If so, was it because of race or for some genuine reason in no sense whatsoever connected to the protected characteristic? The Respondent will argue that there were material differences between the Claimant's circumstances and that of the named comparators.

LIMITATION/TIME LIMITS

3.22 Were all of the Claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the EQA?

3.23 If not, would it be just and equitable for the Tribunal to extend time in relation to any or all of the allegations?

REMEDY

3.24 If the Claimant is successful in any of her causes of action, above, what compensation should she be awarded if any (including for injury to feelings in the case of any proven act of discrimination)?

3.25 Would the Claimant have been dismissed in any event because of her alleged misconduct or SOSR? If so, should compensation be reduced to reflect that? The Respondent will argue that it should.

3.26 Did the Claimant contribute to her dismissal? If so, should compensation be reduced to reflect that? The Respondent will argue that the Claimant did so contribute.

3.27 Has the Claimant taken reasonable steps to mitigate any losses? The Respondent's position on this will depend on the Claimant's mitigation evidence.

3.28 Should there be any adjustments in compensation awarded for any relevant failure to adhere to the ACAS Code?

The evidence

4 The hearing bundle consisted of 1,857 pages and the witness statements ran to almost 170 pages. The Tribunal heard evidence from the Claimant and from 10 witnesses for the Respondent, including, Mr Brunton, who gave evidence from Australia.

5 The Claimant's relied on depression and anxiety as a disability under the Equality Act 2010. The Respondent accepted that she suffered from that condition and that they had knowledge of her disability at the relevant time. The Tribunal took regular breaks both during the conduct of the proceedings and when the Claimant was giving her evidence. It was accepted that it was appropriate for Mr Wilson to adopt what he described as a "light touch" approach to cross-examination and he was not required to put every point in issue to the Claimant given the wide ranging nature of disputes in evidence but to be allowed to rely on the documentary evidence and his witnesses' evidence to counter the Claimant's case consistent with the principles articulated in *NHS Trust Development Authority v Saiger* [2018] ICR 297 at 97 to 102 and *City of London Corporation v McDonnell* [2019] ICR 1175 at 50.

6 Mr Wilson, provided a proposed reading list at the outset of the hearing and the Tribunal read the documents in that list as well as those referred to in the witness statements. The reading list consisted of 26 items, some of which ran to numerous pages. There was a discussion as to whether a number of YouTube videos that had been uploaded by the Claimant had been transcribed and those parts which were in Mandarin translated by the Respondent. The Respondent had not done this, considering it to disproportionate, and had invited the Claimant to identify specific parts of the videos that she wished to have transcribed, the Claimant had failed to respond to that invitation. Mr Wilson provided a running order for his witnesses so that the Claimant knew which witnesses she had to prepare questions for each day and in which order. The tribunal spent the remainder of the first day reading.

7 On the morning of the second day there was some discussion as to which documents the Claimant had received and whether she had a complete bundle. She

was referring to an electronic version of the bundle on her laptop computer. The majority of the bundle had been provided to her in July and additional documents had been provided to her in October, when it was identified that some pages had been omitted from the email these were sent to the Claimant again just before the hearing. These last documents had been added to the bundle at the Claimant's request; they were inserted into the bundle as stated on the index which had been sent to the Claimant with the majority of the documents.

8 The Claimant gave evidence and was cross-examined by Mr Wilson over the course of the second day and the morning of day three of the hearing. The Respondent called its first witness in the afternoon of day three [day one having been spent reading]. The Respondent called Ms Gill, Human Resources Business Partner; Victoria Hollingdale, Performance Leader; Emily Ginty, Human Resources Assistant; Siobhan Regan-Presky, Human Resources Business Partner; Angela Katsi, Investigating Officer; Timothy Jones, Tax Partner, member of the disciplinary panel; Amanda Towers, Human Resources Business Partner HR, member of the disciplinary panel; Matt Brunton, Performance Leader; Seema Khan, Human Resources Assistant and Simon Gilbert, Risk Partner, Partner member of the appeal panel.

Findings of fact

9 The Tribunal made the following findings based on the evidence before it.

10 The Claimant's employment with the Respondent began on 5 October 2015. She was recruited on the graduate trainee programme.

The Claimant's rate of pay

11 On 3 September 2017 the Claimant raised a query with Victoria Hollingdale, her Performance Leader, asking why she was paid less than her peers. The Claimant gave evidence about problems dating back to 2016 when she had appealed against her grading in her performance review. The Claimant described her grading as a low-low and stated that she had appealed it to a low medium-low.

12 The Respondent called evidence to counter the Claimant's contention that she was ranked the same as James Finnegan i.e. her contention that they were both ranked medium-low and therefore should be paid the same salary. The Claimant alleges she was paid £1,000 less than James Finnegan and also that Mei Bin and Zou Jie, who were both female non-UK/EU Citizens in Banking Audit, were paid the same but both ranked medium-low. The Claimant alleged that Mr Alvin Zhao in Private Audit was also ranked medium-low but was paid the same as Mr Finnegan.

13 We were taken to a table extracted from the Respondent's pay records [at page 1576] which showed that the Claimant was paid more than James Finnegan in 2016 and 2017. Mr Finnegan's employment began in 2016. The Claimant was paid £1,000 more than Mr Finnegan in 2016 and £4,000 more in 2017. The Claimant was paid less than Alvin Zhao in 2016 and 2017 although they started on the same salary. Victoria Hollingdale gave evidence that Rebecca Martin looked into the performance data which revealed that the reason for the difference in pay was the difference in the Claimant's performance rating. The Claimant had been put on a performance

development plan in 2016 when she had been graded ‘not meeting expectations’; the Claimant successfully appealed against that grading and as a result was moved from ‘not meeting expectations’ to ‘low’. Ms Hollingdale explained that there were two elements to the performance rating, IRZ and POT but only the IRZ rating affected the pay and bonus.

14 The Claimant was taken to the performance document. Her response was that she was placed on a performance plan in the middle of her first year, after six months, and successfully appealed out of that and therefore her pay should not have been affected. We are satisfied that having successfully appealed against being placed on the performance plan, the Claimant progressed a grade each year from Grade E1 to E2 to E3 and was paid a pay increase and bonus each year. We are satisfied that her level of pay was based on the grade and performance and that had the Claimant not been successful in her appeal she would not have received a bonus or progressed to the next grade.

15 The evidence presented to us does not support the Claimant’s claim. She was in fact paid more than her comparator, Mr Fiinegan. We are satisfied the pay difference in respect of Mr Zhao was due to the difference in their performance rating. In respect of the other comparators mentioned, Mei Bin was rated low- low and then she failed her exam. Zou Jie was rated low- medium and then medium -medium and was able to improve. The Claimant was ranked low- low then medium- low and then low: of those two rankings each year only the IRZ rating affected the pay. Mr Finnegan was ranked as medium and then medium-medium. Feedback on the Claimant was mixed, some positive and some negative including the comment: “had a tough start to her E1 year and currently is not performing to the expected standard”. Her year end review for 2015 to 2016 [page 1576f] described it as ‘a tough year’ and internal feedback reflected that the Claimant needed to ‘develop her communication skills when she interacts with team and colleague, and: “was meeting expectations however based on the development points she is behind her year group”. By contrast Mr James Finnegan for 2015/2016 had no negative comments and at 1576q the comment was: “promote within two years”, at 1576s for 2016 to 2017 his comment recorded: “consistently meets expectations”. At 1576u for Mr Alvin Zhao in 2015/2016 it was recorded that: “he was meeting expectations”, for 2016 to 2017 at 1576x: “he was consistently meeting expectations”. The Tribunal notes that the Claimant’s recollection of the grading that she was given was not the same as is documented.

16 In 2017 the Claimant failed her professional qualification exams in June and was put down for resits in July. The Claimant did not take the resit in July.

17 In August 201 Victoria Hollingdale had cause to email the Claimant about training that she had booked herself on to ‘without authority’ and which was ‘not deemed suitable, justified or appropriate’. Victoria Hollingdale also informed the Claimant that Rebecca Martin has looked into the query about her pay [190].

18 On 11 October 2017 Victoria Hollingdale again emailed the Claimant about booking into a course despite specific emails saying that it was not appropriate [p.215].

19 In October 2017 Ms Hollingdale was due to handover her Performance Leader role to Mr Brunton before she went on maternity leave. Ms Hollingdale was aware that Ms Lu had a number of ongoing issues that Mr Brunton was likely to inherit, and discussed with Mr Brunton the possibility that she continued to deal with at least some of the issues before going on maternity leave. In order to try to get some of these issues resolved Ms Hollingdale and Rebecca Martin sought a meeting with the Claimant, which was arranged for 12 October. The Claimant cancelled that meeting to visit her GP and then went off sick which meant the matters were unresolved and passed to Matt Brunton when Victoria Hollingdale went on maternity leave. Emily Ginty was due to take over in the HR role from Rebecca Martin when Rebecca Martin also went on maternity leave.

20 A handover meeting between Matt Brunton, Victoria Hollingdale, Rebecca Martin and Emily Ginty took place on 12 October 2017. There were 12 items on the agenda. These are set out in Ms Hollingdale's witness statement at paragraph 15. Those issues included, a number of identified expenses discrepancies which might have been coding errors; an issue about the amount of training booked by the Claimant and especially the number of training courses which she signed up that were not relevant for her role; her timesheets showed a discrepancy between the amount of holidays booked and what was shown on Retain (a timesheet tool which showed availability for booking for client work); also in respect of holiday requests, the pattern of holiday requests meant that there were frequent short holiday periods making it very difficult to place the Claimant on client audit engagements. Ms Hollingdale suspected that this was a deliberate ploy on the Claimant's part. Ms Hollingdale noted her concern the Claimant potentially suffered from significant mental health issues that needed to be monitored by the Respondent. In respect of her PQA studies Ms Hollingdale noted that there had been an issue that had arisen because the Claimant had not been advised that her failed exam and then failure to re-sit it in July meant that she should not be attending college. The Claimant had apparently been told that the exam failure would not impact on her onwards study pathway but this had been predicated on her re-sitting the exam in July, however she did not re-sit the exam in July and presented a sick note instead: this had an impact on her onwards pathway and there had been an email from the PQA the team advising the Claimant of this fact.

21 Another concern raised was that instead of raising her issues using the appropriate channels, the Claimant was seeking to have a number of informal meetings with partners in both Insurance and Banking to raise her various issues and informal grievances. Ms Martin suggested it had reached the point where the Respondent may need to sit down and address this directly with the Claimant.

22 It was noted that the Claimant was very upset that her application to join the Junior Client Council had not been approved. Victoria Hollingdale had explained that in order to approve that application the candidate would need to be rated as medium medium or above and that she had declined to nominate the Claimant and two others who had inadequate performance levels.

23 It was also discussed that the Claimant was keen to move to the Banking department but that there could not be formal secondment because the pattern of leave and training the Claimant had entered on her 'Retain' status meant that she unavailable for full-time work until January 2018. It was suggested that the Claimant's

time could be structured as three months working in Banking from January to March 2018 while technically remaining within the Insurance Audit department but that she would need a Banking performance manager during this period.

24 Lastly, Ms Hollingdale noted that the Claimant had raised concerns with her that she had been asked to move out of her apartment with only one month's notice by her landlord and she wanted to know what support the firm could provide. It was agreed that Ms Hollingdale would go back to her say that there was not much that the Respondent could offer although they might be able to provide some additional leave to help with the logistics of undertaking the move.

25 On 13 October 2017, following the meeting with Victoria Hollingdale, Mr Brunton emailed the Claimant to introduce himself [p.209]. He informed her that Vicki [Hollingdale] had mentioned that she may have some capacity to do some work and asked the Claimant if she was able to meet with him to talk it through. The Claimant did not respond to that email until after 2:30 in the afternoon when she responded to say that all was not well. Mr Brunton replied that he was sorry to hear that the Claimant was not well and asked if she could catch up with him at 4 o'clock. If she was able to meet sooner that would be better as he pointed out that there would not be much time to complete the work he had in mind between 4 and 5:30. We are satisfied that it was clear from his email that he was not expecting the Claimant to work beyond 5:30 to complete the work. They met at 4 o'clock. Mr Brunton went through the work and told the Claimant not to stay late, explaining 'do what you can until 5:30' and he confirmed this in an email at 4:43 stating, "do what you can and send across at 5:30". The Claimant told the tribunal that she had to stay late to complete the work.

26 The Claimant sent an email later on that evening, at around 9 or 10 o'clock according to Mr Brunton, which clearly indicated that she had not done what he had asked her to do and that she had ignored his instructions about finishing at 5:30 and sending a status update. It later transpired that the Claimant had put through an expenses claim for dinner and the cost of a taxi home in connection with that work. Mr Brunton was clear there was no need for her to work late and he certainly had not authorised the Claimant's expenses in connection with the work. Mr Brunton told the Tribunal that based upon this episode and his subsequent observations of the Claimant, he formed the view that she had an expectation that she would focus almost exclusively on her training, and was trying to avoid any work while she was training/studying.

Contacting other partners

27 On 13 October 2017 Charlotte Lo, a Banking Partner, emailed Vicki Hollingdale to confirm that the Claimant had contacted her and had been "very forceful in trying to get time into my diary". Ms Lo had thought that the Claimant was looking for some mentoring, but that the Claimant's behaviour and approach indicated to Ms Lo that she was not qualified to provide that support.

28 On 16 October 2017 George Quigley, another Partner at KPMG, emailed Anastasia Fraser-Robinson and Gillian Hardy with his thoughts on a text that he had received from the Claimant. He noted that having met the Claimant once during one of the academy breakfasts she asked for his thoughts on some HR and career issues she was having and he had directed her towards more appropriate channels in the first

instance, rather than going directly to one of the partners. He then received a text from the Claimant which indicated she was 'not in a great place' and sought advice and assistance on how this should be escalated. [p.238]

29 On 16 October 2017, in response to Victoria Hollingdale's email explaining the position about the junior client council nominations the Claimant emailed as follows: "I don't understand why my position of distressed was not considered but if I'd gone out and slept with him I would probably would have a higher ranking no?" [p.239]

30 At 17:10 on 17 October Victoria Hollingdale sent an email to the Claimant (copying in Emily Ginty) highlighting the inappropriateness of the Claimant's comments in her email about sleeping with a partner and also pointing out that she was still awaiting a response to her recent email about asking about the Claimant's whereabouts that week. The Claimant had previously had annual leave booked in but Victoria Hollingdale had also been made aware that the Claimant was booked on to a course. Victoria Hollingdale had made clear that the Claimant's attendance on this course was not necessary, nor was it appropriate for her role and would mean that she would be unavailable for client work. She informed the Claimant that she did not approve the Claimant's attendance on this course and warned that should the Claimant proceed to attend the course despite the clear instruction given, it may be addressed as a disciplinary matter. Ms Hollingdale asked the Claimant to update her, or Matt Brunton, with her whereabouts for that week and to ensure that this was reflected on her timesheets

31 Also on 17 October, Matt Brunton emailed the Claimant to say that he understood she had recently attended a breakfast meeting at which she had met George Quigley and that she has since contacted him regarding her current situation, and that George had directed her to speak to her PL. He explained that George had reached out to him following a text he had received from the Claimant the day before regarding concerns that she had raised and therefore he was trying to contact the Claimant to address those concerns as soon as possible. He suggested that they arranged to meet as part of the handover to him as Performance Leader and to discuss concerns that she had so that he can understand how the firm could best support her going forward.

32 The Claimant responded that evening informing Mr Brunton that she was not feeling the best, stating that she was feeling extremely helpless, she will try her best to keep sane for the rest of the week, she was desperately in need of speaking to George [later referred to as her mentor] and that she was now scheduled to see the GP on Thursday and hopefully she would survive. Mr Brunton told us that he was very concerned given the content of the email.

The meeting on 19th October 2017

33 On 19 October the Claimant was in work and Mr Brunton had intended to meet up with her to discuss her concerns and handover. He also wanted to find out what was causing her emotional and inappropriate behaviour at work. The notes of that meeting are at pages 114 to 116 of the bundle. The Claimant arrived in casual clothes. Mr Brunton asked the Claimant how she was and thanked her for meeting with him. She responded that she was not okay. She had some papers with her that she wanted

to go through. Mr Brunton asked her to take her time but she responded that she could not take her time as he was only available for 60 minutes instead of the 90 that she had requested. He apologised and said he had a client to attend but in fact the meeting continued for two and a half hours. Mr Brunton expressed particular concern in respect of her email from 17 October [p.246] and that she had said she was not sure how stable she would be for a discussion when he had invited her to a meeting and that she had asked HR not to attend.

34 The Claimant then passed Mr Brunton a document with the date and time of the meeting and setting out a list of conditions relating to what would be covered and what he could and could not disclose or take notes about. The document contained a section at the bottom for him to sign. He read the document and handed it back without signing it. Mr Brunton told the Claimant that he wanted to address the concerns she had raised in her emails earlier that week and her text message to George Quigley on 16 October. The Claimant wanted to know which emails, and told Mr Brunton that she had no trust in Insurance or the department and that she was not stable following a number of incidents with her previous People Leader which HR were aware of. She described herself as being at breaking point and very stressed with the emails that had been sent that week and that she was not coping. Mr Brunton explained that he recognised that from the comments in her emails and wanted to discuss it with her, and that he wanted to know how her visit to the GP had gone and whether she was fit for work. At this point the Claimant produced a note from her GP which stated that she was she was signed off as not fit to be in work for at least the next week. The Claimant confirmed that she had told her GP she was not fit to work and needed the note to support this, that she did not feel comfortable sending the note to Wende Miambanzilla (Resource Coordinator) and did not want her Retain records updated to reflect that she was out of the office or on sick leave. She did not want people to think that she was "losing it". The Claimant agreed that she was not fit for work. Mr Brunton recommended that she take time off as directed by her GP and spend some time at home concentrating on her health and continue visiting her GP to seek support and treatment, that once she was fit for work they could have another meeting and continue the discussions.

35 Mr Brunton told the tribunal that the Claimant then stated that she did not feel safe at home because her flat was apparently several floors up, he thinks she referred to it being on the fourth floor, and that there were no people at home and she had no support there. She told him that she felt safe in the KPMG office as there were 24/7 security guards and surveillance cameras and so on. She said that she 'did not want to be wheelchair bound and stuck in a corner unable to use her brain or work which was what she wanted to do'. He acknowledged this but told her that while she had a GP note confirming she was not fit for work she should not be in the office.

36 Mr Brunton wanted to involve HR in the discussion because at this point he was very concerned for the Claimant's wellbeing but the Claimant refused to allow him to get HR to join the meeting even by telephone. He acknowledged that the Claimant did not wish to have HR involved in the discussion but given her comments he believed that he did need to involve HR so that they could provide advice to both the Claimant and to him as to what they should do. The Claimant refused to allow him to contact HR, said she did not trust them: at the time, she had not yet met Emily Ginty and she was upset and felt it was inappropriate that she had been given two pregnant women to

handle her case, i.e Rebecca Martin previous HR rep and Victoria Hollingdale her former people leader [both of whom handed over their respective roles as a consequence of going on maternity leave] and this had distressed her. Mr Brunton acknowledged that the handover of both HR and PL at the same time was difficult for her but that it was not appropriate to make comments about the fact that they were both pregnant, it was unfortunate but not deliberate.

37 Mr Brunton told the Claimant that he did need to speak to HR given her comments and the GP note. The Claimant said she would rather be left alone until early the next week, that she was meeting Be Well on the Monday morning and George Quigley in Monday afternoon which she felt would help. She confirmed that George was the 'mentor' that she referred to in her emails. Mr Brunton recommended that the Claimant take the next few days off work, she was certified not fit and that he had a duty to her as an employee but also to other employees in the department and in the office as well as in the firm, that she should stay at home or with friends where she felt safe and concentrate on her health. The Claimant again said she did not feel safe at home because she did not know what she might do there, since there was no support or supervision, and she had no-one else to support her. She asked whether he was suggesting that she fly back to Singapore to be with her family or was he saying that KPMG only cared about her when she was in the office and not when she was outside the building. The notes show that Mr Brunton made it clear that that was not what he was suggesting. There was some further discussion about the need to involve HR. Miss Lu then brought the meeting to an end.

38 After the meeting Mr Brunton phoned Emily Ginty but had to leave a voicemail; since he was very concerned for the Claimant's wellbeing he called Elizabeth Edwards, the HR Business Partner, to discuss the situation and seek advice, particularly in relation to the comments made by the Claimant which suggested that she might be suicidal or at least at risk of harming herself in some way. He also wanted advice about the Claimant being at work despite having a sick note stating that she was unfit for work.

39 Ms Edwards confirmed that the appropriate course of action was to reach out to the Claimant and try to speak to her about the fact the firm could not have her at work while she was signed off sick and not being fit for work. Mr Brunton tried to call the Claimant but was not able to get a response or leave a voicemail. Shortly afterwards, Mr Brunton was told by another Performance Leader, that he had observed the Claimant on the 11th floor in the Insurance Audit department talking to a colleague, he described her as laughing and having a chat. Mr Brunton sent the Claimant an email informing her that he needed to speak to her after having spoken to HR [p.235]. He then walked several floors of the building to see if he could find the Claimant who had taken it upon herself not to sit with the rest of the Insurance Audit department. He could not find the Claimant and later received an email from her [p.234] apologising for having missed his email and confirming that she had left the building. HR also confirmed with Security by checking the access card logs. HR sent Mr Brunton an email acknowledging their conversation and referencing the available external support services, confirming that Ms Lu should remain at home concentrating on her health until she was fit to return to work. Mr Brunton also told the Claimant to prioritise her Be Well appointment. Be Well was KPMG's wellbeing service provider. [see page 234].

40 Ms Edward of HR notified the non-emergency police line because of their concerns as to the Claimant's whereabouts and her wellbeing in the light of the comments she had made. The police informed Mr Brunton and Ms Edward that they would make a visit to her home and check in on the Claimant. The police also attended the office to gather some background about their concern for her mental health and wellbeing and asked some questions about the conversation with the Claimant and the situation as a whole. The police took contact details from the people they spoke to and requested that Security put a flag, or tag, on the Claimant's pass so that the Respondent would know if she returned to the building.

41 Despite the content of Mr Brunton's email the Claimant returned to the office at about midnight that night. Because of the flag on her access card Security informed the police who had already made a visit to the Claimant's home earlier in the day, the police attended the office. The police spoke to the Claimant to make sure she was okay and then gave her a lift home.

42 The Claimant was very critical of the Respondent for having contacted the police and having put a security flag on her access card. Mr Brunton told the tribunal that he was very concerned about the Claimant, he thought that she was expressing suicidal thoughts and thoughts of self-harm, coming to the office when she was not fit for work and that she was behaving in an unpredictable way. He was very concerned for her and had a duty of care towards her but was also conscious he had duty of care towards the hundreds of other employees in the building. It was HR who had in fact contacted the police when they had been unable to get a response from the Claimant to their voicemail or emails.

43 The Claimant told us that after the meeting with Mr Brunton she went to a drinks reception and then on to the Opera. She had returned to the office at about midnight, because her friend had called her while she was on her way home and she wanted somewhere quiet to take the call. The police had attended and the Claimant was very upset but her friend had persuaded her to accept their offer of a lift home. She then discovered that the police had already been to where she lived earlier that day due to the Respondent not being able to contact her.

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44 Notwithstanding the advice from Matt Brunton to stay at home the Claimant attended the office the following day. Mr Brunton was made aware that she had come into the office. He was anxious to speak to her in the presence of HR to address her fitness to be at work and to reiterate the advice that she should not attend the office if she was not fit to do so. He told us that this was out of concern both for the Claimant's wellbeing and for other employees within the office at the time. The Claimant made it clear that she was not willing to attend the meeting with Mr Brunton and sought to avoid doing so. She claims that she was followed around the office by Matt Brunton and Elizabeth Edwards.

45 The Claimant told the tribunal that she entered the office to have lunch with her friends and that she was having lunch with them in the canteen on the 13th floor when Mr Brunton approached her several times which caused her distress. She complained that she was not given any notice of the requirement to attend a meeting and she was

stressed out at the time and did not know who would be in the meeting until the last minute.

46 The Claimant alleges that Matt Brunton followed her around the office and got ‘the HR lady’ to follow her into the female toilet and forced her to have a meeting with Mostyn Wilson, a ‘bald’ Partner that she has never worked with. She also alleges that she was ‘under distress but they did not care’ and they ‘refused to comment about calling the police on her and did not care about her reputation or how it affected her health’.

47 Mr Brunton accepted that he did follow the Claimant briefly around the office in order to try to persuade her to attend the meeting while she was trying to avoid him. He was concerned about her wellbeing and the fact that she had attended the office having been told not to do so. Mr Brunton was accompanied by Elizabeth Edwards from HR who was there to support both Mr Brunton and the Claimant and since they were concerned about the Claimant’s wellbeing. Elizabeth Edwards follow the Claimant when she entered the toilets. They did eventually persuade the Claimant to agree to a meeting with Mr Brunton and Mostyn Wilson and with her friend supporting her. During the meeting it was explained to the Claimant that the Respondent had a duty of care not only to her but also to other employees and that while she was signed off as not fit to work, she should stay at home and focus on getting well. The Claimant was handed a letter dated 20 October which summarised this [p.1465]. This letter was also emailed to her. She was accompanied from the office by Mostyn Wilson.

48 The Claimant relies on the conduct of Mr Brunton on the 19th and 20th and of October 2017 and Elizabeth Edwards on the 20th October 2017 as being harassment related to her disability. Mr Brunton told the Tribunal that his actions on those days was entirely motivated by his concerns for her wellbeing and his awareness that KPMG owed a duty of care towards all its staff including, but not limited to, the Claimant. The Respondent did not dispute that the Claimant had not met Mr Wilson up until that date. He was brought in and was involved because he was the relevant People Partner in the Audit department.

49 The Claimant asserted that she was entitled to attend the office to meet her friends for lunch and that the Respondent was trying to prevent her from having a social life. She did not dispute that she was trying to avoid speaking to Mr Brunton and that she refused to attend a meeting with him when he asked her to.

50 Having heard all the evidence, we are satisfied that on this occasion the Claimant was choosing to ignore the fact that her performance leader (her line manager), had given her an instruction that she should not be at work when she had a sick certificate signing her off sick, and to ignore his request that she attend the meeting. We found this conduct was part of a pattern of selectively ignoring the Respondent’s management instructions when she chose to do so, or when it suited her. We are satisfied that it was reasonable for Mr Brunton and Ms Edwards to follow the Claimant in order to inform her that she should not be at work, when she chose to walk away from them.

51 We accept Mr Brunton’s evidence that he had no intention to harass the Claimant and we will return to the question of whether it was reasonable for her to find

their conduct on that occasion to be harassment, in our conclusions.

52 The Claimant was clearly very distressed. At her appointment with the Wellbeing councillor on the following Monday she was advised to write down how she felt about events and she did this in an email which she sent to herself [page 961], on 23 October 2017. In that email the Claimant sets out why she felt the encounters to be distressing; she acknowledges that she was avoiding having a meeting and that was the purpose of Matt Brunton and Elizabeth Edwards following her; she refers to Mostyn Wilson as 'the bald partner', and notes that he has told her that if she comes into work when her doctor says she is not fit her pass will be disabled.

53 The Claimant also records in relation to the police turning up on 19 October, that she was told: "the policeman told me KPMG was worried and called the police to check if I was fine".

54 The Claimant did not appear to show any acknowledgement or recognition that she was in the workplace and that she was not simply able to avoid or refuse to attend meetings when requested to attend by management.

55 We accept that the Respondent were genuinely concerned for the Claimant's wellbeing and also due to her erratic and emotional behaviour for the other employees who were in the building. Having considered the wording of the letters from Mr Wilson and the email from Matt Brunton the both emphasised that the Claimant is to remain at home or with friends, away from the office, and attend her BeWell appointment to prioritise her health.

56 The Claimant commenced a period of certified sickness absence. Her GP's statement of fitness to work recorded that she was unfit to work due to severe stress and subsequent fitness at work certificates refer to stress at work. The Claimant met the BeWell psychotherapist on 23 October 2017, this was through AXA which was a service provided by the Respondent to its employees. The Claimant was absent from work from 20 October to 12 December 2017. By January 2018 she was at work with modifications in place, i.e. not travelling to client sites.

October to December 2017 – background complaints in respect of consent forms, occupational health reports and referrals for counselling

57 On 28 November 2017 Matt Brunton emailed the Claimant asking for an update [p.280] noting that she had removed consent to share the AXA occupational health report with KPMG. Mr Brunton pointed out that the report from OH was a useful tool to guide the Respondent on how they can support the Claimant. On 22 November 2017 [p.281] Emily Ginty had received an email from AXA PPP Healthcare to confirm that they had booked a face-to-face appointment with the Claimant on 24 November as requested by her over the phone.

58 On 6 December Matt Brunton emailed the Claimant again [pgs 282-283] in response to her email of 4 December [p.284] in which he asked for another occupational health therapy session on 5 December in the afternoon. The Claimant stated that she did not stop the report from being issued but was not comfortable with

the notes being scanned in and that the previous location was uncomfortable and the therapist was unfriendly and not understanding. She also asked for details of the therapist's qualifications so that she can check on him/her before meeting them. In Mr Brunton's response he explained the Claimant's removal of consent for her notes to be scanned was treated by the occupational health adviser as a removal of consent to produce a report and therefore her case had been closed. As her case was closed Emily Ginty would be able to make another referral on her behalf but it is important to note that the management report would be written and shared with the Claimant, Emily and Mr Brunton. The Respondent referred the Claimant to the policy on sick pay and cooperation with OH and also to the fact that her sick pay was due to reduce to 75% once her absence went over 280 hours. Mr Brunton informed the Claimant that he wanted to let her know about another support service the firm had through Aviva, who offer rehabilitation support as well as group income protection; he informed the Claimant that both the firm and Aviva would need her consent to share her details with them before they can make contact.

59 The Claimant responded on 6 December 2017 [page 282]:

> "I would first like to make it clear that I do not appreciate the emails statements made to me which are stating things I did not say or do. This has happened over multiple occasions."
> …
> "I give my consent regarding the group income protection/salary protection and for the information to be shared with Avia."

The Claimant later pointed to this response to suggest that she had given her consent to a further OH report being produced. However this was understood to be consent given specifically in respect of the income protection arrangement. At the end of the email she states:

> "With regards to how I am doing my likely to returning back to work, I have no comments as I do not have the qualifications to action this as per the forced meeting with the bald partner and yourself and Rob on 20 October 2017."

60 The Claimant returned to work with a restriction not to visit client sites. She arrived at work without having arranged a returned to work meeting. Matt Brunton emailed her at 11:05 on 12 December to inform her that until he saw a copy of the fit note and they can schedule a return to work meeting, there was an expectation that she would not be in the office. He reminded her that she had her work laptop and was free to use it to catch up on emails etc and that they needed to arrange a fresh occupational health referral.

61 The return to work meeting took place on 13 December 2017 and it was agreed that the Claimant should use the period up to mid-January 2018 getting back up to speed with her emails and catching up on any mandatory training that she had missed. Matt Brunton asked the Claimant to keep him and Emily Ginty informed as to what she was working on and how she was getting on. The intention was to allow her to transition back to work gently whilst waiting the outcome of a new OH referral.

62 There was an exchange of emails between the Claimant and Matt Brunton on 7 January and 10 January 2018 [pgs.396 to 398] prior to their meeting on 16 January

to discuss outstanding issues that had been raised by the Claimant. In her email of 7 January the Claimant referred to Mr Wilson as the bald partner: in his response Mr Brunton pointed out that this was not the first occasion on which the Claimant had referred to Mr Wilson in that way, that she knew his name and had used it in previous emails, as well as copying him into an email the previous week, so she was clearly aware of his name and that her reference to him as "bald partner" was "highly inappropriate, offensive and unprofessional" and that if she continued to address him or other colleagues in this manner disciplinary action might be taken.

63 Mr Brunton proceeded to identify a number of the Claimant's concerns and acknowledged that there were outstanding matters to be addressed in their meeting on 16 January. He asked the Claimant to email Emily and himself with a list of all the issues that she would like to discuss that still remain open, so that they could discuss them and with a view to closing them off, and then arrange for a meeting later in the week to discuss the OH report, following her appointment on 12 January and to discuss and agree a return to work plan. He also asked her to update him on what she was working on and for how long each week as he had not received an update from her as to what she was doing and what days she had been in the office. He concluded with: "I am trying to support you as best I can with your return to work, but I do need some cooperation from you with this".

64 The Claimant took issue with some of the points that he raised and asked for a list of what was handed over by Vicky Hollingdale. Matt Brunton responded [p.395] on 15 January 2018 confirming the purpose of the meeting on the 16th was to address any outstanding issues or concerns that she had so that he could inform and support as appropriate. This would enable them to focus on the Claimant's return to work and working environment over the next few months. He pointed out that if she did not wish to discuss these openly with Emily Ginty and himself as part of an informal process then she could discuss them directly with a colleague within HR as per the grievance procedure. He again reiterated that he hoped to use the meeting to understand what she was currently working on and what she has been doing as he had not received an update from her since the last working week of December despite previous request for an update. He noted that if they have not received the OH report it would be useful to catch up and discuss how she was feeling and whether she required any further support.

65 At the meeting on 16 January Matt Brunton and Emily Ginty discussed transitioning the Claimant back into audit related work, in line with her role as an audit assistant, on a modified basis until an OH report was received. The Claimant raised a number of issues dating back to her first six to 12 months with the firm and grievances she had raised then. She was informed that these had already been investigated and resolved. Mr Brunton told us that he listened carefully to the points the Claimant was raising and sought to identify which ones were past issues that had been resolved and which were still ongoing. The issues that were current were then discussed to see how they could progress or resolve these with the Claimant.

66 Mr Brunton followed up that meeting with an email dated 18 January [p.403] in which he informed the Claimant that he had identified an opportunity with Banking Audit (the team the Claimant had said she wished to work in) for her to assist with some work over the next few weeks; that he had spoken to the team to check the

suitability of the work and confirmed that it: “should be relatively gentle in terms of demands on you which I was hoping would be a good starting point” and that they could consider the situation as to a longer term solution once the OH report had been received. He suggested that the Claimant should make contact with the Director in Banking Audit who was leading the work. However, the Claimant refused to engage with the relevant Director and complained instead that this opportunity had not been discussed with her in advance.

Occupational health report 23 January 2018

67 An occupational health report dated 23 January 2018 recorded that the Claimant was suffering from severe stress ‘which she blames on work relationships’. The report indicated that the Claimant’s absence had been due to severe stress which had caused her to become unwell, the stress was essentially work related and boiled down to relationship issues between her and her manager within the department. The Claimant was being prescribed antidepressant medication but had not been referred for counselling or psychological support through her GP. She had some counselling sessions organised through work. In 2017 she had had six sessions which she found helpful. She had asked for more but this request had not been granted at that time.

68 The diagnosis in the occupational health report was documented as stress and depression, but also noted that the depressive illness had not at that point lasted for 12 months.

69 In terms of rehabilitation or recovery it was suggested that a first step could be open and constructive dialogue between Ms Lu and her managers with a view to identifying stresses that made her unwell and with a view to attempting to address them. It was suggested:

> “It may be that such dialogue does need to take place with an external mediator present, in order to ensure objectivity and to maintain structure in such a meeting.”

The OH practitioner had already noted that they were unable to identify any particular specifics in respect of the trigger. It was noted that the Claimant, “suffered from concentration issues as a secondary consequence of her depression and consequently as much stability as can be achieved would be desirable; the Claimant had expressed an opinion that hot desking caused her quite significant stress and did not help the current illness and on that basis if she could be allocated a dedicated workstation to use this would be desirable”.

70 In response to questions asked by the Respondent, the OH doctor, Dr Vohra, expressed the opinion that the Claimant was not psychologically well enough to be coping with her academic pathway, this should be a temporary situation which it was anticipated would resolve within the next three to four months.

71 The Claimant’s GP notes were also in the bundle. On 9 April 2018 the GP notes record that the Claimant reported that she was still having difficulty at work, no mediators [had been arranged], she had had counselling through work but was finding it difficult to access communication through work emails, her employer had suspended her from work pending investigation, [she] does not like talking over the phone or

having meetings that were not pre-arranged.

72 The Claimant told us that she did not like talking about personal matters on the phone although she had made contact with AXA Wellbeing in October and spoke to Aviva on the phone on other occasions which we shall come to later. Other than recording that the Claimant did not like to talk on the phone, there is nothing to suggest that she was at any particular disadvantage by having to undergo a phone triage system to obtain a referral.

73 The OH report dated 23 January 2018 was initially only provided to Emily Ginty because the Claimant refused to give permission for anyone else to see it. She subsequently changed her mind and allowed access to the report and provided a copy of it to Matt Brunton and Mostyn Wilson on 6 February 2018.

Work space

74 The Claimant did not dispute that she had taken it upon herself to work in a breakout area on the 6th floor of the building instead of working on the 11th floor with the rest of the Insurance department. Mr Brunton told the tribunal that this gave rise to some difficult issues. The Claimant told him that she had chosen to do this because she did not get on with her team. After seeing the OH report dated 23 January the Claimant requested a fixed desk and Mr Brunton arranged to provide her with a fixed desk, as opposed to a hot desk, on the 11th floor where her team worked. It was not considered appropriate to provide a fixed desk in a breakout area and it was highly undesirable that the Claimant should work on a completely separate floor from the rest of her team. The Claimant also requested an additional monitor so that she could work more easily across different documents. Mr Brunton told us that it would be even more inappropriate to set up a fixed desk in a breakout area with a permanent additional monitor. Breakout areas were bookable on a daily basis and were used by various different teams.

75 Mr Brunton emailed the Claimant on 2 February [425 to 426] by which time he had still not been given access to her occupational health report and queried some of her requests, stating:

> "I am still unclear about your request for a second monitor. You are currently choosing to sit in an area of the office away from the rest of the Insurance team/department where there are additional screens and desks. The breakout areas and semi-private meeting rooms are not designed for permanent working therefore additional screens will not be provided for these areas. Once you begin working with Sarah, [Director in Banking Audit team] we can look at what support we can offer if you do not have an additional monitor."

Mr Brunton reminded the Claimant that he had suggested they could explore with the Banking Audit team whether there would be an available desk with an additional monitor and he also pointed out that there was a hot desk with additional monitors available in the Insurance Audit department.

76 Mr Brunton told the tribunal that the Claimant's inappropriate use of desk and

meeting room space on the 6th floor as her preferred working area was causing significant issues with the Facilities team. The Facilities team had received a complaint from someone who worked on the 6th floor regarding a meeting room that the Claimant had effectively taken over as her own working space. She had left her laptop and other belongings in the room, including an electrical device for heating [water which at the time was described as, or thought to be, a rice cooker]. When the Claimant had failed to clear her stuff from the room, security boxed it up and removed her things at the end of the day in order to clear the room so that it could be used by other people and the Claimant had become very upset and angry about this.

77 Following a course of email correspondence [pgs 635 to 665 in particular] the Facilities manager eventually decided to make it clear that she was no longer prepared to allow her team to be involved with the Claimant directly and that future contact should take place only with HR acting as intermediary [p.738].

78 Mr Brunton told us that the desk that he had identified for the Claimant on the 11th floor was in a quiet area. The Claimant told us that she was not aware of a specific desk being made available for her. We find that was because she had chosen not to engage in any conversation about the desk on the 11th floor and refused to consider anything that was not on the 6th floor. We find that Mr Brunton had indicated to the Claimant that a permanent desk would be arranged and that a monitor could then be organised if that desk did not already have one, that it was not appropriate to arrange a fixed desk on the 6th floor away from the team and nor was it appropriate to use meeting rooms as the Claimant's own office.

Inappropriate clothing

79 Mr Brunton gave evidence about told us about his attempts to address another aspect of the Claimant's conduct in and around the office which was her habit of wearing inappropriately casual clothing. This culminated in an incident on 1 March 2018 when she behaved in a highly inappropriate way towards him. This occurred following his request to her that she should wear more appropriate business clothes to the office, which was set out in an email on 28 February 2018 [pgs.524 to 525]. From the contents of that email it was apparent the Claimant was around that time also leaving work early without requesting leave. The relevant part of the email is as follows:

> "I noted you were in the office this afternoon in casual clothing. This is not appropriate attire for the office during working hours. Please ensure you are in the office in appropriate work attire going forward".

80 Mr Brunton told the tribunal that on 1 March the Claimant launched into a loud and aggressive tirade against him demanding to know if the bra she was wearing that day was appropriate, and trying him to show him her bra strap which was also completely inappropriate. His note of what took place is at page 524. The Claimant indicated that her comments were in response to his email about inappropriate casual clothing. Mr Brunton explained that his comments had been made in relation to the fact that she was in the office in jeans and a sports jumper. The Claimant referred to what people were wearing on level 12, and asked 'who was he as a man to be telling her what she can and cannot wear?', when he responded that his comments were in

relation to the casual clothing she was wearing not being appropriate for the office in working hours the Claimant stormed off.

81 Mr Brunton followed up this incident with an email on 2 March 2018 [p.534] in which he pointed out to the Claimant that her behaviour was completely inappropriate, and that it was unacceptable and disruptive to other members of staff. He told the Claimant:

> "Going forward I do not expect to see you in the office in casual clothing, such as jeans and trainers, during normal working hours. The firm expects employees to wear smart, business casual clothing – it does not support a policy of "dress down"."

The Claimant replied:

> "I do not appreciate mansplaining on dress codes. Bras are clothing. Try heading up to the 12th floor and walk around. My work wardrobe does not support such weather since my duck down coat zip was spoilt more than a year ago. May I know if I am able to expense winter clothing on to the charge code to ensure that I dress to your desired taste?"

Values Day food

82 Mr Brunton gave evidence about another aspect of the Claimant's behaviour that the Respondent found needed to be addressed during this time, which was a complaint from the Values Day team that the Claimant was regularly and persistently taking food that had been set out for Values Day meetings, claiming that it was left overs. She continued to do this despite having been told numerous times not to do so and had apparently been very rude to members of staff who had asked her to stop. This came to light in February 2018 when it was reported that the Claimant was coming to Values Day at around 1:30pm each week purely for the purpose of removing food, bringing containers to do so. She had been spoken to by staff working on Values Day and had ignored them or was rude and aggressive in response.

83 On 12 March 2018 the Claimant attended the Values Day lunch at 1:30pm with a number of containers to put food into and made several visits taking away food in containers on each occasion. Despite being asked not to take the food, she did not stop. On at least one occasion that day she was very rude to staff stating she was going to take the food notwithstanding their protestations. [An email from Philippa Gregory to Emily Ginty setting out these events is at page 574].

84 Mr Brunton also told the tribunal about other behaviour considered to be inappropriate where the Claimant had made unacceptable comments to or about colleagues. She had been particularly disrespectful to Mostyn Wilson referring to him as the bald partner both orally and in emails [see p.372].

85 On 12 March 2018 Matt Brunton emailed Emily Ginty and Rebecca Claridge raising his concerns about the Claimant's behaviour, stating:

> "I am concerned that every time we try to get her to respond to a reasonable management request she ignores that and then raises other issues or

questions. It is also clear to me that she expects us to do things which, in my personal view, are not a reasonable for us to do. I know we are currently awaiting the updated OH report, but I am concerned this will continue to escalate if a meeting is not had with her to discuss this."

86 On 19 March 2018 Chris Holt, a PQA Adviser informed Emily Ginty that the Claimant had been very aggressive towards him during a telephone call that morning [p.604].The Claimant had been trying to access online tuition and Mr Holt had explained to her the reason she did not have access was because he had received no response to the email on 9 March, which was in relation to going against occupational health recommendations with regards to study and awaiting further OH review before proceeding. He noted that he had in any event asked BPP for access to be granted to her. The Claimant became very aggressive and would not listen to what he was saying and in the end, he ended the call.

Restricting the Claimant's access to the building – March 2018

87 Mr Brunton told us that he and Emily Ginty had become deeply concerned by the newest complaints about the Claimant's unacceptable behaviour and the degree of seriousness was rapidly reaching the point where something had to be done. He was conscious that there were potential issues affecting not only the Claimant's conduct but also the impact it was having on other staff within the business. Following her most recent period of sickness the Claimant had not produced a certificate indicating that she was fit to be at work. Accordingly, Emily Ginty emailed the Claimant asking her to provide a fit note to demonstrate that she was fit for work by 20 March 2018 and it was made clear to the Claimant that if she could not provide such a note then her access to the building would be restricted [p.667]. Ms Ginty pointed out that a number of staff had raised concerns about the Claimant's behaviour, that she was very concerned about her current wellbeing and the impact that this was having on her conduct in the workplace, that she had tried on numerous occasions to meet with the Claimant as well as trying to get updates from her by email but had been unsuccessful and the Claimant had declined her meeting invitation for the next day. In the light of the behaviours demonstrated and the serious concerns they had they were of the view that the Claimant was unfit to be at work and that she should not come into the office until such time as she has been declared fit by her GP. Ms Ginty confirmed that the Respondent hoped to receive recommendations from OH within the next 10 days which would allow them to re-visit and discuss next steps. She informed the Claimant that her wellbeing was of extreme importance and for this reason she had to inform her that they had decided to temporarily suspend her access to the building with immediate effect. Access would be restored once the Claimant was able to provide a fit note.

Meeting on 27 March 2018

88 A meeting was arranged for 27 March 2018 to discuss a number of outstanding issues with the Claimant. Present at the meeting were Emily Ginty, the Claimant and Rebecca Claridge, Matt Brunton dialled in by phone. The meeting lasted about two and a half hours and both Rebecca Claridge and Emily Ginty made notes shortly afterwards summarising what was discussed [p.702 and p.1614]. The Claimant suggests that the fact that the meeting took place on 27 March is evidence of an improvement in the working relationship and that this ought to have been taken into

account when the disciplinary panel was considering her case.

89 The Claimant did not dispute the contents of the notes of the meeting of 27 March [p.1614]. There were seven items on the agenda: (1) Values Day food raised on 13 March 2018; (2) failure to demonstrate KPMG's values to colleagues in the firm such as language and comments used despite being reminded that this is not appropriate; (3) lack of update regarding hours worked and tasks completed, despite repeated request for this information on several occasions; (4) queries around timesheet coding – specifically annual leave input; (5) desk and monitor; (6) PQA; (7) return to work [p.1619].

90 There was a discussion in respect of a number of outstanding issues. The Claimant asked if anything had been done about finding a mediator. The notes record that Emily Ginty explained what a mediator was. Ms Ginty told us that she explained to the Claimant that in order to be able to progress with finding a mediator there would have to be an identification of what it was that the mediator was being asked to mediate; there would need to be clarity about the issues and the people involved so it could be understood who was to be involved in the mediation. The notes record that the Claimant's response was that this was 'not actionable'. Ms Ginty had understood this to mean that the Claimant accepted that they had not reached the point where she had clarified what issues were to be mediated with any specificity and therefore they were not at the point where they could look into arranging an external mediator. Ms Ginty's evidence on this point was not disputed by the Claimant. Some of the issues raised by the Claimant dated back to her performance rating in her first six months. She said she was extremely unhappy, especially with NME [not meeting expectations] at the interim review and sought to explain the context.

91 Mr Brunton was also very concerned that the Claimant had not appeared to have carried out any meaningful work at any point between January and the beginning of April 2018 [p.1100] despite him having made numerous requests for her to update him as to the work that she was doing [see for instance p.1086 and other references in emails already quoted].

92 Mr Brunton told us that he did not accept that the meeting on 27 March was evidence of any significant improvement in the working relationship with Miss Lu. If anything, his impression from that meeting was that they were fast approaching a tipping point where the relationship was likely to break down completely; in his view the suggestion that there was any improvement in the working relationship was significantly undermined by the fact that just a few days later they decided that it was essential to suspend her and commence a disciplinary investigation.

93 A further incident took place on 28 March, the day after the meeting, when one of the Claimant's colleagues, Ms Hay, sent an email to the Claimant and copying in Mr Brunton, in which she alleged that the Claimant had made derogatory and inappropriate comments to her and described the Claimant's behaviour, comments and attitude as: "highly unprofessional and nothing short of disgusting". Ms Hay stated that if there was any repetition of the behaviour she would raise a formal complaint against the Claimant [p.710]. Mr Brunton spoke to Ms Hay about the comments: Ms Hay said they had been made in front of a number of colleagues in the Insurance Audit hot desk area and followed on from previous comments made over a period of time which

related to Ms Hay's appearance, her skin condition and remarking that she looked terrible.

94 The Claimant complains that the incident with Ms Hay took place before the meeting on 27 March and therefore should not have been taken as an additional example of inappropriate behaviour. We are satisfied that it only came to the attention of Emily Ginty and Matt Brunton after the meeting.

The Claimant's suspension

95 Mr Brunton believed the Claimant had made the point on numerous occasions that she did not trust the Insurance department nor other departments such as PQT and she had revealed a marked reluctance to engage with the management team and HR in relation to her issues. It also became clear over time that the Claimant believed that her concerns and issues had not been dealt with and as a result she refused to respond to management requests for information and reasonable management instructions but instead kept reverting back to what she believed to be ongoing unresolved issues.

96 It was his belief that the management team and HR had tried very hard to understand the Claimant's issues and concerns and to support her back into audit work. It seemed to him that every time they sought to discuss matters or asked for clarification the Claimant adopted a number of avoidance tactics. She often chose not to attend the meetings, or refused to speak to him or HR on the basis the information was confidential. Sometimes she would just refer back to earlier emails or raise another matter to deflect attention away from the matter in hand. We accept that this was his genuine view and is a reasonable description of the Claimant's conduct based on his experience of her behaviour and is supported by the contemporaneous emails.

April 2018: Mr Brunton and Ms Gill followed the Claimant around the office

97 Mr Brunton told us that as a result of the Claimant's lack of engagement with the management team, her ongoing refusal to follow reasonable management instructions, and her increasingly unacceptable behaviour, a decision was made to suspend the Claimant so that an investigation could take place into her conduct. The Claimant was invited to a meeting on 3 April 2018 with Mr Brunton and Karen Gill from HR. the intention was to explain that to the Claimant that she was being suspended and give her a letter that explained the suspension and disciplinary investigation process. However, the Claimant declined to enter the room when she saw that Karen Gill was present. The Claimant told us she thought the meeting was going to be with Matt Brunton and that she did not know who Karen Gill was, she accepted that when she saw Ms Gill was in the meeting room she refused to enter the room and walked away.

98 It is accepted that Matt Brunton and Karen Gill followed her towards the lifts and attempted to persuade her to come into the meeting room. In an email later that day [p.1392] the Claimant alleged that Matt Brunton sought to block her from entering the lift. Mr Brunton categorically denied that he sought to prevent the Claimant from entering the lift and told us that neither he nor Karen Gill did anything to prevent her from getting into the lift. We accept his evidence which is also supported by Ms Gill.

We find that it was a reasonable management instruction to ask the Claimant to attend the meeting which was a necessary meeting to hold. We find that Mr Brunton and Ms Gill did follow the Claimant in an attempt to engage with her and to persuade her to attend the meeting.

99 Ms Gill and Mr Brunton offered to delay the meeting by one and a half hours to give the Claimant time to prepare The Claimant did not arrive at the revised meeting time and Matt Brunton and Karen Gill went to the Claimant's desk to ask her to come to the meeting. The Claimant completely ignored Karen Gill, got up from her desk and walked to the IT bar on the 6th floor, Karen Gill walked with her. She did not speak to Karen Gill. There was also a security guard present to whom the Claimant was prepared to speak. The Claimant did not agree to come to the meeting.

100 The Claimant returned to her desk at about 12:30 pm and Matt Brunton called Karen Gill to inform her that the Claimant was back at her desk. Karen Gill came to the 6th floor where the Claimant was busy packing up her belongings, saying she was going home. Karen Gill was unable to find an opportunity to speak with the Claimant confidentially as the Claimant refused to go into a room with her and had decided that she was going home. The suspension letter was therefore revised to reflect the fact that the Claimant had refused to attend the meeting and the letter was emailed to the Claimant's personal email account by Matt Brunton about an hour later [p.990]

Grievance

101 The Claimant raised a grievance against Matt Brunton, Elizabeth Edwards and Karen Gill in emails dated 3 April and 27 April 2018 which were summarised in an investigation letter dated 2 May 2018 [p.1498 to1499] as follows:

> "1. On 20 October 2017 it was inappropriate for Matt Brunton and Elizabeth Edwards [nee Wray] to follow the Claimant around KPMG Canary Wharf office, given it was clear that the Claimant was in a state of distress; and
>
> 2. On 3 April 2018 it was inappropriate for Matt Brunton and Karen Gill to try to pressure the Claimant into attending a meeting against her will, given it was clear that she was in a state of distress."

Disciplinary investigation

102 Ms Angela Katsi, an Employee Relations Manager, was appointed as the investigating officer in respect of the disciplinary allegations against the Claimant. KPMG had three full-time investigators at that time, Ms Katsi being one of them. Ms Katsi was on a period of leave at the time that the case was referred to the Employee Relations Investigations team and there was a short delay in the detailed information regarding the allegation being received from HR which together led to a delay in commencing the investigation into the Claimant's case. It took about four weeks in total before the investigation was properly able to commence. Ms Katsi told us that she was aware that the Claimant's mental health issues had provided a backdrop to her investigation although it was not clear at that point that the Claimant had a disability, and when she interviewed Mr Brunton he told Ms Katsi he had significant concerns about the Claimant's wellbeing and mental health.

103 Ms Katsi told the Tribunal that she would normally begin an investigation by

identifying the key parties and interviewing them. She would have liked to have interviewed the Claimant in order to hear her point of view but the Claimant refused to engage with the investigation process at all.

104 The Claimant was given a number of opportunities to participate in the investigation process to either be interviewed in person or over the phone but chose not to engaged with Ms Katsi at all. She declined to attend meetings in the office and despite numerous requests declined to provide a contact number to call to speak to on the phone. Ms Katsi set out in paragraph 8 of her witness statement numerous instances (with reference to emails which were in the bundle) where she tried to make contact with the Claimant and arrange a meeting or some contact by phone. The Claimant was also given an opportunity to respond to the key points made in the investigation by email but she chose not to provide any responses at all.

105 Ms Katsi's investigation file was completed on 18 September. The first page details who Ms Katsi spoke to in the course of her investigation and in respect of whom notes of those interviews were included in the investigation file: namely, Matt Brunton, Emily Ginty, William Wilson, Matthew Francis, Nicholas Bailey, Callum Reid, Jessica Stephens and Anastasia Hay. Ms Katsi told us that she also spoke to Wende Miambanzilla, there was no note of that interview but there was an email in the papers. Ms Katsi summarised her investigation at pages 2 to 6 of her report and on pages 7 to 8 set out key issues against six allegations of gross misconduct, she summarised the evidence against each of those allegations from pages 9 through to 23. The file also consisted of supporting documents and emails.

106 The Claimant has raised some criticism of the fact that Ms Katsi had been included in an email that she had sent to the ERIT team in respect of her grievance under the Dignity at Work policy. Ms Katsi explained to the Tribunal that the grievance would come into a general ERIT inbox which she would see and she would allocate it to someone in her team. She did not deal with the investigation and she referred it on to Matt Clayton who then investigated the grievance. We accept her evidence on this point. Ms Katsi was not involved in the appeal that the Claimant raised in response to the outcome of the grievance process. Ms Katsi told us that she later learned that the grievance and its appeal had not progressed to a conclusion before the Claimant's employment was terminated. The Claimant had indicated she did not feel able to deal with the grievance case and the disciplinary at the same time and the Claimant was encouraged to seek support and engage with occupational health and Aviva to obtain help she needed but that she did not do so. Ms Katsi understood after the event that the grievance did not progress due to a combination of the Claimant being off sick and difficulty in attempting to define the scope of the grievance which meant that it was not possible to bring it to a conclusion. Ms Katsi believed that the Claimant had been given an opportunity to raise any grievance point she wished to pursue as part of her disciplinary appeal.

107 Ms Katsi set out in some detail in her statement the investigation that she carried out (paragraphs 16-38) and her findings (at paragraph 39 and its subparagraphs, pages 11 to 23) and we do not intend to repeat those here. We note that the contents of those findings were not disputed by the Claimant. She took issue with the way the grievance was dealt with and suggested that it was improper for Ms Katsi to have knowledge of that, we accept Ms Katsi's explanation that she was not

involved in investigating the grievance.

108 Ms Katsi also addressed in her evidence the criticisms of the investigation and of her appointment as investigating officer raised by the Claimant in her appeal against the grievance outcome referring to her response to an email from Megan Smith [at 1291 to 1292] and in at paragraphs 47-48 [pp25 -280].

109 Ms Katsi provided a copy of her investigation file to the Claimant and to the disciplinary panel. The arrangements for the disciplinary hearing were queried by the Claimant. She contacted Ms Katsi with a range of particular requests on 17 September 2018 at 18:40 [1152 to 1153] as follows:

(1) the meeting be scheduled from 11 till 1;
(2) the room be either level 1, 13 or 14 [client floors only];

(3) plenty of refreshments in the room;

(4) plenty of stationery, preferably in blue;

(5) highlighters of several colours;

(6) plenty of wet wipes and tissues [not toilet paper nor rough paper];

(7) a chair that supported her back and would be comfortable to sit on for long period of time;

(8) a translator [fluent in English, Mandarin, Chinese, Intermediate Hokkien, Teochew, Cantonese A2 level, German, French basic level; Russian, Spanish, Korean, Japanese, Malay, Bahasat Melayu, Qingdao Hua, Beijing Hua, Shanghai Hua, Sichuan Hua];

(9) easy access to the female toilet without long walk;

(10) proper security and medical assistance should her condition flair up beyond her control during the panel;

(11) a hard copy of all email correspondence between us;

(12) the interview pdfs (to be sent in a timely manner and in chronological order properly dated);

(13) all the evidence including the two finance excel spreadsheets that she could not open and put them into a ring file with proper page references in file dividers;

(14) a response to her previous queries;

(15) she wanted to voice record the entire panel;

(16) no scribe phone calls and if scribe is necessary he/she must be in person and not from the Insurance HR side.

110 Ms Katsi told us that she considered the request carefully and responded by email dated 20 September 2018 [pgs.1150 to 1152]. Ms Katsi pointed out the Claimant had made a number of requests which did not fall within the scope of adjustments to be made in order to accommodate any disability she may have. As far as the meeting room was concerned, the meeting room would be booked on the 1st floor and standard refreshments would be available, she confirmed the panel members and a scribe, all of whom would be independent and not have any prior involvement with the issues raised, would be present in the meeting room. Ms Katsi reminded the Claimant that she would be able to be accompanied by a colleague and asked for the name of the colleague so that authorisation for the Claimant to speak to that individual could be arranged. Ms Katsi also informed the Claimant that the panel members would be advised to ensure that adequate breaks were taken during the meeting. So far as the request for a chair was concerned, Ms Katsi explained that she had asked Seema Khan and Emily Ginty if they are aware of her back condition or recommendation from OH that would require a special chair to be provided to Miss Lu and they were not ,so they did not understand the basis for providing an alternative chair. So far as security and medical assistance were concerned, Ms Katsi informed the Claimant security would be on hand to assist as required and should medical assistance be required, the panel would request immediate assistance. As for pens and paper etc, she informed her standard pen and paper would be available in the meeting room, that they would provide tissues and wet wipes. She noted that she found the suggestion that the Claimant might need a translator to be a strange one given the Claimant had already worked for KPMG for a number of years and in that time, had not required a translator for any meetings, formal or otherwise and that accordingly a translator would not be provided. Ms Katsi reassured the Claimant however that the panel would ensure that she had understood their queries and would highlight to her any clarification they might require in respect of her responses. The request to record the meeting was declined.

Disciplinary panel

111 The Tribunal heard from Tim Jones who was an Indirect Tax Partner at KPMG. He had considerable experience of dealing with disciplinary matters and had conducted numerous disciplinary and appeal panels and also had previous experience of dealing with employees with disabilities, including making reasonable adjustments and dealing with employees with a range of mental health issues. He told the Tribunal about his own personal experience with mental health problems which became relevant to the way in which he sought to deal with the issues presented by the Claimant and he told us this meant he was especially anxious to ensure that she was afforded every opportunity to obtain support. We find that this was evident from Mr Jones' actions.

112 Prior to being asked to sit on the disciplinary panel with Amanda Towers Mr Jones had no dealings of any kind with the Claimant. He and Amanda Towers were provided with the investigation file (which consisted of pages 1 to 1164 of the Tribunal's bundle). The Claimant had been provided with a copy electronically in PDF form and a hard copy had been made available for her to collect but which she had not collected. Ms Katsi told us that the Claimant had refused to provide an address to which the file

could be delivered.

113 The allegations of gross misconduct were set out in a letter to the Claimant dated 3 October 2018 [p.49]. The letter also informed the Claimant that she had a right to be accompanied by a work colleague or trade union official, and that in the event that she was found to have committed any act of gross misconduct potential disciplinary action might include dismissal.

114 The panel meeting was rescheduled to 8 October 2018 at the Claimant's request. Present at the meeting were Mr Jones, Amanda Towers, the Claimant and Charlotte Lo, a Director accompanying the Claimant, and Jennifer Hunt, Senior HR Adviser to take notes.

115 Mr Jones described the panel as being quite unusual and quite unlike any that he had conducted before. It is apparent from the notes of the meeting [1164a to 1164j] that at times during the meeting the Claimant became very emotional and at times very animated. The meeting was scheduled for two hours on the basis that this was the time the Claimant had said she was available, Mr Jones' considered that should have been sufficient to deal with the issues fairly. However, at the end of the two hours the panel had not managed to cover all of the allegations and allowed the Claimant more time to make any further written submissions she wanted to make in respect of the matters not covered.

116 Ms Hunt recorded that noting the meeting had been very difficult because the Claimant was often aggressive, uncooperative and confrontational. The Claimant had talked very quickly, become upset and was at times incoherent and what she was saying could not be fully captured.

117 During the course of the meeting Mr Jones became very concerned for the Claimant's wellbeing. It was clear to him that she was very troubled and he was particularly concerned by the fact that she seemed to be putting obstacles in the way of getting support that she probably needed by refusing access to OH reports. He became very concerned when she began discussing her suicidal thoughts and he decided to share some of his own personal experiences in the hope that that would help her realise she could come back from a dark place she found herself to be in.

118 Ms Towers deals in more detail with the disciplinary meeting in her statement and Mr Jones agreed with her account. Ms Towers told the Tribunal that when Mr Jones asked about what had led to the Claimant's first period of compassionate leave in 2017 the Claimant said that she needed to call AXA (KPMG's Occupational Health provider) immediately. The Claimant proceeded to demand that they provide her with access to a telephone in order to do so. Ms Towers recalled that the Claimant made a very deliberate display of taking some sort of pill and stated that the panel would understand why and repeated that she needed to call AXA straightaway. She became very emotional. Tim Jones sought to reassure her that they understood it was a stressful situation and it was important that they hear her side of events. The panel arranged for the Claimant to use the phone on the meeting desk, Charlotte Lo dialled the number for her and then it was agreed that Jennifer Hunt would stop taking notes.

119 Ms Towers was very struck by the inappropriate and unprofessional manner in

which the Claimant spoke to the AXA representative. Ms Towers described the Claimant as being aggressive and inquisitorial and at one point she demanded that the representative only respond with a yes or no to her questions. She told us that Tim Jones interjected at an early stage of the call to inform the AXA representative that there were other people who could hear what was being said on a loud speaker, and, following a discussion, it was agreed that the panel, and Ms Lo, would leave the room. Although the panel could not hear, and did not want to hear, the conversation from outside the room they could hear that the Claimant was raising her voice and becoming very animated. They decided they should re-enter the room to bring the call to an end and attempt to resume the meeting. When they went back in the Claimant was still talking in a very aggressive and emotional way. The Claimant terminated the call while the AXA representative was still talking. The meeting resumed at 11.24 am and the panel attempted to go through the disciplinary allegations with the Claimant. Ms Towers set out a detailed account of the meeting in paragraphs 13 to 69 of her statement, and this was not contested by the Claimant who focussed on the requirement to get an Occupational Health report following the meeting.

120 Amanda Towers told the Tribunal that after the meeting concluded, she discussed the next steps with Tim Jones and they agreed that on the current state of the evidence there were clear grounds for dismissing the Claimant for gross misconduct, and also some other substantial reason because of the breakdown in the employment relationship. However, even though they considered that they had two very solid basis for dismissing the Claimant they both still thought there was a small possibility that having sight of the full OH report might give them reason to reconsider whether dismissal was the appropriate sanction. Mr Jones was concerned that there should be a further attempt to see if they could get help for the Claimant and it would be a good idea to see if she could be helped to at least get some CBT support. Mr Jones was genuinely very concerned about the potential impact of dismissal on an employee who was already very troubled and potentially very vulnerable. They decided that Amanda Towers should be the single point of contact in respect of receipt of additional information and in managing the ongoing OH referral issue and the possibility of obtaining some CBT support.

121 The Claimant was offered a further opportunity to provide any documents or statements that might be relevant to the allegations and was asked to send those directly to Amanda Towers by Friday 12 October. She was also asked to provide a copy of the OH report that she had displayed partially on her phone during the meeting but which had not previously been shared with anyone within KPMG.

122 Amanda Towers told the Claimant they were keen that she should speak to someone regarding her current mental state and she was urged to contact AXA at the earliest opportunity and in any event, by no later than 5pm on 12 October failing which the panel would proceed to make their findings on the disciplinary allegations without the benefit of medical advice.

123 Ultimately, the Claimant failed to take up the opportunities that were given to her and failed to provide her consent to AXA by the deadline given by the panel and the decision was taken on the basis of the information already available. Amanda Towers and Tim Jones agreed that they had no real alternative but to dismiss the Claimant when she failed to meet the deadline for providing the consent forms and had

effectively made it impossible to help her to help herself.

124 The decision letter dated 29 November 2018 [1164k to 1164s] set out the reasons for the Claimant's dismissal which took effect on 14 November. The panel were satisfied that the Claimant had committed the alleged acts of gross misconduct and were also of the view that there had been a total and irretrievable breakdown in the employment relationship. The panel had reached the view that there was no trust and confidence left on either side and informed the Claimant that in the circumstances, even if they had not found the Claimant to have been guilty of gross misconduct, the panel would have decided to dismiss for some other substantial reason, namely the breakdown in trust and confidence between the parties.

125 Amanda Towers gave the Tribunal a detailed account of the meeting and of her subsequent attempts to persuade the Claimant to engage with AXA. She recalled that at the end of the disciplinary hearing there was discussion about other points the Claimant wished to raise, which dated back to what she described as 'pay discrimination' and other matters. Mr Jones had commented that it was obvious that the Claimant had not read her full panel file, that she had had an opportunity to prepare for the meeting but decided not to do that: at this point the Claimant had said that her whole plan was to call AXA at the start of the meeting and then walk out and she disputed the point about her not cooperating with OH was correct. Ms Towers formed the view that the Claimant had no intention of seeking to respond to the allegations and was trying to disrupt the process by demanding people stop typing, demanding people dial the phone for her, shouting at AXA, demanding that they leave the room and raising issues that did not appear to be directly relevant to the disciplinary allegations, and in those circumstances she was of the view there was not much more that could be achieved by extending or reconvening the meeting and that outstanding matters would be best addressed in writing.

126 After the meeting the Claimant sent an email to Angela Katsi raising a number of concerns about the process [1693] and Angela Katsi informed Amanda Towers of those concerns and suggested that she was best placed to respond. Amanda Towers responded on 9 October [1694] in respect of some points in the meeting and also the concerns raised in the email to Angela Katsi. Ms Towers also urged the Claimant to contact AXA at the earliest opportunity, and no later than 5 o'clock on 12 October, and reiterated that if she did not contact them by then the panel would proceed to make its findings without the benefit of medical advice.

127 The Claimant responded on 10 October [1696], stating she was unhappy about making phone calls that she found to be outside her comfort zone and that she also was not comfortable with making KPMG aware of the full contents of the OH report.

128 Ms Towers responded to the Claimant's concerns. She extended the deadline for the completion of the consent forms to 15 October, and sent a copy of those forms [pgs.1714 and 1736]. When the Claimant did not respond or complete those forms as required, she was sent a letter by Tim Jones on 5 November 2018 [p.1751] setting out the provisional view of the disciplinary panel which was that the sanction would be dismissal but that she had one final opportunity to make contact with AXA to arrange an occupational health meeting, in which case the panel would wait for the report; the deadline to contact AXA was set at 4pm on 9 November.

129 Arrangements were then made for the Claimant to come into the office to arrange for the AXA referral and to speak to Aviva. Numerous attempts were made to clarify the Claimant's objections to the AXA referral for the OH report and it was arranged the Claimant would come into the office on 9 November to call AXA from the office. She did not attend and instead produced a doctor's note saying that she was unfit for work, which was emailed to Ms Towers on 9 November [1795]. Ms Towers responded confirming that the reference to a dismissal taking place would now be 14 November 2018 but that all other terms would remain the same and that the Claimant would need to provide her consent to AXA for an OH referral on or before 5 o'clock on 14 November 2018 and that this should include agreement for the report to be seen by Amanda Towers, Tim Jones and Siobhan Regan-Presky and should not be subject to any other conditions. It was clearly stated that failing to comply would result in the dismissal taking place on 14 November 2018.

130 The Claimant responded [1798] with further objections which Ms Towers responded to in turn [1797]. On the 13 November the Claimant sent a long email to Amanda Towers, Tim Jones and copying in AXA raising a number of concerns and issues and reiterating her lack of trust in Siobhan Regan-Presky [1802] to which Amanda Towers partially responded on 13 November [1804], informing her that a hard copy consent form for AXA would be available for her to complete; Siobhan Regan-Presky would be waiting for her in the room that had been booked and she would have to fill in the hard copy consent form so that a referral could be made for AXA and the call would not be necessary but that Aviva would still be expecting her call.

131 The Claimant attended the office on 13 November and Ms Towers witnessed some but not all of her behaviour on that occasion. She described the behaviour that she saw as appalling. Siobhan Regan-Presky was in the room that had been booked, as had been arranged; she reported to Amanda Towers that the Claimant had not even acknowledged her presence and did not respond to her when spoken to, that she shouted at Siobhan Regan-Presky and then when she arrived having been summoned for assistance by Siobhan, at Amanda Towers. The Claimant refused to answer questions that were being asked of her and shouted demands that were irrelevant to the purpose of the meeting; she caused such a disturbance in the meeting room that clients and others were concerned and made comments as they passed; she refused to speak to the colleague from security who was on hand, choosing instead to click her fingers and point to him in the direction she wished him to follow her; she put her hand up aggressively to Amanda Towers' face and to Siobhan Regan-Presky's face to stop them speaking when they were trying to help her; and she stole a number of drinks and pieces of fruit from the client refreshment area and put them in her bag as she left.

132 Siobhan Regan-Presky and Amanda Towers both found the encounter on that day to be very distressing. AXA and Aviva both independently complained about the Claimant's behaviour towards their staff. The person to whom the Claimant spoke at Aviva that day describes the Claimant's behaviour as "vile and vulgar" and commented that she had never spoken to anyone so rude in her life. The Claimant was obstructive and the person dealing with the call had felt compelled to lodge an official complaint.

133 The Claimant continued to raise objections to Siobhan Regan-Presky and to query the process that was being followed by the Respondent in arranging for the OH

referral. Ms Towers responded on 14 November [1810] in a very clear email confirming that the Claimant's employment would terminate on 14 November 2018 at 5 o'clock if she did not provide full unconditional consent to the AXA referral. Ms Towers pointed out that the Claimant had failed to give that consent despite Siobhan Regan-Presky and Amanda Towers meeting with her in person and handing the relevant form to her and making it very clear that the completed form had to be delivered in person or by emailing a scanned pdf copy of the completed and signed form by 5 o'clock that day.

134 The Claimant sent an email at 3:11 pm on 14 November [p.1808] with the subject line "This was sent under distress and no logic" with the same expression within the body of the email and attached an incomplete AXA consent form.

135 Ms Towers replied at 20:07 [p.1817] informing the Claimant that her failure to provide a correctly completed AXA consent form providing full unconditional consent meant that her employment had terminated at 5 o'clock on 14 November 2018 as previously indicated. The Claimant was informed that she would be paid three months' pay in lieu of notice and would receive a full outcome letter with the reasons for her dismissal in due course.

The appeal against dismissal

136 The Claimant appealed against the decision to dismiss her in an email dated 3 December 2018 [1187 to 1193] setting out the grounds of her appeal.

137 On 21 December 2018 Kier Halcomb, the in-house solicitor who was overseeing the disciplinary process, wrote to the Claimant [1209 to 1211] informing her that the investigating officer would be confirmed in due course, but that in light of her behaviour towards colleagues and third parties during the disciplinary process the appeal would be undertaken in writing only. He also notified her that the two outstanding grievances would be incorporated into the appeal process and told the Claimant that she would be given an opportunity to provide any further written statements and relevant supporting evidence during the investigation and would also have a final opportunity to comment on the investigation report and file before it was sent to the appeal panel.

138 Mr Halcomb's email summarised the Claimant's grounds of appeal as distilled from her lengthy grounds in her email and he invited her to let him know if she had any questions or comments by no later than 3 January 2019.

139 Megan Smith from the Employee Relations Investigation Team was appointed to investigate the grounds of appeal and to provide a report for the appeal panel. Her investigation and report was concluded on 7 May 2019 [pgs.1165 to 1437]. The Tribunal was told that the appeal investigation had taken longer than usual because when Ms Smith had tried to contact the Claimant but she had not responded in a timely manner and that Ms Smith had found it difficult to understand the relevance of emails and documents that Miss Lu would send to her. It therefore required a substantial amount of correspondence and clarification to fully understand her position and collate the appeal investigation file. The investigation report identified nine heads of appeal from the Claimant's email of 3 December 2018, each with a number of subsidiary points [pgs.1167 to 1170]. In addition to taking issue with the disciplinary allegations

the Claimant raised the following three matters: the breakdown of trust and confidence between Miss Lu and KPMG; deficiencies in the disciplinary process; other grounds of appeal raised during the investigation process.

Disciplinary Appeal Panel

140 Simon Gilbert, a Risk Management Partner, was appointed along with Jody Carleton, HR representative, to hear the Claimant's appeal. The Claimant was notified that the date for the disciplinary appeal meeting was to be 15 May 2019. Ms Smith wrote to the Claimant on 7 May 2019 [pgs.1212 to 1215], enclosing a copy of her report together with the investigation file, and noting that the Claimant had declined to attend the panel meeting on 15 May. She informed the Claimant that neither Simon Gilbert or Jody Carleton had been previously involved in her case, and that Haya Khan, HR Assistant, would act as scribe to the meeting. Ms Smith set out what would be considered, noting the points that had been raised by the Claimant in her appeal and clarification and noted that if the Claimant wished to attend the meeting then she should inform her as soon as possible and no later than 24 hours in advance of the meeting. It had been decided that the Claimant should be given an opportunity to attend the meeting in person despite the initial reservations following her conduct at the disciplinary hearing. The Claimant was reminded of her right to be accompanied to the appeal by a work colleague or trade union official and she was invited to notify KPMG of any adjustments that she might require to accommodate any disability and reminded of the availability of KPMG's free employee assistance helpline [Be Well].

141 Mr Gilbert and Jody Carleton were provided with the investigation appeal file [pgs.1165 to 1437] and the disciplinary investigation file [pgs.1 to 1164] and Mr Gilbert told the Tribunal that he read the considerable quantity of material thoroughly prior to the appeal meeting. We have no reason to doubt his evidence which was not contested.

142 The Claimant posted six videos on YouTube in connection with her appeal. Mr Gilbert noted that at least one of those videos included his and Jody Carleton's names in the title and appeared to be viewable by anyone. She sent links to those videos to Megan Smith and invited the panel to view them. The panel viewed those videos, parts of some of which were in Mandarin Chinese, before reaching a decision on the appeal. The video containing parts in Mandarin commenced in English, the Claimant explained that she was going to continue in Mandarin stating that she expected that they would be able to infer what she was saying from her gestures and tone of voice. Mr Gilbert explained that neither he nor Ms Carleton speak Mandarin, they watched the video but did not obtain a translation as it was clear to them that the Claimant neither requested nor indicated that she was expecting them to do so.

143 The Claimant referenced a number of points in the YouTube videos that she also wanted the panel to consider as part of her appeal. Consequently the panel requested that Megan Smith, the investigation officer, provide further information in relation to those points, which she then did.

The appeal meeting

144 The Claimant chose to attend the meeting by phone rather than in person. Mr Gilbert described the telephone part of the meeting as the most unusual appeal

proceeding with which he had ever been involved. He told us that it was very short, lasting in total about 10 minutes, and that it began very badly. While he was attempting to introduce himself and other people on the call, the Claimant proceeded to talk over him asking for his email address. He provided his email address and then tried to introduce everyone again but the Claimant would not let him speak and talked over him again saying that she had received an email from Megan Smith stating the panel could only see one video and she would like to confirm if the panel was able to see all the videos. During the introductions the Claimant kept interrupting and raising various points, in particular in relation to the presence of the scribe and whether they were dialled in. As a result of her comments, Mr Gilbert asked the Claimant if she was recording the meeting via phone or other device; the Claimant responded that she was, but would not confirm how. Mr Gilbert explained that neither he nor Ms Carleton consented to the meeting being recorded and that the Claimant would have to stop the recording if the meeting was to proceed. The Claimant did not respond to that request but continued to speak about the dismissal appeal and asked about the video she had sent to Ms Smith.

145 Mr Gilbert described how he then told the Claimant that because there was no consent from the panel, they would not engage in further discussion but the Claimant refused to stop recording the meeting. The Claimant was not happy with the attendance of the scribe by phone and stated she did not want to continue with the meeting but would instead email Mr Gilbert and Megan Smith with her comments and thoughts. She then dialled out of the meeting. The notes of that meeting are at pages 1438-9. After the call ended the Claimant emailed Megan Smith stating that her preference was for any further contact to be dealt with by email or in writing.

146 On 21 May 2019 the panel was informed that the Claimant had requested an extension of time to submit further relevant documentation which had been granted. However, on 31 May 2019 the Claimant emailed Ms Smith informing her that she would not be providing any further evidence.

Appeal outcome

147 The appeal panel met on 5 June to consider the appeal. Mr Gilbert told the Tribunal that the panel reviewed each element of the appeal individually and considered all the material that had been provided to it. They were satisfied that a detailed and thorough disciplinary investigation had been conducted and considered by the original panel which had reached the decision to dismiss, the panel was unable to identify any basis on which to question the thoroughness and fairness of the investigation. The appeal panel also agreed that no substantive new material or new evidence had been provided in connection with the appeal.

148 The panel set out its findings on each of the grounds of appeal in its outcome letter dated 19 June [1434 to 1437] summarised in paragraph 25 of Mr Gilbert's statement. The appeal panel saw no evidence that could lead them to conclude that the Claimant was treated unfairly by KPMG in any respect and they had no reason to overturn the disciplinary panel's decision to dismiss. The panel also considered the additional points raised in the YouTube videos following provision of further information by Megan Smith, the investigation officer. Those points were identified as follows:-

148.1 ***Why the relevant individual from the values helpline was not interviewed as part of the appeal.***
The panel was satisfied that the Claimant had not identified the relevance of that person being interviewed. The disciplinary process was focused on the members of the Claimant's team against whom the alleged poor behaviours were targeted.

148.2 ***Withdrawing consent for the OH in March/April 2018***.
The panel considered the information in the appeal investigation report and Emily Ginty's breakdown of the Occupational Health assessments [pp.1247 to 1248]. The panel concluded the Claimant had no legitimate ground for complaint in that regard.

148.3 ***Refusal of face-to-face counselling by Aviva***.
The panel concluded the Claimant had not been refused face-to-face counselling. Aviva's process involved an initial triage call ahead of the face-to-face counselling meeting so that they could establish the next appropriate next steps. The Claimant had expressed discomfort with having the initial triage call. Prior to her suspension, Emily Ginty had arranged for Aviva to agree to waive this initial call and go straight to a face-to-face meeting. However, Aviva later reverted to requesting the initial phone call before being able to provide face-to-face counselling.

149 We accept Mr Gilbert's evidence that the panel decided to dismiss the Claimant's appeal against dismissal on the basis set out in the appeal outcome letter. Mr Gilbert was aware that the Claimant had mental health issues but believed the panel gave her a fair opportunity to present any matters she wanted them to consider and he considers they did carefully consider all the evidence before them. It was clear to the panel that even prior to the disciplinary hearing and her subsequent dismissal, the Claimant's employment relationship with KPMG had significantly and probably irretrievably broken down. It seemed clear to them that there was a wide range of issues that had caused very significant difficulties in almost every aspect of her employment relationship and that there was very little prospect that all of those matters would ever be satisfactorily resolved.

Grievances

150 The Claimant brought two grievances. There was considerable confusion in the way the Claimant expressed her grievance and Mr Clayton tried to clarify with her in numerous emails between them. On 27 September 2018 Mr Clayton set out his revised understanding of the Claimant's grievance [p.31] namely, firstly, the incidents on 19 and 20 October and second it being inappropriate for Mr Mostyn Wilson to insist on a meeting with him. In that description the 3 April does not feature.

151 By 8 October 2018, Meera Shuja has taken over conduct of the grievance interviews from Liz Edwards; her account of events is at g34 to g35 and is consistent with Mr Brunton's account. On 13 November 2018 [g47 to g48] the Claimant attempts to add a whole new raft of complaints and Meera Shuja replies on 22 November that those were outside the grievance and related to the disciplinary.

152 We are satisfied on the evidence before us that the complaints the Claimant raised in respect of 19 and 20 October 2017 and the meeting with Mostyn Wilson were considered by the appeal panel, as were the incidents of 3 April. These incidents were addressed in the investigation report as well as at the Claimant's request in the disciplinary hearing [pgs.1181 and C1179 at g and 1183 at 9g].

The law and submissions

153 Mr Wilson had set out the relevant legal principles in his written closing submissions, the Claimant did not dispute the law was correctly stated and the Tribunal has in large part adopted the relevant passages on the law.

Unfair dismissal

154 The right not to be unfairly dismissed is conferred by section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that the employee was dismissed the question whether any such dismissal was unfair turns upon the application of the test in section 98 of the Employment Rights Act 1996.
Section 98

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason [or, if more than one, the principal reason] for the dismissal, and

(b) that it is either a reason falling within sub-section [2] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this sub-section if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

…

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

155 For the purposes of section 98(2) ERA 1996 conduct means actions of such a nature whether done in the course of employment or out with it that reflect in some way upon the employer/employee relationship, *Thomson v Alloa Motor Co Ltd* [1983] IRLR 403 EAT. It is not necessary that the conduct is culpable *J P Morgan Securities plc v Ktorza* UKEAT 0311/116.

Ordinary unfair dismissal – s.94/98 ERA 1996

156 The Respondent must show that the subjective reason for the Claimant's dismissal was related to his conduct *(*s.98([2) (c) ERA). Once the Respondent has established that, the question to be determined by the Tribunal is the one set out in s.98(4).

The band of reasonable responses

157 Whether the dismissal is fair or unfair is to be determined by reference to the band of reasonable responses test, as set out in *Iceland Frozen Foods v Jones* [1983] ICR 17. The Court of Appeal recognised in *City of York v Grosset* [2018] ICR 1492 that this test allows "*a significant latitude of judgment for the employer itself*". The Court of Appeal in *Foley v Post Office* [2000] ICR 1283 observed

> "*… there will be cases where there is room for reasonable disagreement among reasonable employers as to whether dismissal for the particular misconduct is a reasonable or an unreasonable response.*"

158 The range of reasonable responses test (i.e. the need to apply an objective standard) applies as much to matters relating to the investigative stage as it does to the decision to dismiss itself – see *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111 at [30]. It is not for the Tribunal to substitute its view of what it would have done by way of investigation; the band of reasonable responses still applies.

The Burchell factors

159 Where conduct is the reason for dismissal, the seminal test by which the fairness of the dismissal is judged is as set out in *British Home Stores v Burchell [1980] ICR 303* at 304, per Arnold J. Essentially, what is required is a genuine belief, reasonably held, and which was formed following as much investigation as was reasonable in all the circumstances of the case.

160 The Tribunal should not fall into error by a misplaced and artificial emphasis on the *Burchell* test, and should not lose sight of its task to appraise all the circumstances

of the case – see *RSPB v Croucher [1984] IRLR 425* at [37]-[38]. The burden in regard to fairness is a neutral one – it is not for an employer to *demonstrate* that the dismissal was fair.

Fairness to be considered in the round

161 When determining whether the dismissal is fair the Tribunal should consider the disciplinary process as a whole, including the appeal – see *Taylor v OCS Group Ltd* [2006] ICR 1602 at [46]-[48]. The Tribunal should not consider procedural and substantive fairness separately, but should look at the case "*in the round and without regard to lawyer's technicalities".* As noted at [48]: *"the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as sufficient reason to dismiss*."

No substitution

162 The Tribunal must not substitute its own view in assessing the reasonableness of the Respondent's decision. Even if some other employer[s] may not have dismissed, that does not necessarily make the dismissal unfair. See the observations of Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] IRLR 563 at [42]-[43].

163 Equally, however, the Tribunal's consideration of a conduct case is not a matter of procedural box ticking; it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer – see *Newbound v Thames Water Utilities Ltd* [2015] IRLR 734.

Matters relevant to the investigation stage in particular

164 The extent of investigation required depends on the facts of the case. *Per* the EAT in *ILEA v Gravett* [1988] IRLR 497 at [15]:

> *"… at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required is likely to increase*".

165 As to the requirement to investigate defences, the EAT stated in *Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399 at [23]:

> "*To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole. … What mattered was the reasonableness of the overall investigation into the issue.*"

Dismissal for some other substantial reason

166 *T*he EAT in *Huggins v Micrel Semiconductor [UK] Ltd* [2004] UKEATS/0009/04 held at [33] and [35]:

> "*… we reject as wrong in principle the submission that any conclusion based on some other substantial reason must be wholly outwith the issues of conduct. …*
>
> *There is no error of law when an Employment Tribunal upholds an employer's decision that the breakdown of trust and confidence has been caused or contributed to by the [Claimant's] conduct, categorising this as some other substantial reason for a dismissal.*"

167 In *Eszias v North Glamorgan NHS Trust* [2011] IRLR 550 the EAT drew a distinction between cases in which the reason for the dismissal was the fact of the breakdown of relationship (regardless of whether it was cause by the claimant) and those in which the reason for the dismissal was the conduct which had given rise to the breakdown. Where the focus is on the fact of the breakdown, SOSR will be an appropriate categorisation. See [53]-[56].

168 Once the potentially fair reason of SOSR has been made out, the band of reasonable responses will continue to apply in judging the fairness of the dismissal.

Discrimination arising from disability – s.15 Equality Act 2010

169 The correct approach to determining a claim under s.15 of the Equality Act was summarised by Simler J (as she then was) in *Pnaiser v NHS England* [2016] IRLR 170 at [31]. In essence, the Tribunal must decide:

a. Whether there was unfavourable treatment.

b. What the reason for that unfavourable treatment was. The focus is on the mind of the employer at this point. If there is more than one reason, it will be sufficient to establish causation that something has a "*significant influence*". In deciding this, the employer's *motives* are not relevant.

c. Whether that reason was "*something arising in consequence of disability*". This is a looser test compared to "*caused by*", as emphasised by Simler J in *Sheikholeslami v Edinburgh University* [2018] IRLR 1090 at [66].

d. Whether the reason for the treatment was the "*something arising*" is an objective test and does not depend on the thought process of the employer. Nor is it necessary for the employer to know that the "*something arising*" arises in consequence of the disability – see *City of York v Grosset* [2018] ICR 1492 at [38]-[41].

e. It does not necessarily matter which order the Tribunal answers these questions in, but they all need to be addressed.

170 The upshot of this approach is that the Tribunal must address two separate questions of causation: [i] did the "*something*" arise from C's disability, and [ii] was that "*something"* the reason for C's unfavourable treatment. See *Basildon v Thurrock NHS Trust v Weerasinghe* [2016] ICR 305 at [26]. The burden is on the Claimant to show the "*something arising*", since it is a fact necessary for the Tribunal to conclude that there has been a contravention of the Act.

"*Unfavourable treatment*"

171 The ***ERHC Code*** has this to say at para 5.7, in relation to unfavourable treatment:

> "*This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.*"

172 In most cases, this can be taken to be synonymous with "*detriment*" or "*disadvantage*". The threshold for establishing this is relatively low. However, there must still be something "*intrinsically 'unfavourable*' *or disadvantageous*" about the matter complained of. See *Williams v Trustees of Swansea University Pension and Assurance Scheme* [2019] ICR 230 at [27]-[28].

"*Something arising*"

173 The phrase '*something arising in consequence of the disability*' should be given its ordinary and natural meaning. However, the authorities provide some guidance in determining whether this requirement is made out.

174 In *Pnaiser v NHS England* [2017] 170 at [31] the EAT held:

> "*… the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability … However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact*."

"*Because of*"

175 To establish a claim under *s.15* the something arising must have, or be, "*a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but is nonetheless an effective cause of the unfavourable treatment*" – *Hall v Chief Constable West Yorkshire Police* [2015] IRLR 893 at [42].

176 In *Charlesworth v Dransfield Engineering Services Ltd [2017] UKEAT/0197/16/JOJ* Simler J explained at [14] that an effective cause was "*an influence or cause that does in fact operate on the mind of a putative discriminator whether consciously or subconsciously to a significant extent and so amounts to an effective cause*". A similar explanation is given in *Pnaiser* at [31].

Objective justification

177 The proportionality test is essentially a balancing exercise. In *R. [Elias] v Secretary of State for Defence [2006] 1 WLR 3213* Mummery LJ [at 151] summarised at the leading EU case of *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317, as follows:

> "*… the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.*"

178 What that balancing act requires was expressed by Sedley LJ in *Allonby v Accrington and Rossendale College* [2001] ICR 1189 at [29] as follows:

> "*… at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.*"

179 In *Homer v Chief Constable West Yorkshire Police* [2012] ICR 704 at [22] the Supreme Court confirmed that "*[t]o be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and [reasonably] necessary in order to do so.*"

180 In *Hardy & Hansons Plc v Lax* [2005] ICR 1565 at [32] Pill LJ expressed the test in the following way:

> "*It must be objectively justifiable [Barry v Midland Bank plc [1999] ICR 859] and I accept that the word "necessary" used in Bilka-Kaufaus [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary.*"

181 In *Hensman v Ministry of Defence* [2014] UKEAT/0067/14/DM, Singh J (as he then was) referred to the above passage and stressed at [44] that in applying this approach the Tribunal: "*must have regard to the business needs of the employer*."

182 In considering whether there are alternative non-discriminatory means of achieving the legitimate aim, the legitimate aim itself must be the focus; a non-discriminatory alternative will not defeat a defence of justification if it defeats the legitimate aim – see *Chief Constable West Midlands v Blackburn* [2009] IRLR 135 at [25]-[26].

Failure to make reasonable adjustments – ss.20-21 EqA 2010

183 The correct approach for the Tribunal in determining a reasonable adjustments claim is set out in *Environment Agency v Rowan* [2008] ICR 218 at [27]:

> "*In our opinion an employment tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the Act by failing to comply with the section 4A duty must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant. … Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.*"

184 The focus of the Tribunal is on practical outcomes. As observed by Langstaff P in *Royal Bank of Scotland v Ashton* [2011] ICR 632 at [24]:

> "*… so far as reasonable adjustment is concerned, the focus of the tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not – and it is an error – for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reason.*"

185 The time at which a failure to make reasonable adjustments occurs was addressed in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 at [14]:

> "*Pursuant to section 20(3) of the Equality Act 2010, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage.*"

186 The burden is on the Claimant to show the PCP, to demonstrate substantial disadvantage, and must demonstrate a *prima facie* case that there is some apparently reasonable adjustment which could have been made (and therefore, *prima facie*, that there has been a breach of the duty) – see *Project Management Institute v Latif* [2007] IRLR 579 at [45] and [54]. If the PCP contended for was not actually applied, the claim "*falls at the first fence*" – see *Brangwyn v South Warwickshire NHS Foundation Trust* [2018] EWCA Civ. 2235 at [40].

Substantial disadvantage

187 The question of substantial disadvantage applies in respect of the disabled person compared to "*persons who are not disabled*". The EAT has made clear that "*the function of the provision, criterion or practice within section 20(3) is to identify what it is about the employer's operation which causes disadvantage to the employee with the disability*" – see *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169 at [39]. As observed by the EAT in *Sheikholeslami v Edinburgh University* [2018] IRLR 1090 at [48]:

> *"The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP.*"

188 In assessing substantial disadvantage, the Tribunal needs to identify what it is about the particular disability that gives rise to specific substantial disadvantage. As observed by the EAT in *Chief Constable West Midlands Police v Gardner* [2011] UKEAT/0174/11/DA at [53]:

> "*There may be many cases in which it is obvious what the nature of the substantial disadvantage is, and why someone with the disability in question would inevitably suffer it. … But there are also cases, of which this is one, in which in our view simply to identify a disability as being a general condition – such as "a knee condition" – does not enable any party, and more particularly a court of review, to identify the process of reasoning which leads from that to the identification of a substantial disadvantage, and an adjustment which it is reasonable to have to make to avoid that disadvantage. The conclusion remains unexplained by any description of what it is that the Claimant can and cannot do in consequence of his disability, and there is therefore no information as to the nature of any step or steps which might be taken in order to prevent that particular disadvantage. The words of Rowan are clear and correct. They may however insufficiently emphasise the need to show, or to understand, what it is about a disability that gives rise to the substantial disadvantage, and therefore what it is that requires to be remedied by adjustment. Without knowing that, no assessment of what is, or is not, reasonable by way of adjustment can properly be made.*"

189 The EAT in *RBS v Morris* [2012] UKEAT/0436/10/MAA at [63] held:

> "*We accordingly hold that it was not open to the Tribunal on the evidence before it to find that the Claimant was disabled during the relevant period. It might well*

be that the Claimant could have filled the evidential gap by agreeing to the suggestion made during the case management process that expert evidence be sought which directly addressed the questions which the contemporary reports did not cover. … while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance."

190 The Respondent submitted that the reasoning in *RBS v Morris* can be applied equally to a finding of substantial disadvantage and that this is not a case in which substantial disadvantage – particularly the matters relied on at para 14 of the list of issues ***[A111]*** – can be inferred as a matter of common sense. Unless the Tribunal is satisfied that it has evidence before it to demonstrate that the alleged substantial disadvantage exists (the burden in relation to which lies on the Claimant), the Tribunal will err if it concludes that it does exist. It was submitted that we should not reach conclusions on the basis of an evidential gap, we address this submission in our conclusions below.

191 We accept the Respondent's submission that If substantial disadvantage is not made out (for example, because non-disabled people are equally disadvantaged by the PCP), the duty to make reasonable adjustments will not arise.

Knowledge

192 *Paragraph 20(1)(b) of Schedule 8 of the Equality Act 2010* provides that the duty to make reasonable adjustments does not apply if the employer does not know, and could not reasonably be expected to know, of both the disability and the likelihood of the disabled person being placed at substantial disadvantage.

Reasonableness of proposed adjustment

193 *Smith v Churchill Stairlifts* Plc [2006] ICR 524 confirmed that the test of reasonableness in the case of reasonable adjustment is an objective one. Paragraphs 6.28*, EHRC Code of Practice on Employment* sets out some of the factors, previously enshrined statutorily in *the Disability Discrimination Act 1995*, which may be taken into account when assessing what is a reasonable step for an employer to have to take:

"– *whether taking any particular steps would be effective in preventing the substantial disadvantage;*

– *the practicability of the step;*

– *the financial and other costs of making the adjustment and the extent of any disruption caused;*

– *the extent of the employer's financial or other resources;*

– *the availability to the employer of financial or other assistance to help make an adjustment [such as advice through Access to Work]; and*

– *the type and size of the employer.*"

194 The question of whether a person has control over a particular matter, or the power to do anything about a relevant matter, will necessarily be relevant to determining whether or not a proposed adjustment is reasonable –*County Durham and Darlington NHS Foundation Trust v Jackson* [2018] UKEAT/0068/17/DA at [33]-[34].

195 The Respondent submitted that the Claimant's willingness, or unwillingness, to co-operate is another relevant factor relying on *IDS Employment Law Handbooks, Vol 4, para 21.127:* "*the willingness of the employee to cooperate with attempts to identify reasonable adjustments may be taken into account. If the employee refuses to cooperate, it may not be reasonable for the employer to have to make any adjustment whatsoever.*"

196 We consider it to be uncontroversial that the reasonableness of a particular adjustment will always depend on the circumstances of the particular case – see *para 6.29 EHRC Code of Practice on Employment*.

Disability-related harassment – s.26 EqA 2010

197 The approach that the Tribunal ought to take in determining a claim of harassment is set out in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 at [10]:

"*[1] The unwanted conduct. Did the respondent engage in unwanted conduct?*

[2] The purpose or effect of that conduct. Did the conduct in question either:

[a] have the purpose or

[b] have the effect of either

(i) violating the claimant's dignity or

(ii) creating an adverse environment for her? (We will refer to (i) and (ii) as "the proscribed consequences".)

[3] The grounds for the conduct. Was that conduct on the grounds of the claimant's race [or ethnic or national origins]?"

198 The correctness as a matter of law in the context of *Equality Act 2010* was confirmed by Underhill LJ in *Pemberton v Inwood* [2018] ICR 1291 at [88].

Related to

199 Whether conduct is related to a protected characteristic is a question to be judged by the Tribunal by reference to all of the evidence, not simply the perception of

a claimant; the knowledge or perception of the claimant's protected characteristic by the person making the comment is also relevant – per *Hartley v FCO Services* [2016] UKEAT/0033/15/LA at [23]-[25].

200 The context in which a comment is made will be relevant to determining whether it is related to a protected characteristic, and the Tribunal must contextualise the comment appropriately – see *Warby v Wunda Ground Plc* [2012] EqLR 536 at [21]-[24]. As observed by Underhill J in *Amnesty International v Ahmed* [2009] ICR 1450 at [37] (cited in *Warby* in the context of harassment): "*The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.*"

Proscribed consequences

201 In order to constitute harassment, it is necessary that the conduct has *in fact* given rise to the proscribed consequences. This is an objective test, albeit the subjective perception of the Claimant is relevant, provided it is reasonable – see *Dhaliwal* at [15].

202 As explained by Underhill LJ in *Pemberton v Inwood* [2018] ICR 1291 at [88]:

> "*The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.*"

203 The Court of Appeal held in *Land Registry v Grant* [2011] ICR 1390, per Elias LJ at [47], rejecting the appeal:

> "*the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment*".

In *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ, at [12], referring to the above two authorities, the EAT observed:

> "*We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.*"

Direct discrimination – s.13 EqA 2010

204 Section 13 of the Equality Act 2010 provides that*: "A person [A] discriminates against another person [B] if, because of a protected characteristic, A treats B less* favourable *than A treats or would treat others*".

205 In *Nagarajan v London Regional Transport* [1999] ICR 877 Lord Nicholls at, stated [886], in determining whether or not causation is made out in a case of race discrimination and victimisation, that: "*If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.*"

Burden of proof -s.136 EqA 2010

206 The initial burden is on the Claimant to demonstrate that there are facts from which, in the absence of any other explanation, a court could decide that discrimination is made out. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the protected ground, then the burden of proof moves to the respondent. It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

207 To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the relevant protected characteristic, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive. *Igen Ltd v Wong; Chamberlin Solicitors v Emokpae; Brunel University v Webster [2005] EWCA Civ 142*, *[2005] IRLR 258*, *[2005] ICR 931*, *[2005] 3 All ER 812*.

208 According, to the Court of Appeal in *Madarassy v Nomura International plc [2007] IRLR 246, [2007] ICR 867, CA,* 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it (also restated in *St Christopher's Fellowship v Walter-Ennis [2010] EWCA* Civ 921, [2010] EqLR 82). That means that the claimant has to 'set up a prima facie case'. In *Madarassy* it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically;

209 The Tribunal has in large part reproduced the Respondent's submission on the law as having considered them it accepted that they comprehensively set out the relevant authorities and principles to be applied.

Time Limits & Continuing Acts

210 By *s123 Equality Act 2010,* complaints of discrimination in relation to employment may not be brought after the end of

(1) the period of three months starting with the date of the act to which the complaint relates or

(2) such other period as the Employment Tribunal thinks just and equitable.

211 By s123(3) EqA conduct extending over a period is treated to be done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it.

212 In *Commissioner of Police of the Metropolis v Hendricks [*2003] ICR 530, the Court of Appeal held that, in cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken' in order to establish a continuing act. The Claimant must show that the incidents are linked to each other, and that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'. The question is whether there is "an act extending over a period," as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed'.' Paragraph [52] of the judgment.

213 In *Owusu v London Fire and Civil Defence Authority* [1995] IRLR 574, the EAT held that an employer's repeated failure to upgrade an employee or to allow him to act up at a higher grade when the opportunity arose amounted to a prima facie case of a continuing act 'in the form of maintaining a practice which, when followed or applied, excluded [him] from regrading or opportunities to act up'. Mummery J stated that a succession of specific instances was capable of indicating the existence of a practice, thereby constituting a continuing act extending over a period. Whether those instances did in fact amount to a practice, as opposed to a series of one-off decisions depended on the evidence and the employer's explanations for the refusals.

214 Where a claim has been brought out of time the Employment Tribunal can extend time for its presentation where it is just and equitable to do so. In *Robertson v Bexley Community Centre T/a Leisure* Link [2003] IRLR 434 the Court of Appeal stated that there is no presumption that an Employment Tribunal should extend time unless they can justify a failure to exercise the discretion. Quite the reverse; a Tribunal cannot hear a complaint unless the Claimant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. In exercising their discretion to allow out of time claims to proceed, Tribunals may have regard to the checklist contained in s33 Limitation Act 1980 as considered by the EAT in *British Coal Corporation v Keeble & Others* [1997] IRLR 336. Factors which can be considered include the prejudice each party would suffer as a result of the decision reached, the circumstances of the case and, in particular, the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with any requests of information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the course of action and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action

Conclusions

Dismissal

215 The Tribunal finds that the reason for the Claimant's dismissal was her conduct. We are satisfied that the Respondent had a genuine belief in the misconduct relied

upon in reaching the decision to dismiss. The conduct relied on is that set out in the disciplinary outcome letter [pgs.1164K to 1164S].

216 The Tribunal heard from the investigating officer and the disciplinary panel and had before it the voluminous documentation from which evidence we were satisfied that a thorough, balanced and detailed investigation was undertaken, and that the Claimant was given ample opportunity to respond to the allegations and put forward any mitigating circumstances. The Claimant had not denied a number of the allegations and we find that many of the events giving rise to the disciplinary allegations were recorded in documentary accounts produced at or very close to the time, or were set out in the contemporaneous emails. We are satisfied that the investigation was fair and reasonable in the circumstances.

217 Having heard from the members of the disciplinary panel, Amanda Towers and Tim Jones, we find that they had formed a genuine belief in the Claimant's misconduct. We are satisfied that it was reasonable for them to form that belief based on the information before them. We are also satisfied that they had genuinely formed the view (or belief) at the end of the disciplinary process that there was no longer any trust and confidence between the parties, for the reasons which were also set out in their letter dated 29 November 2018 [pp1164K-1164S]; and that there were reasonable grounds for that belief, based on the Claimant's conduct.

218 We also find that the panel went to considerable lengths to provide the Claimant with an opportunity to put before it any mitigating material, in particular evidence in relation to her mental health. We are satisfied that the decision to dismiss for gross misconduct was one that was within the band, or range, of reasonable responses open to a reasonable employer in all the circumstances. We are also satisfied that having formed the genuine view, based on reasonable grounds, that the relationship of trust and confidence had broken down the alternative ground for dismissal, namely for some other substantial reason, was one that was also open to the Respondent.

The appeal against dismissal

219 The appeal panel had before it the results of the original investigation and also the additional matters that had been investigated by Ms Smith as a result of points that the Claimant had raised and asked to be considered.

220 The Claimant raised a number of specific criticisms of the Respondent in the List of Issues, set out above at subparagraphs .6.1 to .6.12 of paragraph 3 a number of which were also raised in her appeal.

221 We address each of the Claimant's specific criticisms of the Respondent in paragraph 6 of the List of Issues in turn;

6 .1 The Claimant could not sign the Axa form updating her health status

215.1 We do not accept that the Claimant could not sign the form, we find that she chose not to do so.

6 .2 The Respondent did not recognise that the Claimant had depression when making

its decision to dismiss

215.2 The Respondent did not ignore the fact that the Claimant had depression; rather they sought to obtain further information to see what bearing that might have on the outcome of their disciplinary process. Unfortunately, the Claimant frustrated that process at every turn and by her actions made sure that the information was not available to the Respondent. We are satisfied that the Respondent clearly did take into account that the Claimant had depression and was in a very poor state of mental health, but found ultimately that did not excuse or adequately explain the conduct for which she was dismissed. Nothing in the OH report that the Respondent had seen, nor in the GP certificates suggested otherwise (see paragraph 6c of the list of issues).

6.3 The Respondent demanded that the Claimant sign a consent form in order to update them on her health status

215.3 Contrary to the Claimant's assertion we do not find that the Respondent 'demanded' that the Claimant sign a consent form in order to update them on her health status. The Respondent asked the Claimant to consent to a referral back to OH for a further report, in doing so it was clear the about the purpose of that request and the reasons why it asked to see the information, namely to assess whether there was any relevant medical material which would have a bearing on the outcome of the disciplinary process. We find that the Respondent was acting reasonably in seeking to obtain up-to-date information about the Claimant's health and that it also acted reasonably in setting out clearly the provisional decision that had been reached on the basis of the material available [1751-1752]. We find that it was reasonable for the Respondent to provide the Claimant with that information so that she understood the alternative if the information was not provided and could weigh that up in deciding whether she consented to the referral or not. It was ultimately up to the Claimant whether she provided that consent or not.

6 4. During the disciplinary process the Claimant received no help in regards to her health,

215.4 We have found this allegation was not made on the facts. The Respondent made numerous efforts to assist the Claimant to obtain support from Aviva and to inform her that support was available to her should she choose to take that up (see for example the emails at 834-840,843-845, 846-849, 852-855, 844-890 and 891).

6 .5. *The disciplinary hearing was not long enough for all matters to be considered*.

215.5 We are satisfied that the Respondent set aside a reasonable period of time (2 hours) for the disciplinary hearing and that in doing so they were taking into account the time for which the Claimant had told them she would be available. A significant amount of the hearing was taken up by the Claimant's attempts to delay or disrupt the proceedings, avoid answering questions or becoming upset (as she later admitted, she had planned to walk out after speaking to AXA); we are satisfied that in the circumstances it was reasonable for the Respondent to conclude that extending or reconvening the meeting would serve little purpose and that giving the Claimant an opportunity to address outstanding matters in writing was a reasonable response.

6.6 The start of the disciplinary process was delayed by three weeks

215.6 We accept Ms Katsi's evidence as to the reason for the delay. The Claimant did not point to any prejudice to her ability to meet the allegations as a result. We do not find that this initial delay was such that it impacted on the fairness of the investigation or of the disciplinary process overall.

6.7 The *investigation did not deal with matters raised during the grievance procedure*

215. We accept the Respondent's submissions [paragraph 87] on this issue. The subject of the grievance was not relevant to the substance of the disciplinary and it was appropriate (and certainly not unreasonable) for the grievance and disciplinary to be dealt with separately. Further we find that this complaint was considered at the appeal stage.

6.8 *The Respondent refused to change (or remove) Ms Kasi as the investigating officer*

216 We have accepted Ms Katsi's evidence as to her role in the ERIT team and the limited nature of her involvement in responding to the Claimant's grievance. We do not find that there is any substance to the Claimant's criticism of the Respondent in this regard. The refusal to change or remove Ms Katsi as investigation officer was a reasonable decision for the Respondent to take in the circumstances.

6.9 *The Claimant did not receive the full investigation file before the disciplinary hearing*

217 We find that Ms Katsi made numerous attempts to provide the Claimant with the disciplinary file and that the Claimant was informed that a hard copy had been made available for her to collect from the security team at Canada Square [1150,1152,1159,1160 and 1162]. The Claimant did not dispute that she had refused to provide her address so that the file could be delivered to her nor that she chose not to collect it from Canada Square but instead requested copies by pdf, despite her reported difficulty in downloading large files. We find that the Respondent actions were reasonable in the circumstances.

6.10 *Ms Katsi did not interview relevant witnesses*

218 We are satisfied that the witnesses identified by the Claimant had no bearing on the conduct issues being investigated. She did not explain why those witnesses would be relevant to the disciplinary matters that she was facing. We are satisfied that Ms Katsi acted reasonably in deciding which witnesses to interview based on their relevance to the allegations being investigated.

6.11 The Claimant did not receive timely updates of the progress of the disciplinary procedure.

219 Ms Katsi had addressed the reasons for the investigation taking longer than would ordinarily be expected or would normally be desirable. The investigation was complex and was hampered by the Claimant's refusal to engage or to respond to Ms Katsi, and her refusal to provide Ms Katsi with her contact details. The Claimant's

complaints about the perceived deficiencies in the disciplinary process were addressed in the appeal, with the appeal panel finding that that there was no basis on which to question the thoroughness and fairness of the investigation.

6.12 *The disciplinary hearing did not take into account that the Claimant attended an informal meeting in 27 March 2018 with Ms Ginty, Ms Claridge and Mr Brunton (which the Claimant says demonstrated that there were improvements being made in the working relationships).*

220 We have found that this meeting was considered as part of the disciplinary process as a whole [122, 1164D]. We do not accept the Claimant's assertion that her attendance at this meeting indicated an improvement in the relationship, it was held because previous attempts to engage with her informally had been unsuccessful and there were numerous outstanding issues concerning Claimant's conduct. We accept Mr Brunton's evidence that the Claimant's responses in that meeting was a illustration of the approach of an imminent break down in the relationship, which is supported by the contemporaneous notes.

222 In considering the question of fairness under section 98(4) of the Employment Rights Act 1996 our focus is on what the Respondent did and whether they acted reasonably in the circumstances. Having heard from the witnesses and seen the documentary evidence, we are satisfied that the Respondent did everything it could to try to assist the Claimant and to allow her to provide them with further information, for instance, specifically in respect of the OH report, before reaching the decision to dismiss. We are satisfied that the Respondent did more than most employers would do and could reasonably be expected to do.

223 We have found that Ms Katsi's investigation was thorough and fair. Ms Megan Smith carried out further investigations during the appeal process as a result of the matters raised by the Claimant in her appeal and we are satisfied that she carried out such further investigation as was reasonable in the circumstances. We are satisfied that the conduct of the disciplinary process overall falls within the range of reasonable responses that could be expected from a reasonable employer in the circumstances.

224 Mr Wilson, Counsel for the Respondent, submitted that the Claimant was being deliberately obstinate in her approach, we are satisfied that that is a fair assessment of her conduct. We find that the Claimant attempted to frustrate the process and put barriers in the way of meetings, investigations and OH referrals in order to delay or frustrate the course of the investigation, the disciplinary hearing and the appeal. We find that the Respondent's submissions at paragraphs 77 to 93 of Counsel's written Closing Submissions are made out and supported by the evidence and that in contrast the criticisms raised by the Claimant are not well-founded.

Disability discrimination

221 The Respondent conceded that the Claimant was disabled under Equality Act 2010 due to a medically recognised depressive condition and they had knowledge of that disability at the relevant time.

Section 15 – discrimination arising from disability

222 The allegations under section 15 of the Equality Act are set out at paragraphs 8.1 to 8.11 of paragraph 3 above.

8.1: October 2017: the Claimant did not receive a promotion or fixed bonus for performance in the financial year 2016/17

223 We have found on the evidence that the Claimant received a bonus in 2017 of £1,000 [see 1576] and that she progressed from Grade E2 to Grade E3 [pages 436 to 438 and 1576]; the allegation of unfavourable treatment is not made out on its facts.

8.2: 19 October Mr Brunton reported the Claimant to the police

224 We have found that Mr Brunton did not report the Claimant to the police, this was done by HR. The Respondent has admitted calling the police but relies on concerns for the Claimant's welfare as justification for doing so.

225 We find that the Respondent had grounds for having concerns for the Claimant's welfare as a result of her behaviour and the comments she made to Mr Brunton in particular in relation to not feeling safe at her accommodation. Once those concerns were identified it was appropriate for Mr Brunton to take advice from HR. On being told about his concerns HR implemented their standard procedure, notifying the non-emergency police line of their concern about an employee who had at that point had gone 'AWOL', the Claimant was uncontactable, and was not at work having expressed concerns about self-harm or suicidal thoughts.

226 The Claimant objected to the Respondent contacting the police and considered that to be unfavourable treatment. The Respondent did not dispute that this was capable of amounting to unfavourable treatment even though done in the Claimant's best interest and we find that is a sensible position for it to take. We are satisfied that the fact of having the police visit your home or workplace and having to answer their questions is objectively capable of amount to a detriment or disadvantage.

227 Mr Wilson set out in his written submission [at 98] how the Claimant had expressed her case on "something arising" in consequence of her disability at the Preliminary Hearing at which the issues where identified and recorded by EJ Russell. Her case was that the Respondent was aware of her mental fragility and increased susceptibility to stress and acted as it did ***in order to exacerbate her condition.*** We accept that this was the position maintained by the Claimant when she was asked about this aspect of her claim in cross examination. We do not find that the Respondent acted with the conscious or unconscious intention or exacerbating the Claimant's condition.

228 We find that the Respondent acted out of concern for the Claimant's welfare, in response to the Claimant's behaviour which itself was something arising from the Claimant's disability. We are satisfied that the Respondent acted in the reasonable belief that the Claimant was at risk of harm, and that it had a duty of care to the Claimant, and in pursuit of the legitimate aim of ensuring the Claimant's safety and the safety of others. We accept the Respondent's submission that this duty of care was something that it rightly treated with the utmost seriousness and that it represented a

vital and pressing business need. We are satisfied that the Respondent's response was a proportionate response in the circumstances.

8.3: 20 October: Mr Brunton followed the Claimant around the office and/or a female HR employee (Ms Edwards) followed her into the ladies' lavatory.

229 We find that Mr Brunton and Ms Edwards did follow the Claimant briefly, but we find that this is not a complete picture of the circumstances: they were following her in order to persuade her to attend a meeting at which they intended to reiterate that she ought not to be at work, that the Claimant was avoiding that meeting and it was her behaviour in evading them that caused them to follow her. We accept that the Claimant's desire to avoid the meeting, and refusal to follow her manager's instruction, may well have arisen from her disability. However, we find that the Mr Brunton was justified in briefly following her in order to repeat his request, which was a reasonable management request that she attend the meeting, in pursuit of the aim of ensuring that the Claimant was not attending work when she was unfit to attend, and of protecting both the Claimant and the other employees who worked in the building. We find that Ms Edwards followed the Claimant into the ladies' lavatory primarily with the aim of satisfying herself of the Claimant's wellbeing and safety and with the secondary aim of persuading her to attend the meeting. We find those to be legitimate aims and that the actions of both Mr Brunton and Ms Edwards were proportionate responses in the circumstances. We have found the Respondent's actions were justified.

8.4: 20 October 2017: compelling the Claimant to attend a meeting with Mr Wilson, whom she did not know

230 We did not find that the Claimant was compelled to attend the meeting with Mr Wilson; she agreed to attend it in the company of her friend who also persuaded her to attend. The Claimant was asked to attend the meeting with Mr Wilson as he was the relevant People Partner at the time. The purpose of the meeting was to explain to the Claimant that she should not be at work when she was certified by her GP as not fit to attend. We have set out our findings above in respect of the legitimate aim and find that it was proportionate to also involve Mr Wilson due to his role and the seriousness of the situation given the Claimant's erratic behaviour.

8.5: 20 October 2017: in the meeting, Mr Wilson failed to explain why the police had been called, failed to answer the Claimant's questions and did not take notes.

231 We do not find that this allegation is factually made out. We have found that Mr Wilson did explain the purpose of the meeting which was to explain to the Claimant that she was not to attend work until she was certified fit. It was not a meeting that required Mr Wilson to answer other questions from the Claimant and he was not required to take notes. Those matters (alleged failures) did not arise in consequence of something arising from the Claimant's disability, nor were they done (or not done) in order to increase the Claimant's stress and exacerbate her condition.

8*.6: Mid-December 2017: failing to carry out the pay/performance review which the Claimant had missed.*

232 Mr Brunton was accepted that he did not hold a performance review meeting in

mid-December. It is not accepted that this amounted to unfavourable treatment in the circumstances. The Claimant's pay was reviewed in September/October 2017 at the same time as her peers and she was given a pay rise in line with that performance. The performance review meeting did not take place at that time because the Claimant was absent from work from 20 October to 12 December 2017. We accept Mr Brunton's evidence that on her return to work there were a number of issues outstanding before any goal setting could take place, including whether or not the Claimant was going to take up a secondment in the banking department. We find that using the performance review to set performance goals is a legitimate aim and that deferring the review until a time when appropriate performance goals could be set was proportionate, in the circumstances, which included the fact that the pay review had taken place and the Claimant had already received a pay award.

8.7: On 5th and 27th February and end of March 2018 restricting the Claimant's card access to the office.

233 This was admitted. It was done out of concern for the Claimant's fitness to work and because of her behaviour in October. It was not done as alleged by the Claimant deliberately to exacerbate her stress and anxiety. We are satisfied that restricting her access to the building at a time when she was certified as unfit to work was in pursuit of the legitimate aim of discharging a duty of care to the employees, not just the Claimant but to others and that it was a reasonably necessary means of achieving that aim, we find that it was a proportionate means of achieving that aim. We accept the justification set out by the Respondent in its submissions at 102 to 103.

8.8 On 3 April 2018 Mr Brunton and Ms Gill following the Claimant around the office.

234 We accept that being followed around the office could be considered to be unfavourable treatment but in the circumstances of this case it was clear the Claimant was trying to avoid having a conversation with her managers, that it was a reasonable management request that she attend the meeting and that they were justified in trying to persuade her to attend. We have not found that they obstructed her entry to the lift or cornered her at the lifts as alleged and we are satisfied that their attempts to engage with the Claimant were reasonably necessary in the circumstances and were proportionate means of achieving a legitimate aim.

8.9. Following the Claimant's suspension on 3 April not handling the disciplinary investigation properly because of: (a) a 3-week delay at the outset; (b) the appointment of Ms Angela Katsi as investigating officer; (c) separating the grievance and disciplinary processes; (d) not investigating the grievance and/or (e) including disciplinary allegations which were untrue and unsubstantiated by evidence.

235 It is accepted there was a three-week delay in contacting the Claimant regarding the disciplinary allegations. We have accepted Ms Katsi's explanation. We have addressed on the facts the separate processes for the disciplinary and the grievance, and found that it was reasonable for the Respondent to treat them separately. The Claimant has not put forward any reason why the matters she complains of in this allegation amount to unfavourable treatment because of something arising from or in consequence of her disability; or why her disability meant that matters which were

otherwise appropriately dealt with separately should be treated together We do not find matters (a), (b), (c) or (d) were unfavourable treatment because of something arising from the Claimant's disability, they are simply criticisms levelled by the Claimant at the conduct of the disciplinary investigation. The Claimant failed to show a causal link between this conduct and something arising from her disability.

Section 20 - Failure to make reasonable adjustments

236 It is conceded that the Respondent knew or ought to have known the Claimant was disabled.

237 Did the Respondent have the following PCPs.?

1. *A requirement to hot desk*
2. *A requirement to use standard office equipment/laptop*
3. *Seeking to resolve workplace difficulties internally in the first instance*
4. *A requirement to go through telephone triage to access Occupational Health and/or a requirement to return company property on suspension*

238 Was the Claimant placed at a substantial disadvantage by the PCP(s) compared to someone who did not have her disability? The Claimant alleged that she was put at a disadvantage in the following ways:

1. *She needed a stable working environment to feel safe*
2 *She encountered difficulties concentrating and could not work as effectively between multiple documents on a single laptop*
3. *Her panic attacks and mental health problems made an independent person necessary (for the resolution of workplace difficulties)*
4. *The Claimant has a phobia about using the phone and without her laptop found it more difficult to access occupational health.*

1. *A requirement to hot desk*

239 We are satisfied that there was a general requirement to hot desk. We find on the facts that this requirement was not imposed on the Claimant once it became known that this might put her at a disadvantage and impact her ability to perform as a result of her disability affecting her ability to concentrate. After receiving the report from occupational health in January 2018. Mr Brunton identified a fixed desk for the Claimant on the 11th floor and she was not being required to hot desk from January when it became known that this might put her at any disadvantage.

240 In evidence the Claimant described needing somewhere quiet for her studies rather than somewhere safe. However, at this time the advice contained in the occupational health report was that she was not fit to carry on with her studies; we find that this was not part of the work that she was being required to do.

2. *A requirement to use standard office equipment/laptop*

241 The Claimant complains that she was not provided with fixed screens or additional monitors which she alleges put her at a disadvantage because she encountered difficulties concentrating and could not work as effectively between multiple documents on a single laptop.

242 We accept Mr Brunton's evidence that there were a number of workstations on the 11th floor which had additional screens/monitors available for use. In January 2018 (following the OH report) Mr Brunton had a discussion with the Claimant about the availability of monitors, we find that an additional monitor would have been made available to her if she had taken up the desk allocated to her on the 11th floor (the floor where the rest of the Insurance team was located). It was the Claimant's refusal to work on the 11th floor and insistence on working on the 6th floor contrary to her manager's instructions that meant that she was not guaranteed a monitor at her desk. We do not find that this PCP was applied by the Respondent as alleged by the Claimant.

3. *Seeking to resolve workplace difficulties internally at the first instance*.

243 The Claimant did not provide any evidence as to why this put her at a substantial disadvantage other than suggesting that her panic attacks and mental health problems made an independent person necessary. There was no medical or other evidence to explain how seeking to resolve workplace differences internally put the Claimant at a substantial disadvantage, or what the nature and extent of the disadvantage suffered by the Claimant was supposed to be, and how or why an independent person was necessary or what difference if any this would have made to the Claimant. The suggested adjustment is engaging an external mediator, this was taken by the Claimant from what we find was a tentative suggestion in the occupational health report, in order to 'ensure objectivity and to maintain structure in such a meeting'.

244 The question of mediation was discussed at the meeting on 27 March 2018 and the Claimant apparently accepted that this was not something that it was possible to pursue. We accept Ms Ginty's evidence [WS 38] that, in the context where the Claimant had raised concerns with every member of management team that she had contact with and expressed a general distrust of the entire Insurance department and HR, the number of potential issues and individuals that might need to be involved and the Claimant's continued dissatisfaction even when matters had been resolved in her favour (such as the PRP), mediation would not be a realistic solution to the workplace difficulties.

245 We do not find that there was a failure to make a reasonable adjustment in the circumstances

4. A requirement to go through telephone triage to access occupational health

246 We find that the requirement to go through telephone triage was a requirement that was imposed by Aviva, it was not imposed by the Respondent. In any event we are satisfied that the Respondent had sought and had arranged an adjustment to this policy to accommodate the Claimant but that as a result of the Claimant falling to take up the offered appointment and her subsequent behaviour towards the Aviva personnel Aviva withdrew the adjustment and insisted on the Claimant going through triage by phone to ensure that she was referred to the appropriate medical professional. We find that the Respondent took such steps as it could reasonably be expected to take to

seek an adjustment to the policy, and that it could not reasonably be expected to do more in the light of Aviva's insistence on its policy given the Claimant's behaviour towards its staff.

and/or requirement to return company property on suspension.

247 The Claimant asserts that the requirement to return company property on suspension meant that she had no access to a laptop or to company emails and was not able to access attachments and that she was disadvantaged in accessing support from AXA/Aviva as a result due to having a phobia about using the telephone.

248 The adjustment contended for was arranging a face-to-face meeting with the occupational health provider Aviva. We have found that Emily Ginty did make arrangements for the Claimant to have a face-to-face meeting with the OH provider however, as a result of the Claimant's conduct, the independent provider refused to have any further dealing with the Claimant until they had carried out a telephone triage and she could be referred to the appropriate medical professional.

249 We accept the Respondent's submission [at 120 of the Written Closing Submissions] that there is no evidence of a phobia of making phone calls or that this was something that affected her as a disabled person rather than more generally having an aversion to making phone calls. We have found that there are numerous instances evidenced in the documentary evidence of the Claimant making phone calls, including to Be Well, AXA and Aviva and we do not find that she has made out this part of her claim.

250 We are satisfied that the Respondent made reasonable adjustments as far as it could, including providing safe space for the Claimant to make the phone call.

Disability related harassment section 26 Equality Act 2010

Sub-paragraphs 17 to 19 of paragraph 3 above (the list of issues)

3.17: On 19 October Mr Brunton reported the Claimant to the police

251 Mr Brunton did not report the Claimant to the police, this was done by HR. The police were called because of concerns for the Claimant's welfare.

3.18 On 20 October: Mr Brunton followed the Claimant around the office and/or a female HR employee (Ms Edwards) followed her into the ladies' lavatory.
3.19 On 3 April 2018 Mr Brunton and Ms Gill following the Claimant around the office.

252 The Respondent accepted that matters at paragraphs 3.17 and 3.18 of the list of issues were related to disability but denied that the matter at 3.19 was.

253 In respect of 13.9, following the Claimant around the office on 3 April, the Respondent's case was that this was because of the need to implement her suspension for conduct related matters when she was seeking to avoid or evade that suspension. The Claimant accepted that had she attended the meeting she would not have been followed around the office. We accept the Respondent's submission

[paragraph 122] that the treatment on 3 April was not related to the Claimant's disability.

Proscribed consequences

225 In respect of the conduct on 19 October 2017, calling the police, and 20 October, following the Claimant around the office and Ms Edwards following her into the ladies toilet: we are satisfied on the evidence before us that neither was done with the purpose or intention of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

226 We have taken into account the perception of the Claimant when considering the effect of the treatment complained of. The circumstances of the case include not just the Claimant's perception but also the fact that Mr Brunton, Ms Edwards and Mr Wilson had a duty of care to the Claimant and to others, that they had good reason to be concerned for her mental health and personal safety, and that on 20 October it was reasonable for them to ask her to attend the meeting, that she was refusing to attend and simply tried to ignore or evade their requests.

227 We accept that the in October 2017 the Respondent acted as a result of concern for the Claimant's welfare. We note also that the Claimant's GP was sufficiently worried about her to advise her to call 999 or attend A and E. [1459].

228 We accept that in October 2017 Mr Brunton and Ms Edwards acted out of concern for the Claimant and that on 3 April 2018 Mr Brunton and Ms Gills were acting in order to try to persuade the Claimant to engage with a reasonable management instruction, to implement the suspension and to ensure that the Claimant left the premises.

229 We do not find that it is objectively reasonable for the treatment of either informing the police of their concerns about her well-being, or trying to persuade the Claimant to attend a meeting, to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant in the circumstances. We accept the Respondent's submission paragraph at 123, including in relation to the judicial observations in ***Grant*** and ***Betsi Cadwaladr*** that to find so in the circumstances of these events would be to undermine the strength of the statutory language.

Direct race discrimination section 13

254 The claim of sex discrimination was withdrawn by the Claimant. The Respondent contends that in respect of the claim of race discrimination Claimant has put forward a case that amounts to nothing more than an assertion of difference in treatment and a difference of protected characteristic.

255 We have already indicated above we accept the evidence of Ms Hollingdale in respect of the reasons for the difference in pay, not just in respect of the Claimant and Mr Finnegan but also Ms Jie. We have found on the evidence before us that the

difference in rating is the reason for the difference in pay and that the rating was based on the Claimant's performance. We find that two of the comparators cited by the Claimant are non-UK EU nationals were both paid more than the Claimant having received higher performance ratings than her and the same performance rating as Mr Finnegan. We find this to be consistent case with the explanation for the difference in pay being explained not by race but by the performance. We dismiss the claim for direct race discrimination.

Equal Pay

256 We do not find there is any claim to meet under Part V Chapter 3 of the Equality Act 2010 on equal pay. We are satisfied that there was no inequality of terms in relation to pay at the outset of the employment and that the difference in pay as employees progressed, whether men or women, was determined by the performance rating. We have not found any evidence of inherent discrimination in the Claimant's performance rating, we are satisfied that the rating was a genuine (supported by examples of where her performance had fallen down) and material factor. We are satisfied that the evidence of Ms Jie's performance rating and pay supports the Respondent's contention that the performance rating system is not is not tainted by sex. We find the claim fails.

Conclusion

257 For the reasons set out above we dismissed all of the Claimants' complaints

Limitation/Time limits

258 Having dismissed the complaints on their merits, it is not necessary for us to consider the limitation issues. However, for the avoidance of doubt we do find that any matters which predate 19 April 2018 were brought out of time. We accept the Respondent's contention that there is a clear distinction between pre 3 April 2018 and post 3 April 2018 which is the date on which the Claimant was suspended. We do not find there was a regime, policy or ongoing state of affairs that could be described as a continuing act linking the periods before and after that date. After 3 April the Claimant was dealing with entirely different people and there is no evidence before us of any regime or policy or approach that could be described as a continuing act in respect of how the Claimant was treated.

Just and equitable extension

259 The Claimant has not put forward any clear explanation as to why she had not brought her complaints earlier, that is by 19 April 2018 in respect of her first claim and by 19 October 2018 in respect of her second claim. During that time the Claimant was able to formulate the complaints set out in her grievance and was able to pursue those. We note from her medical notes that during the relevant limitation period the Claimant was reporting to her GP that she in some respects felt better, and that she was pursuing other activities, including taking part in a gaming convention. There Claimant has not provided any clear explanation as to why she was able to bring the complaints when she did but unable to bring them earlier when they would have been in time. There is no basis put before us as to why it would be just and equitable there should be

an extension of time. We have noted that the Respondent was able to meet the complaints and we have determined them on their merits however that in itself is not sufficient to warrant an extension of time. We find that they were brought out of time.

Employment Judge Lewis
Date: 1 June 2020