



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Ms Halima Aziz

AND The Crown Prosecution Service

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: Leeds

On: 13- 17 and 20 February 2017
Deliberations in Chambers: 15 March 2017

Before: Employment Judge A M Buchanan
Non Legal Members: Mr P Curtis and Ms B Kirby

Appearances

For the Claimant: In person
For the Respondent: Mr A Sugarman of Counsel

JUDGMENT

It is the unanimous Judgment of the Tribunal that:

1. The claim of direct race discrimination advanced pursuant to section 13 of the Equality Act 2010 ("the 2010 Act") fails and is dismissed.
2. The claim of indirect race discrimination advanced pursuant to section 19 of the 2010 Act is dismissed on withdrawal by the claimant.
3. The claim of disability discrimination by failure to make reasonable adjustments advanced pursuant to sections 20 and 21 and Schedule 8 of the 2010 Act fails and is dismissed.

4. The claim of direct disability discrimination advanced pursuant to section 13 of the 2010 Act is dismissed on withdrawal by the claimant.
5. The claim of indirect disability discrimination advanced pursuant to section 19 of the 2010 Act fails and is dismissed.
6. The claim of discrimination arising from disability advanced pursuant to section 15 of 2010 Act fails and is dismissed.
7. The claim of harassment advanced pursuant to section 26 of the 2010 Act fails and is dismissed.
8. The claim of victimisation advanced pursuant to section 27 of the 2010 Act fails and is dismissed.
9. The claim of unfair dismissal advanced pursuant to sections 94/98 of the Employment Rights Act 1996 (“the 1996 Act”) is fails and is dismissed.
10. The claim for breach of contract in respect of unpaid notice pay advanced pursuant to Regulation 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (“the 1994 Order”) fails and is dismissed.
11. The claim for unpaid holiday pay is dismissed on withdrawal by the claimant.

REASONS

Preliminary Matters

1.1 By a claim form filed on 18 February 2016 the claimant advanced claims against the respondent of unfair dismissal, race discrimination, disability discrimination, unpaid notice pay, unpaid holiday pay, unpaid wages and other payments. The claimant relied on an Early Conciliation Certificate on which Day A was shown as 11 December 2015 and Day B as 8 January 2016. In respect of her claim for unfair dismissal, the claimant indicated that she wished to be re-instated. A claim for compensation in excess of £1.4 million was intimated.

1.2 By a response filed on 24 March 2016 the respondent denied all liability to the claimant. Further particulars of the discrimination claims were requested.

1.3 The matter came before Regional Employment Judge Reed on 15 April 2016 for a Telephone Private Preliminary Hearing (“TPPH”). Case management orders were made. It was noted that the respondent conceded that the claimant was a disabled person for the purposes of the 2010 Act. The claimant was ordered to provide further information in respect of her claims other than unfair dismissal.

1.4 Further information of her claims was provided by the claimant on 11/12 July 2016 (after extensions of time had been allowed). The breach of contract claim was identified as mainly relating to the alleged failure by the respondent to pay the claimant notice pay. The discrimination claims were clarified as direct and indirect race discrimination, claims of direct and indirect disability discrimination and a claim of failure

to make reasonable adjustments. A claim of victimisation pursuant to section 27 of the 2010 Act was confirmed relating to the act of dismissal and relying on previous grievances and proceedings as protected acts. A claim of harassment was also confirmed but not the protected characteristic relied on. By way of background the claimant intimated that she would rely on matters arising since 1993 being alleged failures to promote, unfair monitoring of her work and acts of discrimination in 2001 and later. It was noted that the claim for "*other payments*" notified in the claim form related to heads of damage in the claims for discrimination.

1.5 The respondent replied to that Further Information in a document dated August 2016. It was asserted that the complaint that the respondent had not awaited the receipt of the December 2014 Judgment before issuing notices of expectation for attendance on 4 August 2014 and 7 November 2014 had been litigated in proceedings in 2015 (referred to at paragraphs 7.8 and 7.9 below) and rejected. In any event the third capability meeting had not been commenced until May 2015. The way the respondent had dealt with the obtaining of OH advice in September 2015 was submitted to be reasonable. It was submitted all reasonable adjustments had been put in place to enable the claimant to return to work. It was submitted that a written assurance such as sought by the claimant that she would not be dismissed was not a reasonable adjustment. It was submitted that no holiday pay was outstanding as the claimant had been paid 31.5 days pay at the time of her dismissal and that she had no entitlement to notice pay relying on the provisions of section 87(4) of the 1996 Act. It was denied that the respondent had committed any breach of contract in dismissing the claimant or in the manner in which her appeal against dismissal had been handled. All forms of discrimination were denied. It was noted that the claimant had failed to identify any provision criterion or practice to support any claim for indirect discrimination or failure to make reasonable adjustments.

1.6 A further TPPH came before Regional Employment Judge Reed on 15 August 2016. It was confirmed that the concession made by the respondent as to the disabled status of the claimant related to the impairments of depression, post traumatic stress disorder and anxiety disorder. The claimant confirmed that her race discrimination claim related only to a claim of direct discrimination and that the claim related to the act of dismissal only. For the sake of completeness we record in this Judgment that the claim of indirect race discrimination is dismissed on withdrawal by the claimant. It was noted that the claimant relied on the fact that she is of Asian origin and that her family come from Pakistan. A hypothetical comparator was relied on but the respondent was to check in relation to an actual comparator referred to by the claimant in imprecise terms. The disability claims were confirmed as claims of direct and indirect discrimination and a failure to make reasonable adjustments. The PCP relied on was the application by the respondent of its standard terms and conditions and the failure to give an assurance that the claimant would not be dismissed save in circumstances in which any other employee would be dismissed. In respect of adjustments, the claimant confirmed she sought that same assurance and support to return to work lasting longer than 3 months. In relation to the claim of victimisation, the claimant was required to set out the protected acts relied on and it was confirmed the claim related only to dismissal. Further details of the harassment claim were also ordered to be provided. The claimant confirmed she sought unpaid holiday pay throughout her absence from 2001 – 2014 at around £60000. It was noted the claimant had still not received from the respondent the civil service compensation scheme payment to which she remained entitled.

1.7 On 19 September 2016 the claimant filed additional information as ordered on 15 August 2016. The claimant identified the protected acts in respect of the victimisation claim as:

1.7.1 Employment Tribunal (“ET”) proceedings instituted on 24 December 2001.

1.7.2 A grievance dated 31 October 2006 against Ken McDonald, Angela O’Conner and Richard Foster.

1.7.3 A grievance dated 22 July 2007 against Grace Ononiwu and Ade Randle.

1.7.4 A grievance dated 23 July 2007 against unnamed CPS staff.

1.7.5 A grievance dated 1 August 2007 against Ken McDonald and Peter Lewis.

1.7.6 A letter dated 23 October 2007 asking for action against discriminators and third parties involved in the suspension of the claimant.

1.7.7 A grievance dated 31 October 2008 against Ken McDonald, Ros McCool, Peter Lewis, Seamus Taylor, Mike Kennedy and others in respect of a decision not to take action against those who had discriminated against the claimant.

1.7.8 ET proceedings instituted on 25 November 2014 (1801960/2014) relating to the decision for the claimant to re-apply for her post as Crown Advocate without reasonable adjustment.

1.7.9 ET proceedings instituted on 5 March 2015 (1800540/2015) in respect of discrimination and victimisation in respect of notices served on the claimant to return to work.

1.8 On 19 September 2016 the claimant also served additional information in respect of her claim of harassment. The acts relied on were the act of dismissal, failure to promote in 1993 and being taken off the Crown Court Advocacy List of candidates in 1999. The protected characteristic relied on was not specified.

1.9 On 12 September 2016 the respondent filed a response to the claimant’s further information. The reference to a comparator by a witness Chris Hartley in earlier proceedings was denied. It was noted that compensation to which the claimant was entitled under the civil service compensation scheme had increased to £108363.17 from £80833.00p but had not been paid as the claimant had failed to return the relevant papers to the respondent. The respondent clarified its position in relation to the claims being out of time – contract claims before 12 September 2010 were expressed to be time barred.

1.10 A further TPPH adjourned from 19 September 2016 came before Regional Employment Judge Reed on 22 September 2016. It was confirmed that the only act of harassment relied on was the act of dismissal and the other matters alleged in respect of harassment were by way of background only. Orders were made for the final hearing which now comes before this Tribunal.

1.11 During the hearing regular breaks for the claimant were allowed throughout to take account of her disability. In addition the claimant was allowed whatever time she reasonably requested in order to prepare her papers and her cross examination and her submissions to the Tribunal. The claimant was allowed to stand up and move about whenever she wished to do so in order to alleviate her physical symptoms. There was a considerable number of preliminary matters for the Tribunal to deal with at the outset of the hearing and they are set out in a separate section of this Judgment below.

1.12 The hearing concluded late in the afternoon of 20 February 2017 and the Tribunal had no time in which to deliberate. The matter was adjourned to Chambers on 15 March 2017 when the Tribunal reached its decision. Accordingly this judgment is issued with full written reasons in order to comply with the provisions of Rule 62(2) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Witnesses

2. In the course of the hearing we heard from the following witnesses:-

Respondent

2.1 Sally Madeleine Sharp – who was at all material times the manager charged with the management of the claimant’s absence from work.

2.2 Andrew Penhale – the dismissing officer.

2.3 Jaswant Narwal – the appeal officer.

Claimant

2.4 The claimant.

Documents

3. We had before us a bundle of documents extending to two lever arch files and some 878 pages. We have made reference in the course of our deliberations to those documents to which we were referred in witness statements or during the course of the hearing. Any reference in this Judgment to a page number is a reference to the relevant page within the agreed bundle.

The Issues

4. At the start of the hearing the legal issues to be determined by the Tribunal were agreed as follows:-

Direct race discrimination: sections 9 13 and 39 of the 2010 Act

4.1 In dismissing the claimant did the respondent treat her less favourably than a hypothetical comparator because of her race, colour or ethnic origins contrary to sections 13 and 39 of the 2010 Act?

Failure to make reasonable adjustments: sections 6 20 21 and Schedule 8 of the 2010 Act

4.2 Did the respondent apply a provision, criterion or practice (“PCP”) of:-

4.2.1 Insisting upon the application of its standard terms of conditions and policies and refusing to give the claimant any assurance that she would not be dismissed except in circumstances in which any other employee would be dismissed?

4.2.2 Requiring the claimant to return to work unsupported save for the first three months of her return?

4.3 If so, did either of those alleged PCPs put the claimant at a substantial disadvantage in comparison with persons who are not disabled? If so, what is that disadvantage?

4.4 If so were either of the following steps reasonable adjustments for the respondent to take in order to avoid the disadvantage to the claimant:-

4.4.1 Providing the claimant with an assurance that she would not be dismissed save in circumstances in which anyone would be dismissed;

4.4.2 Supporting the claimant for up to a year and, subject to review, longer than that if at the end of the year she was still seen as deficient in her work performance?

4.5 Did the respondent fail to take either of those steps?

Indirect disability discrimination: sections 6 19 and 39 of the 2010 Act

4.6 Did the respondent indirectly discriminate against the claimant contrary to section 19 of the 2010 Act in relation to her disability by applying a PCP of insisting upon the application of its standard terms and conditions and policies and refusing to give the claimant any assurance that she would not be dismissed except in circumstances in which any other employee would be dismissed?

4.7 If so, did that PCP put disabled people at a particular disadvantage compared with people who are not disabled?

4.8 If so, did that PCP put the claimant at a particular disadvantage?

4.9 If so, has the respondent shown that the PCP it adopted was a proportionate means of achieving a legitimate aim?

Discrimination arising from Disability: sections 6 15 and 39 of the 2010 Act

4.10 Did the respondent treat the claimant unfavourably by dismissing her?

4.11 If so, did the respondent treat the claimant unfavourably because of something arising in consequence of the claimant's disability?

4.12 What was the "something" arising in consequence of the claimant's disability? It is noted the claimant asserted that the something was was the fear of returning to work and mistrust of the respondent without the necessary full compliance with the 2008 Remedies Judgment and the consequent failures by the respondent to make reasonable adjustments to try to rebuild trust and confidence lost through its deliberate bad conduct.

4.13 If so, does the respondent show that the dismissal was a proportionate means of achieving a legitimate aim?

Harassment: sections 6 9 26 and 40 of the 2010 Act

4.14 Did the respondent engage in unwanted conduct towards the claimant related to a relevant protected characteristic namely disability and/or race?

4.15 If so, did that conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment ("the prohibited environment")?

4.16 If not did the conduct have the effect of violating the claimant's dignity or creating the prohibited environment?

4.17 In deciding whether the unwanted conduct had the effect referred to above, the Tribunal must take account of the perception of the claimant, the other circumstances of the case and whether it was reasonable for the unwanted conduct to have the effect stated.

Victimisation: sections 27 and 39 of the 2010 Act

4.18 Did the respondent subject the claimant to detriment by dismissing her?

4.19 If so, was that because the claimant had carried out one or more of the protected acts which are listed at paragraph 1.7 above.

Unfair dismissal: sections 94/98 of the 1996 Act

4.20 Has the respondent shown a potentially fair reason for the dismissal of the claimant namely that the dismissal was on the grounds of capability or in the alternative some other substantial reason?

4.21 If so, did the respondent act reasonably in dismissing the claimant and in particular did the decision to dismiss fall within the band of reasonable responses open to a reasonable employer?

4.22 If the dismissal of the claimant is unfair should compensation be reduced and if so to what extent on the basis of the doctrine of **Polkey –v- A E Dayton Services 1988 ICR 142?**

4.23 Did the claimant contribute to her own dismissal by her culpable or blameworthy conduct?

4.24 If so, to what extent ought compensation to be reduced?

Breach of Contract - Unpaid notice pay: Article 3 of the 1994 Order

4.25 Did the respondent act in breach of contract by failing to pay the claimant notice pay despite the fact she had exhausted her entitlement to occupational sick pay?

4.26 Is the claimant entitled to statutory notice pursuant to section 86 of the 1996 Act?

4.27 Does section 87(4) of the 1996 Act mean that the claimant is not entitled to statutory notice provided for by section 86 of the 1996 Act?

Time limits

4.28 Are any of the claimant's claims out of time?

Preliminary Issues at the Final Hearing

5. There were a number of matters raised by the parties as preliminary issues before the final hearing could get under way. These were considered by the Tribunal and the decisions of the Tribunal announced orally.

5.1 The first application related to the admissibility of certain evidence which the claimant wished to introduce. The Tribunal decided that those matters were better dealt with by another Employment Judge and Employment Judge Burton heard those applications and issued an Order on 13 February 2017. That Order was to the effect that words from paragraph 17 of the claimant's witness statement should not be admitted into evidence and that the statement of Maria Bamieh adduced by the claimant should not be admitted as being wholly irrelevant to the issues to be determined by the Tribunal on liability. Those matters were dealt with on the first morning of the trial.

5.2 The Tribunal assembled on the first afternoon and the claimant made an application to adjourn the trial on the basis of her stated intention to appeal against the orders of Employment Judge Burton. The Tribunal listened to the application and then adjourned to read the witness statements and the relevant pages from the agreed bundle and indicated that it would rule on the adjournment application on the morning of the second day of the trial.

5.3 The Tribunal refused the application to adjourn the trial. We noted the long history of this matter. We noted that the claimant had not in fact lodged any appeal with the Employment Appeal Tribunal against the Order of Employment Judge Burton. We noted the claims now before us had been lodged with the Tribunal some 14 months ago and they related to the claimant's dismissal in November 2015 – almost 18 months ago. We concluded that these matters needed to be dealt with as quickly as possible. An adjournment would necessitate a further long delay which neither party sought. We balanced the prejudice to the parties in allowing or not allowing the claimant's application. We concluded that the balance of prejudice required that this matter continue to final hearing and the application to adjourn was refused.

5.4 A further preliminary matter arose at the outset of the hearing as to whether or not the Tribunal should admit a report ("the Report") prepared by Doctor Helen Bright who had been tendered by the claimant as an expert witness. The respondent through Mr Sugarman made strong objection to the admission of the Report. It was said that the claimant had not sought leave to adduce expert evidence and, whilst the Tribunal was not bound by the Civil Procedure Rules ("CPR") in respect of admissibility, those rules should not be readily disregarded. The respondent was taken by surprise by the late presentation of the evidence which contained a full frontal attack on Doctor Bollmann - the HR doctor used by the respondent in the process which led to the dismissal of the claimant. The respondent questioned whether Doctor Bright could be considered an

expert witness at all given that she had been struck off the Medical Register and was not subject to the control of the General Medical Council (“GMC”). It was noted that the claimant had failed to follow the guidelines for Tribunals on the admissibility of expert evidence contained in **De Keyser Limited –v- Wilson 2001 IRLR 324** and whilst the claimant was a litigant in person that did not give her “carte blanche” to litigate as she wished. It was submitted that the evidence was not relevant to the issues to be determined by the Tribunal. The Report contained no review of the claimant’s medical records and the Report itself was patently not balanced and objective and did not contain any statement acknowledging the duty of the author to the Tribunal. The Report was described as the most extraordinary report ever seen by counsel and one which contained outrageous attacks on Doctor Bollmann to which she was not able to respond. In response, the claimant asserted that Doctor Bright could be classed as an expert for, even though she had been struck off, she still gave expert evidence to GMC Fitness to Practice Panels and they clearly took account of her views. The claimant asserted that she had made the respondent aware that she wished to obtain her own medical expert. Her disability meant that she was late in dealing with matters and that explained why she had only just obtained the Report. The claimant referred to the recent decision of the EAT in **City of York –v- Grosset UK/EAT/0015/16** which was said to be authority for a Tribunal to see medical evidence not before a respondent at the time of dismissal.

5.5 We considered the lengthy submissions with care. We accepted that medical evidence could be admitted if it was relevant. We did not accept that the claimant had properly alerted the respondent to her wish to apply to admit medical evidence. We noted the parties had been ordered to exchange witness statements by 12 December 2016 and had in fact only done so a few days before the beginning of the hearing and that was the first the respondent knew of any intention to call medical expert evidence. We considered section 47 of the Medical Act 1983 to which the claimant had referred us and we accepted that Doctor Bright was competent to give evidence to us as an expert notwithstanding that she had been erased from the medical register. We referred to other authorities referred to by the claimant namely **Jones –v- Kaney 2011** in respect of immunity from suit enjoyed by expert witnesses and **The Governing Body of St Albans School –v- Neary 2010 IRLR 124** and **Harris –v- Enterprise Trust 2015 ICR 617** which both confirmed that the CPR did not apply to Tribunal proceedings. We concluded that the questions we need to engage with in the claims of unfair dismissal and failure to make reasonable adjustments would not be assisted at all by the evidence of Doctor Bright. The questions arising in the new claim under section 15 of the 2010 Act (paragraph 5.6 below) might have some small relevance to the medical evidence but that was all. We accepted that Doctor Bright could give evidence as an expert notwithstanding her status. We noted the guidance in **de Keyser** and concluded that it had not been followed in any particular by the claimant. The case had been closely case managed and no mention of expert evidence had ever been made. We noted our duty to make adjustment to our proceedings in recognition of the claimant’s accepted disability but we considered that was not an open ended duty and the overriding objective was still to be applied by us. We did not disagree with Mr Sugarman’s comments in respect of the actual content of the Report which patently lacked objectivity in parts. We noted that the matters addressed in the Report were all matters which the claimant would be able to explore with the witnesses for the respondent in cross examination. Having assessed all relevant matters, we concluded that it was not appropriate to allow the evidence of Doctor Bright to be admitted for, if admitted, it

would mean that the respondent was severely prejudiced and the parties would not be on an equal footing. The matters addressed in the Report could in any event be addressed by the claimant in cross examination. Accordingly, the evidence of Doctor Bright was excluded.

5.6 In discussion with the parties on the issues to be determined, the claimant withdrew her claim of direct disability discrimination pursuant to section 13 of the 2010 Act and applied to substitute a claim under section 15 of the 2010 Act. The respondent did not consent to that application nor did it object. We considered the principles in **Selkent Bus Company –v- Moore 1996 ICR 836** and decided on balance to allow the application to amend. The claimant was ordered to file a brief pleading in respect of that amended claim and the respondent was ordered to file a brief pleading in response. The issues arising in that claim are therefore included in the issues set out above.

5.7 Having announced our decision on that matter, the claimant then sought a witness order against Doctor Bollmann pursuant to Rule 32 of the 2013 Rules. The application was framed in such a way that it was clear the claimant wished to bring Doctor Bollmann to the Tribunal to be cross examined. Thus the application was flawed. The application was made on the third morning of the six day hearing and would doubtless have caused a further delay in the hearing. We considered whether the evidence of Doctor Bollmann would assist the claimant or the Tribunal. Doctor Bollmann had provided Occupational Health (“OH”) reports to the respondent on the claimant and partly in reliance on those reports, the respondent had made a decision to dismiss the claimant. The issue for the Tribunal in the claims advanced was what led the officers of the respondent to dismiss and then in respect of the unfair dismissal claim whether they had acted reasonably in doing as they did. We bore in mind the overriding objective. We concluded that it was not appropriate to issue a witness order against Doctor Bollmann and the application was refused.

5.8 The respondent applied for certain paragraphs of the claimant’s witness statement to be excluded on the basis that the paragraphs referred to reports and documentation which were not before the Tribunal in the agreed bundle. The claimant objected. We concluded that the parties - and in this case – the respondent was the author of its own misfortune in not following the Orders of the Tribunal. Witness statements were ordered to be exchanged on 16 December 2016 but were only exchanged on 8 February 2017 some three working days before the hearing was to begin. If the Orders had been followed then the parties could have addressed the question of the missing documents, if necessary, by an application to the Tribunal. That had not happened. We concluded the claimant’s witness statement should remain as drawn (save for the redaction ordered by Employment Judge Burton) and the offending paragraphs could be the subject of cross examination or not as the respondent determined.

5.9 When the claimant had completed her evidence at the end of the fifth day of the trial, she sought to produce two emails not in the agreed bundle which had passed between herself and her line manager Sally Sharp. The emails had been in the possession of the claimant throughout but she had not sought to include them until a very late stage in the proceedings. The respondent objected. We considered that it was too late to do so and so ruled. On the morning of the sixth day of the trial, the claimant asked us to reconsider that decision by reference to an email she had written to the

Tribunal dated 20 February 2017 timed at 07:12. We considered all that the claimant had written in that email but decided that the overriding objective led us to conclude that the balance of prejudice was against allowing those documents to be admitted given that Sally Sharp was no longer available to be cross examined with any ease.

5.10 As the hearing progressed both parties made applications to admit documents into the agreed bundle and in the absence of any objection from either party, we allowed such documents to be admitted and added to the bundle. They were paginated appropriately.

5.11 In discussion with the claimant it was eventually confirmed that the claim for unpaid holiday pay was advanced as a breach of contract claim and not as a claim relying in the provisions of the Working Time Regulations 1998. At the end of the evidence the claimant indicated that she did not wish to pursue that claim at all and thus, howsoever advanced, it is dismissed on withdrawal. In addition as the hearing progressed, the claimant indicated at varying times that she did not wish to pursue the claim of direct disability discrimination and that claim is therefore dismissed on withdrawal by the claimant. Only the live claims are referred to in the issues section of this Judgment at paragraph 4 above.

The history of the litigation between the parties

6. There is a long history of litigation between the parties. We set out the parts of that litigation which are relevant to our deliberations in this matter. By no means do we purport to set out the whole of the history of the litigation between the parties.

6.1 The claimant brought proceedings in 2001 (1808550/01) of race discrimination against the respondent. That matter was heard in 2003 and then adjourned and resumed in 2004 and resulted in a reserved decision (pages 87-128) sent to the parties on 11 June 2004 which concluded that the claimant had been subjected to race discrimination by being subjected to various detriments. First by being suspended by the respondent in 2001, the manner of that suspension, being removed from the weekend/bank holiday rota and by being transferred to the Wakefield office without consultation or consent. That matter was heard by Employment Judge Watt and two lay members ("the Watt Tribunal").

6.2 The decision of the Watt Tribunal was subject to various appeals and as a result the remedy hearing in respect of those proceedings came before the Watt Tribunal (by then reduced to two members by reason of the death of one of the non legal members) in June and July 2008. The Judgment on Remedy (pages 129-168) was sent to the parties on 1 September 2008 ("the Remedy Judgment") and resulted in a very considerable award of compensation to the claimant and three recommendations. The first recommendation (page 132) was that the respondent should within 42 days from the issue of the judgment give to the claimant *"a full and complete apology in writing, not merely in form but in substance, genuinely acknowledging that the respondent had discriminated against the claimant and that the suspension and transfer were discriminatory and unlawful acts: furthermore that apology should not contain words of qualification which serve to negate or reduce the scope of the apology offered: it appears to this Tribunal that without such an apology it would be extremely difficult for the claimant to return to her employment with the respondent because her trust and*

confidence in the respondent has been very seriously diminished by reason of the respondent's conduct towards the claimant not least by the failure to offer an appropriate apology for a period now extending to more than six and a half years after the initial events: what constitutes a full and complete apology should be apparent from the main body of this judgment". The second recommendation related to training of those found to have discriminated against the claimant and the third recommendation related to steps to be taken to reintegrate the claimant to the workplace which should provide "significant help and assistance for some considerable period of time after her return".

6.3 The respondent sought a review of the Remedy Judgment and that review was heard by the Watt Tribunal in July and August 2009 and resulted in a Judgment sent to the parties on 2 November 2009 (pages 169-233) which rejected all advanced grounds for a review and the Remedy Judgment was confirmed. There had been an application in the course of that hearing for the Watt Tribunal to recuse itself but the Tribunal concluded it was not appropriate to do so and its conclusions to that effect were contained in the Judgment sent to the parties on 2 November 2009.

6.4 Thereafter several other hearings took place at one of which the Watt Tribunal did recuse itself. The claimant successfully appealed against that recusal to the Employment Appeal Tribunal ("EAT") and so it was that the Watt Tribunal came to consider the matter again in November 2014. By a Judgment ("the 2014 Judgment") sent to the parties on 19 December 2014, the Tribunal considered an application by the claimant for a review of the Remedy Judgment and in particular a question (within the context of a claim for exemplary damages) as to whether or not the letter of apology sent by the respondent to the claimant on 13 October 2008 (pursuant to the first recommendation of the Tribunal referred to above) met the requirements set out in the first recommendation. It was concluded that the letter did meet those requirements with the exception of one paragraph on the second page of that letter. The 2014 Judgment set out why the letter of apology did not comply. This related to the reference in the letter of apology to the Lewis Report and it was determined that the circumstances were such that the breach of the first recommendation had every appearance of being intentional. The Watt Tribunal determined in 2014 that the Remedy Judgment did not require the respondent to address the Lewis Report and its inclusion was unnecessary and served no purpose. The Tribunal considered whether the reference to the Lewis Report was sufficient to enable an award of exemplary damages to be made and it decided that it was not. The 2014 Judgment came to the attention of the respondent in early January 2015: it did not as such require a further letter of apology to be written. In fact the respondent chose to issue a further letter of apology and we make reference to this further below.

6.4 Separate to the above proceedings the claimant began two other claims in the ET at Leeds numbered 1801960/2014 and 1800540/2015. These claims were combined and came before Employment Judge Shepherd and two non-legal members ("the Shepherd Tribunal") and after a hearing in October and January 2016 resulted in a judgment being sent to the parties on 23 March 2016. The claimant succeeded in a claim of failure to make reasonable adjustments within claim number 1801960/2014 but, other than that, all claims of direct disability and race discrimination and direct discrimination on the basis of the claimant's religion or belief and indirect disability discrimination and victimisation were dismissed.

6.5 The Shepherd Tribunal heard from various witnesses – the witnesses common to the Shepherd Tribunal and this Tribunal being Sally Sharp and the claimant. The first claim dealt with by the Shepherd Tribunal related to the appointment process for Crown Advocates which the claimant had been involved in notwithstanding her absence from work. The second claim before the Shepherd Tribunal related to the issuing of two written notices of expectation and attendance at work on 4 August 2014 and 7 November 2014.

6.6 The Shepherd Tribunal set out in its judgment the relevant history of this matter for the purposes of the claims it had to determine. All of those matters are not necessarily relevant to the claims which this Tribunal has to determine. Insofar as there is overlap we have considered the findings of fact of the Shepherd Tribunal and, notwithstanding that we are not bound by them, we do not disagree with them and we see no conflict with our findings of fact and those of the Shepherd Tribunal.

6.7 The Shepherd Tribunal concluded that the respondent had failed to make a reasonable adjustment to the Crown Advocate selection procedure in which the claimant was involved. It concluded that the competitive selection process for Crown Advocate was a PCP which placed the claimant at a substantial disadvantage as a result of her disability given that she had not been at work for approaching 13 years at the time the Crown Advocacy selection process was taking place. The conclusion that the respondent had breached its duty to make reasonable adjustments resulted in a finding of discrimination which resulted in an award of compensation for injury to feelings to the claimant. The claim of indirect disability discrimination in respect of the Crown Advocacy programme was rejected as was the claim of victimisation. It was determined that there was no evidence whatever that the claimant had been treated less favourably because of her religion or belief and that claim was dismissed.

6.8 In respect of the second set of proceedings before the Shepherd Tribunal all claims in respect of direct race discrimination, direct disability discrimination and victimisation were dismissed in respect of the issuing of notices of attendance. The Shepherd Tribunal concluded that the notices were issued by Sally Sharp in accordance with the disability related absence policy which she was following. The claimant had been off work for an extremely lengthy period of time. It was concluded that the issuing of the notices was not because of the claimant's race or her disability. For the avoidance of any doubt, we are bound by that conclusion but the matter before this Tribunal was the question of dismissal and not specifically the issuing of those notices. The claimant had indicated that it was not her illness which was the reason for her not returning to work but rather the ongoing litigation and her continuing mistrust of the respondent and this was confirmed by occupational health reports. The Tribunal concluded there was no basis to conclude that the notices of improvement had been issued because the claimant had done one or more of the protected acts.

Findings of fact

7. Having considered the evidence both oral and documentary and in particular the way in which evidence was given to us and the cross-examination of the witnesses, we make the following findings of fact on the balance of probabilities:-

7.1 The claimant was born on 2 November 1958. The claimant is a solicitor and began work for the respondent on 1 February 1991. The claimant is of Asian origin – her family originates from Pakistan. The claimant was suspended from work by the respondent on 10 October 2001 after an incident which occurred at Bradford Magistrates Court on 25 September 2001 and which resulted in a complaint being made against the claimant. The suspension of the claimant was lifted shortly after it was imposed but by then the claimant had become unwell and was signed off as unfit for work. Very sadly the claimant never returned to work after that day and she was ultimately dismissed by the respondent on 19 November 2015 after an absence of more than 14 years.

7.2 The history of the matter leading to the claimant's suspension and a more detailed history of the ensuing litigation appears in the judgment of the Shepherd Tribunal (pages 15-46). We adopt the findings of fact set out at paragraphs 6.3-6.20 of the Judgment of the Shepherd Tribunal which deal with events of relevance up to September 2013 when Sally Sharp was asked to assume line management responsibility for the claimant.

7.3 When Sally Sharp took over the line management of the claimant she was only broadly aware of the history of the litigation between the claimant and the respondent. Sally Sharp made a conscious decision not to investigate the specific details of the claims or the history of the litigation in order to remain objective and independent in her line management role.

7.4 A telephone call took place between Sally Sharp and the claimant on 14 October 2013 when Sally Sharp explained that she was the claimant's new line manager. The claimant said that she was suffering from depression still. The claimant stated the Tribunal had ordered that she should not return to work until she had received an apology about her treatment – this was not strictly correct.

7.5 On 13 November 2013 Sally Sharp had a telephone conversation with the claimant in which the claimant made plain that it was not her health which was a bar to her return but rather the then ongoing litigation. Furthermore the claimant stated she would not return to work until she had received an unqualified apology. The claimant confirmed that she was still depressed but that she could work with depression. If she received the apology she could return to work on a phased return. The note made by Sally Sharp concludes:-

"It seems to me that this is not a case of someone who is sick and needing support towards a return to work. My phone calls feel like a waste of time as it is the court case and not her health that is preventing her return. Should we be paying someone in this situation?"

7.6 At this time Sally Sharp was managing the claimant under the Managing Attendance Policy of the respondent.

7.7 On 18 February 2014 Dr Bollmann, consultant occupational health physician provided a report to the respondent following an examination of the claimant. In this report Dr Bollmann stated:-

“Ms Aziz is unfit to work in any capacity currently and there are no workplace adjustments that would facilitate an immediate return to work. Although there is no evidence today that her cognition or memory is affected such that she is unfit to undertake the work required of her, the ongoing legal dispute with her employer is fuelling her mistrust of her employer and affecting her motivation/ability to return to work. I expect that she will remain signed off whilst the situation remains unchanged and whilst she continues to feel unsupported by her employer.

Outlook

Prognosis for return to work will not depend on any significant improvement in her health, but on the work factors fuelling her absence. She feels unable to return while she does not trust her employer. This has remained unchanged for the past 12 years. My opinion is that even with the conclusion of the legal aspects of the situation return to work and her workplace remains very unlikely”.

We accept the evidence of the claimant that this report was prepared after a telephone consultation lasting only a few minutes and that the claimant complained about the way that consultation was conducted.

7.8 In February 2014 the claimant’s pay was reduced from full pay to half pay. The claimant had effectively been paid full pay by the respondent up to 19 February 2014 from the date of her original suspension in 2001 either through the award of compensation by the Watt Tribunal or direct payment of salary by the respondent.

7.9 On 28 May 2014 the claimant met with Sally Sharp. Sally Sharp informed the claimant that the respondent was clear that the claimant’s illness amounted to a disability. Accordingly the correct policy to apply to the claimant was the Managing Disability Related Absences Policy (“the Policy”) which had come into force in October 2013. There was discussion about the appropriate “*consideration point*” and it was indicated that 10 days was thought to be an appropriate consideration point in the claimant’s case.

7.10 On 18 July 2014 the claimant attended a disability review meeting with Sally Sharp. The meeting was mintued (pages 307A-D). It was stated to be the first review meeting under the Policy and the claimant was asked what was preventing her from coming back to work. The claimant said that she had gone over this issue and she would not come back to work until after her hearing and there was nothing else she could say. Sally Sharp asked the claimant what court proceedings were outstanding and the claimant stated that there were three matters which were due to be looked at by the Watt Tribunal in October 2014 with regard to legal costs, outstanding tax owed and compensation due to incorrect salary paid, exemplary damages and an unqualified apology. The claimant stated that she would not be able to return to work before the hearing had taken place as to do so may jeopardise her position at the forthcoming hearing.

7.11 On 4 August 2014 Sally Sharp wrote to the claimant in respect of the outcome of the disability review meeting. The letter included the following:-

“When I asked what was preventing you from coming back to work you stated you would not come back until your court proceedings against CPS were concluded primarily because you consider that a return to work might jeopardise your case. You provided me with an update of the symptoms of your depression which you stated were

reduced levels of motivation and mental agility. In addition you indicated that you suffered from joint pains. You made me aware that you were taking medication to assist with your depression.

We discussed the following reasonable adjustments and ease back plan:

Gentle phased return.

Allocation of mentor.

Regular breaks to enable you to walk about, stretch your legs.

Ongoing daily supervision, support and guidance from line manager and/or mentor to assist with the organisation of your work including daily goals.

Extra time to complete tasks.

A detailed induction programme.

Programme to include staged training in digital, legal updates, CPS policies, full file reviews and advocacy starting with G plea courts and leading to trials in magistrates' courts.

Training to include shadowing of all areas of working in advocacy, 1-1 training, e-learning, classroom training and self learning through reading.

Ongoing reviews and adjustments of programme with line manager

I have taken time to consider your representations at our meeting along with the needs of the CPS to effectively deliver its business. Unfortunately, with your continued absence, which is impacting significantly on the business, I have determined that your continued absence at the current level cannot be sustained. I have therefore decided to provide you with a written notice of expectation of attendance. The standard of attendance which we require is for you to commence a gradual return to work starting on 29 September 2014. In order to assist you to achieve the standard of attendance required we will provide you with the help, support, reasonable adjustments and training as discussed at our meeting referred to above. We will also make a further referral to OH Assist. If you have any further ideas for how we could assist you then please let me know. If your absence continues at a level that cannot be sustained, there will be a further review (a second review) within a period of three months no later than 3 November 2014¹.

7.12 On 19 August 2014 the claimant's entitlement to half pay was exhausted and she then went on to no pay and that remained the position until the time of the claimant's dismissal some 15 months later.

7.13 The claimant appealed against the notice of expectation for attendance at work and that meeting took place on 1 October 2014 before the appeal officer Chris Hartley – senior district crown prosecutor.

7.14 The outcome of the appeal was sent to the claimant by a letter of 6 October 2014 (pages 324-325) which followed a meeting lasting some 35 minutes on 1 October 2014 and which was minuted (pages 326-329). At the meeting the claimant stated that it would amount to a reasonable adjustment for her disability to delay her return to work to enable the long standing dispute over the provision of an unqualified apology to be determined and so not jeopardise the outcome of that dispute. The appeal was not successful and the letter confirming the outcome of the appeal states:-

“...I find that delaying your return to work for the reasons you have given would not qualify as a reasonable adjustment for your disability. During the meeting you indicated that were it not for the court case you were able to return and would in any event be prepared to undertake training providing this did not impact your court case by being classed as being back at work.

In the circumstances I find that it was reasonable to expect you to return and therefore uphold the issuing of a written notice of attendance”.

7.15 An occupational health report (pages 495-496) was provided by Nurse Jacqueline McEvoy, OH Adviser, following an assessment of the claimant on 21 October 2014. This report concurred with the remarks made in the previous report in February 2014 and indicated:-

“Ms Aziz’s perception is that unless and until the case is concluded completely in a way that is reassuring for her she cannot regain the trust required for her to feel able to return to work.

From my discussion with her I do not see her being able to return to her current work environment in the near future, due to the complexity of this case and a lack of trust and confidence in her employer to provide unbiased support on her return”.

7.16 On 24 October 2014 Sally Sharp provided the claimant with a draft induction plan and asked for the claimant’s comments. This was a detailed plan covering the first 12 weeks of a return to work (pages 329a-329c).

7.17 As the claimant did not return to work, a second stage disability related absence review meeting was convened which took place on 3 November 2014. This meeting was again with Sally Sharp who said that it was not possible to keep waiting for the court case to conclude before the claimant returned to work. The claimant said that she would not come back to work before the court case. She indicated that she would not be willing to shadow a colleague at work. That meeting resulted in a letter from Sally Sharp to the claimant (pages 332-334) which included:-

“Unfortunately your absence at the current level cannot be sustained. I have therefore decided to provide you with a final written notice of expectation of attendance. The standard of attendance which we require is for you to commence a gradual return to work by 5 January 2015. In order to assist you to achieve the standard of attendance required we will provide you with help, support, reasonable adjustments and training discussed at our meeting and referred to in the draft action plan which you think will assist. We will also make a further OHA referral. If you have any further ideas for how we could assist you then please let me know.

*If your absence level continues or there is no sustained return to work within the three months period, a final review will be held no later than 9 February 2015 to determine the likelihood of improved and sustained attendance/return to work and your capability to meet the requirements of your job. Please note that in the final stages, **all** absences will be considered when determining whether you are likely to return to work within a reasonable timescale or provide regular and effective service over a prolonged period. You should also be aware that this could potentially lead to your dismissal”.*

7.18 The claimant appealed the issue of that notice and an appeal hearing took place before Christopher Hartley on 11 December 2014. Minutes were taken of that hearing (pages 351-352). The outcome of that appeal was sent by letter of 17 December 2014 (pages 349-350) and the appeal was not upheld. During the course of the letter Christopher Harley stated:-

“The reasonable adjustment you were requesting regarding action taken under the managing attendance policy relates solely to waiting for the outcome of your court case and therefore does not in my view qualify as a reasonable adjustment relating to your disability.....As you confirmed that you were willing and capable of returning to work as soon as that case has concluded I find that delaying your return to work for the reasons you have given, would not qualify as a reasonable adjustment for your disability”.

7.19 The 2014 Judgment of the Watt Tribunal was issued on 19 December 2014 and was known to all relevant officers of the respondent by early January 2015. We refer to our findings at paragraph 6.4 above.

7.20 On 5 January 2015 there was a telephone conversation between Sally Sharp and the claimant and in her note (page 352a) of that conversation Sally Sharp wrote:-

“I rang Halima to ask if she was coming to work today. She said she was not. She was going to write to a Mr Summerscales about the judgment. She was going to write to him “without prejudice” and request to have discussions with him before her return to work. She said she would send me a copy of the judgment and a copy of her letter to Mr Summerscales. I said all I needed to know about were things relevant to her return to work so that I could be ready for her”.

7.21 On 7 January 2015 Mark Summerfield, Director of Human Resources, wrote to the claimant reissuing the apology from 2008. In his letter (page 352B) Mr Summerfield stated that having carefully reflected on the 2008 apology it was accepted that it had been unnecessary to refer to the Lewis Report. The letter continued:-

“In the circumstances I feel it will be appropriate to reissue that apology with the omission of that paragraph so that it fully complies with the Tribunal’s original recommendation and serves as a genuine reference that is acceptable to you..... I found the experience of hearing you express your concerns first hand at the recent Employment Tribunal insightful and valuable from my perspective. I very much hope the attached apology assists you with achieving resolution of this matter”.

7.22 The letter of apology dated 7 January 2015 (pages 352C-D) made it plain that on behalf of the respondent an apology which was full, unconditional, unqualified and genuine for the racially discriminatory treatment to which the respondent has subjected the claimant was being issued. It was stated that the respondent deeply regretted the hurt and distress that this had caused. It went on:-

“I recognise that prior to your suspension we did not take reasonable steps to establish the facts. As an organisation we have failed you in that respect. There was, as we have recognised since 2002, and I wish to repeat, no truth in the allegations made by

those third parties against you. The allegations were particularly grave having regard to their content and to your status as a solicitor and senior crown prosecutor especially bearing in mind the tensions in the Bradford area following the riots and the tensions following the tragic events of 9/11.

The ET has observed, and I agree, that notwithstanding these allegations you had continued to work with your colleagues for ten days or so and that your continued presence there caused no adverse effect on the work in the office, no prejudice to any investigation into the allegations, and no public or departmental prejudice. You therefore ought not to have been suspended.

I also accept that the manner in which you were escorted from the office was particularly distressing for you and could of course have been avoided had we looked at the allegations first or had we not suspended you.

The decision that we made after rescinding the suspension, without consultation, was that you should be transferred temporarily to Wakefield. Again, I accept that we were wrong to make that decision. There was no reason why you could not have continued to work at the Bradford branchI hope that you feel able to accept this apology in the genuine spirit in which it is intended and I genuinely hope and trust that we can work with you to facilitate your mutually beneficial, positive and satisfactory return to work'.

7.23 On 16 January 2015 (page 352E) Sally Sharp telephoned the claimant indicating she was keen to know when she would be coming back to work in order to make the necessary preparations. The claimant indicated that she would not be coming back to work until after she had written to HR. Sally Sharp made the claimant aware of how she could access details online of appropriate training courses and encouraged her to visit the site to look through those details although made it clear the claimant would need to be back at work before she could actually undertake any of those courses.

7.24 No formal action was taken between January 2015 and the end of April 2015 as a direction was given by officials at the head-quarters of the respondent that absence management should be suspended pending attempts to have informal discussions between the parties subsequent to the issue of the revised apology.

7.25 On 27 April 2015, and having heard nothing further from the claimant, Karen Wright, Area Business Manager, wrote to the claimant (pages 353-354) asking whether the claimant was unfit or fit for work as the claimant had not submitted any fit note since the last one had expired on 7 March 2015. In the absence of any information to the contrary, the claimant was expected to return to work on 11 May 2015 to be met by Sally Sharp. The claimant did not return to work on 11 May 2015 and so on 12 May 2015 a conversation took place between the claimant and Sally Sharp in which the claimant advised that she was awaiting advice from her solicitor and that she was unfit for work. As a result on 18 May 2015 Sally Sharp wrote to the claimant advising that there was a new attendance policy in force and that she would propose to manage the claimant's absence under the terms of that new policy ("the New Policy"). A copy of the New Policy (pages 540-586) was sent to the claimant. Sally Sharp wrote:-

"I will be arranging a long term absence review in the near future to discuss any barriers which may be affecting your return to work within a reasonable timeframe. I will also

further explore what help and support is available and what if any additional reasonable adjustments can be put in place to help you when returning to work. In addition I will be arranging a case conference with OH Assist in order to consider if there is anything else available that can help you and facilitate an early return to work....”.

The claimant was asked to sign a further consent form for OH and return by 22 May 2015 which she did.

7.26 On 23 June 2015 Sally Sharp held an informal review with the claimant under the terms of the New Policy. The claimant stated that she was still depressed and that she would not be able to return to work until she had received an assurance from the respondent that she would not be sacked. The claimant was told that the next step in the procedure would be to have a formal review hearing. That formal review hearing took place on 14 July 2015 and resulted in a letter being sent by Sally Sharp to the claimant (pages 360-361) and included in that letter was the following:-

“I was delighted to hear...that over the past few days you had started to feel much better: your depression had significantly lifted and you felt much brighter. You now felt motivated over the coming weekend to tackle the backlog in your personal administrative matters. You indicated that you had recovered, virtually entirely, from the chest infection and flu and that the injuries from your fall were much less painful so that you were able to walk with only a little discomfort....We discussed the barriers for you returning to work and you indicated that one of the issues was that you wanted reassurance from CPS that you would not be sacked if you returned to work. You said that CPS have refused to give such an assurance and that you therefore needed to speak to your solicitor to obtain advice. You also informed me that your solicitor had telephoned to speak with you on a number of occasions but you have not yet returned the calls. You confirmed that it was highly unlikely that you would return to work before speaking with your solicitor.....Having taken into account everything that we discussed at the meeting I consider that you are unlikely to be able to return to work within a reasonable timeframe. However until I have received the report following your imminent OH case conference I do not have all of the information available to make a decision as to whether your sickness absence can continue to be supported or whether ill health retirement, redeployment or dismissal is appropriate. I have therefore decided that we will continue to support your absence on an interim basis pending receipt of the report. But I must also explain that your absence will be reviewed regularly and I may reconsider my decision at any time if it becomes likely that your OH report will be unduly delayed”.

7.27 On 14 August 2015 Sally Sharp held a further informal review with the claimant at which it was made plain by the claimant that her position with regard to a return to work was unchanged. The claimant declined an opportunity to attend the office to meet the staff in the team in which she would be working on her return to work.

7.28 On 9 September 2015 the OH case conference took place. Attending for the respondent were Sally Sharp and John Ellam, senior HR business partner. The claimant attended alone. The meeting began with a consultation between Dr Jacqueline Bollman and Sally Sharp and John Ellam. Doctor Bollmann then saw the claimant privately for around 30 minutes during which time Doctor Bollmann made her own notes by typing into a computer. Following the meeting Doctor Bollmann returned

to Sally Sharp and John Ellam and expressed her view that the claimant would not be entitled to ill health retirement and said that she would prepare a report answering the questions which had been posed to her.

7.29 The meeting between the claimant and Doctor Bollmann was not a happy one. The claimant was already unhappy with Doctor Bollmann from previous telephone conferences with her and she did not consider that Doctor Bollmann approached her task on 9 September 2015 objectively, reasonably or fairly. The meeting between the two of them was not cordial.

7.30 The request for the OH case conference (pages 389-390) simply stated:-

“Halima has been absent from work since 2001 in relation to an allegation which was subsequently the subject of an Employment Tribunal and ongoing appeals. Halima is employed as a Crown Advocate which involves attending the Crown Court on a daily basis to present prosecution cases. A comprehensive chronology of events including all communications is attached. Please advise:-

- 1 *The future outlook and prognosis of Halima’s condition.*
- 2 *What support Halima might need to return to work to maintain regular and effective attendance.*
- 3 *What other options might be considered eg ill health retirement”.*

7.31 Because of the difficulties between the claimant and Doctor Bollmann at the case conference, the claimant initially did not consent to release Doctor Bollmann’s subsequent report but ultimately she did so on 9 October 2015. The claimant gave that consent reluctantly because she had not had the opportunity to comment on what might have been said between Doctor Bollmann and Sally Sharp and John Ellam in the meetings which she had had with them both before and after seeing the claimant. The claimant indicated that she was going to make a subject access request under the Data Protection Act 1998 in respect of those matters. The claimant was given until 4:00pm on 30 October 2015 to write to Sally Sharp setting out any comments she had on Doctor Bollmann’s report.

7.32 The Bollmann Report (pages 501-502) of 9 September 2015 indicated that the claimant remained under the care of her GP for depression and was on medication but had not had counselling for the condition. The claimant was noted as having reduced motivation for day to day tasks and that her concentration and memory function were reduced. The report continued: *“Specifically she reports not opening emails, she has not read any legal literature/kept up to date with legal practice since her absence and loses track of thought processes”*. Doctor Bollmann opined that the claimant was unlikely to successfully rehabilitate back to work and that she had been unable to regain any trust in her employer. She continued: *“I found it impossible to discuss the substantial workplace adjustments proposed by the CPS with her as she was dismissive of them, was preoccupied with her perception that the CPS have no plans to rehabilitate her and felt that I was co-operating with them to get her dismissed”*. In respect of the outlook Doctor Bollmann stated: *“There is no realistic prospect that Miss Aziz will make a successful and sustained return to work for both medical and work reasons – she*

describes enduring depression with no plan to access further medical support and this is affecting motivation and engagement with her employer and willingness to engage in rehabilitation discussion. Secondly, her overwhelming sense of organisational injustice is impacting on all perceptions about return to work, workplace adjustments and work security..... There is no indication that her medical condition is permanent and that it cannot improve with engagement with medical management that may include specialist treatment and talking therapy. On this basis she is not deemed permanently unfit for work so ill health retirement is not applicable”.

7.33 Sally Sharp received detailed comments on the Bollmann Report from the claimant (page 402) on 29 October 2015 but that note also challenged the contents of a conversation between Sally Sharp and the claimant on 28 October 2015. In that conversation Sally Sharp had refused to tell the claimant what had been discussed in private between herself and John Ellam and Doctor Bollmann on 9 September 2015 and this clearly provoked a further loss of confidence on the part of the claimant. The claimant said that she wished to have full details of those discussions before she could properly and fully comment on the Bollmann Report. The claimant included in her note to Sally Sharp a summary of some of her objections to the Bollmann report in these terms:

“I did mention a few things about why I disagreed with Dr Bollmann’s Report, such as I stated that her opening comments to me were: “I do not need to hear anything from you as I have been given all the information by the CPS”, and that she was behaving as she was the CPS spokesperson as she said during the conversation “We have done all we can to help you” ”.

7.34 The claimant wrote again to Sally Sharp on 30 October 2015 (page 406) which Sally Sharp received at 13:51 before she wrote to the claimant with her decision at 16:41 that same day. In her additional comments the claimant asserted that the previous report from Doctor Bollmann was based on *“just a few minutes of talking to me over the telephone”* and that the September 2015 report was effectively a copy of that February 2014 report. She asserted that Doctor Bollmann had shown a predetermined mind set against her and that Doctor Bollmann was unwilling to listen to anything the claimant had had to say. The claimant indicated that she would be applying for ill health retirement.

7.35 Having received those comments and having reviewed the Bollmann Report which indicated that a foreseeable return to work for the claimant was not possible and that no reasonable adjustments could be determined, on 30 October 2015 (page 408) Sally Sharp wrote to the claimant a letter which included:-

“There is no evidence that you will return to work in the foreseeable future and the report states that you do not meet the criteria for ill health retirement. As a result I have decided to refer your case to Andrew Penhale, the DCCP, who will decide if you should be redeployed or dismissed or whether your sickness absence can continue to be supported at this time”.

With that letter, the contact between the claimant and Sally Sharp effectively ended. The matter was referred to Andrew Penhale pursuant to paragraph 155 of the New Policy.

7.36 Andrew Penhale was appointed to review the absence of the claimant pursuant to paragraph 156 of the New Policy. Like Sally Sharp, he was broadly aware of the history of the claimant's employment and the litigation between the claimant and the respondent but he too did not enquire into the details of the matter. A meeting was arranged between the claimant and Andrew Penhale for 13 November 2015. That meeting came after the Shepherd Tribunal had started its hearing which had taken place on 19-22 October 2015 but had been adjourned until 18-20 January 2016. The Judgment of the Shepherd Tribunal was sent out on 20 March 2016.

7.37 The formal attendance meeting took place on 13 November 2015. Andrew Penhale was accompanied by Lesley Bakewell, HR advisor, and Judith McDonald as note taker. The claimant attended with her brother Shahid Aziz Mir who did not remain for the whole of the meeting. The meeting lasted approximately 90 minutes and minutes were prepared (pages 438D-H). This meeting was the first time Andrew Penhale and the claimant had met. The claimant raised several points including the fact that she ought not to have been managed under attendance policies until she had received a final and proper apology which she only did in January 2015 which she believed in any event to be a hollow apology. Secondly that any final decision on her attendance should be postponed until the outcome of the Shepherd Tribunal was known. Thirdly that the package of reasonable adjustments which had been offered by Sally Sharp was not long enough and that the induction plan should last for at least 12 months and finally that the claimant should receive a guarantee that she would not be dismissed by the respondent except in exceptional circumstances. The claimant was effectively seeking an assurance that she would not be dismissed for poor performance given her lengthy absence from work and in particular she wished to be assured that she would not be subjected to suspension and removal from the office in the circumstances which had prevailed in October 2001. The claimant asked if she could submit her own medical report as she wished to apply for ill health retirement. It was pointed out to her that Doctor Bollmann's report stated that she would not qualify for ill health retirement and that there was something of a contradiction between the claimant saying that she could return to work if there were written assurances given to her and on the other hand the desire to be considered for ill health retirement.

7.38 During the meeting (page 438E) the claimant asked why Andrew Penhale was not interested in the history of her absence since 2001 and the ensuing litigation and Andrew Penhale confirmed that his principal purpose was to consider if there was an expectation of a return to work by the claimant within a reasonable time frame in accordance with the New Policy. Even though the claimant was no longer being paid, Andrew Penhale stated that he had an obligation to consider the impact of her continued absence on the respondent's business and whether the absence could be supported any longer. The claimant made Andrew Penhale aware that she had made requests for information from the respondent pursuant to the Data Protection Act 1998 and in particular in relation to the conversations between the respondent and Doctor Bollmann on 9 September 2015 at the OH Case Conference.

7.39 Following that meeting Andrew Penhale took time to consider and then wrote a letter to the claimant dated 19 November 2015 setting out his decision (pages 438A-438C). In the letter Andrew Penhale noted that he had considered the occupational health reports of 18 February 2014, 20 October 2014 and 9 October 2015 (that was an error and should have been a reference to 9 September 2015). Andrew Penhale

indicated that he had reached the decision to terminate the claimant's employment because the business could no longer support her continued sickness absence, redeployment was not appropriate, all reasonable adjustments had been explored and no others were appropriate and the claimant did not qualify for ill health retirement because she was not permanently unfit for work. Andrew Penhale concluded that he did not believe the claimant would within a reasonable timescale maintain a satisfactory level of attendance. The basis of that decision was the strong antipathy towards the respondent demonstrated by the claimant and her refusal to return without the assurances sought which he did not consider it reasonable should be given. The relevant paragraph of the letter of dismissal reads:

"You have formed a very strong antipathy towards the CPS which is one of the factors you cite as preventing you from returning to work. You are also refusing to return to work without a written legal guarantee from the CPS that you would not be sacked, other than in exceptional circumstances such as committing a serious criminal offence: and that this could only be the case if the CPS could provide a comparator by way of precedent. You claimed that this was a reasonable adjustment in your particular circumstances, in addition to the significant adjustments already proposed by the CPS. However, I do not consider that such a guarantee is a reasonable adjustment to take account of your disability nor would it be a reasonable change to your condition of service. In the light of your stance on this unreasonable precondition and the current medical advice, there is no prospect of you returning to work with the CPS for the foreseeable future".

The claimant was advised that she was entitled to 13 weeks notice but that she would be dismissed effective from 19 November 2015. She was advised that she may be eligible for compensation under the Civil Service Compensation Scheme. The claimant was also advised of her right to appeal. A copy of the minutes of the meeting on 13 November 2015 were sent to the claimant. Andrew Penhale did not consider further medical evidence was necessary: he relied on the report of Doctor Bollmann whom he had met previously and whose advice he valued. Andrew Penhale did not explore with the claimant the assurance she was seeking about dismissal because she expressed that requirement forcefully and he could not see any room for compromise in the claimant's position.

7.40 The claimant appealed against the decision to dismiss her on the basis (page 444) that there were procedural flaws which affected the merits of the decision, that the outcome was not reasonable in the light of the information on which it was based, that the decision to dismiss was not proportionate and that new information had come to light since the original decision was made. The claimant asserted that the decision was both unfair and an act of discrimination, harassment and victimisation (page 445) and that no account was taken of what she had said at the meeting on 13 November 2015, that the background of her case had not been considered, that the policies were being incorrectly interpreted and that there was continuing discrimination of her and victimisation and harassment.

7.41 The appeal was referred to Jaswant Narwal who is the chief crown prosecutor of the CPS for the South East area.

7.42 An appeal hearing was held on 14 December 2015. The meeting was attended by Jaswant Nawal accompanied by Delores Springer from HR. The claimant attended

alone. Minutes were taken of the meeting which lasted for 65 minutes and they appear at pages 457-460. The claimant particularly asked for clarification on the criteria for ill health retirement during the meeting. The claimant raised questions about the credibility of Doctor Bollmann and complained that the first report of 18 February 2014 resulted from a six minute telephone conversation with her. The claimant further asserted that the report of 20 October 2014 was completed by a nurse who was not qualified enough to give such a report and had simply followed the lead of Doctor Bollmann in her report of February 2014. In respect of the report of 9 September 2015 the claimant stated that there had been private conversations between the respondent and Doctor Bollmann and that the claimant may have been misrepresented. There was discussion at the appeal hearing about the adjustments proposed for the claimant by Sally Sharpe and the length of time for which the adjustments were to be put in place.

7.43 The appeal officer considered all that had been said at the appeal meeting and the claimant's grounds of appeal and rejected the appeal. She did not carry out a rehearing of the formal attendance management hearing but proceeded to review the decision of Andrew Penhale. Jaswant Narwal was not satisfied that there had been procedural flaws in the process which had led to the claimant's dismissal. Further information was given to the claimant in respect of ill health retirement. The appeal officer considered that the claimant had demonstrated hostility and antipathy towards the respondent and continued to display such sentiments during the appeal hearing and that her working relationship was not viable. Jaswant Narwal concluded that it had not been premature to engage the attendance management policy in 2014 but in any event she noted that the matter had started afresh in May 2015. She concluded that the decision to dismiss was proportionate as the respondent could not any longer continue to support the claimant's absence and it was not considered appropriate for a further medical opinion to be obtained particularly on the question of ill health retirement. Accordingly the appeal was dismissed and the claimant was told that she had no further right of appeal.

7.44 Before writing the letter to the claimant on 16 December 2016 (pages 454-456) the appeal officer made further enquiries with HR in respect of ill health retirement and other matters in order to be better able to address those concerns raised by the claimant at the appeal hearing in the outcome letter.

7.45 As a result of having been dismissed for capability reasons the claimant's case was referred to the Civil Service Review Board. The claimant's case was considered and it was originally decided that she should be entitled to 75% of the maximum compensation payable to a civil servant dismissed for capability reasons. The award was reduced by 25% because the claimant had not availed herself of support and counselling offered, had not been proactive in keeping in touch with her line manager, had requested that many meetings be rearranged and had not contributed to the mentoring plan to facilitate her return to work. It was noted that the claimant had been employed for 24 years but had been absent for 14 of those years due to ongoing litigation. That decision was reviewed by the HR director Mark Summerfield on 7 December 2015 (page 628) and reversed. He decided that 100% compensation should be paid for the following reasons:-

"I have carefully considered this submission. I am in no doubt and have publicly stated that the CPS discriminated unlawfully against HA on grounds of race. In my view the

impact of that unlawful discrimination has, at least, played a part in the illness which prevents HA from working for the CPS at any time in the foreseeable future: an illness that falls within the definition of disability under the Act. I cannot divorce HA's illness from the actions that the CPS has taken in the period up to 2010 (at which point the CPS withdrew from initiating any litigious action towards HA). HA's actions during this process of attendance management would undoubtedly have been influenced by her opinion of the CPS and her general view of litigious engagement with her employer and I accept that that view has been shaped by the unlawful actions of the department in the past – for which the employment tribunal has applied an appropriate range of penalties. I do not think it is appropriate to add to the history of this case by reducing the compensatory award for dismissal on grounds of inefficiency and therefore approve payment of the full compensation due to HA under the Civil Service Rules”.

7.46 The effect of that decision was that the claimant was entitled to a further sum of £108,363.17p. That sum has not been paid to the claimant by reason of the fact that the claimant has not yet engaged with the process of completing the appropriate paperwork for the release of that sum.

7.47 In the course of cross examination, the claimant accepted that she was determined to have the assurance she demanded from the respondent about future dismissal and that that assurance was the main issue for her irrespective of the length of the plan in respect of reasonable adjustments. The claimant stated that that was a red line for her as she was not going to go through again all that she had endured in 2001. She accepted that she was forceful in making that demand of the respondent. She accepted that she would not require a comparator if she faced dismissal for a serious offence but she would look for evidence of a comparator in any other circumstance. The claimant asserted that she was too scared to return to work without the requested assurance.

7.48 The Ill Health Retirement Scheme of the respondent summarised at page 381 provides that such retirement should be a last resort. It is necessary to demonstrate that an employee not only has a medical condition that renders them incapable of doing their normal duties but also, despite appropriate treatment, that the ill health and incapacity are likely to be present until the scheme or state pension age

8 Submissions - claimant

The claimant made oral submissions which are briefly summarised:-

8.1 The Tribunal should look at this matter not in isolation but in the context of its 14 year history. The 14 year delay in dealing with the matters which arose in 2001 lies at the door of the respondent. The vast majority of the delay is the respondent's fault.

8.2 The claimant summarised the history of the litigation culminating in the Judgment of the Watt Tribunal in December 2014.

8.3 The claimant submitted that the proceedings had taken a great toll on her. She had represented herself for the majority of the time and the sense of injustice which she felt had only increased with the delay which had occurred. The respondent has unlimited resources compared to her own very limited resources. The claimant asserted that the legal costs of the respondent exceed £1 million, compensation to her

had exceeded £1 million and management costs should be added on top of that. The claimant posed the question what had it all been in aid of and if that was not victimisation what was it? The claimant submitted that the respondent had clearly evinced that it did not wish her to return to work from the very beginning of the matter in 2001.

8.4 Even if the Tribunal accepted the respondent's submission that she had changed her position during the disciplinary process then the 2014 Judgment of the Watt Tribunal had clearly set out that the respondent had exacerbated the situation.

8.5 The claimant asserted that the absence of a proper apology until January 2015 had exacerbated the situation and she was justified in not returning to work until that apology had been given and that was so even though the 2014 Judgment of the Watt Tribunal did not require an amended apology to be given.

8.6 In light of the position in respect of the application for the Crown Court Advocacy role and the 2014 Judgment of the Watt Tribunal, the claimant asserted that she was in order to ask for the assurance that she would not be dismissed as she did during the ensuing process.

8.7 The claimant submitted that the respondent should have gone not just the extra mile but extra miles in her case given the complexity of it and their degree of responsibility for creating it.

8.8 The respondent had obtained psychiatric reports on the claimant in the past and they should have looked back into them rather than relying simply on the reports of Doctor Bollmann who was only an occupational health physician.

8.9 In any event Doctor Bollmann had on the first occasion only interviewed the claimant over the telephone and had not listened to the claimant and as a result a complaint had been made to ATOS about Doctor Bollmann. The claimant was not criticising ATOS generally but only Doctor Bollmann. The fact that Doctor Bollmann spent only six minutes over the telephone in respect of the first report was unacceptable.

8.10 The claimant complained about the attitude of Doctor Bollmann on 9 September 2016 and submitted that the approach in that meeting was confrontational and the meeting did not last 30 minutes as alleged because for most of the time Doctor Bollmann was typing her notes. It was submitted that in those circumstances the respondent should not have obtained a report from Doctor Bollmann but should have obtained a report from a different independent physician. The respondent had not called her to give evidence and she does not justify her findings in her report.

8.11 The claimant submitted that she was not listened to in the meeting on 9 September 2015 and that therefore neither Doctor Bollmann nor the respondent were acting reasonably. The process was far too speedy. The claimant questioned why she had not been referred for ill health retirement. It was asserted that the respondent did not give the claimant an opportunity to have a different report prepared on her because of her race and that it was an act of discrimination.

8.12 It was submitted that the Bollmann report had not taken account of the claimant's physical impairments. It was clearly always the aim of the respondent to end the claimant's employment. It was submitted that Doctor Bollmann had discussed the claimant's details with the representatives of the respondent without her consent. Her consent had neither been sought nor given. It was submitted that Doctor Bollmann had acted in a biased and improper way.

8.13 The claimant asserted that she could have claimed constructive dismissal but did not want to do so because she wanted to work. The claimant submitted that she had worked 24/7 for the respondent but that her depression had made her mentally and physically ill. The claimant asserted that she did not wish to be monitored on her return and that her request not to be dismissed was a reasonable one in the light of the history of the matter. She had sought a comparator for any minor act of misconduct or poor performance but would not have objected to dismissal in the event of a major act of misconduct. It was wrong that the claimant was not able to cross-examine Doctor Bollmann and she did not accept the notes of the meetings with Doctor Bollmann.

8.14 The claimant asserted that the statistics showed that there is disparate treatment still received within the respondent by employees from the ethnic minorities. The figures speak for themselves. The respondent does not take race claims seriously. It was submitted that the respondent was rigid even if the claimant also was rigid. The claimant did not say that she would have accepted something less than she asked for by way of assurances. She was very fearful of a return to work but nothing was offered at all.

8.15 In respect of claim advanced pursuant to section 15 of the 2010 Act, the claimant asserted that the disability arose from the treatment afforded to her by the respondent and if she had not been disabled she would not have had the mistrust in the respondent which she did and that that mistrust arose from her disability.

8.16 The Tribunal were invited to consider the case of **Buchanan –v- Metropolitan Police for the Metropolis UKEAT/0112/16** when considering the question of proportionality and also the decision of **HM Land Registry –v- Houghton UKEAT/0149/14** and in addition the case of **Grosset** (above). The claimant asserted that her claims of harassment and breach of contract should succeed. The claimant made a written submission in respect of wrongful dismissal and asserted that she was entitled to 12 weeks notice and that any other interpretation of the legislative provisions would make a mockery of the legislation.

9 **Submissions – respondent**

9.1 Mr Sugarman produced a lengthy written skeleton argument extending to some 123 paragraphs and those submissions were supplemented orally. Reference was particularly made to the decisions in **BS –v- Dundee City Council [2014] IRLR 131**, **McAdie –v- Royal Bank of Scotland plc [2007] IRLR 895**, **First West Yorkshire Limited –v- Haigh [2008] IRLR 182** and **Matinpour –v- Rotherham Metropolitan Borough Council UKEAT/0537/12/RN** and **General Dynamics Information Technology Limited –v- Karranza [2015] IRLR 43**

9.2 The Tribunal was referred also to the case of **Spencer –v- Paragon Wallpaper Limited [1976] IRLR 373**. Reference was also made to **East Lindsey DC –v- Daubney [1977] IRLR 181** and the guidance that if an employer takes sensible steps to inform himself of the true medical position of an employee then that will be found to have been all that was necessary to be done. It was noted that even if a return to work is predicted that does not mean that a fair dismissal cannot be effected and reference was made to **Lucking –v- May & Baker Limited [1974] IRLR 151**.

9.3 Reference was made to the relatively recent decision of **BS –v- Dundee City Council [2014] IRLR 131** together with the authority of **McAdie –v- Royal Bank of Scotland plc [2007] EWCA Civ 806** where it was noted that an employer might be required to “go the extra mile” where the claimant’s ill health had been caused by the conduct of the employer. The Tribunal was reminded to resist the temptation of being led by sympathy by the employee into and including granting by way of compensation for unfair dismissal what was in truth an award of compensation for injury. It was submitted that there was clearly a fair reason to dismiss the claimant in this case and that the label attached to it should either be capability or some other substantial reason.

9.4 It was submitted that it was reasonable to dismiss. There had been adequate consultation with the claimant over a long period of time. The claimant was asking for assurance as to the future which the respondent could not properly or reasonably give. The rigidity of the claimant’s position was borne out of a permanent and irreparable breakdown in trust and confidence dating back to 2008. The respondent had sufficient medical input into the decision and had reports from Doctor Bollmann from 18 February 2014 and 9 September 2015 and a report from Nurse McEvoy of 21 October 2014. Neither practitioner had recommended a report from a consultant psychiatrist and indeed the claimant was not under the care of a consultant psychiatrist but only her general medical practitioner.

9.5 The claimant had made clear that the main issue preventing a return to work was a lack of trust in the respondent which was entrenched and, based on the claimant’s demands, was impossible to overcome. The respondent was perfectly entitled to place weight on what the claimant was saying.

9.6 It was submitted that it was not unreasonable for the respondent to rely on the consultations with Doctor Bollmann and that it could not be said to be outside the band of reasonable responses to have failed to obtain further medical evidence.

9.7 It was submitted that the decision to dismiss was unimpeachable. The claimant had been absent for 14 years and her absence was causing ongoing difficulties in the department which were not sustainable. The respondent accepts that a cause of the claimant’s continued absence from work in 2015 was her past treatment by the respondent. However by 2015 the respondent had more than gone “the extra mile” in its continuous efforts to make amends, reassure the claimant and get her back to work. It was submitted that it was not outside the band of a reasonable response not to have considered ill health retirement. It was submitted that the dismissal of the claimant was fair.

9.8 In respect of the discrimination claims it was submitted that the direct disability discrimination claim and the victimisation claim were intertwined but the direct disability

claim had been replaced now with a section 15 claim. It was submitted that the Tribunal must look at the employer's state of mind in considering the "reason why" question and the Tribunal should focus only on the reasoning of the individual who performed the act complained of – in this case the dismissal. There would only be liability where the protected characteristic forms the motivation of the person making the decision to dismiss – unwittingly acting on the basis of someone else's tainted decision will not be sufficient.

9.9 It was submitted that the claims of discrimination were misconceived but there was no evidence whatever to suggest that the decision to dismiss the claimant had any bearing whatever on her race. The respondent's officers had deliberately avoided going into the detail of the history of the matter in order to distance themselves from earlier claims and that was entirely proper. It was submitted that the victimisation and harassment claims had no basis in law. It was submitted that the indirect disability discrimination claim was also misconceived and the claimant had failed to identify any PCP which put disabled people at a particular disadvantage.

9.10 In relation to the claim of failure to make reasonable adjustments the Tribunal was referred to the decision in **Environment Agency –v- Rowan [2008] IRLR 20**.

9.11 It was submitted that the respondent had not applied either PCP relied upon by the claimant but that if it did neither PCP put the claimant at a substantial disadvantage in comparison with non disabled people and even if it did the adjustments contended for were not reasonable.

9.12 In relation to the section 15 claim it was denied that the claimant's fear of returning to work and mistrust of the respondent was something which arose from her disability. That fear and mistrust arose from the respondent's treatment of her as she had made it clear time and time again.

9.13 Even if that is wrong the respondent did not dismiss the claimant because of her fear and mistrust of the respondent but because it could no longer sustain her absence from the workplace and because there was no foreseeable return to work. Even if the claimant's fear and mistrust did arise from her disability and even if that was the reason for the dismissal, the decision to dismiss was justified. The legitimate aims of the respondent were to ensure it employed staff who were likely to be able to attend work in the foreseeable future, to ensure it employed staff who were able and willing to give regular and effective service, not to maintain employment relationships with staff where the relationship of trust and confidence had irreparably broken down, to provide a properly staffed efficient and cost effective service to the public and to ensure adequate staffing levels. It was not reasonable or proportionate to offer the claimant what she insisted upon in order to return her to work and without it the claimant stated a return to work was impossible.

9.14 In relation to the breach of contract claim the respondent relied upon section 87(4) of the 1996 Act. Given that the claimant was entitled to 13 weeks pay on notice the statutory provisions are overridden by the contractual provisions. The contractual provisions provide that the claimant should receive 13 weeks pay at the rate at which she was being paid at the point of dismissal. At the point of dismissal, the claimant had

exhausted her contractual pay and therefore it was right that she should not receive any notice payments.

9.15 It was submitted that even if the decision to dismiss was unfair or discriminatory that a fair dismissal was bound to follow and therefore there should be a 100% reduction under the doctrine in **Polkey** from the compensatory award or at least a very high deduction in any event. Furthermore the claimant had acted culpably in conducting herself as she did and that should be reflected in any award of compensation.

10 **The Law**

Direct Race Discrimination: Section 13 of the 2010 Act

10.1 We have reminded ourselves of the provisions of section 9 of the 2010 Act and also of section 13 which reads:

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

10.2 We remind ourselves that direct evidence of discrimination is rarely forthcoming and thus there are particular rules in respect of proving unlawful discrimination referred to below. It is now readily accepted that discrimination need not be conscious. Some people have an inbuilt and unrecognised prejudice of which they are unaware. A discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of 'significant influence', see Lord Nicholls in **Nagarajan v London Regional Transport [1999] IRLR572** at page 576. In some cases discrimination is obvious. However, the Tribunal in most cases will have to discover what was in the mind of the alleged discriminator. In **Nagarajan**, Lord Nicholls said at page 575 that:

"Direct discrimination, to be within section 1(1) (a), the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to enquire why the complainant has received less favourable treatment. This is a crucial question. Was it on the 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 the obvious cases, answering the crucial question, will call for some consideration of the mental process 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 would have to be deduced, or inferred, from the surrounding circumstances".

10.3 The Tribunal has reminded itself of the provisions of section 136 of the 2010 Act and the detailed guidance in **Igen -v- Wong & Others 2005 IRLR 258**. That case of course was dealing with sex discrimination under the Sex Discrimination Act 1975 but is equally applicable to race discrimination claims under the 2010 Act

10.4 In **Madarassy v Nomura International Plc**, in the Court of Appeal, Lord Justice Mummery said at paragraph 56:

"The court in Igen v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material

from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

And later at paragraphs 71 and 72:

"Section 63A(2) [Sex Discrimination Act] does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or a situation for which comparisons are made are not truly like the complainant or a situation of the complainant; or that, even if there has been less favourable treatment of the complainant it was not in the grounds of her sex or pregnancy. Such evidence from the respondent could if accepted by the tribunal, be relevant as showing that contrary to the complainant's allegation of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. As Elias J observed in *Liang* (at paragraph 64), it would be absurd if the burden of proof moved to the respondent to provide an adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all".

10.5 The Tribunal has reminded itself of the guidance in the decision of Underhill J in **Amnesty International -v- Ahmed 2009 IRLR 844** who after dealing with cases of inherently racist behaviour went on to give this guidance in relation to cases which are not inherently discriminatory:

*But that is not the only kind of case. In other cases - of which Nagarajan is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in *James v Eastleigh*, a benign motive is irrelevant.*

Indirect Discrimination – section 19 of the 2010 Act

10.6 We have reminded ourselves of the provisions of section 19 of the 2010 Act:

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

10.7 We have reminded ourselves that in considering a claim of indirect discrimination it is necessary to consider the matter in stages. First has the respondent applied the PCP

contended for by the claimant to the workforce or a part of it. Secondly, if so, to consider if there is particular disadvantage to those with the relevant protected characteristic under consideration: in this case we consider the protected characteristic of disability. To undertake this exercise, we must identify the pool of people to be considered and in considering the pool we must not overlook the provisions of section 23 of the 2010 Act set out below. Thirdly, if group disadvantage can be established we must consider whether the claimant has shown that she suffers particular disadvantage by reason of that PCP. If all those matters are satisfied then we must consider whether the respondent has shown that the application of the PCP is a proportionate means of achieving a legitimate aim.

Reasonable Adjustment Claim: sections 20/21 of the 2010 Act

10.8 The Tribunal has reminded itself of the relevant provisions of section 20 and 21 and Schedule 8 of the 2010 Act which read:

Section 20:

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

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A 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 take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid”.

Section 21

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue of subsection(2): a failure to comply is , accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8

The Tribunal has had regard to the relevant provisions of Schedule 8 of the 2010 Act and in particular paragraph 20 which reads:

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

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

10.9 The Tribunal reminded itself of the authority of **The Environment Agency v Rowan [2008] IRLR20** and the words of Judge Serota QC, namely:

"An Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the 1995 Act by failure to comply with section 4A duty must identify –

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

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate);

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by and on behalf of an employer" and the 'physical feature of the premises', so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice or feature placing the disabled person concerned at a substantial disadvantage".

The Tribunal notes this guidance was delivered in the context of the 1995 Act but considers it equally applicable to the provisions of the 2010 Act.

10.10 The Tribunal has reminded itself of the guidance in respect of the burden of proof in claims relating to an alleged breach of the duty to make reasonable adjustments in the decision in **Project Management Institute -v- Latif 2007 IRLR 579** where Elias P states:

"It seems to us that by the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative.....that is why the burden is reversed once a potentially reasonable adjustment has been identified.....the key point...is that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.....we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

10.11 The Tribunal has had regard to the EHRC Code of Practice on Employment 2011 (“the Code”) and in particular paragraph 6.28 and the factors which might be taken into account when deciding what was a reasonable step for an employer to have to take namely:-

- “(1) Whether taking any particular step would be effective in preventing the substantial disadvantage.*
- (2) The practicability of the step.*
- (3) The financial and other costs of making the adjustment and the extent of any disruption caused.*
- (4) The extent of the employer’s financial or other resources.*
- (5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice from Access to Work).*
- (6) The type and size of the employer. ”*

10.12 We have reminded ourselves of the guidance from Elias LJ in the Court of Appeal in the decision in **Griffiths –v- Secretary of State for Work and Pensions 2015 EWCA Civ 1265.**

In this context I would observe that it is unfortunate that absence policies often use the language of warnings and sanctions which makes them sound disciplinary in nature. This suggests that the employee has in some sense been culpable. That is manifestly not the situation here, and will generally not be the case, at least where the absence is genuine, as no doubt it usually will be. But an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision. As I mention below, the fact that some of the absence is disability-related is still highly relevant to the question whether disciplinary action is appropriate.

As to the second proposed adjustment, the reasoning of the majority is in my opinion more opaque. But I think implicit in its analysis is the belief that there is no obvious period by which the consideration point should be extended. If the worry and stress of being at risk of dismissal is to be eliminated altogether, then all disability-related illness must be excluded. But if that step is not taken - and no-one was suggesting that it should be - then in a case like this when lengthy further periods of absence are anticipated, the period by which the consideration point should be extended becomes arbitrary. As the majority point out in paragraph 49 when drawing an analogy with the O'Hanlon case, in so far as the alleged disadvantage is with the stress and anxiety caused to a particular disabled employee, it would be invidious to assess the appropriate extension period by such subjective criteria.

Also, where the future absences are likely to be long, a relatively short extension of the consideration point is of limited, if any, value. It will not in practice remove the disadvantage if the absences remain over 20 days. No doubt there will be cases where it will be clear that a disabled employee is likely to be subject to limited and only occasional absences. In such a situation, it may be possible to extend the consideration point, as the Policy envisages, in a principled and rational way and it may be unreasonable not to do so. But in my view the majority has taken the view that this is not appropriate in a case of this nature. In my judgment, the majority was entitled to reach that conclusion.

10.13 We note that where a position is reached when there is nothing an employer can reasonably do to alleviate a disadvantage then the duty to make adjustments falls away:

this will be the case where the position is irretrievable and this may be the position reached during a period of extended ill health. This may be the case also where the employer has caused the employee's predicament where, even in that situation, there is no unlimited obligation to accommodate the employee's needs. If an adjustment proposed will not in fact procure a return to work then it will not be a reasonable adjustment. We note also that the EAT in **Lincolnshire Police –v- Weaver 2008 AER 291** made it clear that a Tribunal must take account of the wider implications of any proposed adjustment and this may include operational objectives such as the impact on other workers, safety and operational efficiency. The purpose of an adjustment in the employment context is to return the employee to work.

Discrimination arising from disability – section 15 of the 2010 Act.

10.14 The Tribunal has reminded itself of the provisions of **section 15 of the 2010 Act** which read:

“(1) A person (A) discriminates against a disabled person (B) if –

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

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

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

10.15 We remind ourselves that in considering a claim pursuant to section 15 of the 2010 Act, we need to consider what breach of section 39 of the 2010 Act is established, whether there was unfavourable treatment of the claimant, whether there is something arising in consequence of the disability and finally whether the unfavourable treatment was because of the something arising from the disability. In respect of the meaning of unfavourable in section 15 we noted **Trustees of Swansea University Pension & Assurance Scheme –v- Williams 2015 UKEAT/0415/14** and we have noted in particular the guidance:

“I accept Mr O'Dair's submission that it is for a Tribunal to recognise when an individual has been treated unfavourably. It is impossible to be prescriptive of every circumstance in which that might occur. But it is, I think, not only possible but necessary to identify sufficiently those features which will be relevant in the assessment which this recognition necessarily involves. In my judgment, treatment which is advantageous cannot be said to be “unfavourable” merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be”.

10.16 A useful explanation of the difference between claims under section 15 and those under sections 20/21 of the 2010 Act was provided by Judge Richardson in **General Dynamics –v- Carranza UKEAT/0107/14** in the following terms.

"The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability – S.15 of the Act. The second is the duty to make adjustments, S.20-21 of the Act. The focus of these provisions is different. Section 15 is focused upon making allowances for disability. Unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20-21 focus upon affirmative action – if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage. In many cases the two forms of prohibited conduct are closely related – an employer who is in breach of the duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct. But not every case involves a breach of the duty to make reasonable adjustments, and dismissal for poor attendance can be quite difficult to analyse in that way. Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play, or whether the case is best considered and analysed under the new robust S.15".

10.17 We have reminded ourselves of the guidance of Simler J in **Pnaiser –v- NHS England 2016 IRLR 170** in respect of the proper approach to adopt in cases involving section 15 of the 2010 Act.

10.18 We have reminded ourselves that in considering so called justification, that we must consider an objective balance between the discriminatory effect of the PCP engaged and the reasonable needs of the party who applies it. We have noted the words of Pill LJ in **Hardys and Hanson -v- Lax 2005**. This was a decision of the Court of Appeal taken in the context of a claim of indirect discrimination but this test was applied to claims advanced under section 15 of the 2010 Act by the EAT in **Hensman – v- Ministry of Defence UKEAT/0067/14/DM**.

Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

10.19 We have reminded ourselves of the decision in **Carranza** (above) and the guidance given in that case in respect of justification to which we were particularly referred by Mr Sugarman:

If this case had been put forward as a case of discrimination arising from disability, it would have been easier to analyse - for in truth this was not a case about taking practical steps to prevent disadvantage, but a case about the extent to which an employer was required to make allowances for a person's disability. If the case had been put that way it would to my mind in any event have been doomed to failure. It might have been established that the dismissal and the underlying written warning were

"unfavourable treatment". But it was legitimate for an employer to aim for consistent attendance at work; and the carefully considered final written warning was plainly a proportionate means of achieving that legitimate aim. The Employment Tribunal as a whole proceeded on that basis, and the majority found against the Respondent only because it had shown some mercy before the last lengthy period of absence. It was really unarguable that dismissal after that further very substantial absence was not a proportionate means of achieving a legitimate aim.

10.20 We have reminded ourselves of the decision of Judge Richardson in **Buchanan-v- Commissioner of the Police of the Metropolis 2016 IRLR 918** in respect of the defence of so called justification to which we were particularly referred by the claimant:

The starting-point must be the words of section 15(2)(b) of the Equality Act 2010. This requires the putative discriminator A to show that "the treatment" of B is a proportionate means of achieving a legitimate aim. The focus is therefore upon "the treatment"; and the starting point therefore must be that the ET should apply section 15(2)(b) by identifying the act or omission which constitutes unfavourable treatment and asking whether that act or omission is a proportionate means of achieving a legitimate aim.....In this case, therefore, the ET was required to consider whether each of the six steps taken by the Respondent and found by the ET to be unfavourable treatment arising from disability was justified - that is to say, whether it was a proportionate means of achieving a legitimate aim. It will probably not be difficult to deduce the aims of the Respondent, and for this purpose the policies which it adopted will of course be highly relevant; if the aims are not explicit within the policies, they may well be implicit. In addition to the usual aims of attendance management, which in the case of those who are absent long-term no doubt include supporting them so far as reasonable, considering medical discharge and considering termination fairly where absence can no longer reasonably be supported, the ET may wish to consider whether there was a particular aim in the Respondent's case to assist and support those who had been injured on duty. The ET will then consider whether the steps in question were proportionate means of achieving those aims. Paragraph 103 of the majority's Reasons shows that they were concerned about one aspect of Ms Cunningham's criticism of the Respondent - giving return dates which the employee could not meet. They were concerned that, if it was always unlawful to give such a return date, the Respondent would be unable to operate within the Regulations in the more serious cases, where absence was likely to be prolonged. I do not think the majority need have been concerned. The question will always be whether it was proportionate to the Respondent's legitimate aims to take a particular step under the UPP. In making that assessment it is of course relevant to take into account that Parliament has laid down a procedure to be followed before an officer can be dismissed on grounds relating to capability; so long as it is also appreciated that neither Parliament nor the Respondent's own policies require a mechanistic application of the procedure. It is also relevant to take into account the impact of applying the procedure in a particular way on a particular officer. I would, however, caution the ET to make careful findings as to the Respondent's aims; I think the policies show they may have been more sophisticated than simply "to move in stages towards either a return to work or dismissal".

10.21 We have referred to the decision of HH Judge Clark in **H M Land Registry –v- Houghton and others UKEAT/0149/14/BA** to which we were referred by the claimant. We have noted the guidance given in that decision on the question of Justification:

As to justification, it is common ground between Counsel that at paragraph 26 this Employment Tribunal correctly directed themselves as to the classic test propounded by Balcombe LJ in *Hampson v DES* [1989] ICR 179 at 191E: "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.Ultimately, the balancing exercise, once properly identified, is a matter for the Employment Tribunal absent any irrelevant factors being taken into account or relevant factors disregarded.

Harassment: section 26 of the 2010 Act

10.22 The relevant provisions of section 26 of the 2010 Act provide:

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

10.23 In relation to what is required to establish a case of discrimination by harassment the Tribunal has reminded itself of the guidance given by Underhill J in **Richmond Pharmacology Limited -v- Dhaliwal 2009 IRLR 336** and in particular that the Tribunal should focus on three elements namely:

- (a) unwanted conduct
- (b) having the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him and
- (c) being related to the claimant's race.

Victimisation - Section 27 of the 2010 Act

10.24 The Tribunal has reminded itself of the provisions of this section which read:

- (1) A person ("A") discriminates against another person ("B") if A subjects B to a detriment because-
 - (a) A does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following in a protected act-
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information given, or the allegation is made, in bad faith.....

10.25 The Tribunal has reminded itself that a claim for victimisation requires the Tribunal to make an enquiry into and to determine the reason why the alleged discriminator did a particular act. That reason must be because the victimised person has done a protected act as defined by the 2010 Act. The protected act need not be the only or main reason for the action complained of: it is sufficient if the protected act materially influences those actions.

10.26 In a victimisation claim there is no need for a comparator. The 2010 Act requires the Tribunal to determine whether the claimant has been subjected to a detriment because of doing a protected act. It is not necessary for a claimant to show that she has a particular protected characteristic but the claimant must show she has done a protected act. There is no dispute in this case that the claimant has indeed done protected acts.

Burden of Proof and other relevant provisions of the 2010 Act.

10.27 The Tribunal has reminded itself of the relevant provisions of **section 136 of the 2010 Act** which read:

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An employment tribunal....."

10.28 The Tribunal has reminded itself of the relevant provisions of **section 39 of the 2010 Act** and in particular:

(2) An employer (A) must not discriminate against an employee of A's (B)-

...

(c) by dismissing B

(d) by subjecting B to any other detriment.....

(5) A duty to make reasonable adjustments applies to an employer...

(7) In subsections (2)(c)... the reference to dismissing B includes a reference to the termination of B's employment...

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

10.29 We have reminded ourselves of the relevant provisions of section 23 of the 2010 Act:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

Claim for Ordinary Unfair Dismissal Sections 94-98 (inclusive) Employment Rights Act 1996 (“the 1996 Act”)

10.30 The Tribunal has reminded itself of the provisions of section 98 of the 1996 Act which read:

“98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –

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

(b) that it is either a reason falling in subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) The reason falls within this subsection if it –

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

(b) relates to the conduct of the employee ...

(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –

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

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

10.31 The Tribunal has reminded itself of the decision of **British Home Stores Limited v Burchell [1978] IRLR379** and notes that it is for the respondent to establish that it had a genuine belief in the lack of capability of the claimant at the time of the dismissal and that that belief was based upon reasonable grounds and the dismissal followed a reasonable investigation and a reasonable procedure.

10.32 We have reminded ourselves of the authority of **Spencer-v-Paragon Wallpapers Limited 1976 IRLR 373** and the words of Phillips J:

“What is required will vary very much indeed according to the circumstances of the case. Usually what is needed is a discussion of the position between the employer and the employee. Obviously what must be avoided is dismissal out of hand. There should be a discussion so that the situation can be weighed up, bearing in mind the employer’s need for the work to be done and the employee’s need for time in which to recover his health.....Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and if so, how much longer?..”.

10.33 We have noted the decision in **Luckings –v- May and Baker Limited 1974 IRLR 151** where it was stated that even if a return to work is predicted that does not mean a fair dismissal cannot be effected. We have noted the decision of the Court of Session in

BS-v- Dundee City Council 2014 IRLR 131 and the guidance given on the duties of an employer in cases of ill health of an employee:

Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasise, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.

10.34 We have noted the decision of the Court of Appeal in **McAdie –v- The Royal Bank of Scotland 2007 EWCA Civ 806** and the statement that in situations where an employer has caused the ill health of the claimant then it had a duty to “go the extra mile” before moving to dismiss. We also note the approval given in that case to parts of the decision of the EAT at an earlier stage in the proceedings as follows:

Thus it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him for ever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work. Employees who have been injured as a result of a breach of duty by their employers are entitled to compensation in the ordinary courts, which in an appropriate case will include compensation for lost earnings and lost earning capacity: tribunals must resist the temptation of being led by sympathy for the employee into including granting by way of compensation for unfair dismissal what is in truth an award of compensation for injury. We also agree with Morison P in sounding a note of caution about how often it will be necessary or appropriate for a tribunal to undertake an enquiry into the employer's responsibility for the original illness or accident, at least where that is genuinely in issue: its concern will be with the reasonableness of the employer's conduct on the basis of what he reasonably knew or believed at the time of dismissal, and for that purpose a definitive decision on culpability or causation may be unnecessary.

10.35 The Tribunal has reminded itself of the guidance in respect of the dismissal of employees who have the benefit of ill health retirement pension schemes contained in **Matinpour –v- Rotherham Metropolitan Borough Council 2013 UKEAT/0537/12/RN:**

*“ Mr McNerney is right, not only in our view, but by concession of Mr Calvert, in saying that the Tribunal did not correctly state the facts in **First West Yorkshire v Haigh**. There, the terms and conditions did not require First West Yorkshire to consider ill-health retirement. It should be pointed out, as both lay members in this Tribunal were keen to do, that in general, ill-health retirement is not a decision for an employer; it is one for the trustees of any pension scheme which is applicable. The process is costly and expensive to the scheme. Applications are therefore admitted cautiously, with considerable effort being made to ensure that they meet the applicable criteria, whatever they may be. The Appeal Tribunal did not require the employer to consider ill-health retirement in **First West Yorkshire v Haigh**, but to take reasonable steps to ascertain whether the employee would be entitled to the benefit”.*

10.36 We note that an irremediable breakdown in working relationships can constitute some other substantial reason for the purposes of section 94(1) of the 1996 Act. Dismissal for such a reason can be fair so long as the employer acts reasonably in treating that reason as sufficient to dismiss.

Claim for Breach of Contract - Notice Pay

10.37 The Tribunal reminded itself of the provisions of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and of the provisions of section 87 of the 1996 Act. We have noted the provisions of section 86(1) and 86(4) of the 1996 Act which read:

(1) If an employer gives notice to terminate the contract of employment of a person who has been continuously employed for one month or more, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(1).

(4) This section does not apply in relation to a notice given by the employer or the employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86(1).

10.38 We have noted the following extract from the IDS Handbook on “Contracts of Employment” at paragraph 10.101:

“Sections 87-91 do not apply where the employer is contractually required to give notice that is at least one week longer than that required by section 86-87(4). This means that if the contractual notice exceeds the employee’s statutory entitlement by at least one week then the provisions outlined above concerning the calculation of statutory notice pay do not apply and the employee must rely solely on the contract”.

11 Conclusions

11.1 There are eight heads of claim for the Tribunal to consider. We have considered how best to approach that task and conclude that it is appropriate for us to address the claims in the following order:

- 11.1.1 The claim of direct race discrimination
- 11.1.2 The claim of failure to make reasonable adjustments
- 11.1.3 The claim of indirect disability discrimination
- 11.1.4 The claim of discrimination arising from disability
- 11.1.5 The claim of harassment related to disability or race
- 11.1.6 The claim of victimisation
- 11.1.7 The claim of unfair dismissal
- 11.1.8 The claim of breach of contract.

Direct race discrimination claim: section 13 of the 2010 Act (Issue 4.1)

11.2 This claim did not feature to any extent in cross examination by the claimant of the respondent’s witnesses or in the course of submissions save by reference to sections in the claimant’s witness statements which referred to the Equality and Diversity policies of the respondent and the monitoring of them. In particular we note that the claimant did not at any time challenge Andrew Penhale in cross examination as to the reason he dismissed her on 19 November 2015.

11.3 We have considered first whether the claimant has established facts from which we can conclude or infer that she was less favourably treated when she was dismissed by the respondent. This claim depends on a comparator being identified. The claimant did not rely on an actual comparator but chose to rely on a hypothetical comparator but she did not develop the argument.

11.4 Doing the best we can, we have considered how a hypothetical comparator whose material circumstances were the same as the claimant other than her race would have been treated. We have constructed a comparator of a different race to the claimant but one with the same length of service and holding the same Crown Advocate position as the claimant and one who had been away absent from work for over 14 years and heavily involved in employment related litigation with the respondent throughout that period. We consider a material circumstance for the hypothetical comparator would also be that s/he had succeeded in claims against the respondent for race discrimination and received very substantial compensation. We conclude that a material circumstance would also be that the comparator was unable to offer any date for a return to work absent assurances being given by the respondent in respect of future dismissal.

11.5 We conclude that there is no evidence at all to suggest that such a comparator of a different race to the claimant would have been treated in any different way to the way in which the claimant herself was treated. There is nothing at all to suggest that the act of dismissal was motivated in any way by considerations of the claimant's race. The additional factor required in **Madarassey** is not present and therefore the burden of proof does not pass to the respondent.

11.6 We have checked this conclusion by examining the reason advanced by Andrew Penhale for the claimant's dismissal and thus the reason for the asserted less favourable treatment. The reason advanced for the dismissal was that the claimant would not within a reasonable timescale maintain a satisfactory level of attendance at work. Furthermore he took account of the strong antipathy formed by the claimant towards the respondent and her refusal to return to work without a written legal guarantee that she would not be dismissed other than in exceptional circumstances of serious criminal wrongdoing on her part. We take account of and note that Andrew Penhale, along with Sally Sharp and Jaswant Narwal, did not acquaint himself with the details of the litigation which had taken place between the claimant and the respondent since 2001 in order not to be influenced by those matters. We accept that explanation of the reason for dismissal and thus, even if the burden of proof had passed to the respondent in respect of this claim, the explanation advanced would have been accepted.

11.7 The claim of direct race discrimination fails and is dismissed.

Failure to make adjustments: sections 20/21 and Schedule 8 of the 2010 Act (issues 4.2-4.5)

11.8 We have considered whether the respondent applied either or both of the two PCPs claimed by the claimant. The first PCP advanced conflated a description of the PCP with the adjustment asserted as reasonable. The claim was difficult to understand and was not clarified by the claimant. We conclude that the case advanced was effectively that the respondent would manage the claimant on her return to work in

accordance with its standard conditions and policies and in particular its capability procedure and disciplinary procedure. The second PCP asserted was a requirement that the claimant return to work unsupported save for the first three months of her return.

11.9 We do not accept that the first PCP was applied by the respondent. The respondent had made it clear to the claimant that she would be supported back to work. Sally Sharp had provided to the claimant a comprehensive list of measures which were to be taken to assist the claimant (paragraph 7.11 above) and we accept that these adjustments were not time limited to the first three months of the return to work. We accept that it had been made clear that the matter would be reviewed after three months but at no time was the claimant told that support would cease after three months. Thus the respondent had evinced a clear willingness to adjust its standard conditions and policies and so we conclude the first PCP contended for was not in fact applied by the respondent.

11.10 In respect of the second PCP, we conclude that that was not applied by the respondent. The respondent had made it clear beyond peradventure to the claimant that she would be supported on her return to work and that that support was not time limited to the first three months. The reality of the matter was that the claimant refused to engage with the respondent about adjustments as she was adamant that she would not return to work without an assurance from the respondent that she would not face dismissal save in the case of serious criminal wrongdoing on her part or without evidence of comparable treatment of another employee in respect of any other reason for dismissal. That demand dominated all discussions to the exclusion of any meaningful engagement by the claimant on the question of the offered support to facilitate a return to work. The second PCP was not applied by the respondent and we do not need to consider that matter further.

11.11 In order to do justice to the claimant's case, we have considered the position further in relation to the first contended for PCP. If our decision is wrong and that PCP was applied, then we have considered the question of substantial disadvantage. We conclude that there is no evidence of substantial disadvantage. Any employee returning to work for the respondent after an absence of some 14 years would be in the same position as the claimant whether disabled or not. The claimant's unwillingness to return to work arose from her clear antipathy towards the respondent borne out of the 14 year history of the litigation between the claimant and the respondent. The claimant's accepted disabilities of depression and anxiety and post-traumatic stress disorder were not the reason for the claimant's unwillingness to return to work. Any disadvantage to the claimant in returning to work after 14 years and being subjected to standard conditions and policies was the same as any other employee in that situation whether disabled or not.

11.12 If that conclusion is wrong, then we have considered whether the two adjustments contended for were reasonable. The first adjustment said to be requested at paragraph 4.4.1 above was an assurance from the respondent to the claimant that she would not face dismissal save in circumstances where anyone else would face dismissal. As drafted that would be a reasonable assurance to request and to give but that is not what the claimant requested. The claimant first expressed her request to Sally Sharp (paragraph 7.26) in terms that she wished to have an assurance that she would not be

sacked by the respondent. Over time the terms of the assurance were developed and refined and, by the time the claimant saw Andrew Penhale in November 2015, the assurance sought was that she would not face dismissal for misconduct save in the case of serious criminal wrongdoing on her part and not in any other circumstance of poor performance or misconduct save where the respondent could produce evidence of a comparator being treated in the same way. The claimant wished to have this assurance in writing and drafted by lawyers. That is a very different demand from the adjustment contended for at paragraph 4.4.1 above. We have considered the actual adjustment contended for by the claimant and we conclude that such an adjustment would not be reasonable. Effectively the claimant was asking not to be performance managed or to be subject to ordinary disciplinary procedures of the respondent. We agree with the submission made by Mr Sugarman that this would not be a sensible arrangement or one designed to ensure an effective working relationship between the parties. We take account of the wider implications on other employees of making that adjustment for the claimant. We consider such an adjustment simply would not be practical. We conclude the adjustment actually contended for by the claimant was not reasonable. The adjustment contended for at 4.4.1 above would be reasonable but the respondent did not fail to make that adjustment. There was never any suggestion made that the claimant would be treated in any way differently or less favourably than all other employees on her return to work.

11.13 We have considered the second adjustment contended for at paragraph 4.4.2 above. We do not accept that the respondent failed to make that adjustment. The respondent had offered extensive support to the claimant and we are satisfied that that support was not time limited. We accept that the first plan was expressed to last for three months and then to be subject to review. The respondent had shown itself willing to support the claimant for as long as it took to achieve a successful return to work. There was no failure by the respondent to apply the adjustment contended for at 4.4.2 above.

11.14 In those circumstances, we conclude that the claim of failure to make reasonable adjustments is not well founded and is dismissed.

Discrimination arising from Disability: Section 15 of the 2010 Act (issues 4.10-4.13)

11.15 The dismissal of the claimant was unfavourable treatment within section 15 of the 2010 Act.

11.16 The first matter for our consideration was whether the claimant's fear of returning to work and mistrust of the respondent was something arising in consequence of the claimant's disabilities of depression, anxiety disorder and post-traumatic stress disorder. During the course of her cross examination, the claimant accepted that her fear and mistrust of the respondent arose from the respondent's treatment of her dating back to the events of 2001 and the subsequent conduct of the litigation. She stated that that resulting fear and mistrust gave rise to her mental impairments and not vice versa. We accept that construction of the matter as advanced by the respondent and we accept the submission of Mr Sugarman that a person does not need to be disabled to lose trust and confidence in an employer.

11.17 We have tested that conclusion. The events of 2001 were shocking events for the claimant who then had to endure years of litigation with the respondent before there was an acceptance that the respondent had acted unlawfully and the Remedy Judgment was only issued in 2008. The Remedy Judgment was then the subject of much challenge and further litigation and eventually the 2014 Judgment was issued which determined that the apology ordered in 2008 was not in accordance with the 2008 Remedy Judgment. The apology was reissued. In such circumstances it is little wonder that the claimant evinces mistrust in her employer and an unwillingness to return to work – all of which flows from the actions of the respondent.

11.18 The medical evidence in the form of the Bollmann report of September 2015 (page 502) speaks of both “*medical and work reasons*” as the cause of there being no realistic prospect of a successful and sustained return to work. The report continues: “*her overwhelming sense of organisational injustice is impacting on all perceptions about return to work, workplace adjustments and work security*”. We are unable to conclude in the absence of any other medical evidence that the mistrust and fear of returning to work arises from the claimant’s disabilities. We conclude that the fear and mistrust arose from the actions of the respondent and thus the necessary causal link to the claimant’s disability in order to establish liability under section 15 of the 2010 Act is absent and the claim must fail.

11.19 In case that conclusion is wrong, we have considered whether the reason for the claimant’s dismissal was her fear and mistrust of the respondent or some other reason. We are satisfied that what led Andrew Penhale to dismiss the claimant was not her fear and mistrust of the respondent but simply his conclusion that the respondent could no longer sustain the claimant’s absence from work (an absence which had then lasted over 14 years) in circumstances where there was no foreseeable return to work date. Thus the reason for the unfavourable treatment was not that which arose from the disabilities of the claimant – if our conclusion on that point should be wrong.

11.20 If all those conclusions should be wrong, then we have considered the question of proportionate means to achieve a legitimate aim and so the provisions of section 15(1) (b) of the 2010 Act. We have considered the legitimate aims advanced and contended for by the respondent namely to ensure it employed staff who were likely to be able to attend work in the foreseeable future, to ensure it employed staff who were able and willing to give regular and effective service, not to maintain employment relationships with staff where the relationship of trust and confidence had irreparably broken down, to provide a properly staffed efficient and cost effective service to the public and to ensure adequate staffing levels. We have considered whether these were legitimate aims and we conclude without difficulty that they were.

11.21 Accordingly we move to consider whether dismissal of the claimant was a proportionate step to achieve those legitimate aims. In so doing we have balanced the discriminatory effect on the claimant with the reasonable needs of the respondent. We take account of the effect on the claimant which was effectively to bring to an end a long career with the respondent – albeit one which in the exceptional circumstances of this case had meant the claimant had not been in the workplace for some 14 years of her 24 years’ service with the respondent. Against that very significant effect on the claimant, we have noted the steps taken by the respondent to seek to achieve a return to work. The claimant had received pay for the period of her absence until August 2014. From

2013 the claimant had been sympathetically and effectively managed by Sally Sharp who had put considerable effort into seeking to return the claimant to the workplace. Adjustments had been offered to the claimant by the respondent to reintegrate her to the workplace but those efforts had been met by reason followed by different reason from the claimant not to return. First the claimant wished to delay until the outcome of the Watt Tribunal was known in relation to the question of the apology and this was resolved in January 2015. Then the claimant wished to await the outcome of the Shepherd Tribunal. Then the claimant sought to delay until she had taken advice from her solicitors and engaged in informal discussions with the respondent which covered the period from January until April 2015. Then the claimant showed herself unwilling to engage with the question of adjustments to return her successfully to work unless and until an assurance was given by the respondent which the respondent reasonably (as we find) felt unable to provide. The process had taken over two years from the point when the management of Sally Sharp began and at the end of it there was no foreseeable date of a return to work. Set against that, the claimant was filling a Crown Advocate role which was an important role for the respondent in order to enable it to provide the crucially important public service it was set up to provide. The absence of the claimant meant that others were having to cover her duties and the service was not performing with full efficiency and there was no prospect that it would do so. The absence of the claimant had been managed appropriately since 2013 and in fact the absence had lasted over 14 years. In such circumstances we conclude that the decision to dismiss was a proportionate means to achieve the legitimate aims of the respondent.

11.22 In those circumstances, the claim of discrimination arising from disability is not well founded and is dismissed.

Indirect disability discrimination: section 19 of the 2010 Act (Issues 4.6-4.9)

11.23 We have first considered whether the respondent applied the PCP which the claimant contended for in respect of this claim namely that the respondent insisted on the application of its standard terms of conditions and policies and refused to give the claimant an assurance that she would not be dismissed except in circumstances in which any other employee would be dismissed. As pleaded, this suggested PCP is difficult to understand. This claim was not developed in cross examination or in submissions by the claimant. There was no reference at all to group disadvantage in respect of this claim as there clearly needs to be. It seems to us that this matter is better understood and considered as a claim of failure to make reasonable adjustments. Nonetheless it was advanced as an indirect disability claim also and we must engage with it.

11.24 We conclude that in reality what the claimant was saying in this claim was that the respondent insisted on the application of its capability policy and its disciplinary policy in respect of her future attendance at work. We conclude that there is not the slightest evidence to show that such policies placed employees disabled by reason of depression, post-traumatic stress disorder and anxiety disorder (as the claimant was) at a particular disadvantage compared to non-disabled employees. Without any evidence of so called group disadvantage this claim does not pass first base.

11.25 We do not accept that the refusal to give the claimant the assurance she sought about her own position in the future amounted to a PCP in itself. This was a specific

one-off decision taken in respect of the claimant with no general application to the workforce. It did not amount to a PCP in itself.

11.26 In the absence of the claim being developed by the claimant, it follows that the claim fails and is dismissed.

Harassment: section 26 of the 2010 Act. (Issues 4.14-4.17)

11.27 We have considered whether the respondent engaged in unwanted conduct by dismissing the claimant and we accept that the act of dismissal was unwanted conduct by the claimant.

11.28 We have considered whether the purpose (namely the intention) of the respondent in dismissing the claimant was to violate the dignity of the claimant or to create for the claimant an intimidating, hostile, degrading, humiliating or offensive environment. We have considered the evidence from the three witnesses for the respondent and in particular the evidence of the dismissing officer Andrew Penhale. The Tribunal is entirely satisfied that that was not the purpose of the respondent in so acting. The respondent dealt with the process which led to the dismissal of the claimant first in accordance with the Policy and then in accordance with the New Policy. The meetings with the claimant were conducted in accordance with those policies and we see no evidence whatever of any intention to violate the claimant's dignity or create for the claimant the prohibited environment. We note and accept that the claimant complained about the meeting she had on 9 September 2015 with Doctor Bollmann but that was not advanced as an act of harassment and even if it had been, it would have been out of time.

11.29 We have moved on to consider whether the effect of the dismissal was to violate the claimant's dignity or to create the prohibited environment. In deciding that question the Tribunal has had regard to the perception of the claimant, the other circumstances of the case and whether it was reasonable for the unwanted conduct to have had that effect. We note that the claimant gave no evidence to us at all with regard to her perception of the effect of the dismissal on her dignity or in respect of the matters which could lead to the creation of a prohibited environment. In considering this question we have looked at the history of the dealings between the claimant and the respondent particularly under the line management of Sally Sharp from 2013 onwards. The Tribunal concludes that that management was reasonable and proper management for a period of over two years. There can be no question that the claimant's dignity had the appearance of being violated or a prohibited environment created for her. Whilst the act of dismissal was not one which the claimant sought or welcomed the circumstances of the case lead us to conclude that it was not reasonable for the claimant to conclude (if she did) that the dismissal had the effect of violating her dignity or creating the prohibited environment.

11.30 We have no direct evidence that the dismissal was related in any way to the claimant's accepted disability or her race and there are no matters from which we can infer that that was the case.

11.31 Accordingly the claim of harassment fails and is dismissed.

Victimisation: section 27 of the 2010 Act (Issues 4.18-4.19)

11.32 We have first considered whether or not the claimant carried out one or more protected acts as defined by section 27 of the 2010 Act. The protected acts relied on are set out above at paragraph 1.7 of this Judgment. We are satisfied that the claimant carried out each one of those acts and that each one of them amounts to a protected act within the meaning of section 27 of the 2010 Act.

11.33 Accordingly, we have considered whether in dismissing the claimant the respondent subjected the claimant to a detriment and we are satisfied that dismissal is a detriment and this element of the claim is also satisfied.

11.34 Accordingly, we have considered whether the dismissing officer - Andrew Penhale - moved to dismiss because of one or more of the protected acts. We have considered the decision to dismiss and conclude that the decision was on the face of it a rational decision based on evidence which was before the dismissing officer. We are satisfied that there is no evidence that the claimant was dismissed or that the appeal against dismissal was not allowed because the claimant had done one or more of the protected acts. The reason for the decision to dismiss was not explored by the claimant with the relevant witnesses in the course of cross examination. There is no direct evidence and no evidence from which we could infer that the dismissing officer was influenced in any way – let alone a material way – by the protected acts. Indeed the dismissing officer indicated that he was only vaguely aware of the history of this matter. The question of whether or not he should have been fully aware is a question which the Tribunal will engage with in considering whether the decision to dismiss was reasonable within the context of the claim of unfair dismissal. However, in relation to this claim the question is what was the reason Andrew Penhale acted as he did? There is no evidence whatever to suggest that he acted as he did because of the protected acts.

11.35 In those circumstances, the claim of victimisation fails and is dismissed.

Unfair dismissal: sections 94/98 of the 1996 Act (Issues 4.20-4.24)

11.36 We have first considered whether the respondent has proved the reason for dismissal. In dealing with this matter we have had regard in particular to the evidence of Andrew Penhale and the reliability or otherwise of that evidence. We assessed Andrew Penhale as a reliable and compelling witness who gave straight forward evidence as to the reason he moved to dismiss the claimant in November 2015. We refer to our findings of fact at paragraphs 7.36-7.39 above. We accept the evidence given namely that the reason for dismissal was that the claimant was unable to offer a return to work date within a reasonable timescale and so was unable to maintain a satisfactory level of attendance at work. That was the reason for dismissal. That matter was not actually challenged by the claimant in cross examination in spite of the fact that in her various claims the claimant was seeking to challenge the reason for dismissal or at least seeking to show that there were other unlawful material influences in the mind of the dismissing officer. We conclude that the respondent has proved the reason for dismissal as set out above and therefore discharged the burden of proof which lies on it so to do.

11.37 Before leaving this area of our enquiry, it is appropriate that we consider what factors had led to the claimant's unwillingness to return to work. We have set out above

at paragraphs 11.16-11.19 our conclusion that the reason why the claimant could not offer a return to work date was her fear of returning to work and her mistrust of the respondent and we accept that this was so and that that fear and mistrust arose from the conduct of the respondent towards the claimant in the litigation spawned from the events of 2001 as well as from those events themselves. We accept the evidence of the medical reports in this matter that in addition the claimant was ill in the sense that she suffered from depression, anxiety and post-traumatic stress disorder. We have concluded that those medical conditions arose from the treatment of the claimant by the respondent but the result was that the reason the claimant could not offer a return to work date was both for medical and work related reasons. Indeed we accept the evidence of the claimant that her health issues were not in themselves effectively preventing her return but rather what prevented the reason was the unwillingness of the respondent to provide the assurance sought by the claimant in respect of future dismissal.

11.38 In those circumstances which label should be attached to the reason to dismiss? For the respondent, Mr Sugarman submitted that the reason was related to the capability of the claimant and /or was some other substantial reason for dismissal within section 98(1) of the 1996 Act. We have noted the definition of "capability" in section 98(3) (a) of the 1996 Act as being something assessed by reference, amongst other factors, to the claimant's health or mental quality. Bearing in mind that definition, we conclude that the appropriate label for the reason for dismissal was that it related to the capability of the claimant and we accept the submission from the respondent to that effect. We note and accept that the claimant did not in reality challenge the reason she was dismissed but directed her substantial arguments to the reasonableness of the decision to dismiss. In considering the question of reasonableness of the decision to dismiss, we have borne in mind the fact that the reason for dismissal could have been categorised as a substantial reason falling within section 98(1) as well as related to capability as we have determined it was. We turn therefore to the questions posed by section 98(4) of the 1996 Act.

11.39 We have considered whether in dismissing the claimant, the respondent acted reasonably. We remind ourselves that in considering this question we must not substitute our view as to what we would have done in these circumstances. We remind ourselves that we must judge the actions of the respondent from the objective viewpoint of the hypothetical reasonable employer. We must not be influenced by any other factor and in particular not by any degree of sympathy towards the claimant which it would be difficult not to feel in the circumstances of this case. It is only if we conclude that no reasonable employer would have acted as the respondent did that we can strike down the dismissal of the claimant as unfair.

11.40 We have noted that the claimant had been absent from work (effectively on full pay from 2001 until August 2014) for over 14 years at the time of her dismissal in November 2015. Once the litigation was moving to an end in 2013, the respondent had sought to manage the absence under its various sickness absence policies in light of the position which it accepted namely that the claimant was disabled. Efforts had been made to return the claimant to the workplace by her line manager Sally Sharp for over two years by the time of the dismissal. At the point of dismissal the respondent had a report from Doctor Bollmann dated 18 February 2014 (pages 492-493), a report from Ms Jacqueline McEvoy, occupational health advisor (pages 495-496) and a further

report from Doctor Bollmann subsequent to a case conference on 9 September 2015 (pages 501-502). We have noted that all that medical evidence pointed to the fact that there was no realistic prospect that the claimant could make a successful and sustained return to work. In the most recent report it was indicated that the claimant was unlikely to successfully rehabilitate back to work because of an absence of trust and confidence in her employer – the respondent. There was no prospect of a successful return to work in the foreseeable future at the time of that last report.

11.41 We have noted the consultation with the claimant over the period of in excess of two years from 2013 until November 2015. We refer to our findings of fact and the succession of meetings between Sally Sharp and the claimant from 2013 onwards until the case was referred to Andrew Penhale at the end of October 2015. We noted that the claimant sought in the proceedings before the Shepherd Tribunal to challenge the process of issuing Return to Work Notices in that same period as discriminatory. Those claims failed before the Shepherd Tribunal. We have noted the obstacles raised by the claimant throughout that time to a return to work namely the necessity for an unqualified apology, the conclusion of the proceedings before the Shepherd Tribunal, the necessity for a dialogue with central HR once the 2014 Judgment of the Watt Tribunal was received and then the robust demand from the claimant that the respondent give her the guarantee requested in respect of future dismissal.

11.42 Before reaching any conclusion on the question of reasonableness of the actions of the respondent, we have engaged with the matters put forward by the claimant as being matters pointing to the unreasonable conduct of the respondent and the unreasonable nature of its decision to dismiss. Those matters included whether the respondent should have obtained further medical evidence, whether Sally Sharp and then Andrew Penhale and then Jaswant Narwal should have familiarised themselves with all the details of the claimant's past litigation with the respondent rather than just the broad outline as they did, whether the respondent should have waited for a further period before moving to dismiss and in particular whether it should have awaited the outcome of the Shepherd Tribunal, whether it should have given the claimant the assurances she sought in respect of the disapplication of the capability procedure and partial disapplication of the disciplinary procedure, whether the claimant should have been allowed a further longer period of rehabilitation in the workplace and whether the respondent could be said to have "gone the extra mile" before moving to dismiss the claimant.

11.43 We have noted that the respondent did not await the final outcome of the Shepherd Tribunal before moving to dismiss. When the claimant was dismissed the Shepherd Tribunal was part heard and when the decision of the Shepherd Tribunal was received in March 2016, some four months after the dismissal, the respondent was again found liable for an act of disability discrimination by failing to make a reasonable adjustment in respect of the Crown Advocacy appointment process which the claimant had undergone (along with all other relevant employees) in 2014. That outcome had been heralded by the internal appeal which the claimant had lodged in relation to the Crown Advocacy role for the appeal officer had allowed the claimant's appeal and indicated that the respondent should have done more to assist the claimant in that application. As a result the claimant was confirmed as a Crown Advocate in the new structure without further process. All this had occurred in 2014 and was known when the decision to dismiss was taken in 2015. We conclude that whilst some employers might

have awaited the outcome of the Shepherd Tribunal, we cannot conclude that no reasonable employer would have continued with the management of the claimant's sickness absence which had begun in 2013 pending the outcome of the Shepherd Tribunal. The respondent acted reasonably.

11.44 We have considered whether the respondent should reasonably have obtained further and more detailed medical evidence - particularly from a consultant psychiatrist – as the claimant asserted. We note that there was no recommendation given to the respondent from its medical advisors that that was an appropriate step to take and the respondent was aware from the claimant that she was only receiving medical advice from her General Practitioner and was not under the supervision of any other medical professional. We note also that the claimant made it plain to Sally Sharp and to Andrew Penhale that the main issue preventing her return to work was not in fact a medical issue but rather her lack of trust in the respondent and her fear of returning to work. The respondent could reasonably in our judgment conclude that in those circumstances further medical evidence was not required.

11.45 We have considered whether the respondent acted reasonably in relying on the reports of its OH advisors – and in particular Doctor Bollmann - in light of the claimant's objection to the February 2014 report and the report resulting from the case conference in September 2015 and the evident lack of willingness on the part of the claimant to engage with Doctor Bollmann. We find ourselves in agreement with the submission of Mr Sugarman that the respondent acted reasonably in relying on those reports. The reports were reasoned and consistent, the September 2015 report candidly set out the problems encountered in having a meaningful dialogue with the claimant, the respondent's witnesses knew Doctor Bollmann from other cases and respected her approach and there was no good reason on the part of the respondent to think Doctor Bollmann had acted unprofessionally but every reason to think that the claimant's complaints were borne out of her long standing mistrust of the respondent and its advisors. We conclude that reliance by the respondent on the medical evidence obtained was reasonable.

11.46 We have considered whether the respondent acted reasonably in declining to give to the claimant the assurance she sought about future dismissal. We can readily understand why the claimant sought that assurance. The circumstances of this case are such that the lack of trust and fear of return to work on the part of the claimant are understandable. However, we conclude that the respondent acted reasonably in declining to provide the assurance sought and in that regard we repeat and refer to our conclusions at paragraph 11.12 above. We have considered whether the respondent acted reasonably in offering the adjustments and support to the claimant in returning to work. We have already concluded that we do not accept the claimant's assertion that the adjustments and support were limited to three months: we conclude that it was clear that the support was to be ongoing but subject to review and in adopting that position the respondent acted reasonably. The adjustments offered to the claimant by Sally Sharp in her attempts to return the claimant to the workplace were reasonable.

11.47 We have considered whether the respondent acted reasonably in dealing with the question of the ill health retirement of the claimant. The respondent raised this matter with its medical advisor and was advised that the claimant did not qualify for ill health retirement. The advice was evidently in accordance with the terms of the scheme and in

particular that ill health retirement was a matter to be used only as a last resort. We refer to our finding of fact at paragraph 7.47 above. The claimant had had the opportunity to apply herself for ill health retirement whilst still in the employment of the respondent but had chosen not to do so. The claimant's position on ill health retirement was contradictory as she asserted that she was fit to return to work with assurances on the one hand but qualified for ill health retirement on the other. Faced with that situation, the respondent had sought advice from its advisor and in so doing we conclude had acted reasonably.

11.48 We have considered whether the three officers of the respondent involved in the dismissal process acted reasonably in not informing themselves of all the details of the litigation between the claimant and the respondent before carrying out their respective roles which led to the dismissal of the claimant and the dismissal of the appeal against dismissal. The rationale given for not informing themselves of the full detail was the previous findings of discrimination against the respondent and the desire to approach the management of the absence process and subsequent hearings in an unbiased manner and in a way unaffected by the details of the previous unlawful conduct of the officers of the respondent. We conclude that the officers of the respondent reasonably informed themselves of the history of the matter and thus acted reasonably. Whilst some officers might have wanted to have the full details of the case, we cannot conclude that it was unreasonable of them not to do so.

11.49 Finally we have considered whether in light of all the above mentioned factors the decision to dismiss the claimant fell within the band of a reasonable response. Faced with an employee who carried out a position of great responsibility as a Crown Advocate, one who had been away from work for over 14 years at least two of which were by reason of health related matters, an employee who could not give any indication of a return to work date, an employee who evinced a fundamental mistrust of the respondent and a fear of returning to work, we conclude that the decision to dismiss fell within the band of a reasonable response. Some employers might have acted differently in one or more of the ways raised by the claimant but we cannot conclude that no reasonable employer would have acted as the respondent did in the circumstances of this case taking account of the respondent's administrative resources and the equity and the substantial merits of the case. We conclude that in doing what it did from 2013 onwards, the respondent had gone the "extra mile" in seeking to achieve a return to work for the claimant.

11.50 It follows from that that the claim of unfair dismissal is not well founded and is dismissed.

11.51 We were asked by the respondent - if we found there had been an unfair dismissal - to consider if a fair dismissal could and would have resulted and if so when. Given our findings, that assessment is now not relevant. However, we would add this. Everything in this case pointed to the claimant not being able to return to work. One reason not to do so had followed another over a sustained period of time. Our assessment of the situation is that even if the claimant had been unfairly dismissed, a fair dismissal could not and would not have been long delayed. Given that the claimant was not in receipt of salary at the time of dismissal any loss flowing from an unfair dismissal would have been small. The Tribunal has noted that the claimant has received or will receive from the Civil Service Compensation Fund a sum in excess of £108,000

and in any event that sum would fall to be offset from any liability of the respondent for unfair dismissal. It seems to us that in any event the claimant would have been entitled to no further compensation than that which she will already receive given that dismissal would have followed.

11.52 We were also asked by the respondent to consider a deduction from compensation by reason of the culpable and blameworthy conduct of the claimant. Had we been required to engage with this question, we can say that we can see no such conduct on the part of the claimant. The claimant found herself in the position of having no trust in the respondent in 2015 not by reason of her own culpable and blameworthy conduct but rather that of the respondent as is clearly set out in the Judgments of the Watt Tribunal and to some extent the Shepherd Tribunal. We would have made no deduction in respect of contributory conduct had that matter been a relevant matter for our consideration.

Breach of Contract Claim: Article 3 of the 1994 Order (Issues 4.25-4.27)

11.53 We have considered the provisions of the claimant's contract of employment (pages 535-539). The relevant provisions are contained in the section headed "Notice" on page 538. This provides that where an employee has four years or more continuous service, the respondent is required to give to the claimant one week notice for each year of continuous service plus one week to a maximum of 13 weeks. In this case the claimant had worked for the respondent for some 24 years and thus was entitled to receive 13 weeks' notice of dismissal.

11.54 In the section headed "Sick leave" on pages 536/7 the claimant may be allowed sick absence on full pay for up to six months in any period of twelve months and thereafter half pay subject to a maximum of twelve months paid sick absence in any period of four years or less. The claimant had been absent from 2001. At least from 2013 the claimant's absence was treated as being due to illness. She had moved to half pay in February 2014 and to zero pay from August 2014. There was no dispute that this was a correct application of the contractual provisions.

11.55 We have considered the provisions of the 1996 Act and accept that section 88(1) of the 1996 Act provides for an employee who has normal working hours in force during the period of notice to be paid in accordance with that section of the 1996 Act if "*incapable of work because of sickness or injury*".

11.56 The provisions of section 88 are subject to the provisions of section 87 of the 1996 Act and section 87(4) dis-applies section 88 where the notice required to be given by the employer to terminate the contract is at least one week more than the notice required to be given by section 86(1) of the 1996 Act. The notice required by that provision for the claimant given her length of service was 12 weeks.

11.57 Accordingly we conclude that in the circumstances of this case, the contract of the claimant provides for 13 weeks' notice which is at least one week more than the section 86 notice and thus the provisions of section 88 of the 1996 Act do not apply. The claimant's right to payment is therefore governed by her contract of employment. The contract makes no provision for the claimant to be paid in the circumstances of this matter.

11.58 Accordingly the claim for breach of contract in respect of notice pay is not well founded and is dismissed.

Final comments

12.1 In his submissions on behalf of the respondent, Mr Sugarman rightly stated that these claims arise in “unusual and unfortunate circumstances”. The respondent was found to have discriminated against the claimant in 2001 and subsequently and has had to pay the claimant very considerable compensation. The claim before this Tribunal focussed on the dismissal of the claimant in November 2015 in circumstances where the absence - then extending to over 14 years - was at least in part caused by the past treatment of the claimant by the respondent and in circumstances where a return to work was not foreseeable.

12.2 The claimant advanced several claims to this Tribunal which took us a considerable time to deal with. Whilst the claimant has not succeeded in any of her claims on this occasion, the matters raised by her were serious matters and were deserving of and received detailed and consequently lengthy consideration by this Tribunal.

12.3 The result of the events of 2001 has been the loss by the claimant of her career within the respondent and the loss of a role which she clearly enjoyed and, from the way she conducted herself before this Tribunal, a role to which she was clearly very well suited. That is a very sad consequence of the events of 2001 and subsequently. However, even where a respondent has acted as egregiously as this respondent acted in the past towards the claimant, the law does not say that such an employee cannot be dismissed. Absent discrimination and absent unreasonableness, such a dismissal is lawful and that is our conclusion in this matter: a conclusion reached only after long and detailed deliberation by the Tribunal.

12.4 The Tribunal expresses the hope that the claimant will be able to accept the decision reached by this Tribunal and so bring to an end the litigation which has now been ongoing between the parties for over 15 years and which has so clearly taken its toll on the claimant.

**EMPLOYMENT JUDGE A M BUCHANAN
JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 30 May 2017
JUDGMENT SENT TO THE PARTIES ON
30 May 2017
AND ENTERED IN THE REGISTER
G Palmer
FOR THE TRIBUNAL**