EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Ms Phelan	Jaguar Land Rover Ltd

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Midlands West **ON** 27 February – 3 March
19 - 20 April 2023 (in chambers)

EMPLOYMENT JUDGE Harding

MEMBERS
Ms Whitehill
Mr Kelly

Representation
For the Claimant: Mr Segal KC
For the Respondent: Mr Islam-Choudhury, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1 The claimant's claims of harassment related to the protected characteristic of sex contrary to sections 26 and 41 of the Equality Act 2010 succeed in relation to the claims set out at paragraphs 6.1, 6.3, and 6.5 below. It fails and is dismissed in relation to the claim set out at paragraph 6.2 below.

2 By consent the claim of harassment related to the protected characteristic of sex/ harassment of a sexual nature succeeds in relation to the claim set out at paragraph 6.4 below.

3 The claimant's claim of a failure to make reasonable adjustments contrary to sections 20 and 41 of the Equality Act 2010 fails and is dismissed.

4 The claimant's claim of victimisation contrary to sections 27 and 41 of the Equality Act 2010 fails and is dismissed.

5 By consent, the claim of detriment on the grounds of having made a public interest disclosure contrary to sections 47B and 48 of the Employment Rights Act 1996 is dismissed on withdrawal by the claimant.

Summary

1 The claimant pursues claims of harassment related to sex/sexual harassment, victimisation and a failure to make reasonable adjustments. The events with which this case are principally concerned are an unannounced visit that was made by a male colleague of the claimant's, Mr Cramp, to the claimant's home on 5 September 2018 when the claimant was off sick from work. During this visit it is accepted that Mr Cramp entered the claimant's flat without her knowing he had done so. There is significant factual dispute between the parties as to what happened once he had entered the claimant's property. It is the claimant case that this and one other incident amount to harassment related to sex/ sexual harassment on the part of Mr Cramp and she also makes complaints of harassment about the conduct of another colleague, Mr Dunn. The allegations of victimisation principally relate to how the respondent reacted to the incidents involving Mr Cramp, as well as the subsequent decision to terminate the claimant's contract and not offer her alternative employment.

2 A claim of detriment on the grounds of having made a protected disclosure was, very pragmatically, withdrawn by the claimant at the start of this hearing. The claimant withdrew these claims in the light of certain concessions made by the respondent that the claimant had done protected acts for the purposes of the victimisation claim and also because it was acknowledged that the whistleblowing claims covered the same factual territory as the victimisation claims and accordingly it was not considered proportionate to pursue them.

The Issues

3 A list of claims had been drawn up at a case management preliminary hearing on 26 May 2020 and we started this hearing by going through the list of claims and identifying the issues that we were required to determine, which were as follows:

Disability status

4 Before us it was said that the claimant's case was that she was disabled at the relevant time by way of anxiety and depression, or alternatively by way of PTSD, which the claimant asserts she developed as a result of the unannounced visit to her home by her work colleague on 5 September 2018. The respondent accepted that it was the claimant's case that she was disabled by way of anxiety and depression. However, it disputed that PTSD formed part of the claimant's case on disability. It did so because PTSD was not recorded as one of the impairments relied upon by the claimant in the list of issues drawn up at the preliminary hearing. In the list of issues, page 74, it was explicitly recorded in relation to disability status that the claimant relied upon anxiety and depression. Accordingly, one of the issues for us to determine was whether it was part of the claimant's pleaded case that PTSD was a disability at the relevant time.

5 The respondent does not accept that the claimant had the impairments of anxiety and depression at the relevant time (September 2018) and in the event that we resolve this dispute in the claimant's favour the respondent does not accept that any such impairment had a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.

Sex or sexual harassment

6 The acts of asserted unwanted conduct are as follows:

6.1 On 5 September 2018 Mr Adrian Cramp entered the claimant's home without her permission.

6.2 On 5 September 2018 Mr Cramp initially refused to leave the claimant's house when asked to do so by the claimant notwithstanding the fact that the claimant had just got out of the shower and was naked.

6.3 On either 5 or 6 September 2018 Mr Cramp attempted to send the claimant flowers to her home address.

6.4 On 3 October 2018 Mr Dunn sent the claimant an offensive text message.

6.5 On 17 October 2018 Mr Dunn persistently called the claimant despite her not answering the phone and then came to her house and tried to gain access to the claimant's house by the French doors.

7 Two further allegations of unwanted conduct, those recorded at points 3.1(i) and 3.1(ii) of the case management order of 26 May 2020, page 74, were withdrawn by the claimant at the start of this hearing.

8 At the start of this hearing the respondent admitted that the complaint set out at paragraph 6.4 above was an act of harassment related to sex and/or sexual harassment. The respondent also accepted that the conduct set out at points 6.1 and 6.3 occurred. There is factual dispute in relation to the conduct set out at points 6.2 and 6.5. There is no dispute that the conduct was unwanted. Aside from the incident set out at paragraph 6.4 above the respondent disputes that any of the conduct was related to sex/of a sexual nature.

9 It is accepted that all complaints of harassment related to sex/ sexual harassment are within time.

Failure to make reasonable adjustments

10 It took a little while to clarify exactly what the PCPs and substantial disadvantage/s were said to be for these claims; on the list of claims drawn up at the case management hearing there had been no identification of the substantial disadvantage and one of the PCP's was very broadly defined. After discussion we established that the first claim was put as follows; it is the claimant's case that the respondent applied a PCP, namely a practice of having a different recruitment process for internal candidates (defined as being those either directly employed by the respondent or working for the respondent as agency workers) versus external candidates. The substantial disadvantage this is said to have caused (and what it was about the disability that was said to give rise to this disadvantage) is that the claimant was left without a role and had she not been disabled it was more likely she would have secured an alternative role because it was easier to apply as an internal candidate; whereas the process for external candidates was more challenging. We read this formulation of the claim back to Mr Segal, for the claimant, who confirmed that it was correctly recorded.

11 The reasonable adjustments contended for are that;

11.1 The respondent should have extended the date of the termination of the claimant's contract to allow her to apply for an alternative position within the organisation.

11.2 She should have been offered permanent alternative employment,

11.3 She should have been allowed to apply for alternative employment using the respondent's exceptions process.

11.4 The respondent should have accepted the claimant's job application, which was made by email on 15 October 2018.

11.5 There was a fifth reasonable adjustment set out at paragraph 4.5.5 of the order of 26 May 2020, but it was accepted that this was a restatement of the

adjustment set out above at paragraph 11.1 above and that this, therefore, did not require to be separately analysed.

12 It is the claimant's case that the respondent applied a PCP that all outsourced contracts would be cancelled. The substantial disadvantage this is said to have caused is that the claimant was given very little notice of this and was unable within the period of time available to her to make applications for alternative roles as an internal candidate. It was not explained what it was said to be about the disability that gave rise to this disadvantage. Again, we read this formulation of the claim back to Mr Segal who confirmed that it was correctly recorded.

13 The reasonable adjustments contended for are that:

13.1 The respondent should have extended the date of the termination of the claimant's contract to allow her to apply for an alternative position within the organisation.

13.2 She should have been offered permanent alternative employment.

13.3 She should have been allowed to apply for alternative employment using the respondent's exceptions process.

13.4 The respondent should have accepted the claimant's job application which was made by email on 15 October 2018.

14 The respondent accepted that these claims were within time. During closing submissions the respondent conceded that these PCP's were applied, but it disputed that these caused the substantial disadvantage identified.

Victimisation

15 It is the claimant's case that she did the following protected acts:

15.1 On 5 September 2018 she reported an alleged incident of harassment to Mr Andrew Bailey and Mr Nick Molesworth.

15.2 On 7 September 2018 the claimant reported the same incident to Leicestershire police.

15.3 On 7 September 2018 the claimant reported to Mr Bailey that Mr Adrian Cramp had attempted to send her flowers.

15.4 On the same date she informed Mr Bailey that she had reported the 5 September incident to the police.

15.5 On 17 October 2018 the claimant reported an incident of harassment involving Mr Dunn to Leicestershire police.

16 The respondent accepted that all of the above were protected acts.

17 It is the claimant's case that she was subjected to the following detriments because she had done these protected acts:

17.1 Andrew Bailey/Dave Cuttler omitted to take any steps to advance or address the claimant's reporting of the incidents to them.

17.2 Andrew Bailey/Dave Cuttler failed to recognise that there had been inappropriate conduct and take disciplinary action against Mr Cramp.

17.3 The claimant's contract was terminated.

17.4 There was a failure to grant the claimant's request for an extension to her contract.

17.5 There was a failure to allow the claimant access to the exceptions process, and

17.6 There was a failure to consider, explore and offer alternative employment opportunities as a means of avoiding termination of her contract.

18 Two further detriments, those set out at 6.2(ii) and 6.2(v) of the order of 26 May 2020, were withdrawn by the claimant at the start of the hearing.

19 It was accepted that the claims of victimisation were within time.

Evidence and Documents

20 There was an agreed bundle of documents running to just over 900 pages and a much shorter supplementary bundle of documents which had been produced by the claimant.

21 In relation to witness statements, we had a witness statement from the claimant together with a disability impact statement which had been included in the main bundle of documents. There was also handed in what was termed a "witness summary" for a Mr Mike Carson but we were told that the claimant did not rely upon this and we were not, therefore, asked to read it. For the respondent witness statements were provided for; Mr Adrian Cramp, Business Planning Analyst, Mr Anthony Dunn, Power Electronics Launch and Quality, Dr David Cuttler, Manager of the Certification and Compliance Team, Ms Laura Shepherd, Recruitment Delivery Consultant, Mr Nick Molesworth, Documentation and Data manager, and Mr Robert Gill, Recruitment Delivery Team Manager. Dr

Cuttler had, in fact, provided two witness statements, the second being an amended version of the first.

22 Mr Cramp and Mr Dunn were the two individuals against whom the allegations of harassment were made. We were told at the start of this hearing that neither Mr Cramp nor Mr Dunn would be attending to give evidence. We were told that a decision had been made by the respondent not to call Mr Dunn because he had complained about the adverse impact on him of being called as a witness. In relation to Mr Cramp we were told that he was very unwell. Counsel for the respondent told us that it was his understanding that Mr Cramp was not fit to attend the hearing and he said that he had requested medical evidence in support of this. In response it was said by Counsel for the claimant that up until the week of the hearing it had been anticipated that Mr Cramp would be attending as a witness. In the event no medical evidence was produced by the respondent and the suggestion that Mr Cramp was too unwell to attend the hearing was not pursued by the respondent any further. No further explanation for Mr Cramp's and Mr Dunn's non-attendance was provided in closing submissions. Mr Bailey, against whom a number of the allegations of victimisation were made, was not called as a witness and no statement was provided for him.

Observations on the witnesses

23 We bear in mind, when making general observations on credibility, that such general observations need to be treated with some care. That is because, in essence, it is perfectly possible for a witness to lack credibility in respect of one particular point or issue whilst still being a reliable witness on other points or issues. Nevertheless, there are some general observations that we consider it important we make.

24 Overall, we did not find the claimant to be a credible witness. Her answers were, on occasion, wholly contradictory in respect of straightforward matters. For example, it was put to the claimant in cross examination that she had not raised with the respondent before or at the start of her contract in February 2018 that she suffered with anxiety and depression. The claimant stated that she had raised this with the respondent at the time. The question was put to the claimant again and, once again, she asserted that she had told the respondent this at the time, and she referred to notes of a meeting which she said had taken place with Dr Cuttler at the start of her contract in February. When the claimant was asked where these notes were in the bundle she made reference to notes of a meeting that had taken place on 19 September 2018. Counsel for the respondent pointed out to the claimant that his question was about what she had told the respondent at the start of her contract in February. The claimant's response to this was to refer to page 557 of the bundle, which was an email from Dr Cuttler to HR dated 27 September 2018. She pointed out that in this document Dr Cuttler had talked

about the claimant being upset following an incident with a colleague very shortly after she had started work.

25 It was then put to the claimant that there was a difference between the respondent knowing that she had been upset following a particular incident at work versus the respondent knowing at the start of her contract that she had suffered with anxiety and depression and had done so since 2009. The claimant accepted that there was a distinction between the two. It was put to the claimant for a third time that she had not informed the respondent at the start of her contract that she suffered with anxiety and depression. The claimant paused and then said that she was confused. The question was put again and the claimant's answer became that she was not obliged to inform the respondent about it. It was only following an intervention from the tribunal, requesting the claimant to answer the question, that her evidence became that she did not tell the respondent about her anxiety and depression at the start of her contract, she said because it was not relevant.

26 Moreover, the claimant in her witness statement painted a very particular picture of her relationship in August/September 2018 with her work colleague, Mr Cramp, paragraphs 29 - 30. She described WhatsApp messages from Mr Cramp at this time as "unrelenting", she said that she was "increasingly uncomfortable with his interest", feeling "pressurised" by him, being made to feel "very uncomfortable" and receiving increasing attention from him. However, this description of events did not seem consistent with the WhatsApp exchanges between the claimant and Mr Cramp that were included in the bundle, and the claimant's attempts to explain why this was so were at times unconvincing and lacked credibility. For example, when it was pointed out to the claimant in cross-examination that one of the WhatsApp exchanges demonstrated that they had socialised outside of work, the claimant's response to this was that the respondent positively encouraged teambuilding and social events. The event in question, however, was self-evidently not a teambuilding or work social event, it was a non-work event to celebrate Mr Cramp's birthday, page 203, which, as it turned out, the claimant and Mr Cramp had attended alone. When counsel for the respondent continued to press the point the claimant declined to answer the question, stating simply that counsel had already asked her about that, and this was a pattern that was repeated. Moreover, when asked why there had been no acknowledgement in her witness statement of the friendly relationship that had existed between them the claimant's explanations included that she did not consider it to be relevant and it was not a JLR matter. Neither of which we considered to be cogent explanations, particularly given the context of this case.

27 In fact, the claimant's evidence, it seemed to us, had a particular tendency to be unreliable and inconsistent with contemporaneous documentation when it came to describing events concerning Mr Cramp. For example, the claimant told us in evidence that a WhatsApp exchange between the claimant and Mr Cramp which appeared at page 228 of the bundle demonstrated that Mr Cramp was

"monitoring" her quite regularly and she told us that this disturbed her. The particular part of the message that the claimant was referring to started with Mr Cramp messaging the claimant whilst they were at work telling her that she was not showing as on line. But the context of this comment was that a few minutes earlier the claimant had messaged Mr Cramp asking if she was on (line), page 227. It is this that Mr Cramp responded to, saying that she was not showing as on line. The claimant continued to ask if she was "on now", page 228, and Mr Cramp told her that she was still not on line. The claimant continued to ask Mr Cramp if she was on line, page 230, and he continued to confirm that she was not. The claimant made a joke of it; her response to this was "pants", "still pants" and "brightly coloured flared pants" followed by LOL (laugh out loud). To be as fair as possible to the claimant the tribunal asked the claimant to read the whole WhatsApp exchange, to ensure that she had the context of it in her mind, and then asked if her evidence remained that Mr Cramp's references to her not being on line showed that he was monitoring her, and that this was disturbing. She did so and confirmed that this remained her evidence. Read objectively this exchange simply cannot be said to be a disturbing example of Mr Cramp monitoring the claimant; all he did was to respond to (repeated) requests from the claimant asking him to confirm whether she was showing as on line or not. We highlight further examples of this in the relevant parts of our findings of fact below.

28 The claimant had also stated at paragraph 38 of her witness statement that Mr Cramp had "frenzied himself to the point of convincing my then acting manager Mr Bailey to drive him to my home", and that Mr Cramp had confirmed this in a message that he wrote which was at page 238 of the bundle. In fact the message, which was sent to the claimant from Mr Cramp said no such thing; it contained an apology and then said "I did not mean to scare you I was just so worried about you". No reference in the message to being in a "frenzy" and no reference to being so "frenzied" that he had convinced Mr Bailey to drive him to the claimant's home.

29 In relation to the respondent's witnesses, Dr Cuttler's evidence was notably inconsistent on one point. In the second version of his witness statement he had stated at paragraph 8 that when he returned from holiday at the end of August 2018 he was given a non-negotiable instruction by Mr Tony Jordan to terminate external salaried and salaried agency contracts. He later in that paragraph described it as a blanket instruction. Yet, there was no mention at all of any instruction to terminate such contracts in the first version of his witness statement.

30 Not only was there inconsistency as to whether an instruction was issued or not, there was also inconsistency as to the terms of the instruction. Included in the second version of his statement but struck through (which inaccurately gave the impression that these words were contained in the first version of his statement and were being removed) were that the instruction was to terminate

"all temporary agency or contractors". Inserted in place of those words were that the instruction was to terminate "external salaried and salaried agency contracts". When we asked Dr Cuttler to explain to us what was meant by the terminology external salaried and salaried agency contracts he said it meant people who were not staff. However, during cross-examination Dr Cuttler accepted that one person who had worked for him, who he described as a direct agency worker, did not have their contract terminated. He was then asked whether the instruction was to end all contracts of an agency nature or to end the claimant's contract and Dr Cuttler's response was that he "could not recall exactly". It was pointed out to Dr Cutler that there appeared to be inconsistency between the agency worker being retained and Dr Cutler's evidence that the instruction was to terminate all agency staff. He was asked if he had any explanation for that inconsistency and he said that he did not (although he did at other points say that cost might be the differentiating factor between the claimant and the other agency worker).

31 A roughly contemporaneous email from Dr Cuttler described the situation in different terms again. He said, page 557, that "in the first week of September Tony advised that we needed to terminate outsourced contracts". He was asked in cross-examination whether outsourced contracts would include the other agency worker who was not terminated and he initially said no and then that he did not know. He was asked whether the word outsourced covered both external salaried and salaried agency contracts or just one of these categories. Dr Cuttler was not able to answer this question. We will explain what we considered to be the relevance of this inconsistency in our conclusions.

32 Mr Gill, it turned out, was not part of HR, albeit his job title suggested that he was, and whilst he was able to provide some evidence on the respondent's recruitment process generally and a recruitment freeze that was imposed in the summer of 2018 it was notable that he was not able to give any evidence at all on many of the relevant issues. His answers repeatedly to questions in cross-examination were that he "had no idea" or "didn't know". He was unable to help at all, for example, on how many agency contracts were terminated prematurely in August/September 2018, he was unable to help with whether contracts terminated prematurely were terminated in writing, he had "no idea" what percentage of people were directly employed by the respondent at the time of events with which this case is concerned, he "didn't know" whether the respondent had a high proportion of agency staff and he told us that he "had no idea" what the exceptions process was. Whilst we accept that Mr Gill genuinely did not know the answers to these questions this does mean that we had virtually no evidence on the wider picture relating to the termination/premature termination of agency staff/contractors/ outsourced contracts/ external salaried and salaried agency contracts/purchase service contracts.

Findings of Fact

33 Whilst the majority of our findings of fact are contained in the section that follows, some further findings, particularly those that also form a conclusion, can be found within the conclusions section of these reasons.

34 From the evidence that we heard and the documents we were referred to we make the following findings of fact:

<u>Disability</u>

34.1 The claimant first suffered with anxiety and depression in mid-2009, and she was referred to occupational health by her then employer, Rolls Royce, in August 2009, page 105. She was assessed by occupational health early in January 2010. We accept the claimant's evidence and find that this referral was made in respect of her anxiety and depression, which at this point was ongoing. It was recorded in the report, page 105, that the claimant considered her issues with the organisation to be the cause of her illness, which was described as being a work related illness, and it was said that she would not be "able to progress" her illness until steps had been taken to resolve these issues, page 105. It was said that in the doctor's opinion the claimant was likely to be considered to be disabled. The doctor stated that her condition was likely to be long-term, substantial and had affected her activities of daily living. The claimant was assessed again in July 2010 and a report was subsequently produced which referred to the claimant continuing to have an underlying medical condition (without naming what that condition was), page 107. Once again we accept the claimant's evidence and find that the reference to an underlying medical condition in this report was a reference to her anxiety and depression.

34.2 It was recorded in this report that the claimant had a work related illness and that there were organisational issues which related to problems with her previous role in terms of relationships with team members, problems with the team ethos and conflicts with her preferred way of working, and there was a recommendation that alternative roles be considered for the claimant. Her illness was described as being secondary to the organisational issues. Once again the doctor gave the opinion that the claimant was likely to be considered to be disabled. The doctor stated that the claimant's condition was likely to be long-term, substantial and had affected her activities of daily living.

34.3 Based on a letter that was produced from Turning Point dated January 2011, page 109, we find that at this time the claimant had a PHQ -9 score of 16 and a GAD score of 15. It was recorded that the claimant's scores had reduced from severe to moderate and that the claimant was being discharged from Turning Point's care.

34.4 In October 2013 a GP, Dr David Poll, provided a letter for the claimant in respect of an ongoing court case, page 110. It was said in this letter that the claimant had a background anxiety state related to the case. The GP recorded that he was concerned about aspects of the claimant's mental health which were being influenced by the continuing processes around her case and he wrote in support of a postponement of an upcoming hearing which he said would give the claimant more time to address her anxiety issues. He also recorded that he noted that her psychological issues continued to relate to a reaction to the issues being discussed in her case rather than a background mental health problem.

34.5 In February 2014 the claimant was signed unfit for work for a 3 week period with what was termed a stress related problem, page 111. She was signed off again with stress in October 2014, on this occasion for a 3 month period, page 113.

34.6 On 24 September 2018 the claimant was certified as unfit to attend court for the period 21 September to 30 September as a result of anxiety, page 899. The claimant had a County Court case ongoing at this time.

34.7 In November 2018 the claimant's GP referred her to the Community Mental Health Team and the team wrote to the claimant's GP on 9 November 2018, pages 118 – 119. It was said in the letter that the claimant in discussion had identified two main issues (we interpose, causing her anxiety, as the letter refers to the claimant's anxiety levels); the fact that she was facing what was termed a revenge eviction from her home address and that she had been the victim of sexual harassment at work. It was further recorded that the claimant did not believe there was any role for mental health services as her difficulties were entirely secondary to her social circumstances. Under the subheading "plan" it was said there was no role identified for the Community Mental Health Team and that the claimant's anxiety levels appeared to be a normal response to her circumstances and her reports suggested that she was managing the situation well, page 118.

34.8 By December 2018 the claimant's GP was treating the claimant for what he described as severe anxiety, page 122.

34.9 On balance, we find that in the latter part of 2009 and 2010 the claimant's anxiety and depression was having a substantial adverse effect on her ability to carry out her normal day to day activities; at times she found it difficult to cook, clean or shop. She struggled to take care of herself, sometimes would not eat and her concentration was affected, she avoided leaving the house and she had difficulties sleeping. We have accepted this evidence because some support for it was provided by the content of the Occupational Health reports, as set out at paragraphs 34.1

and 34.2 above. By early 2011 however things were starting to improve, as evidenced by her improving PHQ-9 and GAD scores, paragraph 34.3 above.

34.10 We do not find, as the claimant asserted in her disability impact statement, that from the early part of 2011 up to September 2018 she continued to suffer with anxiety and depression the severity of which would fluctuate dramatically but with bouts of severe depression on average once a year which would last for days if not weeks. We do not find that throughout 2011 – 2018 she had bouts of depression during which she was unable to; get out of bed, carry out basic household chores, look after herself, shower or cook, concentrate and focus on basic tasks. We set out our reasons for not making these findings in our conclusions.

The claimant's application for the compliance role

34.11 In January 2018 Dr David Cuttler interviewed two candidates for a compliance role on his team, one of whom was the claimant. During the interview the claimant asked about the respondent's code of conduct and there was a discussion about the fact that the respondent had a very clear expectation of behaviours between colleagues and also had processes in place for reporting any discrimination or unacceptable behaviour. The claimant requested a copy of this code of conduct.

34.12 On 30 January 2018 the claimant accepted a role to work with the respondent as a Compliance Engineer working on exhaust pipe emissions. She was a contractor not an employee, and she was engaged through Gattaca Projects Agency, also known as Matchtech. At this time the respondent was trying to clear a backlog in emissions tests which it had been unable to complete at its normal facility in Solihull. In order to tackle the backlog it had been agreed that each week approximately 12 to 18 vehicles would be sent to the emissions test facility at the engineering centre in Gaydon. This, in turn, meant that Dr Cuttler needed an extra person on his team to manage the transfer of vehicles, booking tests and collating the test results for review.

34.13 A contract was entered into between Gattaca and a limited company, identified only by its company number, for the supply of these services, page 95. It was accepted that this limited company was the vehicle under which the claimant was contracted to work for the respondent. The respondent was described as the client in this contract. The contract was a fixed term contract with a project start date of 20 February 2018 and a project end date of 14 March 2019, page 95. The respondent did not, therefore, enter into any contract with the claimant; her contract (via the limited company) was with Gattaca. The total price for

the contract was £64,260. Before us, it was not disputed that the respondent bore this cost (although the contractual mechanism for this was not before us). Had the respondent recruited directly for someone to carry out the Compliance Engineer role it likely would have recruited someone on a salary of around £40,000 - £50,000 a year. Accordingly, this was a somewhat more expensive way of fulfilling the business need. It was not unusual, however, for the respondent to pay a premium when it was entering into a bespoke contract for delivery of a particular project, such as this.

34.14 This type of contract is known internally as a purchase service contract. This term is used by the respondent when it enters into a contract with another company for completion of a particular task. The respondent also uses agency workers, where particular individuals are engaged via an agency to do a particular job, either on an open ended basis or for a particular period of time.

34.15 The claimant started in her role on 20 February 2018 and at this time was reporting into Dr Dave Cuttler, Emissions and Fuel Economy Compliance Manager. She was the only person within Dr Cuttler's team who was engaged on this type of contract, although he also had an agency worker working for him.

34.16 Very shortly after the claimant started work, we know not exactly when, there was an incident between the claimant and a male colleague, HG, the description of which was that HG had misappropriated the claimant's coat. This was described as an incident which caused the claimant a great deal of distress.

<u>The respondent's recruitment process</u>

34.17 The respondent has an internal portal on which roles available to internal candidates only are advertised. It also has an external portal for roles that are available to external candidates. Internal candidates are considered to be those people who are already on the respondent's payroll/are the respondent's employees. Agency workers and contractors (including purchase service contractors) are considered external candidates even if they are working for the respondent at a time when an internal role is advertised, because they do not form part of the respondent's headcount. Roles will be advertised internally only when there is no budget approval to increase headcount. About 50% of the respondent's roles are, in fact, filled by internal recruitment. There is nothing inherently more challenging or demanding about the process if a person applies as an external candidate; it is simply that external; candidates cannot apply for internal roles.

34.18 An agency worker or contractor could in theory submit an application form for an internal vacancy on the internal system but their application would be automatically screened out at an early stage because they are not an internal candidate.

34.19 As set out above, it is part of the claimant's case that the respondent should have applied what was referred to as the exceptions process to her. We find that whilst there was no formal written exceptions process, there was a well-established internal mechanism which could be used in exceptional circumstances, where an agency worker was carrying out a business critical role, under which a manager could apply to convert a contractor/agency worker to a permanent employee.

34.20 We make this finding for the following reasons. In the respondent's ET3, paragraph 20, the respondent had explained that the exceptions process is a well-established internal mechanism used in exceptional circumstances where a business critical agency worker needs to be retained and, subject to senior management signoff, the process can be used to convert the agency worker to an employee of the respondent. In the first version of his witness statement, paragraph 15, Dr Cuttler told us that the process was a mechanism which enabled a manager to request the conversion of a contractor to a permanent employee if the role was business critical, the skills base for the role was in very short supply and a contractor's performance was outstanding. This, of course, was consistent with what was in the ET3. In the amended version of his statement, paragraph 15, Dr Cuttler stated that there was no such process in a formal sense but in "incredibly unique circumstances" an agency contract could be extended if the work was business critical. This appeared, to us, to be an attempt to restrict the circumstances in which this process could be applied from one where there was a business critical role which needed to be filled to "incredibly unique circumstances", as described. We concluded that what the respondent had set out in its ET3, and in the first version of Dr Cuttler's witness statement, was most likely to be accurate.

The claimant's driver's medical self declaration

34.21 Because there was a possibility that the claimant might be required to drive in her role she was required, shortly after her engagement with the respondent had started, to fill in a driver's medical self-declaration, page 423. The claimant was required to answer 14 questions about her health as part of this declaration. It was said at the start of the form that if the answer to all of the questions was "no" then the claimant would be deemed fit to drive but if the answer to any of the questions was "yes" then a referral would be made to occupational health in order that they could make further enquiries or arrange for a medical.

34.22 The form then went on to say this:
Have you ever had, or do you currently suffer from, any of the following conditions;
Question 11 was: serious psychiatric illness or mental ill health.
The claimant ticked no in response to this question. She also stated in response to question 9 that she had never had a serious problem with memory or periods of confusion.

34.23 The claimant told us that she filled the form out in this way because she was not obliged to make her employer aware of her anxiety and depression, she was only obliged to inform them of what she termed notifiable conditions that might affect her ability to drive. We reject that as an explanation for why she filled the form in as she did because, fundamentally, that explanation was inconsistent with what the form was requiring the claimant to do. The form did not require the claimant to declare conditions which, in her opinion, might affect her ability to drive it required a declaration of certain health conditions suffered presently or in the past in order that occupational health could make an assessment and then advise the respondent on whether ability to drive was affected.

34.24 The claimant additionally told us in cross examination that she had spoken to occupational health prior to filling in this form, informed them of her anxiety and depression and asked if she was obliged to disclose anything that might affect her ability to drive. It was her evidence that Occupational Health told her to consult a government website in order to help her decide whether any particular condition needed to be declared, and that this also helped inform her decision about what to put on the form.
We reject that evidence. We do so because:
(i) This was not mentioned in the claimant's witness statement; it was raised for the first time by the claimant during cross examination.
(ii) We considered it inherently unlikely that Occupational Health would have advised the claimant to consult a government website before deciding what to declare on the form. We think it far more likely that Occupational Health, if they had been spoken to, would have told the claimant that she should answer the questions on the form truthfully and accurately.
(iii) We take into account also that the claimant's evidence in this regard was somewhat lacking in detail and cogency. There was no detail about who she spoke to and when. And the claimant's evidence was that the question she asked Occupational Health was whether "she was obliged to disclose anything that affected her ability to drive", not whether she was obliged to disclose anything that did not, in her view, affect her ability to drive. Accordingly, the question that the claimant told us she asked Occupational Health was contrary to her own position that she had no condition that affected her ability to drive.

The claimant and Mr Molesworth

34.25 Mr Molesworth worked for the respondent as a Documentation and Data Manager. He was not managed by Dr Cuttler, the claimant's manager, he was part of the wider team working for Mr Tony Jordan. He became friendly with the claimant and regularly exchanged emails and text messages with her. On occasion these messages included some mild sexual innuendo on the part of Mr Molesworth, albeit often in the context of a light hearted exchange. For example, pages 516-520;
Mr Molesworth asked the claimant if she wanted to go for a drink or a walk as he needed a break from his screen, the claimant responded she had just got back from one and would have to be quick. Mr Molesworth
"Is that a no? Or time for a quickie? (in a manner of speaking)".
Claimant;
"Oh my dayzzzzz. Again. LOL"
Mr Molesworth;
"Captain (this was the claimant's nickname for him) Molesworth!!"
Claimant;
"Rain check my lovely. I've used my allocation of walking, break for the day".
After which the claimant then emailed him to say she felt bad for him now, "maybe she could do two Costas in one day" and Mr Molesworth arranged to "swing by her desk". Followed nearly 45 minutes later by a message from the claimant to Mr Molesworth;
"Thank you for the refreshing beverage Captain".

The claimant and Mr Cramp

34.26 Mr Cramp worked as a Business Planning Analyst. We did not understand it to be disputed that Mr Cramp is someone who, at the time of the events with which this case is concerned, had mental health difficulties which he had suffered for some time. The claimant was aware of this; he shared that with her in the summer of 2018.

34.27 By the summer of 2018 Mr Cramp and the claimant were friendly at work and were regularly sending each other emails and Whatsapp messages, as well as socialising at work. For example, on 13 July 2018 the following email exchange took place between the claimant and Mr Cramp, pages 511-512:
Mr Cramp emailed the claimant at 14:22.20 PM saying there were chocolate doughnuts on offer and the claimant responded 7 seconds later writing "noooo" and then in a separate email "shall I come over?", and then "am starving" page 511. Mr Cramp responded "LOL feel free" and the claimant responded "on my way LOL". Just over half an hour later the claimant sent another email to Mr Cramp; "mmmm… suitably stuffed,

thank you". And there then continued a further light-hearted email exchange between them with Mr Cramp complaining that there was now doughnut powder all over the floor.

Mr Cramp's 51st birthday

34.28 In August 2018 the claimant and Mr Cramp socialised outside of work; the claimant went to a cricket match with Mr Cramp to celebrate his 51st birthday. No one else attended the cricket, it was the claimant and Mr Cramp alone. Mr Cramp sent the claimant the following WhatsApp message after the event, page 203:
"Just got home. I know things didn't go quite as smoothly as either of us wanted, but the time we spent together meant a lot to me. My 51st birthday was a good one thanks to you safe journey home
peace and love",
Which was followed by the peace emoji and the heart emoji

34.29 To which the claimant replied;
"So glad you're home safe. Absolutely my lovely. Be good". Which was followed by a smiley face emoji page 203.

34.30 On 17 August 2018 Mr Cramp went camping at a music festival and he sent the claimant some photographs of the festival via WhatsApp, pages 204 – 205. By this point they knew each other sufficiently well to share an in-joke about a spork that Mr Cramp used whilst he was camping. Mr Cramp had broken his spork and he sent the claimant a WhatsApp picture of the broken spork together with a broken heart emoji, page 206. The claimant responded back: "oh no…… the spork" with an upset face emoji. As the claimant explained in cross examination, she "knew that Mr Cramp loved this spork". That particular joke continued between them on the following day with Mr Cramp sending the claimant via WhatsApp a picture of a new spork with the message;
"New spork! All is right with the world".
The claimant responded with a laughing face emoji and the OK sign, page 208.

34.31 On 22 August 2018 Mr Cramp sent a WhatsApp to the claimant asking if she was in Whitley tomorrow and if so could they grab a coffee, page 213. The claimant's response was:
"Will try sound nice
all okay?
Coffee for any reason or just catch up?"

34.32 Mr Cramp responded that it had not been pleasant at work recently and the claimant asked what had happened and;
"Who's been giving you problems? Send them to me", page 214.

Mr Cramp responded with a nickname that he had for the claimant "Hippy" and said that he would tell her tomorrow, a message sent with the peace and heart emojis. Her response, at 9:20PM in the evening was:

"If it gets too much text me
Had a meltdown of my own today
Sat in work car park unable to move for 3 hours"

34.33 Mr Cramp's response to this at 9.26PM was:
"Life is bastard! Same I'm always here for you. I will never tell you lies or let you down I've got your back", page 214. The claimant responded with the OK emoji, the thumbs up emoji and the 100 emoji (which is generally used to emphasise support and approval, a picture equivalent of "absolutely")

34.34 The next day Mr Cramp sent a WhatsApp to the claimant to say that he was OK now and had calmed down. He asked how she was and she responded that she never knew there was such a thing as a revenge eviction, page 214. The claimant was at this point facing eviction from her flat following on from having made complaints to the landlord about the state of the property. The conversation between them continued. He responded "as long as you are okay? It's been a horrible day but tomorrow is a new one? You have chocolate should you need it and stands I'm away (sic) if you need a bolthole and of course a cat". The claimant's response just a few minutes later at 9:45 PM was "good to have that peace of mind thank you kindly Ade" followed by the okay emoji to which Mr Cramp wrote "that sounds like a polite speech, we're mates remember?". The claimant's response to this was "totes lol", page 216.

34.35 The claimant's explanation for having sent this last WhatsApp message was that what she meant by this was that they were "workmates" and it was not an affirmation that they were friends. We reject that evidence; it was simply not reflective of the context of the conversation. The claimant, we find, was affirming Mr Cramp's view that they were friends.

34.36 The claimant also shared information about the eviction notice with Mr Andy Bailey, Manager Certification and Compliance team and Dr Cuttler, informing them that she had been served with a no-fault possession order which she said had since been termed a "revenge eviction", page 268.

34.37 Mr Cramp and the claimant continued to exchange WhatsApp messages regularly after this, frequently about non-work-related matters, see for example page 225. Whilst the claimant was usually responsive whenever Mr Cramp messaged her, there were some messages that she

did not respond to. Often conversations were started by him asking the claimant whether she was OK, pages 220 and 223, for example. Mr Cramp had also taken to sending the claimant messages first thing in the morning, for example at 7.37AM;
“May you notice the beauty of the morning, see the glory of the sunshine, feel the moments of the new day and hear from a friend who cares. Good morning!”, page 226.

34.38 There was a lengthy WhatsApp exchange on 29 August 2018 between Mr Cramp and the claimant about the claimant’s impending eviction. During the course of this Mr Cramp suggested that he was going to take the claimant for a curry, an invitation which the claimant responded to in somewhat ambivalent terms “Don’t go to any trouble Ade with this inspection now happening Friday”, page 221. The claimant went on to say to Mr Cramp that the stress (of the eviction situation) was doing her head in and that she felt exhausted every day, had no energy and it was getting her down, page 222. Mr Cramp responded “I get that! Was the reason I thought you needed a timeout, you talk I listen remember”. He also messaged her to say “try to keep positive hippy” accompanied by the peace emoji and the heart emoji, page 222.

34.39 Mr Cramp started a WhatsApp conversation with the claimant at 11.05AM on 30 August asking how she was, page 223, and the claimant updated him with details of work that was being done on her flat. The conversation continued between them off and on during the day.

34.40 At 7:37 AM on 3 September 2018 Mr Cramp sent a WhatsApp to the claimant saying:
“Good morning I send you this message today because it’s important you know. You are not alone in this world, morning, afternoon, evening, all day, every day”, page 227. The claimant did not respond to this message.

34.41 Later on in the day Mr Cramp messaged the claimant asking how things were and she responded:
“frustrating tbh…. Gmail keeps crashing
am I on?
Did you get my chat?”, page 227.

34.42 Mr Cramp responded a few minutes later:
“you are not showing as online (sad face emoji) I did get you to reply (:-) emoji) I send a message each morning because I know that’s the worst time”, page 228.

34.43 The claimant then wrote:
“how about now… on?” And then
“and thank you” followed by a smiley face :-) emoji, page 228.

34.44 Mr Cramp responded
“No still shows you as active 40 minutes ago”, followed by the sad face emoji to which the claimant messaged saying it was annoying and Mr Cramp then asked whether the claimant was connected via pulse secure. The claimant confirmed that she was and stated that the problem was being caused by her old laptop which was running very slow, page 228. Mr Cramp offered her the number for IT support. He asked her if she wanted to meet in a pub later for a chat, an invitation which the claimant politely declined saying that she felt unwell “would do Ade but my nose won’t stop running…run down maybe”, page 229. The conversation between them continued with Mr Cramp saying that he wanted to help to which the claimant responded;
“I know its sweet. But I’ll be asleep super early today. Probably early evening. Try (to be in) early tomorrow”, page 229. Mr Cramp’s response was;
“Ok I understand. I mean it you are not alone and I am your friend any time of day or night and trust me I do not sleep”, page 229.

34.45 The claimant wrote back;
“And I know this for sure about the no sleep lol.
Am I online now
How about now
Or now
Or now lol”, page 230.

34.46 Mr Cramp responded no, no and still no, to which the claimant wrote;
Pants
Pants
Still pants
Brightly coloured flared pants
LOL, page 231.

34.47 We reject the claimant’s evidence that by this point Mr Cramp was monitoring her regularly at work, which was disturbing her, and that this exchange was evidence of this. We do so for the reasons we have set out at paragraph 27 above.

34.48 On 4 September 2018 at 6.37AM Mr Cramp sent a WhatsApp to the claimant saying this, page 233:
“Good morning… Know this, you really are amazing and very special.
Thanks for being my friend.
I’m here if/when you need me”.

34.49 The claimant responded 20 minutes later, page 233:

"Ade I hardly slept a wink last night
probably stress and exhaustion
might ring my GP
would you help me tomorrow?"

34.50 Mr Cramp wrote back 30 minutes later, page 233;
"As we talked about, please call the GP and get an appointment ask to see the IAPT team". And he then gave the claimant a contact number for Mr Bailey and asked her of she was okay. The claimant thanked Mr Cramp, told him she was in the queue, that she thought she might have flu and that she had massaged Mr Bailey and Dr Cuttler. Mr Cramp told her to keep talking to him.

34.51 There were then further WhatsApp exchanges between them about various matters, including how the claimant was feeling. The claimant sent Mr Cramp an uplifting quote from John Lennon and he responded with the :-) emoji, the peace emoji and the heart emoji, page 234. At 11:44 AM she messaged that she had not had a reply from "DC or Andy" and she then asked Mr Cramp (who was in work) if he had seen them around yet, page 235. In cross-examination the claimant's explanation for sending this last message was that she was concerned that Mr Cramp was stepping in when it was more important for her managers to be informed (of the fact she was feeling unwell). She stated that she sent this message to let Mr Cramp know he was to take a step back. We reject this evidence. Read objectively there was simply nothing about this part of the exchange which explicitly or implicitly could be taken as the claimant telling Mr Cramp to take a step back. This is a further example of the unreliability of the claimant's evidence, particularly when it came to describing events concerning Mr Cramp.

34.52 The WhatsApp chat between them continued with Mr Cramp then telling the claimant he had seen Mr Bailey who had told Mr Cramp he had received her message. The claimant asked Mr Cramp how Mr Bailey had appeared and he said fine. The claimant then forwarded to Mr Cramp a copy of the text message that she had sent to Mr Bailey, page 236. In that message she talked about the difficulties that she was having with her revenge eviction and she also referred to the fact that Mr Cramp, who she described as working in business planning, was giving her a lift into work the following day, page 236.

34.53 Mr Cramp responded when he saw this message saying "how dare you I work in powertrain strategy. business planning indeed!!! Keep positive I'm here whatever happens I will always stand by you", page 236.

34.54 On the version of the messages produced by the claimant it could be seen that there was a response from the claimant to this message, the

very top of which appeared on page 236, but the message could not be read because the text had been cut off. The remainder of this WhatsApp exchange was, in fact, disclosed by Mr Cramp. It was as follows, page 634:

34.55 The claimant apologised. Mr Cramp responded "as it's you I'll let it slide this time" and the claimant then sent Mr Cramp a GIFF of a double face palm, page 635, with LOL and laughing/crying emoji's. She then messaged Mr Cramp as follows:
"text reply from Andy… All good
Thanks Ade
and he knows uve (sic) got my back which is (ok/good emoji)", page 635.

34.56 At some point, we know not when, it had been arranged between the claimant and Mr Cramp that he would give her a lift into work on the 5 September and at 5:01 PM the claimant messaged Mr Cramp with her home address, page 637. She also provided him with very brief directions. Mr Cramp told her to text him if there were any problems and she responded "trust me!" Followed by the exasperated face emoji, page 637.

34.57 The claimant's evidence was that by this time she was finding Mr Cramp's behaviour invasive, his attention was making her feel very uncomfortable, the volume of his messages was unrelenting, she felt pressurised to maintain contact and she was increasingly uncomfortable with his interest. We reject that evidence because it is highly unlikely in our view that in such circumstances she would have;
(i) asked Mr Cramp for help, paragraph 34.49 above,
(ii) arranged for him to give her a lift into work, paragraph 34.56 above, and when that was not possible because she was ill made the arrangement again for the following day, see paragraph 34.71 below,
(iii) acknowledged that Mr Cramp "had her back" and sent this message with a positive emoji, paragraph 34.55 above, and
(iv) provided Mr Cramp with her home address and directions as to how to get there, paragraph 34.56 above.
(v) We took into account also in rejecting this evidence our general assessment of the claimant's credibility and our particular assessment that when it came to describing events concerning Mr Cramp the claimant's evidence was unreliable. This was, in our view, a further example of this.

34.58 It is clear, in our view, that by this point the claimant and Mr Cramp had developed a friendship. However we infer and find that, on Mr Cramp's part, by the late summer of 2018 this had developed into an interest that extended beyond friendship to something of a more intimate nature. He was, more likely than not, somewhat infatuated with the claimant by this point we find. We set out in our conclusions our reasons for making this finding of fact.

The respondent's financial situation

34.59 By the summer of 2018 the respondent was in financial difficulty. On 24 August 2018 Mr Ian Hartnett, a senior manager within the respondent, sent an email to all of the respondent's employees, pages 625-626. In this email he set out that the respondent was not selling enough, costs were too high and the respondent's cash situation was becoming critical. He set out that with immediate effect all external salaried and salaried agency hiring activity was to cease and that whilst hiring processes which were underway would complete no more invitations to external candidates would be made. It was also said that agency renewals would be progressed but there would be a lower threshold at which CEO and CFO authority was required for the renewals. Accordingly, in this email Mr Hartnett announced a recruitment freeze. It was not, however, mandated or even suggested in this email that as a cost saving measure existing agency contracts/contractors should be terminated prematurely.

Conversations between Dr Cuttler and Mr Jordan: was an instruction issued?

34.60 Towards the very end of August 2018 Mr Jordan, Dr Cuttler's manager, had a discussion with Dr Cuttler about the fact that the respondent was going to need to reduce operating costs quickly. He asked Dr Cuttler to consider ending some contracts within his team in order to assist with the cost saving.

34.61 Dr Cuttler's evidence as to precisely what, if anything, he was instructed to do in relation to contractors/agency workers after this conversation was confused and inconsistent. We reject Dr Cuttler's evidence and do not find that a blanket instruction was issued to him by Mr Jordan to terminate all agency workers and/or all contractors and/or all purchase service contractors. We reject the respondent's evidence for the following reasons. As set out above, paragraph 29, the first version of Dr Cuttler's witness statement did not make any mention at all of any instruction having been issued. We considered this to be a significant omission given that the reason for the termination of the claimant's contract was a matter of significant dispute between the parties and it was essentially Dr Cuttler's position before us that he had no option but to terminate the claimant's contract because such an instruction had been issued.

34.62 We took into account the inherent inconsistency between Dr Cuttler on the one hand saying there was a blanket instruction to terminate everyone who was not on the respondent's payroll and on the other hand his admission that one agency worker who had been on his team was

retained. We drew an adverse inference against the respondent in respect of its failure to disclose documentation to demonstrate that the early termination of agency workers/contractors had taken place elsewhere across the business, despite a specific disclosure request from the claimant, page 858. We took into account also that the only contemporaneous evidence produced by the respondent went to the different issue of a recruitment freeze not early termination of agency workers/contractors. We bore in mind when reaching this finding that the evidence of Mr Molesworth was that he too was issued with an instruction by Mr Jordan. But his evidence as to the terms of the instruction was different again from that of Dr Cuttler. He told us that he was instructed that purchase service contracts needed to be brought to an end, and notice given in line with the amount of money that had been paid against the contract so far, and that other agency workers would have to be justified in order to keep their jobs. Lastly, if there had been a blanket instruction to terminate all non JLR employees, as the respondent before us suggested, we considered it likely that there would have been something in writing in relation to this, just as there was with the recruitment freeze, and nothing was produced by the respondent.

34.63 Doing the best that we can on the evidence that was before us we consider it more likely than not that the situation was as Dr Cuttler described in his first witness statement; namely that he was told towards the very end of August there were going to be significant cutbacks and he needed to consider ending some contracts within his team in order to assist with the cost saving.

34.64 We find, based on the oral evidence of Dr Cuttler, that one other service contractor in the compliance group, albeit not reporting to Dr Cuttler, had his contract ended prematurely at this time. There was also an agency worker who worked initially for Dr Cuttler and then for Mr Bailey who did not have his contract terminated and one person on a service purchase contract working for Mr Molesworth, whose contract was not terminated at this time, but whose contract was terminated a number of months later.

The timing of the decision to terminate the claimant’s contract

34.65 We accept the evidence of Mr Molesworth and find that on 3 September he had a conversation with Dr Cuttler, because he was trying to get information from him as to how safe his (Mr Molesworth’s) contractor might be, and he was told during this conversation that the claimant was at risk.

34.66 Before us Dr Cuttler’s evidence was that before the incident on 5 September a decision had been made by him, following on from the

conversation with Mr Jordan, to terminate the claimant's contract. The claimant's position was that the decision was made after the incident (and her report of it to Mr Bailey, Mr Molesworth and the police), which assertion was based on the fact that Dr Cuttler did not issue a written instruction to terminate the contract until 12 September.

34.67 We have accepted Dr Cuttler's evidence and found as a fact that he decided to terminate the claimant's contract before the incident on the 5 September (and any subsequent reports about it). We explain our reasons for making this finding in our conclusions.

34.68 We find that having made this decision before 5 September Dr Cuttler then contacted Hardeep Banwait, who was based in the respondent's purchase department, on 5 September to ask what the correct procedure was to terminate the claimant's contract, page 561. It was agreed that Dr Cuttler should speak to Gattaca before formal notification was sent out.

34.69 Dr Cuttler tried to speak to the Gattaca project manager on 6 September, without success, before emailing him on 10 September. The project manager at Gattaca contacted Dr Cuttler on 11 September explaining that his original point of contact had now left and they were now the right contact. Dr Cuttler than explained that Gattaca would shortly receive written confirmation of the termination of JLR's contract with Gattaca in respect of the services provided by the claimant.

<u>The shower incident 5 September 2018</u>

34.70 As set out above, it had been arranged between the claimant and Mr Cramp that he would give her a lift to work on the morning of 5 September.

34.71 At 5.25 in the morning the claimant started a WhatsApp conversation with Mr Cramp. The message was as follows, page 237:
"Ade sorry. Sorry for this information. Have been in pain on loo last half hour. Touch of IBS symptoms. Feel clammy and faint. Will have to ring surgery at 8.00 when they open. Please let me know you got this message so you don't go to trouble this morning… If okay with you we'll try again tomorrow morning".

34.72 Mr Cramp responded at 6:14 AM:
"okay kidda I'll talk to you later".
And then at 6:29 AM:
"Good morning. There is something you must always remember. You are braver than you believe, stronger than you think and smarter than the average bear!" Followed by a bear emoji, page 237.

34.73 The claimant responded at 6.29AM with a crying face emoji. She wrote that she “was trying” and she stated that she was texting Andy (a reference to Mr Bailey) now. She asked Mr Cramp if it was too early to text Mr Bailey, page 238. Mr Cramp responded at 6.31AM “no but I think it would be good to call him sometime before 8:30 follow the procedure”, page 238.

34.74 The claimant sent a WhatsApp to Mr Bailey at 6:35 AM apologising for it being so early, page 247.
She then wrote:
“I’ve been up since 5 AM (Ade knows) with IBS stress symptoms and will need to ring surgery when they open 8 AM if you need to call me before 8:30 I’ll be by my phone”.

34.75 Mr Cramp messaged the claimant at 7.30AM saying that he felt for her followed by a peace and heart emoji and he wrote that he had been there and got the T-shirt and still put it on some days, page 238. The claimant did not respond to this message.

34.76 Mr Cramp messaged the claimant again at 9:18 AM saying;
“How’s things kidda?”, page 238. The claimant did not respond.

34.77 At 9:22 AM Mr Bailey messaged the claimant saying that he was sorry to hear the news and asking if she had been able to get a doctor’s appointment, page 247. The claimant did not respond until 11.38AM, for which see below.

34.78 Mr Cramp texted the claimant again at 10.26AM saying, page 238;
“You are scaring me now! Please let me know u r ok?” The claimant did not respond.

34.79 Mr Bailey told Mr Cramp that the claimant had not responded to his WhatsApp message. Mr Cramp was concerned; he considered it out of character for the claimant to not respond to WhatsApp messages instantly. He told Mr Bailey that he was worried because the claimant was in an awful situation at home that was spiralling out of control. Mr Cramp and Mr Bailey decided that they should go and check on the claimant at her flat. We accept this account, which was contained in Mr Cramp’s witness statement, because it is evident from the WhatsApp that he sent at 10:26AM, see paragraph 34.78 above, that he was genuinely concerned for the claimant at this time.

34.80 When they arrived at the flat Mr Bailey asked Mr Cramp to go and check on the claimant. Mr Cramp rang the front doorbell but there was no answer and so he then went round to the back of the house and found the

French doors were unlocked. He went into the flat and started shouting for the claimant with no response.

34.81 We find that Mr Cramp moved through the kitchen and main living area shouting hello until he arrived in the hallway close to the bathroom. The claimant was at this time in the shower in her bathroom just off the hallway. We find that whilst he was in the hallway she became aware of his presence because she heard his voice calling out. We find that the claimant was scared by his presence. She demanded to know how he had got into her flat and he told her that when she had not answered her front door he had walked around to the side entrance and found the French doors unlocked and let himself in. We find that she demanded he leave and he did so.

34.82 We do not find, as the claimant asserted, that Mr Cramp saw the claimant naked; that he was standing in the doorway of the bathroom looking at her as she got out of the shower. We do not find that she then had to stand naked in front of him desperately trying to cover herself with her hands as she did not have a towel and that she demanded he leave but he refused to do so until she had come out of the bathroom. We do not find that Mr Cramp then said to her that he was going to wait in her flat for 30 minutes until she came out of the bathroom and that she repeatedly shouted at him get out and go back to work, or that Mr Cramp only eventually left after this confrontation had happened. We explain in our conclusions why we have rejected this evidence from the claimant.

Mr Cramp's apology and the claimant's response

34.83 After this incident Mr Cramp almost immediately sent a WhatsApp to the claimant, his message was timed at 11:08 AM. He said this:
"I'm so sorry I did not mean to scare you I was just so worried about you", page 238.

34.84 The claimant responded to this message at 1.18PM, she said this, page 640:
"I appreciate the intention Ade it's just it was too much. I need space. Please wait for me to contact you when I am ready".

34.85 At 11:38 AM the claimant sent a WhatsApp to Mr Bailey saying this, page 247:
"hi Andy, bit shaken can you call when you have a moment?"

The first protected act (Mr Bailey)

34.86 That day the claimant spoke to Mr Bailey about the incident. We do not find that the claimant told Mr Bailey that Mr Cramp had entered her

property and found her in the shower and then refused to leave and stayed against her wishes because (i) such an account would not be consistent our findings as to how the incident actually happened and we consider it likely the claimant would have given an accurate account of the incident at this stage and (ii) such an account was not consistent with the verbal description of the incident that the claimant also provided to Mr Molesworth that day, see below. We consider and find that the claimant would have given a similar account of the incident to Mr Bailey as she did to Mr Molesworth, see below. In the days that followed Mr Bailey did not take any steps to progress any form of investigation or action into the incident. We consider it more likely that not that, just as with Mr Molesworth, paragraphs 34.98 and 34.99 below, the claimant told Mr Bailey that she did not want any action taken at this time.

34.87 At 12:07 PM the claimant sent a WhatsApp to Mr Molesworth saying, page 290:
"Nick urgent can you take a quiet moment to call?"

The first protected act (Mr Molesworth)

34.88 He called her a short while later. We accept the verbal evidence of Mr Molesworth and find that the claimant told him that whilst she was in the shower she was very surprised to hear a voice on the other side of the door and it panicked her because she was in the shower. He (a reference to Mr Cramp) could have seen her naked. She said that she asked him to leave and that she had later found out that it was Mr Bailey who had driven Mr Cramp there and that shocked her even more. Mr Molesworth recommended that the claimant report the incident to HR.

34.89 After the conversation with Mr Molesworth the claimant sent a WhatsApp to him at 3:08 PM saying, page 290,
"Already suffering intense stress. What Ade did just made it worse, supposed to be recovering". He responded:
"yes a big shock, if you're around tomorrow will have another chat. Have you had any further contact with him today?"

34.90 The claimant then forwarded to Mr Molesworth the WhatsApp messages she had received from Mr Cramp that morning to which he responded:
"it's good that he's not responded since your last message - the test will be seeing how long that lasts for… If he can take no for an answer", page 292.

The flowers

34.91 Also on 5 September there was an delivery of flowers to the claimant's home address, which she rejected. The flowers had been sent anonymously. There was a card with the flowers which read:
"I have been, and still am at times, where you are at right now. I understand. You are loved", page 249.

34.92 The claimant contacted the florist who informed her that the flowers had been sent by Mr Cramp.

34.93 We accept the evidence of Mr Cramp, as it was supported by an invoice from Interflora, page 632, that he placed this order at 6:45 AM on 5 September – i.e. before the incident at the claimant's home had happened. He knew at this point that a decision had been made to terminate her contract, as he put it "that yet more bad news was coming her way", and he wanted to show some support.

34.94 The claimant sent a Whatsapp to Mr Molesworth at 5:58 PM to say that she had received flowers from Mr Cramp and that she was scared now, page 294. Mr Molesworth responded that it was time to take more action, page 294.

34.95 The next day, 6 September, Mr Bailey sent a WhatsApp to the claimant at 9:10 AM asking how she was and whether she had made it into the office, page 248. The claimant responded thanking Mr Bailey for asking and saying that although her stomach was a bit off she was on her way into work and was having a coffee with Nick (Mr Molesworth) to ease her way into it. She said "all will be okay", page 248.

34.96 The claimant was also in contact via WhatsApp with Mr Molesworth that morning about meeting up for a coffee/breakfast. Mr Molesworth messaged the claimant at 9.04AM to say he was starving and would be going to buy some toast soon. The claimant responded:
"I'm sorry my lovely had a flashback in shower and a moment. We may miss breakfast however costs (for which read Costa) are always open. See you shortly. Queenie", page 293. (Queenie was the claimant's nickname).

The second Protected act: 7 September 2018; the report to the police

34.97 On 7 September 2018 the claimant reported the incident with Mr Cramp to the police. The crime report, which we considered we could treat as a reliable summary of what the claimant reported at the time, even though it post-dated this initial conversation the claimant had with the police, stated that after the claimant had called in sick to work she was

later that morning having a shower when a fellow employee let himself into her flat and watched her in the shower, page 165. There was no mention in the summary that whilst she was stood naked in front of Mr Cramp he refused to leave until she had come out of the bathroom, that Mr Cramp said to her that he was going to wait in her flat for 30 minutes until she came out of the bathroom and that she repeatedly shouted at him get out and go back to work. Given that all of this conduct would have been a serious aggravating feature of the incident we infer, from the absence of this information in the report, that the claimant did not make these complaints to the police. It was also recorded by the police that the claimant did not support police action.

34.98 There was a Whatsapp conversation that day, 7 September, between the claimant and Mr Molesworth. The claimant sent Mr Molesworth a copy of the text that had been on the card sent with the flowers and she asked Mr Molesworth not to do anything saying that she was thinking about things at the moment, page 296. He responded that she was not to worry as he was not going to do anything without her say so, page 298. Subsequently, on 8 September, Mr Molesworth sent the claimant information about how to deal with stalkers, page 299. The claimant responded to this saying that she had thought Mr Bailey was being supportive until he said to her that he had told Mr Cramp that he did what he (Mr Bailey) would have done in the circumstances, page 300. She stated that had massively undermined her confidence in Mr Bailey and that consequently she had phoned Leicestershire police the night before, page 300.

34.99 Mr Molesworth asked the claimant whether the police were going to follow it up or just log it and monitor it at this stage, page 302. The claimant responded that the police would usually attend - i.e. visit Adrian, however she had said that in light of the manager's highly questionable actions the police would just document it until she instructed differently. Mr Molesworth asked if she was going to take it further at work, page 302. She responded as follows, page 302;
"Prob not at work unless or until anyone tried to mess with me in any way, whether it be on a contractual or personal level". This was on 8 September.

The third and fourth protected acts

34.100 On 8 September the claimant reported to Mr Bailey that Mr Cramp had sent her flowers anonymously and that she had reported the incidents to the police. (The claimant in her statement said this happened on 7 September and in the list of issues it was also said that she told Mr Bailey about the flowers on 7 September and on the same date told him she had reported matters to the police. However, as she did not report the incident

to the police until the evening of 7 September, see paragraph 34.98 above, it must have been 8 September when she told Mr Bailey about the flowers and the report to the police).

Mr Cramp's message to say goodbye and the response

34.101 On 11 September at 10.05AM Mr Cramp sent a Whatsapp to the claimant saying that he just wanted to say goodbye:
"What happened last week was beyond horrible, I should never have been put in a position where I knew what was happening, but could not tell you. I hope you believe me when I say I tried to protect you. And maybe what I did makes a little more sense now you know. I will always be your friend but understand you feel I let you down. So I promise I will never contact you again, but you will always be my friend", page 239.

34.102 The claimant responded at 11.21AM as follows;
"I just needed space Ade. You don't need to say goodbye. Nobody wants that. Just needed space. All will be okay".
She ended the message with a :-) emoji, page 641.

34.103 We do not find that the claimant had reported the incident of 5 September to Dr Cuttler by this time. The claimant led no evidence to this effect in her witness statement and in the circumstances we prefer the evidence of Dr Cuttler that he was not told about the incident by the claimant until later.

34.104 We do find, however, that Mr Bailey, more likely than not, had told Dr Cuttler about the incident on 5 September. We make this finding because Dr Cuttler accepted in cross examination that he had spoken to Mr Bailey that day before he and Mr Cramp want round to the claimant's property and spoken to him afterwards, and given the highly unusual nature of the incident it seemed to us to be inconceivable that Mr Bailey would not have mentioned it to Dr Cuttler. We do, however, accept Dr Cuttler's evidence that Mr Bailey did not subsequently tell him that the claimant had reported an alleged incident of harassment to him (protected act 1) or that she had reported to him that Mr Cramp had sent her flowers (protected act 3). As the claimant's stance at this time was that she did not want any action taken about these matters, paragraph 34.82, we considered it relatively unsurprising that the claimant's reports to Mr Bailey were not passed on at that point to Dr Cuttler. That said, we considered it to be more likely than not that Mr Bailey told Dr Cuttler that the claimant had told Mr Bailey that she had reported the 5 September incident involving Mr Cramp to the police (protected acts 2 and 4). It is not, after all, a usual occurrence for an employee to report another employee to the police about a matter that was, at least in part, work related, and

accordingly we think it likely that this would have been passed onto Dr Cuttler.

The termination of the claimant's contract

34.105 On 12 September 2018 Dr Cuttler emailed Mr Banwait to say that due to the respondent's financial situation the contract which the respondent had entered into with Gattaca, under which the claimant was supplied to the respondent, would have to be terminated. Dr Cuttler requested that Gattaca set the last paid working day for the claimant as Friday 28 September, page 552.

34.106 On 17 September Mr Thomas Rick from Gattaca spoke to the claimant and emailed her, page 47 claimant's bundle. He told her that the respondent was terminating her contract as of the end of September and that her last working day would be 28 September 2018. The claimant was told that the respondent had taken the decision to cancel outsourced contracts as a cost saving measure in light of the well-publicised financial pressures the company as a whole was facing. She was further told that this was in no way reflective of her performance carrying out the duties of her contract. She was asked to provide an updated CV so that the agency could assist her in securing a new placement.

34107 On 18 September Dr Cuttler messaged the claimant stating that he knew that the news from Gattaca would be a shock for her and came at an inopportune time. He asked the claimant to let him know if it would help to talk, page 270. The next day he invited the claimant to attend a meeting with him on 19 September, page 267.

34.108 The claimant was the only person on Dr Cuttler's team to have her contract terminated. The agency worker on the team (who around this time had moved across to Mr Bailey) remained working for the respondent. There was one other person in the department who was on a service purchase contract whose contract was terminated, but this was not until very many months later, sometime in the summer of 2019. We also find, based on Dr Cuttler's oral evidence, that there was one other contractor on a purchase service contract in a different department whose contract was ended prematurely around September 2018. This person worked in the Compliance Certification group.

Meeting 19/9

34.109 On 19 September 2018 the claimant attended a meeting with Mr Molesworth and Dr Cuttler, page 555. The claimant informed Mr Molesworth and Dr Cuttler during this meeting that she had anxiety and depression, which was recognised as a disability, and she confirmed she

was willing for information in relation to this to be shared with HR on a need-to-know basis only. There was discussion about the incident with Mr Cramp and Mr Bailey and also the earlier incident involving HG. We find, based on Dr Cuttler's verbal evidence, that the claimant informed him that Mr Cramp had entered her property via the French windows and had seen her, as he put it, in a state of undress. Based on Dr Cuttler's account of this meeting at page 558 we also find that she told him that she was very upset and had reported the incident to the police but had asked them not to take any action because of Mr Cramp's mental health condition, see paragraph 34.111 below. The claimant also told him that Mr Cramp had sent her flowers and there was a discussion about her current personal circumstances.

Claimant confirms she does not wish to complain

34.110 On balance we accept the evidence of Dr Cuttler that the claimant stated that she did not wish to pursue any formal action against any person at this time but that she did not want any contact with Mr Cramp or HG, either professionally or socially, page 555. We accept this evidence because it was corroborated by the evidence of Mr Molesworth, who was also present at the meeting, and Dr Cuttler's note of the meeting, page 555. Additionally, in an email sent by Dr Cuttler to HR a few days later on 24 September, he wrote that he had made the claimant aware during this meeting of the Code of Conduct and that "at present she simply wants no contact with Harry" and "minimal contact with Adrian" and she did "not want to formally complain" page 558, which in broad terms supported Dr Cuttler's verbal account. Lastly, we took into account that in an email of 27 September written by Dr Cuttler, for which see more below, he stated that the claimant "*now* wanted to formally report her situation to HR", the clear implication of this wording being, in our view, that previously the claimant had told him that she did not wish to formally complain.

34.111 We were mindful when making this finding that Dr Cuttler also wrote to the claimant on 20 September, paragraph 34.110 below, that he had not raised the question (with HR) of registering any concerns with respect to "dignity at work" as the first priority was to address the issue of the contract end date, page 560, which arguably suggested that there had been a discussion about pursuing a complaint under the Dignity at Work policy. But there were different interpretations that could be put on these words; for example *if* the claimant chose to complain how would she go about doing it. Consequently we did not consider this was sufficient to undermine our finding of fact, on the balance of probabilities.

34.112 The claimant also stated during the meeting that she had lost confidence in Mr Bailey. The claimant stated that in her view she ought to be afforded reasonable adjustments to the termination of her contract.

There was a discussion about whether the claimant could be found alternative work and she stated that she would be open to a different contract if that helped to save money.

34.113 That day, 19 September, Dr Cuttler filed a request with HR for HR advice, which generated the ticket number 284018, page 555. Dr Cuttler asked for an HR specialist to call him stating that he had been instructed to terminate an outsourced contract as a means of saving money and had terminated the contract but had then been made aware of a number of what he described as complications relating to the claimant's anxiety and depression which he said was a recognised disability. He stated that the claimant believed that the respondent might have a responsibility to allow for a reasonable adjustment, page 555.

34.114 He was told by HR that any request for a reasonable adjustment should be made to Gattaca in the first instance as they were the claimant's employer, page 555. He informed the claimant of this the following day, 20 September, page 560. Dr Cuttler advised the claimant to speak to Gattaca and told her that he had asked for a further discussion with HR in order to check JLR's position on the assumption that Gattaca made a request to the respondent for an extension (of her contract). He also informed the claimant that he had not raised the question of registering any concerns with respect to "dignity at work" as the first priority was to address the issue of the contract end date, page 560.

34.115 Dr Cuttler continued to pursue the issue of the claimant's contract termination/extension with HR. On the afternoon of 20 September he wrote to HR stating that he was trying to work through a complex issue that he had not dealt with before and had raised a ticket with HR directly and requested a call, page 558. He wrote that HR Direct had simply stated that it was not a JLR problem and had closed off the ticket and that this ultimately did not help him or JLR, page 558. He was asked to provide further detail and on Monday 24 September he sent a lengthier email to HR, pages 556-557.

34.116 In this email of 24 September, pages 557 – 558, Dr Cuttler explained that in the first week in September he had been advised that outsourced contracts needed to be terminated and that he agreed to follow this up with Gattaca as he was the manager who had originally raised the contract. He said that contract termination was finally communicated to the claimant by Gattaca on 17 September. He asked whether there was a legal responsibility on Gattaca to provide a reasonable adjustment, i.e. extended notice of contract termination on grounds of disability, assuming that was medically corroborated. He asked whether JLR, as the organisation Gattaca was contracted to, would also have any form of responsibility and if so what those responsibilities were.

34.117 He also provided some brief detail of the incident between HG and the claimant, his description of which was that HG had moved the claimant's coat from her chair and put it in a cupboard, page 557, which escalated into a letter from the claimant's solicitor written to HG. He set out that the claimant had said that she was receiving unwanted and excessive texts from Mr Cramp and he provided some detail about Mr Cramp's visit to her home, saying that Mr Cramp had entered her house whilst she was in the shower. He wrote that this had made the claimant very upset and she had reported the incident to the police but had asked them not to take any action because of Mr Cramp's mental health condition. He wrote that he had made the claimant aware of the respondent's Dignity at Work code and that she had stated that at present she simply wanted to have no contact with HG and minimal contact with Mr Cramp. He wrote that whilst the claimant felt that Mr Bailey should have dealt with the situation better when confronted with Mr Cramp's heightened concern she did not want to formally complain, page 558. Finally, he explained that outside of work the claimant was being evicted from her rented home and was receiving help from the council which was dependent on having a secure income. He explained that loss of employment could therefore result in the loss of the claimant's home, hence her heightened sense of anxiety.

34.118 This relatively lengthy email produced a terse and unhelpful response from HR on 27 September 2018 which was:
"You are paying for a service, if that service is not being provided you can terminate the contract as per the terms", page 556.

34.119 In the meantime on 25 September 2018 the claimant had emailed Alan Edwards who worked for the respondent, we know not in what capacity. She wrote, pages 563 – 564, that she had suffered a number of difficult circumstances which Dr Cuttler was "trying to help be considered in support of an extension to my work at JLR". She stated that she had a disability in the form of depression and anxiety which required reasonable adjustments and she wrote that her symptoms had been triggered by circumstances including conduct on the part of Mr Bailey and Mr Cramp while she was off sick on Wednesday 5 September. She wrote that her manager was sympathetic to her having her contract extended in light of the circumstances. She asked for an urgent teleconference in order to arrange a contract extension before 28 September when her contract was due to be terminated.

Meeting 27 September between the claimant and Dr Cuttler

34.120 The claimant covertly recorded this meeting. Based on the transcript, pages 348 – 364, which was not challenged and is likely to be

the most accurate record of the meeting, we find as follows. At the start of the meeting Dr Cuttler explained to the claimant that as a business there was no mechanism under which they could automatically extend the claimant's contract. There was discussion about the fact that she was not an employee of the respondent and that Gattaca would need to approach the respondent to make a case for an extension to the claimant's contract as a reasonable adjustment, page 348 - 350. Dr Cuttler also stated that if there was something the respondent was required to do then the business would do it. Dr Cuttler reiterated that the claimant was not employed by the respondent and that was part of the problem, page 351. He stated that he could not deal with the situation as if she was employed by the respondent because she was not. He stated that as she was employed by Gattaca things had to go through Gattaca. He stated that as far as he was aware the respondent was not obliged to take the claimant on. He referred to the fact that the claimant had been trying to bring various people from JLR together to have a meeting and he said this would be seen as interference, in the sense that the claimant would be seen as trying to organise the respondent to create a position for her, page 352. He stated that many people were leaving the respondent and that was it. Contracts were finished. The claimant was not the only person, page 352. Dr Cuttler told the claimant that she was asking whether the respondent was in a position to do anything under reasonable adjustments and the answer to that was that he did not know because it was not his specialist subject and he was not an expert on the law, page 353. Dr Cuttler stated that so far as he was aware reasonable adjustments did not mean that there was responsibility on the respondent to extend the claimant's contract. The claimant stated that she had suffered at the hands of the respondent's employees and it was about remedying that, page 354.

34.121 Dr Cuttler said that if Gattaca made their case Mr Banwait would work with HR to establish if there was a legal obligation on the respondent to extend the contract and if there was then it (the contract extension) would happen, page 354. Pausing there, no evidence was led that Gattaca ever made any form of case to the respondent for extension of the claimant's contract.

34.122 Dr Cuttler reiterated that attempting to bring the respondent's people together to talk about the claimant's employment under a separate contract would be deemed as interference, page 354. The claimant stated that she did not think the right thing was being done and she was doing everything within her power to make sure people were talking. She stated that she felt she might need to go to HR, page 354. Dr Cuttler explained that there may still be external positions for the claimant to apply for, although he also said that he had not looked.

34.123 Dr Cuttler referred to the exceptions process, which he said was not a means of obtaining a reasonable adjustment, page 355. He explained it was a way of retaining someone when there was an urgent business need, or an emergency, as he put it, page 355. He stated that if the claimant had the right to claim in law the company would meet it (i.e. would meet its obligations), page 356. He told the claimant that the exceptions process was not about protecting the individual it was about managing the business and trying, mostly unsuccessfully, to reserve a position in a department, page 357. He stated that it had nothing to do with protecting a person because they had a right to be protected.

34.124 The claimant stated that she felt she would be criticised if she did not go to HR directly and have a conversation about what had happened and she asked for the contact Dr Cuttler had spoken to, page 357. Dr Cuttler said that he would obtain the name of a person in HR who the claimant could talk to but he would not give her the name of the person he had taken advice from as he did not know if they would be the right person for her to talk to, page 358.

34.125 Dr Cuttler told the claimant that in relation to the conduct (of other employees) the relevant policy was dignity at work and the claimant could make a formal complaint if she wished, page 359. The claimant stated that HR needed to know everything that the claimant and Dr Cuttler had spoken about in their earlier meeting. Dr Cuttler responded that she had told him in the meeting that certain things were confidential and he had not passed these on, page 359.

34.126 Dr Cuttler told the claimant that, as of the present time, it was a business decision, the respondent needed to release people, page 360. The claimant stated that as of next week she was not in any sort of contract so she felt she needed to do everything while she was still on site, page 361. She stated that the respondent was vicariously liable for the conduct of their employees. She stated that she did not want to be criticised down the line for not having raised something page 362. The claimant said that she should visit HR in case there was any doubt or ambiguity as to why this triggered the obligation to make reasonable adjustments. Dr Cuttler stated that he was not going to speculate on the law and he did not know what obligation the respondent had. It could be from nothing to a lot, he did not know, page 363. He also stated that he would give her a contact for HR so that she could speak to them and make her concerns known, page 363.

34.127 After this meeting Dr Cuttler responded to HR's unhelpful email of 27 September pointing out that he had not made any reference to performance and querying whether it was correct from what had been said that the respondent had no obligation to support Gattaca under disability

law, page 556. He explained that he had had a follow-up meeting with the claimant that afternoon and she had been pressing for a resolution in respect of her employment status. He wrote that there had been a protracted discussion the upshot of which was that the claimant had been trying to arrange a meeting between purchase, business planning and Dr Cuttler and that he had explained this was not appropriate and was not a solution that could apply in her situation, page 556. He said that he had restated that the claimant's only option of employment with the respondent was to apply through the external job board sites. He wrote that the claimant wanted assurance that Dr Cuttler was fighting for a position for her and once he had made it clear this was not the case the focus of the conversation changed as to what was wrong with the respondent and why the respondent was getting rid of her. Dr Cuttler wrote that "as I suspected she now formally wants to report her situation to HR - which I take it means - her negative experiences with other personnel on JLR sites", page 556. Dr Cuttler queried if he should direct the claimant to a general freephone number and if not what HR would recommend. He asked for a reply that afternoon. We do not know if a response was received; we were not taken to any such document within our bundle.

34.128 We accept the evidence of Dr Cuttler and find that it was only at this meeting that the claimant indicated for the first time to Dr Cuttler that she wanted to pursue a formal complaint about Mr Cramp's behaviour (hence his use of the word "now" when he told HR that as he suspected she "now" wanted to formally report her situation to HR, page 556).

34.129 Dr Cuttler contacted HR again on 27 and 28 September saying that he was looking for a copy of the harassment procedure because the Dignity at Work policy made reference to a harassment procedure when making a formal complaint, page 601. He was advised on 28 September that there was no harassment procedure. He was also advised that as the claimant was a contractor the correct process was for her to be directed back to her employer and as this had happened there was no further action to be taken at this stage, page 600. We reject his evidence that he was told that the claimant could log a ticket online or phone in with her complaints, and that because he believed after the meeting on 27 September his working relationship with the claimant had broken down he spoke to Mr Molesworth and asked him to pass this information onto the claimant, because that was inconsistent with the HR record at page 600.

Meeting 28 September

34.130 On 28 September 2018 the claimant called Ms Laura Sheppard who is a Recruitment Delivery Consultant, which is not a role that sits within HR. The claimant apologised for phoning out of the blue and informed Ms Shepherd that she had been given her number by a

colleague. She said that she was classified as disabled and she stated that she had experienced some really alarming conduct from two men on site and had struggled to find any HR support, page 370. Ms Shepherd asked the claimant if she was making a formal complaint and the claimant's response was:
"yes potentially. I really feel we should document the issues that have happened as the first step. If you see what I mean", page 371.
Ms Shepherd agreed to meet with the claimant once she had made some enquiries about who would be the relevant person to help the claimant and what the procedure was, page 372.

34.131 A short while later Ms Shepherd telephoned the claimant back and they arranged to meet. Ms Shepherd informed the claimant that she would need to raise a ticket through HR and that she should state it was a grievance and set out what she would like to discuss, page 378.

34.132 The claimant referred to a possible discussion about reasonable adjustments and then stated that the conduct of the two individuals was very serious. She stated that it potentially involved the police, page 380. She said that she was worried she might not be on site after today because there was an end date to her assignment that had now been accelerated. The claimant confirmed that she was a contractor and Ms Shepherd asked if she had raised the matter with her agency, page 381. She said that she had but that it had got lost. The claimant asked if she could sit with HR so they could document what had happened and Ms Shepherd pointed out that she did not sit within the HR function and that she had just obtained information for the claimant by making some enquiries. The claimant stated that she was worried she was not physically going to be on site any more. The claimant asked if there was anyone, even if they were not trained, who would take the issues down and pass them on. Ms Shepherd asked the claimant if she had spoken to the HR Business Partner within function and the claimant asked who this was, page 386. Ms Shepherd said she would speak to HR, page 388. Ms Shepherd in fact then went to speak to her manager, Mr Stuart Franklin, who said that he would see what he could do. Mr Franklin subsequently spoke to the claimant himself and she reported the incident of 5 September to him describing this as an incident of serious harassment. Mr Franklin then spoke to Mr Gill who recommended that he tell the claimant to report the incident to a member of JLR's HR team. We did not hear from Mr Franklin, and we do not know whether he did that or not.

Compliance position

34.133 On 28 September 2018 the claimant was informed by Mr Dunn that there was a compliance position being advertised on the internal intranet which was for internal candidates only. The role was for a

compliance engineer in the Electrical Architecture department, page 678. There were 10 internal applicants for this role.

34.134 On 15 October 2018 the claimant emailed the respondent's HR team asking to register her interest in the vacancy and she requested that HR ensure she was considered for the position, page 603. The claimant acknowledged that the vacancy was listed internally but requested that her application was not disregarded owing to her exceptional circumstances which, she said, had resulted in an exceptions process being recommended. It was not disputed that the claimant made no formal application for this role.

34.135 HR responded to the claimant that day to say that they were unable to accept applications over email and that any applications would need to be made through the JLR careers website, page 604. She was informed that as there was no further action to be taken by HR at that time the ticket would be closed down.

34.136 Solicitors acting on behalf of the claimant subsequently contacted Mr Franklin, who in turn contacted Mr Gill. He looked at the applications for the position and confirmed that the claimant had not applied for the role and he queried whether the issue was that the role was open to internal applicants only and as the claimant was no longer there she could not apply, page 590. Mr Franklin responded that he was unable to comment on what the claimant's issue was.

34.137 The compliance engineer role was not, in fact, filled, we know not why. We do not find that Mr Bailey, Mr Molesworth or Dr Cuttler had knowledge of the compliance engineer vacancy in the Electrical Architecture department. Mr Molesworth and Dr Cuttler told us that they had no knowledge of any vacancies, and this evidence was not challenged. We did not hear from Mr Bailey but we think it more likely than not that if Mr Molesworth and Dr Cuttler had no knowledge of the vacancy then Mr Bailey would not have done either. We accept the verbal evidence of Dr Cuttler and find that he did not have any vacancies in his team at the point when the claimant's contract came to an end.

Mr Dunn

34.138 Mr Dunn worked for the respondent in Power Electronics Launch and Quality. He was not based at the claimant's workplace, but would regularly travel there. He became friendly with the claimant from about May 2018 and they exchanged phone numbers and messaged each other quite frequently. On occasion he visited the claimant's house. They knew each other sufficiently well for the claimant to borrow money from him on occasion.

34.139 He knew about the incident on 5 September having been informed about it by the claimant.

34.140 On 27 September 2018 the claimant sent a WhatsApp to Mr Dunn asking him if he would help her backup all emails and hangouts in Gmail. She stated that she could only find the functionality to do single emails one at a time but as there were thousands to backup there were too many for that page 256. Mr Dunn responded that of course he could help "anything at all you feel you need help with, I'm there", followed by a winking emoji. The claimant responded by WhatsApp thanking Mr Dunn and saying that she was so in shock that she did not know if she would make it tomorrow to which Mr Dunn responded:
"I will come to you if you like? Just don't be in the shower when I get there", followed by a winking emoji, page 256.

34.141 The claimant sent a WhatsApp to Mr Dunn at 5:59 AM the following day saying that she had slept in her car the night before because she was too upset to drive home. She asked if he had received the money from her and said that the bank had only allowed her to transfer £200. She asked if she could give him cash on site later and thanked him kindly, page 257.

34.142 Mr Dunn responded asking if the claimant was okay and whether she was going home and the claimant responded that she was going to site. Mr Dunn told the claimant he would come and see her as soon as he got there, page 258.
The claimant's response to this was to tell Mr Dunn that she was fed up of being mistreated and could not take it any more to which Mr Dunn responded:
"you can get through this. Trust me. I'm here for you. Go home, get a shower and clear your head, I'll come to you as soon as I can", page 258.

34.143 The WhatsApp conversation between them continued and it was during this conversation that Mr Dunn informed the claimant that there was a compliance engineering job being advertised internally.

34.144 The claimant responded by WhatsApp:
"Sorry Anthony for delay. As promised (the claimant then inserted her email address) for compliance engineering job spec. Such a cheek internal only.
U clever man"
Followed by the 100 emoji and the ok emoji, page 259.

34.145 The WhatsApp conversation continued between them on Sunday 30 September and during this conversation Mr Dunn asked the claimant

how she was feeling now and whether she was feeling better, page 262. She responded that she had sharp stomach pains “like my body knows life is crashing”. Mr Dunn’s response to this was to tell the claimant that he thought she needed to relax for a day or two; “we need to find you a good man to take care of you don’t we”, page 262.

34.146 There was no response from the claimant to this message and the following day Mr Dunn contacted her asking her if he had said something to upset her, page 262. It was evident that the claimant did then respond, albeit the response was not included within our bundle of documents, because Mr Dunn then sent a WhatsApp to the claimant to say:
“Yes that’s not a problem at all Orla. Don’t worry your little self. Anything else I can help with don’t be afraid to ask”, page 263.

34.147 The claimant messaged that she was at breaking point, and Mr Dunn responded to this with some advice for the claimant about making a structured plan day-to-day. He ended this message by saying to the claimant “you’re a little ray of sunshine and you can get through it, I promise”. The claimant’s response was “wow thanks”, followed by a sun emoji, page 263.

34.148 The following day the claimant messaged Mr Dunn to say that she had experienced unexpected irregular bleeding and the surgery had said if she could not be seen soon enough she should visit the walk-in facility at hospital. Mr Dunn sympathised and suggested that maybe the stress of the situation was getting to her.

34.149 The claimant thanked Mr Dunn and he then messaged her to say this:
“Just your luck at the minute eh. Not that it’s any of my business but the other day I was going to suggest you need to find a guy, not just for companionship, but for the more intimate moments in life. Sex is a great stress relief you know”, followed by a winking emoji. “But I guess that’s the last thing on your mind at this moment in time”, page 265.

34.150 There was no response to this message from the claimant and by 7:05 PM that day Mr Dunn was messaging the claimant asking her if there was any particular reason why she was not talking to him, page 266. He also told the claimant that he needed her to return a charger of his, page 266.

34.151 The claimant did not respond. She did, however, forward this message to Mr Molesworth, page 326, saying to Mr Molesworth “Nick please find a quiet place and call me confidential”. Mr Molesworth responded to this message with a message that started “Understand that’s

not the sort of message you need right now. I'm not"…. (The rest of the message was cut off in our bundle).

Mr Dunn's visit to the claimant's home

34.152 On 17 October the claimant received some missed calls from Mr Dunn following which he visited the claimant's house. He knew where she lived, having been to her home before. He knocked the door. The claimant did not answer. He left. We do not find that he rattled the French window door handles because (i) this is not what the claimant reported to the police, see below, and (ii) nor was it how the claimant described the incident when she spoke to Mr Dunn that day, see below. We accept the evidence of Mr Dunn and find that the reason why he went round to the claimant's house, at least in part, was in order to see if he could collect his phone charger. We do so because that is consistent with what he told the claimant at the time, see the police report, page 171, and the claimant's transcript of their subsequent conversation, page 390.

34.153 The claimant telephoned Mr Dunn after his visit. There was a transcript of this phone call, which the claimant had recorded, contained in the bundle of documents, pages 390 – 391. On the basis of this we find that the following conversation took place between the claimant and Mr Dunn. Mr Dunn said to the claimant that the last time she had texted him was the last time that he had heard from her. She responded "yes I had hoped you would get the message". She stated that she had heard him knock on the door and Mr Dunn responded that he was just popping round to see if he could get his charger. The claimant told Mr Dunn that he could get an alternative from IT and she then said that the police were handling this and she was not to contact him again. At this point the call was terminated.

The fifth protected act

34.154 The claimant reported the incident to the police on 17 October, page 171. She reported that Mr Dunn had visited her home and knocked the door when she had already told him not to go to her home, page 171. She reported that she had telephoned Mr Dunn to ask why he was there and he had said that he wanted to collect his phone charger. The police recorded that the claimant had refused the offer of an officer coming out to take a statement and that the claimant had said she did not want Mr Dunn speaking to as she was happy that she had told him over the telephone that she wanted no contact. The police recorded that no further enquiries were to be made.

34.155 Mr Dunn's social media Snapchat user name at the time was "mclitsucker9".

The Law

35 Harassment is defined as follows:

26(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of –
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(4) In deciding whether the conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

36 Accordingly, there are three different elements to the statutory test to be considered. In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, a case bought under the RRA, it was explained that it is a healthy discipline for a tribunal specifically to address each of the three elements and to ensure that clear factual findings are made on each in relation to which an issue arises.

(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 relationship of the conduct to the protected characteristic.* Was that conduct related to the claimant's protected characteristic?

37 If the tribunal concludes that there was unwanted conduct related to a protected characteristic which has the *purpose* of violating the dignity of the claimant, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, the conduct would, as a matter of law, constitute harassment. As to what is meant by purpose, in **Dhaliwal** this was equated with intent, paragraph 14.

38 So far as effect cases are concerned, in the case of **The Reverend Canon Pemberton v The Right Reverend Inwood [2018] EWCA Civ 564**, Lord Justice Underhill reformulated the guidance that he had given, whilst sitting in the EAT some years previously in **Dhaliwal**, as to the approach to be taken by Tribunals to harassment claims. In judging whether conduct had the proscribed effect three matters fall to be considered, although the second and third factors will overlap;

(i) Did the claimant perceive the conduct as violating her dignity or having the proscribed effect (a subjective question),
(ii) the other circumstances of the case, and
(iii) whether it was reasonable for the conduct to have that effect (an objective question).

39 As was emphasised in **Weeks v Newham College of Further Education UKEAT/0630/11** it must be remembered that the word in section 26(1)(b)ii) is concerned is “environment”. An environment is a state of affairs. It may be created by *an* incident, but the effects are of longer duration.

Related to

40 The conduct must be “related to” the relevant protected characteristic. This is a question of fact, **Warby v Wunda Group Plc [2012] EqLR 536**. It stands in stark contrast to the use of “because of” elsewhere in the Act. There is no requirement for a causative link. It is enough if there is a connection or association with the prohibited ground. It is a broad test. Often, with harassment complaints, the nature of the conduct complained of consists of abuse that is overtly related to a protected characteristic. If such conduct is proved on the facts then it follows that the conduct will be related to the protected characteristic. Sometimes it will not be obvious from the face of the comment or conduct that it is related to a protected characteristic. Then the focus is on the alleged perpetrator’s conduct and whether that conduct, objectively, is related to the protected characteristic, **Unite the Union v Nailard [2016] IRLR 906.** Whilst the mental processes of the alleged harasser will be relevant to the question of whether the conduct complained of was related to the protected characteristic (see for example **Bakkali v Greater Manchester Buses (South) Ltd UKEAT/0176/17**) it is not determinative. Thus in **Hartley v Foreign and**

Commonwealth Office Services **UKEAT/0033/15** the alleged perpetrator's perception of whether the conduct related to a protected characteristic was not determinative of the question and the tribunal was held to have erroneously based its conclusions on the subjective intention of the manager. The question of whether the conduct in question related to the protected characteristic has to be judged objectively.

Disability

41 Section 6(1) of the Equality Act 2010 defines a disabled person as a person with a physical or mental impairment which has a substantial and long term adverse effect on her ability to carry out normal day to day activities.

42 In determining whether a claimant is disabled we are required to consider the statutory Guidance on the definition of disability.

43 The disability should be assessed at the date of the discriminatory act and not at the date of the Hearing; **Richmond Adult Community College v McDougall [2008] EWCA Civ 4.** The onus is on the claimant to prove that, in the relevant period, she was disabled for the purposes of the Act.

44 The case of **Goodwin v Patent Office [199] IRLR 4** is authority for the proposition that four questions fall to be considered when determining whether an individual is disabled for the purposes of the Act;

(a) Does the claimant have an impairment which is either physical or mental?
(b) Does the impairment affect the claimant's ability to carry out normal day to day activities and does it have an adverse effect.
(c) Is the adverse effect substantial?
(d) Is the adverse effect long term?

An impairment

45 The 2011 Guidance on the Definition of Disability makes clear that the term impairment should be given its ordinary and natural meaning, A3. What is important is to consider the effect of the impairment and not its cause, A7 (provided that it is not an excluded condition).

46 What is meant by long term is defined in Paragraph 2(1) of Schedule 1 of the Equality Act 2010.

(1) The effect of an impairment is long-term if –
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

47 **Swift v Chief Constable of Wiltshire Constabulary [2004] IRLR 540** sets out the approach that should be taken when considering the issue of likelihood of recurrence.
Firstly the tribunal should consider whether there was at some stage an impairment which had a substantial adverse effect on normal day to day activities. If so it is necessary to consider if the impairment ceased to have a substantial adverse effect on normal day to day activities, and if so when. Thirdly the substantial adverse effect should be identified and this should be defined precisely. Finally it is necessary to consider if the substantial adverse effect is likely to recur and if so will it again amount to a substantial adverse effect on normal day to day activities.

48 "Likely" for the purposes of subsections (b), (c) and (2) should be understood as meaning something that is a real possibility, that it "could well happen", Guidance paragraph C3 and **SCA Packaging Ltd v Boyle [2009] IRLR 54.** This is a lower test than the balance of probabilities. So far as the recurrence provisions are concerned, it requires to be remembered that what a tribunal is needs to consider, if there have been substantial adverse effects in the past, is whether *those effects* are likely to recur. The issue is not whether the impairment is likely to recur. Indeed, as was explained at paragraph 13 of **Boyle** by the NICA;
The recurrence provisions presuppose that an impairment continues to subsist although it does not currently have a substantial effect.
Baroness Hale, on appeal to the House of Lords, explained it thus, paragraph 49, **2009 UKHL 37**:
In other words, if the underlying condition fluctuates in the severity of its effects, the fact that they are not currently substantial does not matter if they are likely to become so again in the future. A person with multiple sclerosis may enjoy periods of remission in which the manifestations of her disease are not sufficiently severe to constitute a disability but there is always a risk that they will do so again.

49 See also the EAT in **J v DLA Piper UK Ltd [2010] IRLR 936**, paragraph 45;
We proceed by considering two extreme examples. Take first the case of a woman who suffers a depressive illness in her early 20s. The illness lasts for over a year and has a serious impact on her ability to carry out normal day-to-day activities. But she makes a complete recovery and is thereafter symptom-free for 30 years, at which point she suffers a second depressive illness. It appears to be the case that statistically the fact of the earlier illness means that she was more likely than a person without such a history to suffer a further episode of depression. Nevertheless it does not seem to us that for that reason alone she can be said during the intervening 30 years to be suffering from a mental

impairment (presumably to be characterised as 'vulnerability to depression' or something of that kind): rather the model is of someone who has suffered two distinct illnesses, or impairments, at different points in her life. Our second example is of a woman who over, say, a five-year period suffers several short episodes of depression which have a substantial adverse impact on her ability to carry out normal day-to-day activities but who between those episodes is symptom-free and does not require treatment. In such a case it may be appropriate, though the question is one on which medical evidence would be required, to regard her as suffering from a mental impairment throughout the period in question, i.e. even between episodes: the model would be not of a number of discrete illnesses but of a single condition producing recurrent symptomatic episodes. In the former case, the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness. But in the latter, the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period.

The duty to make reasonable adjustments

50 The reasonable adjustments duty is contained in Section 20 EA2010 and further amplified in Schedule 8. In short, the duty comprises of three requirements. If any of the three requirements applies, they impose a duty to make reasonable adjustments. Section 21 provides that a failure to comply with one of the three requirements is a failure to comply with the duty to make reasonable adjustments by A (A being the employer or other responsible person) and amounts to discrimination, Section 21(1) and (2).

51 The first requirement is the requirement set out at Section 20(3) and is as follows:

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

52 The approach that a Tribunal should take was set out in the judgment of HHJ Serota QC in **Environment Agency v Rowan** **[2008] IRLR 20**. We are required to identify:

(a) the relevant arrangements (PCP) made by the employer,
(b) (not relevant)
(c) the identity of non-disabled comparators (where appropriate), and
(d) the nature and extent of the substantial disadvantage suffered by the Claimant (as a result of the arrangements).

53 Only then is it possible to go on to consider whether any proposed adjustment is reasonable; in particular, to determine what adjustments were reasonable to prevent the PCP placing the Claimant at a substantial disadvantage.

54 A substantial disadvantage is one that is more than minor or trivial, section 212 EQA. Whether or not such a disadvantage exists in a particular case is a question of fact. It is the PCP that must place the claimant at the disadvantage **Nottingham City Transport Ltd v Harvey UKEAT/0032/12**, and the 2011 Code paragraph 16. Using a comparator may help with this exercise as the purpose of the comparator is to establish whether it is because of disability that a particular PCP/ physical feature/ auxiliary aid disadvantages the disabled person in question, see paragraph 6.16 of the 2011 Code of Practice on Employment. The substantial disadvantage should be identified by taking into account what it is about the disability which gives rise to the problems and effects which put the claimant at the substantial disadvantage identified, **Chief Constable of West Midlands Police v Gardner UKEAT/0174/11.**

55 This is not, however, a question of causation. As the EAT explained in **Sheikholeslami v University of Edinburgh UKEATS/0014/17** 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 the claimant is placed at that substantial disadvantage by the PCP. In **Griffiths**, a case concerning the management of sickness absence, it was also explained that the fact that the disabled and non-disabled were treated equally and may both be subject to the same disadvantage when absent in the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled or category of them than it does on the able-bodied.

Victimisation

56 Victimisation is defined in section 27 of the Equality Act as follows:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> > (a) B does a protected act
> >
> > (b) A believes that B has done, or may do, a protected act.

57 It is now well established that the term "because of" in the Equality Act has the same meaning as that given to the words "on the ground of" under the legacy legislation. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in **Nagarajan v London Regional Transport [1999] ICR 877** referred to as "the mental processes" of the putative discriminator;

"Section 1(1)(a) is concerned with direct discrimination, to use the accepted terminology. To be within section 1(1)(a) the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances. The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred.

58 The burden of proof provisions set out at section 136 of the Equality Act apply to claims for victimisation and harassment. The proper approach has been addressed by the Court of Appeal in **Igen Ltd v Wong [2005 IRLR 258**, **Madarassy v Nomura International plc [2007] ICR 867** and **Laing v Manchester City Council [2006] IRLR 748**. The Supreme Court in **Royal Mail Group v Efobi [2021] EWCA Civ 18** confirmed that the law remains as set out in these cases despite changes to the wording of the burden of proof provisions in the Equality Act. In summary, as per **Igen**, the burden is on the claimant to establish facts from which a tribunal could conclude on the balance of probabilities, and absent any explanation, that the alleged discrimination/victimisation had occurred. At that stage the employer's explanation for the treatment - the subjective reasons which caused the employer to act as he did - must be left out of the account. It was also explained in **Madarassy** that the facts from which discrimination could be inferred can come from any evidence before the tribunal, including evidence from the respondent, save only for the absence of an adequate explanation.

59 The need for there to be something more than a difference in treatment and a difference in status has, in the context of discrimination claims, been emphasised repeatedly by the EAT, see for example **Hammonds LLP & Ors v Mwitta [2010] UKEAT 0026_10_0110** and Mr Justice Langstaff in **BCC & Semilali v Millwood UKEAT/0564/11**. This applies equally to victimisation claims, see for example the Court of Appeal in **Greater Manchester Police v Bailey [2017] EWCA 425** paragraph 29; 'It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act: see **Madarassy**, per Mummery LJ at paras. 54-56 (pp. 878-9)".

60 There is no requirement for a comparator in a victimisation claim, in contrast to claims for direct discrimination.

61 At the second stage, the respondent is required to prove that they did not contravene the provision concerned if the complaint is not to be upheld. 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 because of, in this case, the protected acts, or put another way that the protected acts did not "materially influence" the treatment in question (or for the harassment claims that the unwanted conduct was in no sense whatsoever related to the protected characteristic of sex). That requires the tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that (in this case) the protected acts were not a reason for the treatment in question, or that the treatment in question was not related to sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof, **Igen**. If the respondent fails to establish that the tribunal must find that there is harassment/victimisation.

62 Although a two stage approach is envisaged by s.136 it is not obligatory. In some cases it may be more appropriate to focus on the reason why the employer treated the claimant as it did, **Hewage v Grampian Health Board [2012] UKSC 37.**

Submissions

63 Mr Islam-Choudhury, for the respondent, produced written submissions and supplemented these with oral submissions. We summarise only the main points here. He submitted that the claimant was an unreliable witness and gave examples of where, he said, her oral evidence was inconsistent with text messages and documents. He pointed to a number of what he termed omissions in the claimant's evidence; for example that she had omitted to say in her witness statement that she had been to a cricket match in London with Mr Cramp and arranged for him to give her a lift to work. He said that it was significant that the claimant had failed to disclose key text messages and submitted that these messages were "cynically edited out by the claimant" as they appeared to undermine her allegations of harassment.

64 Mr Islam-Choudhury acknowledged that Mr Cramp and Mr Dunn had not given evidence but he submitted that the tribunal could attach as much weight to their evidence as it deemed appropriate and that weight could be attributed to those parts of the statements that were supported by other documentary evidence and witnesses, or were otherwise not in dispute.

65 As to the sexual harassment claims, he submitted that when conduct is not overtly related to sex it is necessary to look at the context to understand if the conduct is related to sex, and that this is an objective test. He submitted that,

whilst it was accepted that Mr Cramp had gone to the claimant's home, the conduct was not related to sex or of a sexual nature; it arose out of genuine concern for the claimant's wellbeing. He submitted that the claimant's account, that Mr Cramp had seen her naked and refused to leave, was not corroborated or supported by the claimant's texts after the event, nor was it supported by the report provided to the police and that this, taken together with the claimant's lack of credibility, meant that the claimant had not proved this allegation on the balance of probability. He submitted that Mr Cramp's actions in sending the claimant flowers were not related to sex or a sexual nature and that this action needed to be viewed in the context of their obvious friendship at the time. Mr Islam-Choudhury acknowledged that the respondent had conceded liability for the actions of Mr Dunn in sending the claimant an offensive text message but submitted that Mr Dunn's subsequent visit to the claimant's flat was not on any objective view related to sex or of a sexual nature. Mr Dunn had gone round to the claimant's flat to retrieve his charger.

66 In relation to the issue of disability, he submitted that the claimant had identified two impairments for the purposes of this claim; anxiety and depression. PTSD, he submitted, did not form part of the claimant's case, for which see more below. In the event that we were to find that the claimant was disabled at the relevant time by way of anxiety and depression he conceded that the respondent had knowledge of this disability from 19 September onwards. In relation to the claims of a failure to make reasonable adjustments he conceded that the asserted PCP's had been applied but submitted that the claimant had not proved that these caused her substantial disadvantage.

67 He acknowledged that the respondent had conceded that the claimant had carried out five protected acts between 5 September - 17 October. He submitted that the reason why Andrew Bailey and Dr Cuttler had not taken steps to address the claimant's complaints/discipline Mr Cramp was because the claimant wanted no formal action taken at the time. In relation to the termination of the claimant's contract he submitted that the decision to terminate the claimant's contract had been made before the incident on 5 September and it followed from this that the reporting of the incident on 5 September could not have had any bearing on that decision. As to the failure to grant a request for an extension to the contract/apply the exceptions process/arrange for alternative employment he submitted, simply, that these matters had nothing to do with the protected acts.

68 Mr Islam-Choudhury objected to the respondent's application to amend (for which see below), asserting that were this application to be granted it would cause significant prejudice to the respondent. It was not, he submitted, a minor change because it would broaden out the factual enquiry of the tribunal considerably. Moreover the allegation, as it had originally been drafted, was a very specific allegation naming two particular individuals and if the allegation was broadened in the terms suggested the respondent would have been deprived of

the opportunity to call an HR manager as a witness to deal with the broadened complaint.

69 Mr Segal, for the claimant, reminded us that in deciding whether conduct is related to sex a tribunal must apply an objective test and whilst the motive or intention of the person responsible for that conduct might form part of the relevant circumstances it is not determinative of the question the tribunal has to answer. He submitted that it could not be overstated how significant Mr Cramp's failure to attend this hearing was. He submitted that there had been no warning of this before the hearing and that whilst there had been an indication from the respondent on the first day of the hearing that medical evidence would be provided to explain the non-attendance none had been forthcoming, without any further explanation from the respondent. It must be inferred, he submitted, that Mr Cramp did not want to have his evidence tested in court. He submitted that no weight could be given to Mr Cramp's evidence where it conflicted with that of the claimant.

70 He submitted that Mr Cramp's conduct on 5 September was clearly related to sex/of a sexual nature. He referred to a number of Mr Cramp's WhatsApp messages in support of this. He stated that it was obvious that these communications were, at the lowest, related to the claimant's sex. He described Mr Cramp's visit to the claimant's home as an implausible overreaction for anyone not wanting to appear as the "knight in shining armour" to his "damsel in distress". He submitted there was no basis for rejecting the claimant's account of events. Even if Mr Cramp had been motivated by a desire to support or empathise with the claimant that was not the point.

71 In relation to Mr Dunn's conduct he submitted that the tribunal would want to determine whether Mr Dunn would have behaved in that way had the claimant been a male colleague. The fairly clear answer to that, he said, was no. The fact that Mr Dunn had refused to attend to give evidence, he submitted, suggested that he did not want to defend himself in this regard.

72 As to whether the claimant was disabled, he submitted that the tribunal had to decide whether the claimant was disabled by way of her depression/anxiety/PTSD, for which see more below. He submitted that the respondent's line of questioning in cross examination, much of which had focused on whether there was underlying or ongoing anxiety and depression, was based on a false assumption. Depression and anxiety, he submitted, always arose in response to external circumstances such as loss, trauma or mistreatment. It was obvious, he submitted, that the claimant had suffered from a disability in 2009-2011 and in her witness statement the claimant had given evidence that the symptoms had recurred between this time until 2018. He submitted that the respondent had not challenged the claimant's evidence that serious flareups had continued throughout the 10 year period since 2009. Mr Segal reminded us that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be

treated as continuing to have that effect if that effect is likely to recur. He submitted that on the evidence it was clear that the claimant was suffering from a disability, the substantial adverse effects of which were indeed likely to regularly recur. He submitted that it was also clear that the claimant was suffering from the substantial adverse effects of that disability after 5 September 2018.

73 In relation to the first reasonable adjustments claim it was submitted that the PCP was that the respondent had a policy of treating agency workers/ex agency workers as external candidates, (which is not how the PCP was identified at the start of the hearing, see above). It was submitted that the substantial disadvantage this PCP was said to have caused was that being able to apply via an internal portal or by email in a much more restricted pool is clearly less daunting for someone suffering from depression, anxiety and PTSD.

74 As to the second reasonable adjustments claim, he suggested in relation to the asserted PCP that on the evidence that was before the tribunal it would be difficult for the tribunal to identify with confidence the correct factual position in relation to whether or not a blanket instruction was issued to Dr Cuttler and if so in what terms. He confirmed that the second claim of a failure to make reasonable adjustments was pursued in the alternative to the victimisation claim in so far as it related to the termination of the claimant's contract. He submitted that it was the claimant's primary factual case that Dr Cuttler did have some measure of discretion as to whether and when to terminate agency contracts and that he only decided to terminate the claimant's contract on 5 September because he realised that she had or would be complaining about the conduct of Mr Cramp that morning.

75 Mr Segal submitted that the substantial disadvantage for the purposes of this claim was that the claimant was, in practice, prevented from having her grievance dealt with properly because she was no longer on site and working for the respondent.

76 Mr Segal made an application to amend the first claim of victimisation, the current formulation of which was that Andrew Bailey/Dave Cuttler omitted to take any steps to advance or address the claimant's reporting of the incidents to them. The application was to substitute "the respondent" for Andrew Bailey/Dave Cuttler, so that it now read; the respondent omitted to take any steps to advance or address the claimant's reporting of the incidents. Mr Segal submitted that the amendment was minor and did not introduce any factual issue that was not already before the tribunal.

77 In relation to the victimisation claim, and the decision to terminate the claimant's contract, Mr Segal reiterated that the claimant's primary factual position was that Dr Cuttler had a discretion whether or not to terminate her contract, which he had refused to exercise in the claimant's favour. He submitted that on the basis of those presumed factual findings it seemed an almost

inevitable inference that Dr Cuttler chose to terminate the claimant's contract immediately because he was aware that she had made, or was very likely to be making, a complaint of serious harassment.

78 As to failing to allow the claimant to apply for an alternative position, or facilitate her to be given an alternative position, he submitted that given that the claimant's health had been so adversely affected by the actions of the respondent's employees it was, but for the protected acts, to be expected that the respondent would have approached the potential sudden loss of a job for the claimant more sympathetically and creatively than it had. What the respondent did not want was for the claimant to continue to have a role at the respondent if she was determined to pursue harassment complaints.

Conclusions

Disability status

79 As set out above, there was a dispute between the parties as to whether it was the claimant's case that she was disabled at the relevant time by way of anxiety and depression, or alternatively by way of PTSD, anxiety and depression. The respondent disputed that PTSD was an impairment on which the claimant (permissibly) relied. The list of issues/claims, it was submitted, was contained in the case management order of 26 May 2020, page 74. It was explicitly recorded in that order, the respondent submitted, that in relation to disability status the claimant relied upon the impairments of anxiety and depression, page 74. The claimant's position was that at paragraph 4.3 of this order, page 80, the claimant had been ordered to provide an impact statement identifying what mental impairments were relied on in relation to the disability issue and then requiring certain information to be provided in respect of each impairment, page 80. The claimant had duly provided a disability impact statement and this had referred to PTSD in addition to anxiety and depression. It was on this basis that PTSD was said to form part of the claimant's case on disability.

80 Whilst Counsel for both the claimant and respondent based their submissions on the content of the case management order of 26 May 2020, the starting point, it seemed to us, when it came to identifying whether the claimant as part of her pleaded case relied on the impairment of PTSD as a disability, was the claim form. In the claim form it was explicitly pleaded that the claimant was disabled by way of her anxiety and depression, see paragraph 4, page 25. It did not form part of the claimant's pleaded case that her PTSD was also a disability. At the first case management hearing on 13 February 2020, when the claimant was represented by counsel, the disability was identified as being anxiety and depression, page 61. Consistently with this, as already set out, at the subsequent case management hearing in May 2020, at which a more comprehensive list of claims/issues was drawn up, and when the claimant was again represented, the disability was once more identified as being anxiety and depression, page 74.

81 It is true that the claimant was ordered to set out in her disability impact statement what mental impairments were relied upon in relation to the disability issue, but there was no suggestion within the case management order that the claimant had been given permission to amend her claim in this respect. Given the way in which the claimant's claim had been pleaded, and the issues then identified consistently with the pleaded case, it seemed to us that the claimant would have needed to make an application to amend in order to be able to rely on her PTSD as a disability. No such application has been made and in those circumstances, we concluded, the claimant's claim was limited to that which had been set out in her claim form/the list of issues/claims, namely that her anxiety and depression were the impairments relied upon for the disability issue.

82 We next considered whether the claimant had proved that she was disabled by way of her anxiety and depression at the relevant time (September 2018). It was the claimant's case that she has been disabled by way of anxiety and depression from 2009 to September 2018 (and beyond), and that whilst the asserted substantial adverse effects of the impairments on her ability to carry out normal day to day activities were not constant during this period they were fluctuating and likely to recur. It was not the claimant's case that she had a past disability at the relevant time. Likelihood of recurrence is, of course, an issue on which medical evidence will often be required. In this case there was none. We consider it important to set out, at the start of our analysis, the medical evidence that the claimant chose to produce on the disability issue. Somewhat unusually, the claimant did not produce her GP records. Moreover, the medical evidence that was produced was restricted to limited snapshots of information over the period of time that we were being asked to consider. As set out above, paragraphs 34.1 and 34.3, there were two occupational health reports from 2010 and a letter from Turning Point dated January 2011. After that, however, there was nothing until October 2013 when a GP, Dr David Poll, wrote a letter in support of a postponement application for an upcoming court hearing. We were told in that letter that the claimant was suffering from increased symptoms of stress and needed time to deal with her background anxiety state relating to an ongoing court case, paragraph 34.4. It was specifically noted that the claimant's psychological issues related to a reaction to the issues being discussed in her case "rather than a background mental health problem".

83 After that we know that the claimant had 3 weeks off sick from work in February 2014, with what was described as a stress related problem, paragraph 34.5, and she was signed off again with stress for 3 months on 6 October 2014, paragraph 34.5, a period of ill health which would have ended around 6 January 2015.

84 There was no medical evidence at all produced for a period of 3 years and 9 months after that. On 24 September 2018 the claimant was certified as unfit to attend a court hearing for a nine-day period as a result of anxiety, paragraph 34.6. This was followed by a letter from the claimant's community mental health

team to her GP dated 9 November 2018, paragraph 34.7, in which it was said that there was no role to be played by mental health services as the claimant's difficulties were described by the claimant herself as entirely secondary to her social circumstances and her anxiety levels were a normal response to those circumstances. This letter post-dates the relevant period. Finally, we know that by December 2018 the claimant was being treated for severe anxiety. Likewise, this also post-dates the relevant period.

85 What the very limited medical evidence appeared to show, therefore, was that the claimant was at times (in particular 2009 to early 2011 and late 2018) suffering from anxiety and depression in reaction to certain events in her life. In 2013 she had, for a period of time, what was termed a "background anxiety state" related to a court case "*rather than a background mental health problem*" (our emphasis), and in 2014 for a period of time she suffered from stress, which cannot be said to be the same as a diagnosis of anxiety and depression.

86 There was a substantial amount of cross examination by the respondent of the claimant as to whether she was suffering from underlying or ongoing depression/anxiety between 2009 - 2018. Mr Segal, in closing submissions, suggested that the respondent's approach in focusing on this issue was erroneous. We disagree. There are two different models. A person who has suffered several short episodes of anxiety/depression which have had a substantial adverse impact on her ability to carry out normal day-to-day activities but who between those episodes is symptom-free and does not require treatment may have a number of discrete illnesses or there may be a single condition producing recurrent symptomatic episodes. In the former case, the issue of whether the recurrent illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness. But in the latter, it may be that there is an impairment producing recurrent symptomatic episodes throughout. The recurrence provisions, as we have already explained at paragraphs 48 and 49 above, presuppose that *the impairment* continues to subsist throughout the period that the substantial adverse effects are said to be likely to recur.

87 Of course, what matters is the effect of an impairment and not its cause, paragraph A7 of the Guidance, but what is causing the impairment may be of relevance to whether it can be proved that the impairment has continued to subsist. In this case the medical evidence produced by the claimant did not demonstrate that there was an ongoing impairment; it suggested that the claimant had periods of illness as a reaction to specific events. It showed that in the latter part of 2009 the claimant developed anxiety and depression and that in 2010/the very early part of 2011 and late 2018 the claimant was suffering anxiety and depression as a response to specific stressful events. It showed that in 2013 the claimant had a background anxiety state which was a reaction to a court case, which was *not* considered to be a background mental health problem, (and no evidence was led as to the longevity of this) and that in 2014 she had stress.

Even if one assumes that the 2013 medical evidence was sufficient to show that the claimant's anxiety and depression from 2009 to early 2011 had continued through to 2013 (which we did not consider it was given what was said about it) there was then a gap of nearly 5 years in the medical evidence before there was another episode of anxiety, and once again this episode appeared to come about as a reaction to a specific, stressful event in the claimant's life.

88 The evidence as to the continuation of the impairment of anxiety and depression, such as it was, came from the claimant. What the claimant told us at paragraphs 4 - 8 of her disability impact statement was that, since 2010, she has continued to suffer from what she described as bouts of severe anxiety and depression on average once a year, and she then set out what she asserted the substantial adverse effects on normal day-to-day activities were during these flare-ups. It seems that we were being asked to infer from the asserted regularity of these episodes (were we to accept the claimant's evidence that they had occurred) that they were being caused by an underlying impairment of anxiety/depression.

89 Mr Segal submitted that the claimant's evidence concerning the flare-ups should be accepted because it had not been challenged by the respondent in cross examination, although he did not go so far as to suggest that it would be unfair to the claimant to reject the claimant's evidence in these circumstances. It is correct to say that the claimant was not taken to these specific paragraphs of her statement during cross examination and questions were not asked about the substantial adverse effects which she set out in these paragraphs. But it is also fair to say that the issue of whether or not the claimant was suffering from anxiety and depression *at all*, in particular in the period January 2015-October 2018, but also more generally from 2009 to 2018, was repeatedly put to the claimant in the context of cross-examining her about what the medical evidence showed. It was put to the claimant three times that there was no medical evidence to show that she had anxiety and depression during the period January 2015 - October 2018, it was put to her that she was not suffering with anxiety and depression during the time that she worked for the respondent, it was put to her that there was no medical evidence to show that she had anxiety and depression when she started work for the respondent in February 2018 and it was repeatedly put to her that the medical evidence did not support her case that she had underlying anxiety and depression from 2009 onwards. Moreover, the respondent had made it clear at the start of this hearing that the very existence of the impairment at the relevant time was in dispute. If the very existence of the impairment which is said to be causing the substantial adverse effects is challenged it follows from this that the evidence as to what substantial adverse effects the impairment is said to be causing is also challenged. For these reasons we rejected Mr Segal's submission.

90 In any event, as we have set out above, we have rejected the claimant's evidence that on average once per year between 2011 – 2018 she would suffer a

severe bout of anxiety and depression which might last for days if not weeks in the manner she described in paragraphs 5-8 of her disability impact statement. We did so for the following reasons. Firstly, it is evident that by very early in 2011 the claimant's anxiety and depression was improving, paragraph 34.3 above. Secondly, and significantly, there was no medical evidence produced to support these assertions. As we have already set out, the medical evidence that there was told us that the claimant had anxiety issues in 2013, relating specifically to a court case, although it was also recorded that there was no background mental health problem. After that there is no mention at all of anxiety until 24 September 2018, just days before the claimant's dismissal. Yet the flare ups were, on the claimant's account, continuing throughout this period and were completely disabling when they occurred; preventing her from going about her day-to-day life in even the most basic of ways. Given the lengthy period of time over which the claimant asserted that she suffered from these recurrences, and how severe they were said to be, that seemed to us to be a surprising omission. Linked to this, there was no evidence to suggest the claimant had required any form of treatment, or indeed sought any form of medical help, during any of these asserted severe recurrences. Additionally, such episodes were inconsistent with the declaration that the claimant made when filling in the driver's medical declaration for the respondent. If the claimant was having yearly flare-ups during which she was so ill that she was unable to get out of bed and look after herself, struggled to concentrate and could not leave the house, it follows that she continued to suffer with serious mental ill health and, moreover, ill health that would have prevented her from driving (as she was unable to leave the house). Yet she made a declaration to the opposite effect, paragraphs 34.21 – 34.22.

91 Lastly, in terms of why we have rejected the claimant's evidence on this issue, the evidence was in broad and non-specific terms. Whilst the claimant told us that "on average" she would suffer a flare-up once per year and that this might last for days if not weeks we were not told specifically when any of these flareups had occurred. The symptoms were also described in generic terms, for example;
"At its most severe I am unable to get out of bed and cannot carry out basic household chores such as cooking, cleaning, tidying or shopping….I am also unable to concentrate and focus which means at times I cannot pay bills or do basic admin… I have gone extended periods of time without eating", paragraph 5 claimant's impact statement.
But there was no detail provided as to how many flare ups of this nature she had suffered from or how and when things had started on each occasion to improve or what a less severe flare-up was like and how regular these were. That, combined with our general assessment of the claimant's credibility, undermined the cogency of this evidence.

92 For these reasons we concluded that, whilst the claimant has proved that she had anxiety and depression in 2009 to the early part of 2011, which did have a substantial adverse effect on her ability to carry out her normal day to day activities, she has not proved that her anxiety and depression continued to

subsist from then until 2018. The claimant has not proved that she had a single condition producing recurrent symptomatic episodes over this period, which is what she asserted her case to be. She did develop anxiety as a response to a court case in September 2018, at the very end of the relevant period, but no evidence at all was led by the claimant as to what the effects of that specific episode of illness were on her ability to carry her normal day to day activities, nor how long it could be said that those effects were likely to last, and accordingly the claimant has not proved that the anxiety that she developed in September 2018 was itself a disability. The medical evidence that came after that post-dated the relevant period. For these reasons the claimant has not proved that she was disabled by way of anxiety and depression at the relevant time.

Harassment related to sex/harassment of a sexual nature

Complaint 1: On 5 September 2018 Mr Adrian Cramp entered the claimant's home without her permission.

93 This conduct did, as a matter of fact, occur, paragraphs 34.80 and 34.81. We would have had no hesitation in concluding that the claimant had proved that this conduct was unwanted, but this was, in any event, conceded by the respondent.

94 We did not consider that the actions of Mr Cramp could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her because, fundamentally, it was evident from the text messages, in our view, that his motivation (i.e. his purpose) in entering her home was genuine concern for the claimant;
9.18AM: How's things kidda, paragraph 34.76 above,
10.26AM: You are scaring me now! Please let me know u r ok?, paragraph 34.78 above,
11.08AM: I'm so sorry I did not mean to scare you I was just so worried about you, paragraph 34.83.

95 But we concluded that the claimant had proved that it had that effect on her, and that it was reasonable for the conduct to have had that effect. There was no dispute, after all, that the claimant had no knowledge that Mr Cramp was coming to her home. His conduct was, objectively, highly intrusive. He entered her home; the most private of spaces, and as it happens he did so whilst she was in the shower; i.e. during a personal and intimate moment. When he entered her home he did not just stand on the threshold of it but moved into the property and walked around it until he heard a response from her. Whilst the claimant and Mr Cramp had, on our findings, a friendly relationship, he was, at the end of the day, a work colleague not someone with whom she had a very close or intimate personal relationship. For these reasons we concluded that the claimant had proved that this conduct had the effect of both violating her dignity and creating

an intimidating, hostile and degrading environment for her. We bore in mind that the requirement is that the conduct creates an "environment" – i.e. a state of affairs. But this incident alone was sufficiently serious, in our view, that by and of itself it can be said to have created the proscribed state of affairs.

Was the conduct related to sex?

96 We should firstly explain our reasons for finding, at paragraph 34.58 above, that by the late summer of 2018 Mr Cramp's interest in the claimant had developed beyond friendship to something of a more intimate nature, and that he was somewhat infatuated with her. We have drawn this inference for the following reasons. Firstly, there was the content of some of Mr Cramp's WhatsApp messages, which at times were really quite intimate. For example:

(i) His 51st birthday message to the claimant, paragraph 34.28,
Just got home. I know things didn't go quite as smoothly as either of us wanted, *but the time we spent together meant a lot to me* (our emphasis). My 51st birthday was a good one thanks to you safe journey home
peace and love.

(ii) And his message of 3 September, paragraph 34.40,
"Good morning I send you this message today because it's important you know. *You are not alone in this world, morning, afternoon, evening, all day, every day* (our emphasis)".

(iii) And later that day, paragraph 34.44;
Ok I understand. I mean it you are not alone and *I am your friend any time of day or night* (our emphasis) and trust me I do not sleep.

(iv) And his message of 4 September 2018, paragraph 34.48;
Good morning… Know this, *you really are amazing and very special* (our emphasis).
Thanks for being my friend.
I'm here if/when you need me.

97 Moreover, amongst all the WhatsApp messages Mr Cramp sent the claimant there were 19 heart emojis. Emojis do, of course, have to be taken with a pinch of salt; they are a highly informal and shorthand means of communication. But it is the frequency with which he uses this emoji which stands out, particularly when taken together with the content of some of the messages, and when set in context; i.e. that the starting point for this relationship was that the claimant and Mr Cramp were work colleagues.

98 Additionally when Mr Cramp sent the claimant flowers his message said this, paragraph 34.91;

I have been, and still am at times, where you are at right now. I understand. *You are loved* (our emphasis).

99 Whilst we did not consider that individually any one of these factors would support the inference that we have drawn it is the overall picture that is painted that we considered to be significant.

100 We concluded that the claimant had proved facts from which we could conclude that the conduct of Mr Cramp in entering her home without permission was related to sex, and consequently we concluded that the burden of proof had reversed. Those facts were as follows. Firstly, there is our finding that by the late summer of 2018 Mr Cramp's interest in the claimant had developed into an interest that extended beyond friendship to something of a more intimate nature, and he was somewhat infatuated with her. That is an interest that is related to the claimant's sex. Secondly, ignoring for a moment any explanation for the conduct, as we must do at stage 1, Mr Cramp's conduct on 5 September, on the face of it, was out of all proportion to the situation he was confronted with; a failure by the claimant to acknowledge messages for a couple of hours whilst she was off sick from work. It appears, on the face of it at least, to be a complete over reaction to the events which were that day occurring, and that is something that calls for an explanation.

101 Accordingly, the burden of proof moves across to the respondent to prove that the conduct was not related to sex. This requires not just an explanation but a cogent explanation that is unrelated to sex. Before us it was the respondent's case that the claimant and Mr Cramp were friends and he acted as he did out of concern for the claimant. We have found that they were friends and that there was genuine concern on the part of Mr Cramp about the claimant that day; that much is evident from the WhatsApp messages. We have little doubt that was part of his motivation for doing what he did, paragraphs 34.58 and 34.79. But the question for us is a much broader one. On our findings this is someone who had an interest in the claimant that extended beyond friendship. Has the respondent proved there was no association or connection between this wish/hope for a more intimate relationship, which is an interest that is related to the claimant's sex, and Mr Cramp's conduct on that day?

102 We concluded that the respondent had not proved this for the following reasons. Firstly, Mr Cramp, as we have already mentioned, failed to attend this hearing. A witness statement had been provided for him but this was unsigned. That is not to say, of course, that we cannot place weight on a hearsay account but ultimately we concluded in the circumstances of this case that the account contained in the statement was not sufficient to discharge the burden of proof for the following reasons. His absence, in our view, has to be treated as unexplained; whilst the respondent had suggested at the start of the hearing that Mr Cramp might be unwell and medical evidence might be produced no such medical evidence was provided. The respondent, moreover, did not contest Mr

Segal's submission that right up until the week of the hearing the claimant had understood that Mr Cramp would be attending the hearing as a witness which indicated there was no long term ill health preventing him from attending. His absence was particularly striking because his evidence went to the most significant and central dispute of fact between the parties. For these reasons, the very fact of his absence undermined the cogency of the explanation offered by the respondent.

103 Secondly, the account that Mr Cramp provided in his witness statement was inconsistent with the account of the incident that was first provided by the respondent in its ET3. In its ET3 the respondent had pleaded that Mr Cramp found the French windows unlocked, he stepped inside and shouted the claimant's name remaining just inside the French windows, he shouted again, the claimant responded and she said that she was fine and he was to go away so he did so, page 47. Yet his witness statement, paragraph 12, he also described after having had no reply from the claimant when he first shouted out that he then moved into the kitchen by the main hallway and then moved to the edge of the main sitting room by the corridor to the bathroom. As Mr Cramp was the only person from the respondent present during this incident these (differing) accounts must have come from him and that also undermines the cogency of the explanation.

104 Thirdly, there is the fact that Mr Cramp's conduct was out of all proportion to the situation he was confronted with. There may have been an explanation for this, of course. People, after all, do ill-judged things regularly, that is human nature. But his absence from this hearing means that overreaction remains unexplained. Moreover, there is an element to the overreaction which, on the face of it at least, assumes a greater degree of intimacy than actually existed.

105 It is not enough for the respondent to provide an explanation for the conduct. It must prove that the conduct was in no sense whatsoever related to sex. For the reasons we have set out we concluded the respondent has not discharged the burden of proof on the balance of probabilities that the conduct was not related to sex.

106 We did not, for the avoidance of doubt, conclude that this was unwanted conduct of a sexual nature for the purposes of section 26(2)(a). There was nothing sexual about this conduct on our findings and conclusions. It was not sexually explicit in any way, nor could it, on our findings, be considered to be some form of unwelcome sexual advance and there was no sexually suggestive remark or inappropriate physical contact, on our findings. Had we found as a fact that Mr Cramp, once he had entered the claimant's home, had stood and stared at her whilst she was naked and refused to leave, we may well have reached a different conclusion, but we have not found as a fact that this is what occurred, for the reasons we have already set out.

Complaint 2: On 5 September 2018 Mr Cramp initially refused to leave the claimant's house when asked to do so by the claimant notwithstanding the fact that the claimant had just got out of the shower and was naked.

107 On our findings this complaint fails on the facts, paragraph 34.82. We explain our reasons for that here.

108 There was, of course, significant factual dispute between the parties in relation to the latter part of this incident. The claimant's account at paragraphs 33 and 34 of her witness statement was;
On getting out of the shower I was terrified and shocked to see Adrian Cramp standing in my doorway. I was naked and desperately trying to cover myself with my hands as I did not have a towel with me and no ability to protect my dignity. This put me in a very distressed state and I had to demand that Mr Cramp leave. Initially Mr Cramp refused to leave until I had come out of the bathroom. He said that he was going to wait in my flat for 30 minutes until I came out of my bathroom. I demanded to know how Mr Cramp had got into my flat, to which he stated that when I had not answered my front door he had walked right around to the side entrance and found my French doors were unlocked and let himself into my flat. I repeatedly shouted to him to get out and go back to work and eventually he left.

109 Mr Cramp's account was that he rang the front doorbell but there was no answer and so he went round to what he described as a back door. He found the door open and stuck his head through the door and shouted for the claimant but got no reply. He went into the kitchen by the main hallway and shouted again and got no reply before shouting for a final time at which point the claimant responded asking "is that you Ade". Mr Cramp's account was that by this point he on the edge of the main sitting room by the corridor to the bathroom and that the claimant told him to go and he did.

110 Where Mr Cramp's account differs to that of the claimant, we do not find that the respondent has proved on the balance of probabilities the account set out in Mr Cramp's witness statement for the following reasons. As set out above, Mr Cramp failed to attend the tribunal in circumstances where he was the witness to the central dispute of fact between the parties, and his absence was unexplained. As also set out above, the accounts of the incident were inconsistent as between the ET3 and his witness statement. Moreover, there was no internal investigation by the respondent, either by way of a disciplinary case or a grievance investigation, meaning that there was no contemporaneous account from Mr Cramp and, in particular, no contemporaneous account that had been tested in any way, shape or form against the claimant's account and against which his witness statement could be assessed.

111 However, it is also, of course, for the claimant to prove on the balance of probabilities the facts that she asserts. As set out at paragraphs 34.81 and 34.82

we have accepted some aspects of the claimant's account but we have rejected large elements of her account in respect of the latter part of the incident. We deal first of all with our reasons for accepting some elements of the claimant's account.

112 We have found that the claimant was scared by Mr Cramp's presence, that she demanded to know how he had got into her flat, and that he told her that when she had not answered her front door he had walked around to the side entrance and found the French doors unlocked and let himself in, paragraph 34.81. We have accepted that the claimant was scared by Mr Cramp's behaviour firstly because Mr Cramp immediately sent a WhatsApp to the claimant apologising for scaring her, paragraph 34.83, which was contemporaneous evidence of her reaction at the time and secondly because, in our view, discovering that a male work colleague is in your home uninvited whilst you are in the shower would self evidently be a frightening and disturbing experience.

113 We have accepted the claimant's account in relation to the conversation as to how Mr Cramp had accessed the property for the following reasons. Given the degree of surprise that Mr Cramp's unannounced visit must have caused the claimant, it seemed unsurprising to us that one of the first questions from the claimant would be to demand to know how he had got into her flat. Additionally, it was factually correct, on the respondent's account, that Mr Cramp had accessed the flat via the unlocked French windows; this was the account contained in the ET3 and Mr Cramp's witness statement (he referred to it as a veranda type door but we did not understand anything to turn on that). It was also the account that the claimant had included in her ET1. In the absence of there having been any internal investigation it seemed to us that the only way in which the claimant would have known at this early stage of proceedings how Mr Cramp had accessed her property was if she had asked and he had told her during the incident, as she asserted to be the case.

114 But there are certain elements of her account which, we concluded, she had not proved on the balance of probabilities; specifically that Mr Cramp was standing in the doorway of the bathroom as she got out of the shower, that whilst she was stood naked in front of him he refused to leave until she had come out of the bathroom, that Mr Cramp said to her that he was going to wait in her flat for 30 minutes until she came out of the bathroom and that she repeatedly shouted at him get out and go back to work with Mr Cramp only leaving after this confrontation. We rejected this evidence for the following reasons;

115 The incident as described by the claimant was very serious; a heated confrontation that took place between them whilst she was naked with Mr Cramp refusing to leave her property for a period of time. Yet there were WhatsApp messages that cast significant doubt on this version of events:

(i) The message from the claimant to Mr Cramp a couple of hours after the incident in response to his apology for scaring her, paragraph 34.84;
I appreciate the intention Ade (our emphasis) it's just it was too much. I need space. Please wait for me to contact you when I am ready.

We considered the words "I appreciate the intention Ade" were fundamentally inconsistent with the account of events given by the claimant.

(ii) There was also the WhatsApp message the claimant sent Mr Cramp on 11 September following Mr Cramp messaging the claimant to say he would not contact her again, paragraph 34.102;
"I just needed space Ade. You don't need to say goodbye. Nobody wants that. Just needed space. All will be okay" ending the message with a :-) emoji.

Had the incident happened as the claimant described we think it unlikely the claimant would have encouraged Mr Cramp to not end all contact with her, nor indeed would have ended the message with a smiley face emoji.

(iii) Then there was the claimant's WhatsApp to Mr Molesworth, paragraph 34.99, when he asked her whether she would take matters further at work;
"Prob not at work unless or until anyone tried to mess with me in any way, whether it be on a contractual or personal level".

This in our view showed that (i) the claimant was someone who was able to complain (not everyone is able to do so of course) and (ii) that she was choosing not to do so at that time but was keeping it in her "back pocket", so to speak, to deploy at an opportune moment. That, we considered, was inconsistent with the very serious incident that the claimant described.

116 Then there was the account of the incident that the claimant provided to Mr Molesworth; that she heard a voice on the other side of the door and it panicked her because she was in the shower. He (Mr Cramp) "could have" seen her naked, paragraph 34.88 above. Not that he did see her naked. Moreover, the description of her "hearing his voice" was consistent with them not having seen each other. There was also the claimant's account of the incident which was provided to the police. This had to be treated with a degree of caution, because the report that was before us contained no more than a brief summary of what the claimant had reported. It also has to be noted that the report did record the claimant as reporting that Mr Cramp had let himself into her flat and had watched her in the shower, paragraph 34.97, so it was partially consistent with her account before us. However, there was no suggestion in the police report that the claimant had reported that there had been a heated confrontation between them whilst she was naked with her shouting at Mr Cramp to go and Mr Cramp refusing to do so. Given that these are serious aggravating features to the incident we think it likely that even the summary report would have mentioned this, had it been reported. We infer, therefore, that, more likely than not, this was

not reported and we think it highly unlikely that it would have *not* been reported if it *had* happened.

117 We also drew an adverse inference against the claimant in respect of her failure to disclose, for the purposes of this hearing, some of the WhatsApp messages that she had sent to Mr Cramp.

(i) She failed to disclose the message that she sent to Mr Cramp on 4 September, the very day before the incident, paragraph 34.55;
"Thanks Ade
and he knows uve (sic) got my back which is (ok/good emoji)".

(ii) She failed to disclose the next part of this exchange where she sent Mr Cramp her home address, paragraph 34.56.

(iii) The claimant failed to disclose her response to Mr Cramp's apology, sent on the day of the incident, paragraph 34.83;
"I appreciate the intention Ade it's just it was too much. I need space. Please wait for me to contact you when I am ready".
She failed to disclose her response to him saying he would cease all contact with her, paragraph 34.102;
"I just needed space Ade. You don't need to say goodbye. Nobody wants that. Just needed space. All will be okay".

118 It was put directly to the claimant in cross examination that these failures to disclose on her part were deliberate. The claimant's explanation was that when she carried out disclosure she was homeless and she did her best to disclose everything that she had but it was difficult for her. We rejected that explanation. In part because the claimant was able to disclose many, many messages and in part because all of the messages that we were taken to that the claimant had failed to disclose were messages that undermined elements of her case. Additionally, it was noticeable from the claimant's documents that the claimant had disclosed a copy of Mr Cramp's apology sent to her on 5 September, page 238 and paragraph 34.83, and it could be seen from her copy that there was a response from her to him immediately underneath (there was the start of a green box denoting a reply from her). However, this was cut off on her copy of the document. Even if the claimant had been experiencing difficulties disclosing her WhatsApp messages (and we do not accept that she was for the reasons set out) it is highly unlikely, in our view, that the claimant would have been able to disclose an entire WhatsApp chain of messages from that day but then just inadvertently cut off the very last message sent by her, when it appeared immediately underneath copies of messages that were disclosed. We concluded that the failure to disclose these messages on the claimant's part was deliberate. The claimant, we concluded, withheld messages that undermined her description of Mr Cramp's conduct and behaviour and the impact of that on her,

and this likewise cast doubt on the accuracy of her version of events of 5 September.

119 Lastly, we took into account our general assessment of the claimant's credibility and also our particular assessment that the claimant's evidence had a tendency to be unreliable when it came to describing events concerning Mr Cramp, paragraphs 26 and 27 above.

120 There is one aspect of our findings that differs from either account provided to us; where Mr Cramp was standing when they spoke to each other. The claimant said he was standing in the doorway of the bathroom as she got out of the shower, Mr Cramp that he was on the edge of the sitting room. We have rejected this element of the claimant's account for the reasons we have already explained. We also think it likely, given the inconsistency that existed in Mr Cramp's accounts of where he was in the property, that Mr Cramp was seeking to minimise how far into the claimant's flat he went. We considered it more likely than not that Mr Cramp had moved through the claimant's property and into the hallway close to the bathroom 34.81. We did so because, given that it was not disputed that the claimant was in the shower at the time of the incident, it seemed to us Mr Cramp would have had to have been very close to the bathroom in order for her to be able to hear him calling out to her.

<u>Complaint 3: On either 5 or 6 September 2018 Mr Cramp attempted to send the claimant flowers to her home address.</u>

121 It was not disputed that this happened, paragraphs 34.91 and 34.92 above. The respondent conceded that this conduct was unwanted. We did not consider that the actions of Mr Cramp could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her but we concluded that the claimant had proved that it had that effect on her, and that it was reasonable for the conduct to have had that effect, and we did so for two reasons. Firstly, the flowers cannot be viewed in isolation; context is important. They arrived on the same day as, and just after, the shower incident. Secondly, just as with the shower incident, there is an element to Mr Cramp's behaviour which, arguably at least, displays, a greater degree of intimacy between them than actually existed; in particular his comment in the card "you are loved".

<u>Was this conduct related to sex?</u>

122 People send flowers for many different reasons some of which are entirely unrelated to the protected characteristic of sex; it is a way to say thank you, for example, or to show empathy or support. Likewise, to tell some they are loved is not necessarily related to sex; friends or family members might say this to each other. But on the facts of this case we concluded that the claimant had proved facts from which we could conclude that the conduct of Mr Cramp in attempting

to send the claimant flowers was related to sex and consequently we concluded that the burden of proof had reversed. Those facts were as follows; (i) our finding that by the late summer of 2018 Mr Cramp was somewhat infatuated with the claimant and had an interest in her that extended beyond friendship, which is an interest that is related to the claimant's sex and (ii) our conclusion, set out above, that the shower incident was an act of sex related harassment and (iii) that the message with the flowers was, on the face of it, overly intimate behaviour from someone who is a work colleague and with whom the claimant had no more than a friendly relationship.

123 Accordingly, we concluded that the burden of proof had reversed. The respondent has not, we concluded, proved on the balance of probabilities that the conduct of Mr Cramp was in no sense whatsoever related to sex for the following reasons. Firstly, there was the fact of Mr Cramp's unexplained failure to attend the hearing. We have set out in detail in paragraph 102 above our reasoning in relation to this. His absence, in essence, is in itself a factor that undermines the cogency of the explanation offered by the respondent (which was that the flowers were sent as a gesture of empathy and support). Secondly, we also considered that the facts that had moved the burden of proof across to the respondent, specifically our earlier finding of sex related harassment and our finding that Mr Cramp had an interest in the claimant that extended beyond friendship would have required there to be a particularly clear, cogent and tested explanation from the respondent to show on the balance of probabilities that Mr Cramp's conduct in sending the flowers was not related to sex. That is all the more so when what was said in the note accompanying the flowers, "you are loved", is weighed into the balance. Such an explanation was absent because Mr Cramp failed to attend.

124 For the reasons we have set out we therefore concluded that the respondent had not discharged the burden of proof on the balance of probabilities that the conduct was not related to sex. We did not, for the avoidance of doubt, conclude that this was unwanted conduct of a sexual nature for the purposes of section 26(2)(a). There was nothing of a sexual nature about this conduct, on our findings and conclusions.

<u>Complaint 4: On 3 October Mr Dunn sent the claimant an offensive text message.</u>

125 It was conceded by the respondent this was an act of harassment related to sex and/or sexual harassment.

<u>Complaint 5: on 17 October Mr Dunn persistently called the claimant and then came to her house and tried to gain access to the claimant's house by the French doors.</u>

126 This complaint is factually accurate, paragraph 34.152 above. It was not disputed that this conduct was unwanted. We did not consider that the actions of

Mr Dunn could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her but we concluded that the claimant had proved that it had that effect on her, and that it was reasonable for the conduct to have had that effect for the following reasons. The context in which the conduct occurs is important. In this case the context was that the claimant had already suffered an unannounced visit to her home address by a male work colleague just a matter of weeks before. History was repeating itself. Moreover, Mr Dunn himself had committed an act of sexual harassment towards the claimant just two weeks before this incident. Conduct and behaviour that is repetitious is much more likely (reasonably) to have the proscribed effect. The principal dispute between the parties in relation to this complaint was whether this conduct was related to sex. We concluded that the claimant had proved facts from which we could conclude that the conduct of Mr Dunn was related to sex and consequently we concluded that the burden of proof had reversed. Those facts were (i) that it was conceded that Mr Dunn had committed an act of harassment related to sex/sexual harassment in relation to the claimant just two weeks prior to this incident (ii) that he had sent other texts to the claimant of an inappropriate nature in the weeks preceding this incident, "I will come to you if you like? Just don't be in the shower when I get there", followed by a winking emoji, paragraph 34.140 above and "we need to find you a good man to take care of you don't we", paragraph 34.145 above, and (iii) his snapchat user name, which was sexually explicit and would be offensive to many women, paragraph 34.155.

127 Accordingly, we concluded that the burden of proof had reversed. The respondent has not, we concluded, proved on the balance of probabilities that the conduct of Mr Dunn was not related to sex. In circumstances where Mr Dunn did not attend to give evidence, he was one of the principal witnesses in the case, his witness statement was unsigned, and because of the lack of internal investigation there had been no challenge or testing of his account we considered that very little weight could be attached to his statement. Moreover, the very fact of his unexplained absence is a factor that undermines the cogency of the evidence contained in his statement. We were mindful, when reaching our conclusion, that we have found as a fact that the reason why he attended the claimant's home, at least in part, was to retrieve his charger, paragraph 34.152 but whether conduct is related to sex is a much broader question than this. Lastly, just as with Mr Cramp, we also considered that the facts that had moved the burden of proof across to the respondent would have required there to have been a very clear, cogent and tested explanation from the respondent to prove that this conduct was not related to sex, which there was not given his absence. Accordingly, the respondent has not discharged the burden of proof and this claim succeeds.

128 We did not, for the avoidance of doubt, conclude that this was unwanted conduct of a sexual nature for the purposes of section 26(2)(a). There was nothing sexual about this conduct, on our findings and conclusions.

Failure to make reasonable adjustments

Complaint 1

129 Our primary conclusion, as set out above, is that the claimant has not proved that she was disabled at the relevant time, and these claims fail on this basis alone. However, we also considered it appropriate to analyse these claims on the assumption, contrary to this conclusion, that the claimant had proved that she was disabled by way of anxiety and depression at the relevant time.

130 It was the claimant's case that the respondent applied a PCP, which was defined at the start of the hearing as being; a practice of having a different recruitment process for internal candidates (defined by the claimant as being those either directly employed by the respondent *or engaged as agency workers*) versus external candidates. The claimant did not prove, as a matter of fact, that this PCP was applied because only employees were treated as internal candidates not agency workers, paragraph 34.17. The PCP was put differently in closing submissions, without objection from the respondent; it became that the respondent had a policy of treating agency workers/ex agency workers as external candidates and external candidates were not permitted to apply for internal jobs. The respondent accepted that this PCP was applied, in the sense that it was accepted that certain vacancies were only available to internal candidates and that if an external candidate applied for an internal role they would be filtered out of the application process automatically. It accepted that agency workers/ex agency workers were treated as external candidates.

131 The next question was whether the claimant had proved that this PCP caused her substantial disadvantage. The substantial disadvantage this is said to have caused as it was originally set out at the start of this hearing was: that the claimant was left without a role and had she not been disabled it was more likely she would have secured an alternative role because it was easier to apply as an internal candidate; whereas the process for external candidates was more challenging. We concluded that the claimant had not proved that the practice of making certain vacancies only available to internal candidates and filtering out automatically any external candidates for such roles caused her substantial disadvantage in comparison with those who are not disabled. This practice was applied to the disabled and non-disabled alike. They were both subject to the same disadvantage. Whether a potential candidate was disabled or not, if an external candidate applied for an internal role their application would automatically be filtered out. Moreover, this was not a case where it was said by the claimant that this PCP in some way bit harder on the disabled in comparison with the non-disabled, as can sometimes be the case, for example, with sickness absence policies.

132 The PCP did not, in any event, lead to the claimant being left without a role, which appeared to be part of the disadvantage asserted; what left her without a role was the decision to terminate her contract early. It would not, on our findings, have been any easier for the claimant to apply had she remained in role, because as a contractor she would *always* have been treated as an external candidate, paragraph 34.17, and it follows from this that we do not find and conclude that it would have been more likely that she would have secured an alternative role had she remained in post. The process for external candidates was not, on our findings in some way inherently "more challenging" it was simply that external candidates could not apply for internal roles, paragraph 34.17.

133 As set out above, the asserted substantial disadvantage, in particular, what was meant by the external process being "more challenging", was expanded somewhat in submissions, again without objection from the respondent, perhaps reflecting the shift in how the PCP had been formulated. In submissions it was said that for jobs advertised externally there was "obviously a more competitive pool", paragraph 58, and that an application via the internal portal would entail a "much more restricted pool", paragraph 59. But there was, with respect, no evidence at all led to this effect. And that cannot be inferred particularly in circumstances where; (i) the respondent fills up to 50% of its vacancies via internal recruitment suggesting that there is considerable internal movement, paragraph 34.17, (ii) the respondent is a large employer so there is no obvious basis on which it could be said that an internal pool would be smaller or less competitive than an external pool and (iii) there were 10 internal applicants for the Compliance engineer role, paragraph 34.133, which is not a particularly small number. It was also said in submissions that the "more challenging" external process was one which the claimant "did not feel able to undertake" at the time and that the internal route, with a more restricted pool, was "clearly less daunting". Once again, the claimant led no evidence that she did "not feel able to undertake" an external recruitment process. Likewise, the claimant led no evidence that an internal process was less daunting, and accordingly we have made no findings of fact to this effect. This complaint therefore fails. The claimant has failed to prove the asserted substantial disadvantage on either formulation advanced by her.

<u>Complaint 2</u>

134 It was the claimant's case that the respondent applied a PCP that all outsourced contracts would be cancelled. The substantial disadvantage this is said to have caused, as it was identified at the start of the hearing, see above, is that the claimant was given very little notice of this and was unable within the period of time available to her to make applications for alternative roles as an internal candidate.

135 We have not found that an instruction to cancel all outsourced contracts was issued; we have found that Dr Cuttler was told there were going to be

significant cutbacks and that he needed to consider ending some contracts within his team, paragraphs 34.60 and 34.63 above. It was accepted by Mr Segal that in the event that we were to find that a blanket instruction to terminate all outsourced contracts was not issued then this claim would fail; it was run in the alternative to the victimisation claim concerning termination of the claimant's contract.

136 However, given that the respondent conceded in closing submissions that this PCP *had* been applied we considered that we should analyse this complaint on the basis that such a PCP existed, even though that is contrary to our factual finding. We concluded that the claimant had failed to prove the asserted substantial disadvantage. Whilst it is correct that she was given very little notice of the decision to terminate her contract (11 days), it is not correct that this left her unable within the time available to apply for alternative roles as an internal candidate. At no stage would the claimant have been able to apply for roles as an internal candidate, see paragraph 133 and 34.17 above. In submissions the substantial disadvantage was put differently; it was that the claimant was prevented from having her grievance dealt with properly because she was no longer on site. But this was so different from how the case on substantial disadvantage had been set out at the start of the hearing that we concluded it would be wrong for us to consider this complaint in this way; that would be tantamount to considering a complaint that had not been raised.

Victimisation

137 It was conceded by the respondent that the claimant did five protected acts as follows:
On 5 September 2018 she reported an alleged incident of harassment (i.e. the shower incident) to Mr Andrew Bailey and Mr Nick Molesworth, on 7 September 2018 the claimant reported the same incident to Leicestershire police, on 7 September 2018 the claimant reported to Mr Bailey that Mr Adrian Cramp had attempted to send her flowers, on the same date she informed Mr Bailey that she had reported the incidents to the police and on 17 October 2018 the claimant reported the incident involving Mr Dunn to Leicestershire police.

Complaint 1: Andrew Bailey/Dave Cuttler omitted to take any steps to advance or address the claimant's reporting of the incidents to them.

138 There was, in respect of this claim, an amendment application made by the claimant during closing submissions. The application, which was objected to by the respondent, was to remove the names of Mr Bailey and Dr Cuttler and to insert instead "the respondent", the purpose of this amendment being, we were told, to broaden the complaint so that it included HR. We concluded the amendment application should not be granted for the following reasons. The application was made very late in the day and after evidence had concluded. The claims, including this claim, had been identified as far back as 26 May 2020 and

had been agreed since then. The claimant has been represented throughout this process.

139 Mr Segal submitted that the application to amend was a minor one. Whilst in one sense this was right, in the particular context of this application made, as it was, during closing submissions, we did not agree this was the case. The effect of this amendment application, were it to be granted, would be to widen out this complaint to consider why any inaction on the part of HR occurred in circumstances where the respondent was not on notice that this was to be considered. As Mr Islam-Choudhury, in our view, correctly submitted if the amendment application were granted it would require consideration of the raising of the HR tickets and what happened after 27 September, which was a broader enquiry than the original complaint. Whilst there was some documentary evidence before us relevant to this issue a party in a discrimination claim should be given the opportunity to call a witness to advance an explanation as to the reason why something did, or did not, occur. The respondent had not had that opportunity. The respondent, moreover, had not called an HR Business Partner (or indeed anyone from HR) as a witness; Ms Shepherd and Mr Gill were not part of HR and accordingly this was not a situation where questions had, in fact, been asked of a witness during the course of the hearing that were relevant to this issue. For these reasons we considered that there would be prejudice to the respondent were we to grant the application at this stage. The claimant, on the other hand, suffered no prejudice, in our view, if the application was refused (aside from the usual prejudice of not being able to pursue a claim she now wished to pursue). That point aside, however, even if the amendment application was refused the claimant still had a very substantial claim against the respondent, and it was not suggested that this element of the claimant's case was, in some way, of particular importance to the claimant. Consequently the practical consequences to the claimant of refusing the amendment were slight; the practical consequences for the respondent, for the reasons we have set out, more significant.

140 Turning first of all to this complaint in so far as it was made against Mr Bailey, by 7 September the claimant had, it was conceded, carried out 4 protected acts, three of which Mr Bailey clearly knew about because they were conversations the claimant had directly with him, paragraphs 34.86 and 34.100. It is also correct that in the days that followed he did not take any steps to progress any form of investigation into the incident, paragraph 34.86 above. We were prepared to assume that the burden of proof had moved across to the respondent. We concluded that the respondent had proved that the reason why Mr Bailey took no action was because the claimant had told him that she did not want any action taken at this time, paragraph 34.86. That is an explanation that is in no sense whatsoever because of the protected acts.

141 As to Dr Cuttler, he was not one of the people to whom a protected act was made. A person can only be influenced by a protected act if they know of it.

Dr Cuttler was not asked any questions about whether he knew of the protected acts made to the police nor whether he was told about what the claimant had reported to Mr Molesworth. He was asked whether Mr Bailey had told him that the claimant had expressed concern about the incident to him, and he said that Mr Bailey had not, which is evidence we accepted, see paragraph 34.104 above. Moreover, Dr Cuttler's evidence in his witness statement was not entirely clear about what he knew when; he said in the context of *the claimant* not reporting the incident to him that he became aware of events at a much later time, paragraph 9, but he did not set out what if anything he might have been told by others about reports the claimant had made to them.

142 Doing the best we can on the evidence that was before us we have found that Dr Cuttler knew of what was conceded to be the second and fourth protected acts; the report of the incident of 5 September to the police by the claimant, and the claimant informing Mr Bailey that she had reported this incident to the police. On our findings Mr Bailey told Dr Cuttler about both of the protected acts, paragraph 34.104. He was, of course, also told by the claimant that she had reported the incident to the police during the meeting of 19 September, paragraph 34.109 above.

143 We were prepared to assume that the burden of proof had moved across to the respondent. We concluded that the respondent had proved that the reason why Dr Cuttler took no action, at least up until 27 September, was because the claimant had told him that she did not want any action taken, paragraph 34.110. That is an explanation that is in no sense whatsoever because of the protected act.

144 By the meeting of 27 September, however, the situation had changed. The claimant told Dr Cuttler that she felt she might need to talk to HR directly, paragraphs 34.124 and 34.126. Dr Cuttler understood this to mean that she now wanted to formally report her situation to HR, paragraphs 34.127 and 34.128.

145 However, it is not factually accurate that Dr Cuttler then omitted to take any steps to advance or address the claimant's complaint. He did take steps. He contacted HR and asked for advice. He informed HR that the claimant now wished to formally complain and he queried if he should direct the claimant to a general freephone number and if not what HR would recommend, paragraph 34.127. He also twice contacted HR to see if he could obtain a copy of the harassment procedure for the claimant, paragraph 34.129. Accordingly, this complaint (which was that he failed to take *any* steps) fails on the facts. He did then fail to take any steps to pursue matters beyond this but even had this been the claimant's complaint (which it was not) we would have concluded that the reason why this happened was because he was told by HR that no further action was needed because the claimant was not an employee of the respondent, paragraph 34.125, which is an explanation that is in no sense whatsoever because of a protected act.

Complaint 2: Andrew Bailey/Dave Cuttler failed to take disciplinary action against Mr Cramp

146 It is factually correct that no disciplinary action was taken against Mr Cramp. Our analysis and conclusions as to why this was so in relation to Mr Bailey are exactly the same as set out at paragraph 140 above in respect of the first complaint of victimisation. In relation to Dr Cuttler it is again factually correct that he took no disciplinary action against Mr Cramp. Our analysis and conclusions as to why this was so are as set out at paragraphs 143 and the latter part of paragraph 145 above.

Complaint 3: the claimant's contract was terminated

147 It is, of course, factually correct that the claimant's contract was terminated. The relevant decision maker was Dr Cuttler. As we have already set out, on our findings he knew of the second and fourth protected acts, and he did so on or after 8 September 2018, paragraphs 34.100 and 34.104. We concluded that the claimant had proved facts from which we could conclude that the decision to terminate her contract was because of these protected acts and consequently we concluded that the burden of proof had reversed. Those facts were as follows; (i) the timing of the instruction from Dr Cuttler to terminate the claimant's contract, coming days after the protected acts, paragraph 34.106 (ii) the respondent's refusal in the course of this litigation to respond to the claimant's specific disclosure request for documentation in respect of any other agency workers whose contract had been terminated prematurely, page 858, despite this clearly being relevant (iii) the fact that only one other person on a service purchase contract (on the evidence that was before us) had their contract terminated prematurely at this time, paragraph 34.64 and (iv) that Dr Cuttler was inconsistent in his evidence before us as to whether he was issued with an instruction to terminate contracts, and if so what the terms of that instruction were, see paragraphs 29 and 30 above, (we should make clear it is the fact of the inconsistency not the explanations themselves).

148 We concluded that the respondent had proved that the reason why the claimant's contract was terminated was because Dr Cuttler had been told that he needed to consider what contracts he could end as a cost saving measure and he identified the claimant's contract as one such contract. The critical issue here, we considered, was the timing of Dr Cuttler's decision. Dr Cuttler's account was that he made his decision before the incident of 5 September (and it follows from this before any reports about that incident); the claimant's account that the decision must have been made around 12 September when Dr Cuttler issued the written instruction to terminate her contract.

149 Whilst it is correct that the written instruction to terminate the claimant's contract was not issued until 12 September, paragraph 34.105, Dr Cuttler was

able to explain to our satisfaction why this was so. We have found as a fact that Dr Cuttler spoke to Mr Hardeep Banwait in the purchasing department on 5 September to confirm what the correct procedure was to terminate the contract and it was agreed that he should speak to Gattaca in the first instance. Following this Dr Cuttler then spent several days trying without success to speak to the project manager at Gattaca before emailing him on the 10 September and speaking to him on 11 September. It was only once he had spoken to the project manager at Gattaca that Dr Cuttler then issued the written instruction to Mr Banwait to terminate the claimant's contract on 12 September, paragraph 34.105. We accepted his evidence that the delay in issuing the written instruction was caused by trying to contact Gattaca for the following reasons. Dr Cuttler's account was, to an extent, corroborated by page 561, which set out his time line of events. We say to an extent because it was not clear to us when this document was created or what its purpose was. Nevertheless it was reasonably detailed about what had happened when, and so we considered that some weight could be placed on it. Moreover, this explanation (that he tried to contact Gattaca before doing anything else) was also consistent with what Dr Cuttler wrote to HR on the 24 September, paragraph 34.116. After setting out in this email that he had been told in the first week in September that outsourced contracts were being terminated he said, about the claimant's contract, that he had agreed to follow this up with Gattaca as he was the manager who had originally raised the contract. That then was contemporaneous evidence that there was delay in implementing the decision because he was trying to contact Gattaca.

150 Additionally, in relation to *when* the decision was made, Dr Cuttler wrote in this email that he was told "in the first week in September" that outsourced contracts needed to be terminated. This was written at a time when the focus was not on the reason why the claimant's contract was terminated, or when that decision was made, but on whether as a reasonable adjustment the contract should be extended. It was written at a time when Dr Cuttler would not have had any real awareness of the significance of when he made his decision. Yet the email suggests the decision was made in the first week in September; consistent of course with his evidence that he made his decision before 5 September and also consistent with him making the decision before 8 September, which is the very earliest date, on our findings, on which he could have been aware of the protected acts.

151 More significantly, Dr Cuttler's evidence as to the timing of the decision was corroborated by the hearsay evidence contained in Mr Cramp's witness statement, which was that Mr Cramp knew by the 4 September that a decision had been made to terminate the claimant's contract, paragraph 11, and most importantly this evidence was in turn supported by a relatively contemporaneous WhatsApp message from Mr Cramp sent to the claimant on 11 September, paragraph 34.101. The relevant part text of the text read;

"What happened last week was beyond horrible, *I should never have been put in a position where I knew what was happening, but could not tell you* (our emphasis) *I hope you believe me when I say I tried to protect you*".

152 It is notable that the claimant herself accepted in evidence that this likely referred to Mr Cramp knowing that a decision had been made to terminate her contract. Additionally, we took into account our finding that Mr Molesworth, on 3 September, had a conversation with Dr Cuttler, because he was trying to get information from him as to how safe his (Mr Molesworth's) contractor might be, and he was told during this conversation that the claimant was at risk. From this it was clear that the claimant was, at the very least, considered "at risk" by the beginning of September. It was also notable, in terms of the timing, that even after the instruction to terminate the claimant's contract was issued on 12 September, paragraph 34.105, there was still a 5 day delay by the respondent before this was implemented, paragraph 34.106, suggesting that this was not something that was being treated as an absolute priority and putting into context the earlier delay whilst Gattaca were contacted. For these reasons we concluded the respondent had proved that Dr Cuttler had made the decision to terminate the claimant's contract before the incident of 5 September.

153 As to the reason for the termination of the claimant's contract, we took into account in accepting Dr Cuttler's explanation that his decision was made as a cost saving measure, that it was beyond doubt that the respondent was in financial difficulty and that cost saving measures were being considered. It was not disputed that the claimant had been recruited as an extra member of Dr Cuttler's team in order to carry out work relating to a particular project with an already finite timescale, paragraphs 34.12 and 34.13 which, in our view, increased the likelihood that the claimant would be identified as someone to be dismissed in such circumstances. As set out at paragraph 152 above, it was clear from the evidence of Mr Molesworth and Dr Cuttler that, within Mr Jordan's team at least, termination of contractors was being considered as a cost saving measure. Lastly we took into account that on 19 September, which again was well before there was any focus on the reason why the claimant's contract was terminated, Dr Cuttler wrote to HR that the claimant's contract was terminated as a means of saving money, paragraph 34.109 above.

154 Accordingly, for these reasons, the respondent has proved, we concluded, that the decision to terminate the claimant's contract was in no sense whatsoever because of the protected acts.

<u>Complaint 4: The failure to grant the claimant's request for an extension to her contract.</u>

155 We understood the relevant decision maker to be Dr Cuttler with the assistance of HR from whom he was taking advice. There was very little focus on this complaint during the course of this hearing, in particular no questions were

asked of Dr Cuttler about this issue during cross examination and neither the claimant nor the respondent addressed us in any detail on this claim during closing submissions.

156 Doing the best that we can on the evidence that was before us it is factually correct, on our findings, that the claimant requested an extension to her contract and that this was not provided. The first time this issue arose was during the meeting with Dr Cuttler on 19 September when the claimant suggested that she ought, as she put it, to be afforded reasonable adjustments to the termination of her contract, paragraph 34.112. This was closed down as an option by Dr Cuttler during the meeting on 27 September, paragraphs 34.120.

157 In submissions it was said on the claimant's behalf that if we were to find that Dr Cuttler had a discretion as to whether to terminate the claimant's contract or not it was "an almost inevitable inference" that the contract was terminated on the 28 September (and not extended) because Dr Cuttler was aware that the claimant had made, or was very likely to make, a serious complaint of harassment. Pausing there, a belief that a person may do a protected act can, of course, be sufficient for the purposes of a victimisation claim, but that is not the basis on which the claimant's claim was put. The claimant's case was put on the basis that between 5 – 17 September she did 5 protected acts, and that this is what caused the respondent to act as it did, it was not that the respondent believed she might do a protected act.

158 Turning to the claimant's pleaded case, we have already set out that of the five protected acts that were relied upon by the claimant, on our findings Dr Cuttler had knowledge of two; that the claimant had reported the incident with Mr Cramp to the police and had told Mr Bailey she had done this. We concluded that the claimant had not proved facts from which we could conclude that the failure to extend her contract was because of the second or fourth protected act and consequently we concluded that the burden of proof had not reversed. Even had the burden of proof moved across to the respondent we would have concluded that the respondent had proved that the reason why the claimant was not granted a contract extension was because it needed to reduce costs, the claimant was not an employee of the respondent, and any request for a contract extension as a reasonable adjustment would need to be made via the claimant's employer, Gattaca, and no such request was made, paragraph 34.121. Plus the respondent did not, in any event, consider that it had any obligation to make an adjustment for the claimant in the form of a contract extension, which is the basis on which this request was made.

159 Much of this can readily be discerned from the transcript of the meeting of 27 September between Dr Cuttler and the claimant, which was produced by the claimant. This we considered to be an important document for the following reasons. No formal complaint had been made by the claimant to the respondent about the incidents when this meeting took place, nor, until this meeting was

there any indication that she wished to make such a complaint, paragraphs 34.110 and 34.128. At the point of this meeting, therefore, matters were still reasonably low key internally; and it is unlikely that Dr Cuttler would have been on “high alert” or minded to adopt what he considered to be his best defensive position. Moreover, he had no knowledge that the meeting was being recorded. Consequently, we considered that the account provided to the claimant by Dr Cuttler in the meeting on balance could be treated as an accurate reflection of what actually was in his mind at the time (the reason why). She was told; she was not an employee of the respondent, and that he could not deal with the situation as if she were an employee because she was not, paragraph 34.120, she was told that many people were leaving the respondent and that was it. Contracts were finished, paragraph 34.120. Dr Cuttler told the claimant that so far as he was aware reasonable adjustments did not mean that there was responsibility on the respondent to extend the claimant’s contract. He also said that if Gattaca made their case Mr Banwait would work with HR to establish if there was a legal obligation on the respondent to extend the contract and if there was then it (the contract extension) would happen (and it can be inferred from this that if the respondent was of the view that there was no such obligation then no extension would be given). Taken together this is an explanation that is in no sense whatsoever because the claimant had done a protected act. Accordingly, this claim fails.

Complaint 5: the failure to allow the claimant access to the exceptions process

160 We understood this to be a complaint in respect of which the relevant decision maker was said to be Dr Cuttler. On our findings an exceptions process did exist, albeit it was not a formal written process but simply a well-established internal mechanism under which a manager could request that a contractor be converted to a permanent employee in the event they were carrying out a business critical role, paragraph 34.20. This process was not applied to the claimant and accordingly this complaint is factually accurate.

161 In submissions all that was said about this on the claimant’s behalf was that given that the claimant’s health had been so adversely affected by the actions of the respondent’s employees it would, but for the protected acts, be expected that the respondent would have approached a potential sudden loss of a job for the claimant more sympathetically and creatively. What the respondent did not want, it was said, was for the claimant to continue with them if she was determined to pursue harassment complaints, paragraph 71.

162 Once again, a belief that a person may do a protected act was not the basis on which the claimant’s victimisation claim was pursued.

163 There are, in any event, a number of other points to be made about these submissions. Firstly, as at the time that the respondent was considering this issue, what the respondent had been told about the claimant’s ill-health was that

she had anxiety and depression which was considered to be a disability and that she had suffered at the hands of the respondent's employees and consequently there should be a reasonable adjustment made for her, paragraphs 34.109 and 34.120, but there was nothing before the respondent to suggest that she was particularly unwell at the time. Nor could there have been; the very serious ill-health which the claimant asserts she now suffers from post-dated the events with which this case is concerned, paragraphs 34.7 and 34.8. Secondly, the respondent did not ignore the concerns raised by the claimant nor treat them with a particular lack of sympathy; to the contrary as soon as the claimant explained her situation to Dr Cuttler he filed a request with HR for advice and then met with the claimant to discuss that advice, paragraphs 34.109 - 34.118. Thirdly, it is important to bear in mind the timeline. The respondent, on our findings, had no knowledge that the claimant wanted to pursue a complaint formally until the meeting that Dr Cuttler had with the claimant on 27 September, paragraph 34.127, one day before the claimant's contract terminated. At its highest Dr Cuttler "suspected" prior to that this that she might make a formal complaint to HR, paragraph 34.127. Even after the meeting he remained unclear as to the exact nature of the complaint; he "took it to mean" it was "with regard to her negative experiences" with other personnel, paragraph 34.127. It certainly cannot be said that the respondent knew/believed before the meeting on the 27 September that the claimant was "determined to pursue harassment complaints", and for the reasons set out, it overstates the position as to the respondent's knowledge/belief after the meeting of 27 September.

164 Reverting to the pleaded case, we concluded that the claimant had not proved facts from which we could conclude that a failure on the part of Dr Cuttler to apply the exceptions process to the claimant was because of the protected acts of which he had knowledge and consequently we concluded that the burden of proof had not reversed.

165 We were mindful, when reaching this conclusion, that there was a degree of inconsistency in what Dr Cuttler set out in the first and second versions of his witness statement in relation to the exceptions process. But, as we have already commented, there was no fundamental inconsistency, in our view, between the two versions, the latter version, simply appeared to seek to minimise and restrict the existence and use of the policy, paragraph 34.19. Consequently, we did not consider that this inconsistency was sufficient on its own to move the burden of proof across the respondent. Moreover, had we found that the decision to terminate the claimant's contract was tainted by a protected act then this would have been a factor to move the burden across to the respondent in respect of this complaint also. However, we have already explained why we have not concluded this decision was tainted in this way.

166 In any event, even had the burden of proof moved across to the respondent we would have concluded that the respondent had proved that the reason why the exceptions process was not applied to the claimant was because

it is only used by managers when they wish to try to retain somebody who is in a business critical role, paragraph 34.20. The claimant was not considered to be in a business critical role, as we have already set out she was brought in as an extra person on the team to carry out project work of a finite duration, paragraphs 34.12 and 34.13. Moreover, the basis on which discussions were taking place with the claimant about the possibility of her contract continuing was that she might be entitled to such as a reasonable adjustment, and Dr Cuttler was of the clear view that the exceptions process did not apply to this type of situation. That much was clear from what he explained to the claimant during the meeting on 27 September, paragraph 34.123 above. These are explanations that are in no sense whatsoever because the claimant had done a protected act.

Complaint 6: The failure to consider, explore and offer alternative employment opportunities as a means of avoiding termination

167 There was very little focus on this claim during the hearing. It was once again said on the claimant's behalf during submissions that given that the claimant's health had been so adversely affected by the actions of the respondent's employees it would, but for the protected acts, be expected that the respondent would have approached a potential sudden loss of a job for the claimant more sympathetically and creatively. We have already explained above our conclusions in relation to these submissions.

168 As to our findings of fact in relation to this claim, there was, on our findings, some very limited discussion with the claimant about alternative employment opportunities. Dr Cuttler told the claimant that as far as he was aware the respondent was not obliged to take the claimant on, paragraph 34.120, and he stated there may still be external positions for the claimant to apply for, paragraph 34.120. But it was certainly the case that there was no offer of alternative employment made to the claimant. However, in order for there to be a failure, as a matter of fact, to offer the claimant alternative employment, a vacancy must exist which the claimant could have been offered (this claim was not put on the basis that the respondent should have created a vacancy for the claimant). We have accepted the evidence of Dr Cuttler and found that there were no vacancies in his department, paragraph 34.137.

169 There was one vacancy in a different department, that of Compliance Engineer in the Electrical Architecture department, paragraph 34.133. As this was being advertised on the internal portal at the point when the claimant's contract was terminated, paragraph 34.133, this must have become vacant at some point prior to the termination of the claimant's contract.

170 We know virtually nothing about this role because no witness dealt with it in their evidence and no questions were asked about the role in cross examination. We certainly cannot make any findings that this was a similar role to the one that the claimant was carrying out. We did not consider we could infer

the roles were similar from the fact that the claimant attempted to apply for this role, paragraph 34.134, because people regularly apply for roles that they are not suitable for. We asked Dr Cuttler if could help us with the degree of similarity or otherwise between the two roles and he could not.

171 In any event, in order for a person to be influenced by a protected act they must have knowledge of it. On our findings the people who had knowledge of at least one of the protected acts were Mr Bailey, Mr Molesworth and Dr Cuttler. We concluded that the claimant had not proved facts from which we could conclude that a failure on the part of Mr Bailey, Mr Molesworth and Dr Cuttler to offer her alternative employment as a compliance engineer in the Electrical Architecture department was because of one or more of the protected acts and consequently we concluded that the burden of proof had not reversed. Even if it had, on our findings, Mr Bailey, Mr Molesworth and Dr Cuttler did not know of this vacancy, paragraph 34.137, and accordingly the reason why they did not offer the claimant this vacancy is that they did not know the vacancy existed. That is a complete explanation that is in no sense whatsoever because of the protected acts.

Employment Judge Harding
Dated: 16 May 2023