Case No: 1304471/2018

EMPLOYMENT TRIBUNALS

Claimant: **Ms. Rose Taylor**

Respondent: **Jaguar Land Rover Limited**

Heard at: **Birmingham** **On: 20, 21, 24-28 August 2020 and 1, 2 and 14 September 2020**

Before: **Employment Judge Hughes**
Sitting with Mr T.C. Liburd and Mrs R.J. Pelter

Representation
Claimant: **Ms. R. White, Counsel**
Respondent: **Ms. J. Ferrario, Counsel attending in person apart from on 14 September when oral reasons were given (attending by CVP). The Respondent's instructing Solicitor and Officers for the Respondent attended in person throughout.**

This case has also been listed for a Remedy Hearing on the 2 October 2020. A unanimous judgment has already been promulgated. Written reasons were requested on 14 September 2020. For ease of reference, the judgment is reproduced here:

The unanimous decision of the Employment Tribunal is that:

1 The claimant has the protected characteristic of gender reassignment.

2 The claimant's allegations of harassment because of gender reassignment in respect of allegations 2, 4 to 11, and 13 to 24 of the harassment schedule are well-founded. These allegations form part of a continuing course of harassment and it is just and equitable for them to be deemed in time.

3 The claimant's claim for harassment related to sexual orientation (allegation 1 of the direct discrimination schedule, but more properly categorised as harassment as per allegation 3 of the harassment schedule) is well-founded, however, it is out of time and there is no jurisdiction to hear it.

4 The claimant's allegations of direct discrimination because of gender reassignment (paragraphs 1(a) and (c) of the direct discrimination because of gender reassignment schedule) are well-founded and it is just and equitable to extend time and deem them to be presented in time.

5 The claimant's allegation of victimisation in respect of the respondent's failure to permit her to retract her resignation is well-founded.

6 The respondent's statutory defence to the above allegations fails, and it is totally without merit.

7 The claimant was constructively unfairly dismissed.

8 The remaining allegations are dismissed.

9 Having heard submissions on this point, this Employment Tribunal considers it appropriate to award aggravated damages in this case because of the egregious way the claimant was treated and because of the insensitive stance taken by the respondent in defending these proceedings. We are also minded to consider making recommendations in order to alleviate the claimant's injury to feelings by ensuring the respondent takes positive steps to avoid this situation arising again.

10 The claimant's compensation shall be uplifted by 20% because of respondent's complete failure to comply with the ACAS Code of Practice in relation to the claimant's grievance about short term measures to assist her transitioning.

REASONS

Preamble

1. Pages referred to in square brackets in these Reasons are page numbers in the bundle unless otherwise stated. The Claimant presented a Claim Form on the 28 September 2018 which was in time in respect of the last acts complained of. She had complied with the Early Conciliation requirements. The claims were for constructive unfair dismissal, direct discrimination or harassment because of/related to gender reassignment and sexual orientation, and victimisation. The Respondent submitted a Response defending the claims but making it clear that it was not in a position to say whether numerous allegations of harassment had taken place. The Respondent relied on the statutory defence in that regard. The case has been case managed over quite some time and during the course of the proceedings, the Claimant's name was amended from her "male name" i.e. birth name to her preferred gender reassigned name - "Ms. Rose Taylor". Case management resulted in quite a lengthy and complicated series of schedules relating to various allegations – titled Further & Better Particulars [69H to 69S] plus a list of issues [69T and 69U]. During the course of the case management, the Respondent raised for the first time the question of whether the Equality Act 2010 ("EA10") protected the Claimant on the basis that she had described herself to members of the Respondent's staff as "gender-fluid" and (as we have found) "transitioning", but with no intention of undergoing surgery. The Claimant had also told the Respondent she wished to dress in a male style on some days and a female style on other days. There were discussions about the Claimant's preferred name but, ultimately, she did not change from her male name to her female name during the course of her employment with Jaguar Land Rover Limited. Consequently, the

documentary evidence largely referred to the claimant by her birth name and as he/him. In these reasons we have substituted the Claimant's preferred form of address when quoting from such documents in italics to make it clear that the actual documents use a male form of address.

2. We were told that the question of whether a non-binary, gender fluid person has the protected characteristic of gender reassignment is a novel point of law and that was one of the issues we had to determine after hearing the evidence.

3. There was a joint bundle of documents - R1. In addition to the bundle, we had opening submissions from the Respondent and from the Claimant - R2 and C1, and closing submissions - R3 and C5. The Claimant's representative had also provided an extract from Hansard - C2, a Schedule of Loss - C3 and a Chronology and Cast List - C4. The latter document was very helpful, and we thank her for it. In addition, the Tribunal has (of our own motion) had reference to documents which we have labelled T1 - the Government's Explanatory Note relating to the definition of gender reassignment; T2 – sections of the Equality Act Code on Practice; and T3 - a document provided by the Government Equalities Office- "Guidance on recruitment and retention of transgender staff".

Witnesses

4. Written witness statements were produced for all witnesses and those were taken as read. The Claimant gave evidence in support of her case and did not call any other witnesses. The Respondent called: Mr Mark Poole - the Claimant's Line Manager at the time of the events in question; Mr Findlay Morrison - Mr Poole's Line Manager at the relevant time; Mr Michael Glithero – the person who dealt with what was ultimately treated as a grievance by the Respondent, but not to the Claimant's satisfaction; and Mr Peter Bingham - who dealt with the grievance appeal on the papers. All of those witnesses were managers and/or senior managers in the engineering department. There was also a witness statement from Ms Laura Bache from Human Resources who did not attend to give evidence. That statement was taken as read and we have given it such evidential value as we considered it to be appropriate in the circumstances.

Findings of fact

5. From the evidence that we saw and heard the Employment Tribunal made the following primary Findings of Fact relevant to the issues that we had to determine.

6. The Claimant commenced working at the Respondent's Jaguar Whitley site as an agency worker from around July 1998. She commenced employment with the Respondent as a permanent employee on the on the 14 June 1999. At that point the Respondent's title was Jaguar Cars Ltd. That entity later came under the umbrella of Ford Cars Ltd and subsequently became Jaguar Land Rover Ltd which was acquired by Tata Motors Ltd in 2008. The correct Respondent for these purposes is Jaguar Land Rover Ltd ("JLR"). The Claimant had continuous service from 14 June 2000 to the effective date of termination of her employment. The

Claimant's contract of employment [77 onwards] provided that the Claimant was required to give at least one month's notice in writing if she intended to leave the Respondent's employment. By 2006, the Claimant had been promoted to the position of Infotainment Simulation and Architecture Engineer and, in that role, at the time of events in question, reported to Mr Mark Poole the Navigations System Development Manager. The Claimant according to Mr Poole's witness statement "was a very capable and quiet team member and a bright engineer" [paragraph 2 WS – Mr Poole]. The Claimant had known Mr Poole for a long time, but they had not always worked together. Mr Poole was aware that the Claimant had for some years considered herself to be a gay male. Mr Poole's evidence was that the Claimant's sexual orientation had not been an issue. The Claimant did not choose to be overt about her sexual orientation in the workplace. The Claimant's performance reviews, including one undertaking shortly before the termination of her employment showed that she was a high performer and regarded as being very competent at her job [80-85].

7. During the period when the business entity which is now Jaguar Land Rover Ltd was owned by Ford, Ford had facilitated a number of Employee Resource Groups/networks including a lesbian, gay, bisexual and trans plus ("LGBT+") network which the Claimant had been a member of. There was (apparently) a body called "the Diversity Committee" (also referred to as "the Diversity Council") at the point when the Respondent became part of the Tata group of companies, but it became apparent during the hearing before us that this Committee is no longer in existence or is entirely moribund because none of the Respondent's witnesses had heard of it. The Claimant's evidence was that when she queried who the Committee members were, and what its function was, she was informed that: "It didn't really do anything, but could not be got rid of for political reasons".

8. At the time of the events in question, the Respondent employed around 43,000 employees plus 5 -10,000 agency workers which meant the total number of staff was approximately 50,000. Consequently, the Respondent is one of the biggest, if not the biggest, employer in the West Midlands. The Respondent has an extensive Human Resources Team which operates centrally and also provides Advisors with responsibility for individual departments. It is fair to say that the Human Resources Team has not functioned properly or provided accurate and professional advice in this case.

9. Surprisingly, there was no Equal Opportunities Policy in the bundle. All of the Respondent's witnesses thought that there must be one, but none of them had actually seen it. All of them appeared to be confused between the Dignity at Work Policy (which concerns bullying and harassment in the workplace) and equality and diversity issues. After the evidence was completed, and on the day when we heard submissions, the policy ("the "Diversity & Equal Opportunities Agreement") was handed in. It is a collective agreement between the Respondent and the relevant Trade Unions. Although it was in force at the relevant time none of the Managers who dealt with the Claimant was advised to read it. The collective agreement [page 10 of the document at 526 onwards] required the Respondent, with the support of the Trade Unions: "To ensure that all

employees are aware of their personal and legal obligations to avoid discrimination in accordance with the Equality Opportunities Policy… that employees were…informed of any developments/changes on an ongoing basis.. and that behaviour and language contrary to the spirit of the agreement will not be tolerated and that failure of individuals to observe those principles might lead to disciplinary action". It also provided that training and communication in support of the agreement would be provided as follows: communication to employees about the detail of the equal opportunities agreement; and training for supervisory and management staff [page 11 of the agreement]. Finally, the agreement stated that: "All individuals must without exception observe the requirements of the policy. Immediate supervisors and other employees must apply its principles within all company establishments and on all company business wherever they are. Failure to observe the policy could result in disciplinary action" [page 12 of the agreement]. The sad truth, as this case very clearly demonstrates, is that no steps were taken to implement it or bring it to the attention of employees or managers - none of the managers who gave evidence had received specific training about it.

10. The Respondent also had (and has) a Dignity at Work Procedure [91 onwards]. The managers who gave evidence were aware of this procedure, although we formed the view that they confused it with, or thought it was, an equality and diversity policy. Under "Scope" it states that it applies to all Jaguar Land Rover employees, independent contractors, agency employees and other individuals while on company premises or engaged in company business [91]. There is a "Definitions" section which provides definitions and examples of the type of behaviour that may constitute harassment, bullying, and victimisation. Harassment is defined as unwanted conduct, that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment. The procedure states harassment is related to the protected characteristics of gender (including gender reassignment), race, colour, ethnicity, nationality, religion and/or religious belief, sexual orientation, age, and disability. The procedure provides examples of the kinds of behaviour that could be defined as harassment and states this would include name calling, using very inappropriate names, banter, practical jokes, suggestive comments, abusive language, jokes, posters, assault, insulting behaviour or gestures and circulation of offensive material including the use of email. The procedure states that: "Harassment may be directed at an individual or group and can be a single incident or a behaviour that persists over a period of time; and it may be physical or visual, verbal or non-verbal behaviour. It can be intentional or unintentional and is defined by reference to the impact on the recipient". The procedure also defines bullying. Victimisation was defined as follows: "Victimisation is where an individual is treated less favourably because he or she is suspected or known to have complained or given evidence about alleged inappropriate conduct**.** Examples of behaviour include talking in a negative way about the individual concerned, or labelling someone as a "troublemaker"" [92]. The procedure explains (under the heading "Context"): "It is the impact of our behaviour rather than our intention that primarily defines acts of harassment or bullying". Under the heading "Procedure for Implementation" it states: "Complaints of harassment whether formal or

informal will be taken seriously. Often there are no witnesses to act upon to the alleged acts of harassment, this does not mean, however that a complaint cannot be acted on, in all cases complaints will be thoroughly and sensitively handled." Under "Roles and Responsibilities" the procedure says: "Supervisors and managers have specific responsibilities to create a climate at work that is free from harassment." Examples of how this could be done are: "Explaining the company's procedure to employees for whom you are responsible; setting an example; and supporting and protecting individuals who complain of harassment". The procedure also makes it clear that: "All employees have a responsibility to help maintain a workplace that is free from harassment and where the dignity of others is respected". It explains that employees have a duty to challenge unacceptable behaviour by bringing it to the attention of the individual concerned, or to a supervisor or manager. There is a section "Ways to resolve an issue" which states: "Most recipients of harassment, simply want the harassment to stop. Informal methods of dealing with the situation are often the quickest and lowest profile and most effective ways and means of achieving this" [92]. As regards informal resolution, the procedure states: "Where an employee would prefer to discuss an issue with someone of the same sex, sexual orientation, religion or ethnicity, Human Resources will arrange or endeavour to arrange a suitable alternative." Although this does not refer to other protected characteristics including gender reassignment, it can be inferred that this ought to apply across the board. The procedure states that if a person feels unable to speak to someone such as their line manager, they can get support from Occupational Health, or one of the Diversity Committee or Council Members for their site or function, or one of the Diversity Team Members. For these purposes, it has already been noted that the Diversity Council/Committee did not appear to exist in any meaningful form. There was no Diversity Team until after the Claimant raised diversity issues with the Human Resources team.

11. At this point, we consider it appropriate to set out some context in respect of this case. It has been quite rightly accepted by the Respondent's witnesses that the Claimant was subjected to harassment related to gender reassignment over a sustained and prolonged period of time. The Respondent's witnesses also accepted that the Claimant raised concerns about this on numerous occasions but that no action was taken to prevent the harassment from occurring and/or continuing. This was because the Respondent's managers took the view that unless the Claimant "named names", there was nothing they could do. In other words, they viewed harassment as a purely disciplinary matter, where the victim must identify the alleged perpetrator and the perpetrator, if found guilty, would then be dealt with appropriately. Clearly, that is not the only way the Respondent could have dealt with this situation. The Claimant was, understandably in our view, reluctant to name names because she thought the situation would get worse. In our collective experience that is a common outcome. If an employee is disciplined for harassing a colleague, their workmates may treat the colleague who made a complaint badly i.e. victimise them. There were, as we shall later explain, other ways of sending a clear message that such behaviour is unacceptable and would not be tolerated.

12. Also, by way of context, the Claimant was eventually referred to Occupational Health because of the stress, anxiety, and distress she experienced as a result of harassment. In our judgement, this was dealing with the symptoms or consequences of the problem, rather than the cause. Of course, Occupational Health may provide advice about how the Claimant could try to manage the impact that harassment was having on her health, but the real point here is that Occupational Health could not deal with the cause i.e. a sustained course of wholly unacceptable harassment in the workplace.

13. The site where the Claimant was based, which is in Gaydon, has 7,000 employees and the building the Claimant worked in has over 1,000 employees. There were 450 people in the Infotainment Department, all working in an open-plan office on one floor. Furthermore, the site is adjacent to the Aston Martin site, which is likely to have several thousand employees. In addition, delivery drivers regularly visit the Gaydon site. This illustrates the fact that someone in the Claimant's situation could be exposed to harassment at any point, on any day, by a large number of people when just going about her business on the site.

14. There was no evidence whatsoever that the managers who gave evidence, or indeed anyone else working for the Respondent, had been trained on the Dignity at Work procedure. Some of the managers who gave evidence vaguely recalled that that they may have had some form of training on equal opportunities many years previously. It does not appear that the people who dealt with the Claimant throughout this period had regard to the Dignity at Work procedure, even though they were aware of it when they dealt with the Claimant's case. By way of example, Mr Bingham told us that when he dealt with the Claimant's grievance appeal, he did not look at the procedure and simply relied on what he was told by a Human Resources Advisor. We heard no evidence from any member of the Human Resources Team.

15. On the 24 January 2017, the Claimant raised some questions with Human Resources - this is referred to by the Respondent as "raising a Human Resources ticket". In particular, she questioned whether JLR had an Employee Resource Group ("ERG") for LGBT+ employees and asked whether, if not, it would be possible to start one and whether there was HR guidance on how best to progress it. The Claimant also queried whether there was an HR Representative to work with, or Department responsible for diversity that should be involved, and whether there was guidance on what company resources should, or should not be used. The Claimant observed that there was no visible group representing the interests of LGBT+ people and said it seemed to be a small investment which could have a positive impact on the business. The Claimant said she had been with the Respondent for about 18 years and during that time there was some representation through Ford for a short while, but there was nothing of the kind at JLR. In raising this ticket, the claimant had identified an issue which had not previously been considered. By way of example, on 1 February 2017, Ms Helen Rutter, Human Resources Manager responded: "Thanks for raising this, it is a subject that is largely unaddressed in JLR and not to my knowledge for any particular reason. I will pick this up

internally within HR. There is a particular HR form I have in mind and noting your interest I will come back to you" [212].

16. This set into motion an initiative which was predominantly driven by Human Resources for the Claimant to spearhead or champion the rights of LGBT+, be instrumental in setting up an ERG/network at JLR, and (as it was envisaged at that point in time) be involved in developing suitable policies.

17. However, what became sadly apparent during the Hearing, in response to a question from one of the Employment Tribunal members, was that not only was there no LGBT+ ERG/network, but there were also no ERGs/networks at all. There were no support mechanisms for staff with protected characteristics, and there was no person designated to deal with diversity and equality issues. In fact, it was positively asserted on behalf of the Respondent, that the whole reason that Ms Laura Bache was eventually moved into a Human Resources role with responsibility for assisting with setting up ERGs/networks, was because the need to do so had been identified by the Claimant.

18. This came as a considerable surprise to us. The Claimant, in response to a question from Mr Liburd said: "Yes it's staggering to think that [there was nothing] in 2017". We completely agree. The other point we would make is that although the Claimant had raised this issue, she had willingly, but not by choice, become a champion, or poster girl, for LGBT+ rights (and, arguably the wider interests of people with protected characteristics) because Human Resources recognised there was a need to improve the Respondent's lack of engagement with equality and diversity issues. It was also clear to us that in order to have the backing to do so, the members of the Human Resources Team who dealt with the claimant over the ERG issue, believed that a business case had to be made to the Respondent's Board.

19. It was the Claimant's evidence that in March 2017 she told Ms Helen Rutter that she was a transgender and thought herself to be on part of a spectrum, transitioning from the male to the female gender identity. We accepted that. At that point, the Claimant had not told anyone else at work, although she was dressing in female clothes outside work. Her evidence was that she had thrown away all her male clothing with the exception of her shoes (because of her foot size). It is also fair to say that wearing female clothing need not include wearing dresses. It is very common for women to wear blouses and trousers in the workplace.

20. On the 5 April 2017, the Claimant sent an email to her Line Manager, Mr Poole, in which she raised the fact that she was transgender. She said: "This is an umbrella term, and in my case the precise word would be gender fluid. I have no plans for surgical transition. HR is aware and I was asked if I wanted to be part of the Transition at Work Policy that is in the early stages and I think this is a good idea… Whilst I am open to discuss on this topic, it is hard for me and some questions I will not be answering at this time. I suspect that with time, I will be more open, however tough this may be, I think this is an important part of starting an Employee Resource Group and ultimately towards being happier at work,

which is what this is about. I have spoken to some of the team this week and they are fine" [123]. Mr Poole responded saying "I am so glad you feel you are able to discuss this with me and I want to assure you that you have my full support".

21. On the 22 May 2017, the Claimant sent an email to Mr Poole saying: "I have a lot of anxiety about the way I dress for work, my hesitation is that being gender fluid, I have been unsure how I should/can express myself at work and to some degree, it will a learning experience. I think there are false expectations, I should present myself as a "passing woman" I don't agree that makeup, wig and everything else that entails is right for me and sitting at a desk all day dressed like that would be humiliating and uncomfortable, therefore I intend to present in a mixed mode occasionally. I think that the hardest part will be the first day in the office." The Claimant went on to describe the fact that she wanted to fix a day to go to work dressed in female clothing [126].

22. A conversation to discuss the claimant's emails took place between the Claimant and Mr Poole on 24 May 2017. The Claimant had prepared a PowerPoint to explain her situation and some of the issues which needed addressing because she realised it would be a difficult conversation. During the course of that conversation, the Claimant says that Mr Poole described her as "not normal". The Claimant was keeping a log of transitioning at work, the content of which has not been disputed. In that log she recorded Mr Poole as having made the "not normal" comment when describing her situation, that he told her "not to dress" [we infer this means in female clothes] and "being told to use the disabled toilets" [377]. We concluded that was an accurate reflection of the conversation. We decided that (contrary to his evidence) Mr Poole did describe the situation as "not normal", but that the Claimant took that to mean that he thought that she was "not normal" because she was, as she said in evidence, "the situation". In terms of the "not to dress", we concluded that this comment was as a result of Mr Poole requesting a delay to the date for dressing in women's clothing, so that he could discuss the matter with his line manager Mr Findlay Morrison. Mr Poole's evidence was that he wanted to take the Claimant's lead but to wait until Mr Morrison had returned from a work-related trip abroad. As to "being told to use the disabled toilets", Mr Poole accepted he had said this to the Claimant. He said this was because there was a previous occasion when a fellow manager was dealing with a transitioning colleague and that the manager concerned was advised (we infer by Human Resources) to tell the colleague to use the disabled toilets. We accepted that this was the reason why Mr Poole thought it was appropriate to advise the claimant to use the disabled toilets.

23. Clearly this was not appropriate advice. Firstly, telling a transitioning person to use the disabled toilets is, at the very least, potentially offensive to them because it suggests that their protected characteristic equates to a disability. Secondly, disabled toilets are for disabled people to use and should not be used by other people. The fact is that this advice had been given to a number of transitioning people, including the colleague referred to by Mr Poole, the Claimant herself, and to a transgender colleague on another site. The Claimant became aware of that colleague's situation

because that colleague alleged that having to use the disabled toilets had caused her to develop Irritable Bowel Syndrome. Although the latter is technically hearsay evidence, it is of course admissible, and we accepted it. It is also fair to say that the Respondent's witnesses when cross-examined on this point, accepted in hindsight that it was not appropriate advice.

24. In this context, it is relevant to note that some advice was given to the Claimant's department managers and HR on 16 June 2017 by Ms Helen Rutter of Human Resources [126G to I]. She said transitioning was not a very common situation and merited pause for thought. She gave an example of another colleague who was transitioning and how that had been dealt with, but continued: "I would say at this point that no two cases are the same and the destination may change once the individual starts on a journey, for instance, from choosing to dress or present as a new sex, through to undergoing gender reassignment, then that is probably a long road". She went on to make some further points and said: "The watch outs are toilets, which ones will *the Claimant* be using, please don't request that *she* uses the disabled toilets as this puts us straight in the firing line on the discrimination front. If this becomes *her* own decision at some point, that's fine." Ms Rutter also said another 'watch out' was "Unhelpful comments from colleagues", and that: "The top tip is to keep dialogue open". So, it would be fair to say that at that stage, the toilet problem was acknowledged as a sensitive issue by Ms Rutter, as was the fact that the Claimant could be exposed to comments once it became apparent that she was transitioning e.g. because of her clothing.

25. On the 16 July 2017, the Claimant got in touch with Ms Suzanne Beaumont (Senior HR Business Partner, Vehicle Engineering). She said: "Hi Suzanne, I thought I should reach out and say hello as I know you have had a recent conversation with my senior manager, Findlay Morrison, and I look forward to having a conversation. In the meantime, I thought it might be useful to summarise a bit." The Claimant went on to say she had two separate work streams ongoing with HR. The first was ticket 92717 LGBT Resource Group. The claimant explained that she had raised that ticket on her fortieth birthday in January because she was so depressed and a big part of that was social isolation and not being able to build connections. The Claimant pointed out that there are some protected characteristics which are unseen, such as being gay, and as such can be invisible, unless the person chooses to manifest that aspect of their personality; whereas there are other protected characteristics which are visible, such as the colour of one's skin or some physical disabilities. More material, for these purposes was the second ticket - number 135758 Transition at Work. In respect of that ticket, the Claimant said she had anxiety issues about how I dress at work: "I never dress as a man except at work. I have discussed this with Mark (Poole), Fin (Morrison) and Kirsty Pitcher (a Human Resources Director), so they have a reasonable understanding. I spoke to the "D" Grades on my team so they would know I am trans, but I suspect they don't really understand what this means…. My main issue is around understanding and planning the dress-code to my situation. Transgender is an umbrella term and it can take a lifetime to really understand who you are. I would describe my situation as starting social transition at work for male to female transition,

currently, I would say "genderfluid" but this could be part of the transgender journey and not the final destination." The Claimant went on to say she was not sure what the toilet arrangements should be and that she was looking for a temporary dress-code with monitoring in the short term and would like consideration as to where she should be working. She gave an example of possibly spending 50% of her work time in the Infotainment Department and 50% in the Diversity & Inclusion Department, although as already noted, there was no such Department at that time, so it would have been 50% in Human Resources, dealing with diversity and inclusion issues (we assume, by reference to setting up an LGBT+ ERG/network).

26. So, at this point, it was abundantly clear that there were two separate issues: the wider issue of visibility and support for LGBT+ within Jaguar Land Rover; and the separate matter of how the Claimant was to be supported to transition in the workplace i.e. how she was to dress, what toilet she was to use, and monitoring the situation, to provide help and support.

27. On the 19 June 2017, the Claimant was walking through a building described as Building 523 and recorded that someone who was talking to a colleague had said about wanting "to get rid of all the gay people" [377]. We accepted that that comment was made – the Claimant's evidence was not challenged, and she recorded it contemporaneously. It was not directed at the Claimant but we accepted that it was upsetting and amounted to harassment related to sexual orientation because harassment in law can be in respect of a comment made about another person or a general comment, such as this comment.

28. On the 26 June 2017, the Claimant explained the situation to the team she worked in [Claim Form paragraph 9] after which the Claimant commenced dressing in female mode two days per week.

29. On the 30 June 2017, while in Building 523, on the Gaydon site, the Claimant recorded that one of the Respondent's employees (who is named in the Claim Form, but it is unnecessary to name him for these purposes) said to her: "I was checking out your dress, looked up, saw it was you and my jaw dropped" [377]. The Claimant was upset by that. It was clearly an offensive and unwanted comment.

30. On 30 June 2017, an HR Case Management Advisor, called Ms Amy Reynolds, who had responsibility for dealing with some of the matters raised by the Claimant, sent an email to ask how she was getting on. In her reply, the Claimant firstly referred to her work on starting up the LGBT+ ERG, and how the proposal to set up a network could be communicated to the workforce, so that people could join it; the possibility of having a regular midlands social event for the LGBT+ community and supporters, with a view to organising a formal launch event. The claimant then raised two other points. She asked where she should be working, giving the example 50% Diversity and Inclusion. The claimant then said: "When is the company going to realise that LGBT people exist and need support? … It makes you feel worthless and undervalued and we are continually ignored, what can be done to fix this?" [126J]. The Claimant's

evidence was that she got no response from Ms Reynolds and so followed the matter up in person with her and received vague platitudes but no concrete proposals.

31. On 10 July 2017, whilst outside Building 523, a male employee (named in the Claim Form, but not in these reasons) said to the Claimant whilst passing in the opposite direction: "So what's going on? Are you going to have your bits chopped off?" The Claimant recorded this in her transitioning diary [377]. Her evidence was unchallenged. We accepted that it was said - it was obviously an offensive and unwanted comment.

32. On the 18 July 2017, the Claimant submitted a confidential report to a Mr Guy Higgins, the Respondent's Director of Compliance and Ethics [133-134]. The report firstly dealt with the wider picture (i.e. ERGs).The Claimant said that all major companies have a number of ERGs groups and gave some examples. She then said: "So we are not doing what other companies are doing, doing nothing is costing us millions in lost productivity and every day LGBT people are unfairly suffering. Since raising the initial ticket in January no visible progress has been made". The Claimant made reference to the fact that a Diversity & Inclusion Manager was to be recruited. The Claimant said that due to lack of trust in JLR, LGBT+ staff did not feel able to come forward to discuss their issues. The Claimant gave some examples of other LGBT+ staff who had experienced problems at work.

33. The Claimant then referred to the second work ticket concerning support for her during transitioning. She said: "I am directly suffering due to a lack of LGBT support network within JLR, I am in a situation of having no definition of what is acceptable or that anything can be done. I am expected to suffer in silence, while I expect there will be some adjustment by employees, I may have known for a long time, the least the company could do is to sort out an Employee Resource Group. Comments to me have included: "What's going on here? Are you "going to have your bits chopped off?". I have been trying to push things forward and… the reason for highlighting this is to give it serious visibility and we need to start understanding that this is not a trivial issue".

34. Mr Higgins replied on the 19 July 2017 querying whether the Claimant wanted this to be a confidential issue for him to take forward or whether her name could be associated with it [129]. He proposed looking into the matter with the Human Resources Leadership Team. The Claimant replied making reference to protecting those around her and her family.

35. The Claimant referred to personal circumstances such as the fact that she has children and that her male partner who died. She said that any investigation into allegations can make things worse for the complainant and that; "Other companies do a lot of work to try and support and educate people". She gave examples of outreach work she had done to make links with other organisations. She said that other engineering companies, such as Atkins and Airbus had launched LGBT networks. The Claimant confirmed that her name could be used [128-129].

36. Mr Higgins replied on the 20 July 2017, saying that he had made some initial enquiries with the HR Leadership Team and had been informed that the Claimant was in discussion with Ms Kirsty Pitcher about what the company could and should be doing in this area. He then said: "I think there are two parts to dealing with the types of issue you raise, the proactive element of fostering an appropriate environment and support mechanisms, and the reactive element of addressing specific cases of inappropriate behaviour [128].

37. In relation to the reactive elements, he went on to say: "In order to have a meaningful investigation into a particular allegation, we do need as much information as possible about who has allegedly done what, where and when etc.… and whatever evidence there is in support".

38. This acknowledges there were two strands: the broader proactive long-term strategy (ERGs etc.); and providing support and a good working environment for the claimant in the short-term. The latter included protecting the claimant from unacceptable and discriminatory comments. Unfortunately, as can be seen from Mr Higgins' reply, the only way the Respondent was prepared to do so, was if the Claimant named names. As already noted, if the Claimant had been prepared to do so, it was likely that her situation would have worsened by being ostracised or exposed to further abuse.

39. The Claimant's reply referred to her own experience of transitioning at work with no support. She said "On the reactive side, I am unable to raise a specific case. The point for raising a case [i.e. a ticket] as I did was to point out specific examples of problems that are going on. Investigation of everyone could lead to lots of problems i.e. people might not want their sexual identity to come to light." The Claimant said that: "Leaders probably did not understand the effect of what they were saying. HR didn't know how to support staff and that employees did not feel able to speak up" [127]. So, at this point, the Claimant made it clear that there was a need for reactive action, but that she did not want to raise a specific case. As we have already observed, it would not have been necessary to raise a specific case for positive action to have been taken under the Dignity at Work procedure. Instead the way that it was dealt with was to put the onus on the victim to initiate action against specific alleged perpetrators which, to our minds, missed the point. This was a missed opportunity and, if robust, appropriate action had been taken to reinforce the requirement to comply with the procedure and treat all colleagues with respect, we would not be here today.

40. On 22 July 2017, the Claimant raised the fact that offensive comments were being made to her with Ms Suzanne Beaumont and was told: "Not to be sensitive in relation to the reaction of her colleagues and the issues *she* may face when transitioning at work". That was unchallenged evidence and we accepted that it occurred because it was one of the many issues the Claimant recorded at the time [377]. Clearly the response was offensive and unsupportive, and implied that the Claimant was wrong to complain.

41. At this point, as far as we can tell, the Claimant was dealing with at least four people from Human Resources – Ms Amy Reynolds, Ms Kirsty Pitcher, Ms Suzanne Beaumont, and Ms Helen Rutter plus, although not a member of the Human Resources team, Mr Guy Higgins. Having to deal with a variety of people is confusing, and carries with it the potential for no one to take ownership of dealing with a problem. It was an unproductive and unhelpful approach which eventually resulted in the second ticket never being resolved. We thought that a far better approach would have been to have one individual responsible for dealing with the personal support issues around the Claimant's transitioning, and a different named person to help with the ERG/network issue, because in reality they are two separate things. In reality, as time went on, the two issues blurred into one and, from the Respondent's perspective, the proactive long-term plan became the solution to the claimant's individual situation.

42. On the 24 July 2017, the Claimant raised a query about changing the name of her access card with Ms Amy Reynolds. It took some while for Ms Amy Reynolds to respond. On 7 November she emailed to say: "For payroll reasons, there can only be one name on the ID card and there might be a possibility of two photographs" [180B]. The Claimant responded saying that she wanted to put that issue on hold. Consequently, the Claimant retained her male name during the course of her employment with the Respondent.

43. On the 7 August 2017, whilst using the male toilets, the Claimant overheard two of her colleagues talking about her: The first said: "Have you seen it"? and the other replied: "I saw "it" in the atrium". The Claimant reported that to Ms Kirsty Pitcher who responded by saying: "What else would you want them to call you?" The Claimant's evidence on this point was unchallenged and we accepted it. That was a truly appalling response to a very serious complaint. To call a human being "it" is completely unacceptable. The Claimant's evidence was that by this point she was not really sure what sort of comments were appropriate and, when cross-examined about this, said that since she was being told by Human Resources not to be sensitive and: "What else would you want them to call you?", this made her feel as though she was the one with the problem. We completely understood how she felt.

44. On 18 to 22 September 2017, the Claimant was off sick. Her evidence was that this was because of depression. It is pertinent to note that prior to this she had no significant history of sickness absence, or of mental illness as far as we are aware.

45. On the 19 September 2017, while the Claimant was still off sick, she sent an email to Mr Findlay Morrison. In particular, she referred to a number of issues affecting her health and causing stress. She said: "I don't know what toilet to use, I raised this three times with no progress over six weeks. I spoke to HR twice about moving as part of the transition at work, but this was ignored. As a young engineer I face being picked on, laughed at, [subjected to] homophobic abuse, and isolated. It has not been easy against this backdrop". The Claimant made reference to the comments set out above, and said: "I have had negative comments and advice from Human Resources". She made reference to the "Not to be

sensitive", and the "What would you want them to call you?" comments. The Claimant then said: "When trying to understand the dress-code, I was told: "No allowances would be made for transition" and that when she asked Human Resources for support and guidance, she received no answer. The Claimant said she had raised two HR tickets but there had been no progress or resolution and that: "Vehicle engineering is like a step back in time. We are expected not to be sensitive. It sets the tone that you should expect in this environment." The Claimant also referred to a lack of LGBT+ visibility in JLR and the fact that there was no diversity leader to speak up for the rights of LGBT+ people. She said that JLR was incurring costs because the culture was making people unwell. The Claimant also made reference to attending a mental health course run by MIND around Eastertime [158-159].

46. This was clearly a cry for help and support, particularly in relation to the specific issues that were affecting the Claimant around the transitioning i.e. toilets, dress code and harassment.

47. Mr Morrison replied on the 21 September 2017 asking for a prognosis and enquiring when the Claimant was likely to be fit to return to work. He asked if she would like an Occupational Health referral. He went on to say: "I'd like to seek some solutions to the issues raised in your email and due to the seriousness of the allegations, I will need HR support. Are there any specific individuals in HR who have let you down because I can request different support? Are you happy to continue with Amy Reynolds as Case Manager?" [157].

48. In reply, on the same date, the Claimant said "she was not sure of the Occupational Health referral or what it could do and made reference to the steps she was taking to improve her health. She said, "I have already suggested to Mark [i.e. Mr Poole} that the grievance process would make sense. I think there are too many conversations going on and it does need looking at as a whole, ideally somebody without any previous who can be objective about what's been going on". The Claimant went on to say she would like to see some progress.

49. There was further correspondence which resulted in Mr Morrison suggesting a different HR Manager should deal with the Claimant. A decision was taken that the Claimant's email should be treated as a formal grievance. There was no attempt to pursue an informal resolution. The Claimant's evidence was that she had not sought to raise a formal grievance. We accepted that. We inferred that the decision was taken on HR advice, because the evidence of the managers who dealt with the grievance and appeal, was that they relied on HR to provide guidance as to how to proceed.

50. In terms of the Claimant's health situation, we consider that the cause of her sickness absence should have triggered a more positive and proactive response or, to put it another way, set off alarm bells. The Respondent had a duty of care to the Claimant in respect of her health and wellbeing, but the Respondent's response was dismissive. As referred to previously, the referral to Occupational Health medicalised the situation and implied that the claimant needed treatment but failed to address the

reason she was ill. This comes back to the point we have made (and will no doubt reiterate) that in a situation such as this, if you do not remove the cause, there is little point treating the symptoms resulting from it because they are unlikely to resolve. At a subconscious level, the implication is that the victim is at fault, or is the problem, rather than the employer. By contrast, we are aware from other cases involving this Respondent, that health and safety on the production line is taken very seriously and positive action is taken to learn from accidents, and to seek to avoid recurrence ("toolbox talks" etc.) The ongoing harassment experienced by the Claimant was not seen as a health and safety issue but, properly analysed, it was.

51. On the 27 September 2017, one of the Respondent's senior managers said to the Claimant (in reference to her shoes): "How do you get around in them, it looks hard work".

52. On the 1 October 2017, the Claimant was walking towards the onsite coffee shop, at a different site (the Whitley Site in Coventry), when a female colleague looked at her and said: "Oh my God!".

53. On the 31 October 2017, one of the Respondent's contractors commented on the Claimant's outfit saying: "Is this for Halloween?".

54. On the 17 November 2017, the Claimant was stopped by a female engineer who said, "it's nice to see you in your attire, you have cracking legs".

55. The Claimant evidence on the above points was unchallenged and we accepted it because the Claimant was a very credible witness and had made contemporaneous notes. Unfortunately, by this point, the Claimant was being exposed to harassment in the form of wholly unacceptable comments on a regular basis, and nothing was done to nip it in the bud. The consequences of that inaction were that the Claimant became increasingly mentally unwell, ceased to work for the Respondent, and, ultimately, that we are all sitting here today.

56. On the 6 October 2017, the Claimant wrote to Ms Vanessa Morris, the Human Resources advisor who was providing support on her grievance to Mr Michael Glithero (a Senior Manager in engineering who was to hear it). She said: "Thank you for setting up the meeting for the JLR initiated Grievance Hearing". The Claimant said she did not intend to provide any representation at the meeting but had collated some information in preparation. On 9 October 2017 there was an email exchange between Ms Morris and Mr Glithero [160B-160A] Ms Morris said that her Line Manager, Ms Helen Rutter, had told her that the Respondent intended to employ someone to work on diversity policies, ERGs etc. and the intention will be engage with the Claimant and other interested parties to capture their feedback. She said: "So it looks like the policy side may be in hand or at least progressing with someone who specialises in this brought in". Mr Glithero replied saying that he had not read all the information that the Claimant had had sent and thought it best to speak to the Claimant at the proposed Stage One Meeting. A person called Vanessa , who worked in HR, sent an email saying that she had read most of the Claimant's written

submissions, that it was mostly about benchmarking and statistics, and that the Claimant had also made reference to meeting a manager on a course who had told her he did not feel able to come out as gay at work.

57. As already noted, the decision to engage someone in HR to lead on equality and to diversity work, came about because the Claimant had brought the lack of corporate action on those issues to the Respondent's attention. Ultimately, the Respondent did not engage a specialist and the person who got the role (Ms Laura Bache) had already been working in Human Resources at JLR, in what she described in her witness statement as "an organisational design focused role within the HR function". Ms Bache's statement confirmed that she moved into the Inclusion and Representation Manager role in 2018, but had been focusing on that work from September 2017.

58. There was a grievance meeting on the 11 October 2017 [161-165]. There were discussions about the two strands i.e. the long-term strategic work and the short-term support for the claimant to transition at work, including concerns about her health. It is fair to say that most of the conversation related to the former, specifically to Ms Bache and how things were going to change for the better with her appointment. For example, the Claimant also referred to having set up links with the LGBT+ network in Rolls Royce and with National Grid in Solihull which could be useful to Ms Bache and to setting up an ERG.

59. For these purposes, we shall focus on the other strand i.e. short-term support. The Claimant raised the toilet issue, saying: "I am transgender, and I struggle with what toilet I should use… I understand it is difficult to resolve but I am not having any feedback and who will fix it?". Mr Glithero replied that HR must make a clear and unambiguous statement about that quickly. Secondly, the Claimant raised bullying and harassment and said: "I get lots of comments and at some level I should expect it, but on some level, I don't know what is acceptable. We try to make excuses and do not feel like we can say anything as it gets people into trouble. I feel isolated in the office, you look around the office and you don't see anyone like yourself. For me, it is some visible support, I need in the interim". The Claimant also said: "We promote diversity but have not had it for five years". When cross-examined about the significance of five years, the Claimant explained that she kept emails for five years because the projects she works on are long-term, and that when she checked through her emails, there were only two relating to LGBT+ issues, and neither promoted a diversity agenda (one was about how to target sales to the "pink pound" market).

60. In terms of the bullying and harassment, Mr Glithero said: "If you feel bullied, for direct help then the only way is "Who is it?" and absolutely up to you". He added that if the claimant thought that course of action was not appropriate, the Respondent, through Ms Bache, could look at communication guidance for the direct management group in Infotainment and the wider management group. Unfortunately, that did not happen. Consequently, the only way that the harassment against the Claimant was going to be dealt with was if she named names.

61. This is perhaps an opportune time to point out that what the Respondent could have done was issued a notice to employees highlighting serious concern at the highest level that that incidents had been reported of people being subjected to unacceptable harassment due to protected characteristics. Such a notice could have referred to the terms of the Dignity at Work procedure, which Mr Glithero had been advised by HR was relevant (or indeed the Equal Opportunities Policy if it had been drawn to his attention). The point is that this was a means of sending a messages that such behaviour (by reference to the examples in the procedure) was completely unacceptable and would be taken very seriously, and could result in disciplinary action. That would have provided comfort and support to the Claimant and, indeed, others in a similar situation. As to naming names, we have already observed that this could well have made the Claimant's situation worse and led to a spiralling problem. In our view, singling out individuals is a very unhelpful approach, and can deter other people from complaining about lack of respect from colleagues. A much more productive and positive approach would have been to give a clear message to the workforce and to contractors, about unacceptable conduct in the workplace and its potential consequences.

62. The Claimant was asked to say what a successful outcome to the grievance would look like and replied: "Success would look like visible support, interim steps, and some action being taken".

63. To summarise, at this point, the Claimant was being seen as a champion for driving forward the diversity and inclusion agenda and the Respondent's HR Department appeared to have some commitment to that strategic work. However, no meaningful action was being taken in respect of the lack of visible support for the Claimant as an individual, or tackling the abuse the Claimant was receiving.

64. Ms Vanessa Morris contacted Ms Bache after the meeting to say that in the interim the Claimant would like a statement about which toilets she should use. Ms Morris said she had run this past Ms Helen Rutter and someone called Judith and wanted to double-check before issuing a proposed statement: "I have liaised internally in HR and in the absence of a JLR policy, and while the company considers whether a suggestion such as gender-neutral toilets would be appropriate, we feel you should use the toilets you feel comfortable to use each day. We appreciate this will vary from day-to-day. However, if you do not feel comfortable using either the gents or the ladies, then please use the disabled toilets." It was somewhat surprising to us that Helen Rutter was proposing the disabled toilets as an option, given her previous comments about that. Ms Bache replied that day approving the statement as "a sensible response" on the same day and said that the issue of gender-neutral toilets would take more time to address [166H].

65. Consequently, and also on 11 October 2017, Ms Morris emailed the Claimant in the above terms [166]. As the Claimant's representative established in cross-examination of the Respondent's witnesses, this put the onus on the Claimant to decide which toilets to use and to deal with any challenges made by colleagues unhappy with her choice. There were other possibilities, such as designating some sets of toilets on its sites as

gender neutral, or possibly putting out a message to inform relevant staff which toilets the Claimant would be using.

66. Shortly afterwards, Ms Bache met the claimant to discuss LGBT+ work. She emailed Mr Glithero and Ms Morris to report back on that meeting. Ms Bache said that it would be helpful if the Claimant could have some dedicated time for her LGBT+ ERG/networking activities. She said that did not necessarily need to be much, but would show support from the business for all the extracurricular work that the Claimant was doing, such as work with an internal ERG/network and mentoring LGBT+ students. Ms Bache said that achieving a cultural change would improve the business so that: "People feel able to be open and accepted regardless of their sexuality and gender identity".

67. On 18 October 2017, the Claimant sent an update to Ms Morris and Mr Glithero [166A and B]. She referred to the comments set out in paragraphs 51 to 54. The Claimant said: "I am concerned about the statement made regarding toilets, other staff are transitioning and possibly don't have guidance. How do non-LGBT staff know what to expect to put them at ease if they are unsure? What about staff who are looking to transition and might not be brave enough to speak up?". The Claimant said that she had used the male toilets at the same time as a member of the security and that: "This was probably embarrassing for us both".

68. On the 26 October 2017, the Claimant emailed Laura Bache to reassure her that if she was concerned about the amount of work time the Claimant was devoting to diversity and inclusion activities, this had been discussed in her mid-year review and the feedback from the review was positive. Ms Bache responded saying: "Thanks for this, it's more from a perspective point of view on how we can make roles like yours work in the business. You are probably the only person I have come across who is operating in a network role, albeit it is not as formal as perhaps we'd like. So that means you have the challenge of showing how this role can add real value to the business and your personal development, all whilst maintaining performance in your role which is likely to be a bargaining chip with the business!" She added: "I am not at all concerned about your involvement in D and I, in fact I wish there were more of you in the business. As you the only person doing this type of role, I guess to really show how it can work, I was looking for reassurance that it's possible to take on the network responsibilities alongside a day job." She went on to say she agreed with the Claimant that an executive sponsor was required, and that it might be good for someone to share their perspective of being LGBT+ with the board. She finished by saying: "I am really happy to be working with you and genuinely believe we can get LBGT+ and diversity rocketing up the organisation's agenda" [170-171].

69. On the one hand the Respondent had the very laudable aim of including its staff in setting up networks and having ownership of them. On the other hand, the Claimant had been put in the position of being a unique champion for the purpose of demonstrating that diversity and inclusion work could fit with her role as a skilled engineer i.e. providing evidence for a business case which could then be applied to other people. In fact, as the Claimant explained to us, she did the vast majority of her

LGBT+ in her own time. Unfortunately, the Claimant was not supported as an individual, and this was having an impact on her health and well-being.

70. A second Stage 1 grievance meeting was held on 1 November [172-175]. A before, much of the discussion was around the LGBT+ ERG/network and it is not necessary to cover that. The Clamant raised the fact that the comment: "Is this for Halloween" had been made the previous day. The Claimant said that she thought she would try going to Occupational Health, but it was "scary" because she didn't know what they could do and because that other people who had been to Occupational Health had lost their jobs. The Claimant also said: "Just because I'm on site, it doesn't mean I'm healthy". Mr Glithero sought further information about the person who made the Halloween comment and the Claimant said: "I do not want to point fingers, the point is I still get comments". However, it was very clear that without names being named, no action would be taken. Towards the end there was a discussion about options moving forward. The Claimant said that she hoped things would change but there was always another priority, and that it would be good to have formal goals. She then said: "Short-term it is the comments. I have no one I can talk to". Mr Glithero suggested that support would come from the network (which of course at this point was embryonic). Mr Glithero said the respondent could influence by communication and education The Claimant said there was nothing else she wanted to discuss, and that it was: "Good it's not being rushed".

71. It was put to the Claimant that comment: "It's good, it's not being rushed", was made in respect of the whole grievance, including the lack of support and continuing verbal abuse. However, as the claimant clarified, and was in fact apparent from the minutes of the meeting, that comment referred to the wider long-term project of promoting the equality and diversity agenda, and demonstrating that it was taken seriously by the Respondent.

72. On the 1 November 2017, the Claimant was referred to Occupational Health [171A – B]. The information provided to Occupational Health was that the Claimant had been off with depression from the 18 to 22 September 2017 on a self-certificate and had been prescribed Sertraline (an anti-depressant which reduces anxiety) by her GP. It stated that the purpose of the referral was to investigate what support could be provided to the claimant by Occupation Health e.g. counselling, such as CBT, if appropriate, and to review other support or treatment options. This, as we have already stated, turned the Claimant into a set of symptoms to be treated, and failed to acknowledge that the cause needed to be addressed, which Occupational Health was not in a position to do.

73. On 1 November 2017, Mr Glithero sent an email to Ms Bache setting out his take on the meeting earlier that day [171C]. He said that it had gone well. The content related solely to the wider, strategic agenda. He said: "I believe we have progressed the grievance and can track progress through policy development". There was nothing about the fact that the Claimant was still being subjected to abusive treatment as a result of her transgender status, or the impact on the Claimant's health.

74. Also on the 1 November 2017, the Claimant sent a list of seven items and priorities to Mr Glithero [178]. These related to her substantive role and the ERG/networking role. In the same email, the Claimant said: "To summarise where we are, I get offensive comments and I have not been supported since my return to work. While things may change in the longer term, nothing has changed in the short term and my health is affected. The time scales mentioned in the (grievance) policy, have already passed and I have to ask myself what the purpose of them is if no action has been taken?" [177-178].

75. On the 6 November 2017, Mr Morrison informed Mr Glithero that the Claimant could be allowed some work time to progress the JLR LGBT+ activities, which would need to be agreed in advance so that it did not adversely affect immediate business. He said that he anticipated this would be a few days per month. Also, on the same day, the Claimant received a message from a Communication and Engagement Manager called Ms Tracey Ledward, saying she would like to attend a meeting which had been arranged on the Whitley site on the 7 December to discuss setting the LGBT+ network. Ms Ledward said: "I am not LGBT, but I do have a lot of experience with building an LGBT+ diversity committee and network in my previous company Deutsche Bank and, being an active ally, I would love to be able to help JLR". This was an example of the Claimant's progress in trying to get the network off the ground. The Claimant thought Ms Ledward was an ideal person to be an ally and the forwarded her details to Ms Bache.

76. On the 15 November 2017, the Claimant sent an email to Ms Bache which was then forwarded to Michael Glithero [page 183]. The Claimant said that: "The language used in the comms is not the best and comes across as being more like HR want to sack you". This was a reference to a reminder about the requirement to comply with the Respondent's gifts and hospitality policy, worded as follows: -

> "This is a strict reminder that you will adhere to JLR's gifts and hospitality corporate policy as any breach of this policy will be regarded as a serious matter and is likely to result in disciplinary action including potential dismissal".

The Claimant found this quite a threatening email. Respectfully, we disagree. This email demonstrated that it was perfectly possible to put out a stern reminder of the need to comply with the gifts and hospitality policy, worded in general terms. We thought it was remarkable that the Respondent gave no thought to doing the same in relation to the Dignity at Work Policy, and one can only question why that was.

77. The Claimant also referred to as what she described as the new attendance process, stating: "When I am ill, I do not know or understand the expectations…. I have depression with severe suicidal ideation. Having done mindfulness training, I try to live in the moment, but it can feel like standing on a cliff edge. I don't necessarily want to share this with my Manager… I am trying to walk until I drop… It is bizarre given all the policies we have, the most confusing is the one that should be supporting

you." The Respondent therefore knew the Claimant was seriously ill and the cause of it.

78. In the document prepared by the Claimant at a later point in time, and not long before her employment ended, she made reference to an extract from JLR e-newsletter called People Talk circulated on 4 April 2018 [264-265]. The Claimant referred to it as: "The Company's tough email". We took that to be an ironic description. The extract was titled "Customer First and Zero Tolerance". It read as follows: "As part of our role with customer first behaviours, we make a commitment to making each other feel special. Everyone's commitment to the Dignity at Work procedure demonstrates the value we place on equality, inclusiveness, and diversity in the workplace. The procedure can be found on the People Portal". As one of the Tribunal Members pointed out when asking questions of the respondent's witnesses, if you compare that bland and aspirational statement with the message sent about the gifts and hospitality policy some five months previously, the contrast is stark. At the point when the relevant edition of People Talk was published, the Claimant had been enduring harassment for the best part of twelve months because of her choice to dress in female mode. The People Talk item may, or may not, have been connected to the Claimant's difficulties with being harassed – nobody was able to clarify that. If it was, then it hardly constituted a strong message about the importance of dignity and respect in the workplace.

79. 16 November 2017, a third stage one grievance meeting was held [185-189]. For these purposes it is material to note that the Claimant said they were about fifty days into the grievance process but: "I still get comments and it's never-ending. I have no one I can talk to about it. Just because I'm here, it doesn't mean I'm healthy. Communication on the health side is not working well". By this point the Respondent was well aware that the ongoing harassment had very seriously affected the Claimant's mental health, but had taken no proper or decisive action to stop it. Instead, the problem had been turned into a medical problem. When cross-examined about this, Mr Glithero was asked "What could be a greater priority than preventing harassment in the workplace?". He replied, "There isn't". His words speak for themselves. We thought it likely that if the Claimant had a different visible protected characteristic, which was better understood, such as race, the Respondent may have dealt with any harassment in a more robust and decisive fashion. On the other hand, we could not be sure that would be the case, because of the Respondent's corporate lack of commitment to diversity and inclusion. The rest of the meeting entailed discussions about the LGBT+ ERG and network.

80. On the 17 November 2017, the Claimant recorded that a female engineer had made the comment: "It's nice to see you in your attire, you have cracking legs" [page 378]. Clearly, this was unacceptable, and would be equally unacceptable if a male made this comment to a female.

81. On the 22 November 2017, Mr Glithero sent an email to Ms Bache in which he described his meeting with the Claimant as "constructive". He raised a question about the immediate communication plan regarding toilets. He then went on to refer to the wider strategic work which was ongoing. There was no mention at all of the Claimant's health or of the

comments being made and their impact on her. We concluded that although the Claimant was seen as having a value to the respondent as a skilled engineer and LGBT+ champion, no real value was attached to her as a human being.

82. In KISS ("Kindness in Societies") News November 2017 (later referred to as Pride rather than KIS) the Claimant published an article about the LGBT+ ERG. She said there were almost 100 members and the intention was to set up a formal committee and that there would be meetings about this at the Gaydon site on the 5 December and the Whitley site on the 7 December [193D & E]. This demonstrated that despite her personal difficulties at work, the Claimant was continuing to push forward with equalities work.

83. On the 1 December 2017, the Claimant emailed Mr Glithero saying that Occupational Health and Care First (an employee support line) were not really able to help her [page 190]. The Claimant said she was laughed at to her face by a group of male colleagues on the 16 November and had a similar experience involving a a male colleague on the 30 November. She also made reference to the "cracking legs" comment made on the 17 November [190]. Ms Vanessa Morris replied querying whether the Claimant's concerns about OH and Care First could be referred back for them to address [197]. In the meantime the Claimant's activity around the LGBT+ network continued and colleagues responded to her privately about their experiences at JLR. For example, on 7 December 2017, the Claimant received an email from a male colleague saying: "As a middle-aged male, I have worked for many generations with workplace humour and banter and I am not really sure what reaction I'd get (probably incredulity) should it ever come to light about me being bisexual. I train people in dignity and diversity at work, so I know what should happen, but I am also very aware about what might happen…". Clearly colleagues were looking to the Claimant for support and indeed were appreciative of the efforts she was making. Sadly, we return to the point that there was no proper support for her. Part of the respondent's case before us was that LGBT+ ERG colleagues could have provided support to the claimant but, as the claimant pointed out, many were fearful to identify as LGBT+ at work. Also, the notion that empathetic colleagues are in a position to prevent serious harassment, rather misses the point that responsibility lies with the employer.

84. On the 8 December 2017, the Claimant emailed Ms Vanessa Morris saying: "I heard feedback from Laura about the Diversity Councils that they were ineffective but not removed due to political reasons". As noted previously, the respondent's witnesses were unable to confirm the existence, or function of, those entities.

85. There was a second Occupational Health Report dated 13 December 2017 [202] worded in much the same terms as the first one. It stated that the Claimant was trying to implement the lifestyle measures discussed and was waiting for a CBT appointment in January. It said that it would not be unexpected for the Claimant's concentration and focus to be variable, her short-term memory to be poor, and for her to be more easily fatigued at present.

86. On 8 January 2018, prior to attending a team meeting, the Claimant accidentally struck her head while closing the boot of her car, causing injury. The Claimant said she felt compelled to explain the injury during the meeting, because it was bleeding. The claimant later reported the incident saying that it caused blood and dizziness and had occurred because she had anxiety and depression [250]. The claimant said she had told Mr Poole that she suspected it had happened because she was worried about how colleagues would treat her that day. In evidence to us, the Claimant said no action was taken by Mr Poole, by way of enquiry or an offer of support.

87. On 24 January 2018, the claimant reported the injury referred to in paragraph 86. She also reported an incident of being hooted at by a delivery driver while crossing the road on site, causing her to spill her drink and burn her hand [229]. The Claimant said she suspected the driver realised she was a transgender employee and thought it would be funny to behave aggressively towards her. The Claimant said it made her feel unsafe. This incident was also recorded in the Claimant's diary [379]. We accepted that it happened. Although the claimant specifically raised this with the Respondent, she was told that nothing could be done without the registration number of the vehicle.

88. On 28 January 2018, the Claimant submitted a HR Ticket making the point that some of the women's toilets at JLR were locked and those tended to be toilets within manufacturing. The Claimant said this created a negative environment and caused a stressful situation for her. On 30 January 2018, she received a response from HR saying that the decision was made to lock the toilets because "certain behaviours demonstrated … that female toilets were being targeted for vandalism". Locking the toilets (with a punch lock) was considered to be a practical solution to a problem. On 4 February, the Claimant responded by querying whether she could be given access to the female toilets on the manufacturing sites. On the 6 February, HR replied saying the locks were the responsibility of Site Services and that she should contact Site Services in advance of her visit to a site to arrange for the female toilet facilities to be made available. The Claimant replied on the 7 February saying she would be surprised if she could do so without being referred back to HR. She asked who the relevant contact person In Site Services was. The Claimant chased this up on 12 February. A contact person was not identified – see paragraph 96.

89. On 31 January 2018, the Claimant sent an email to Mr Poole making reference to the grievance process [215-216]. The Claimant said she had not been supported in the workplace, she had never asked for a formal grievance process, but that her grievance had effectively been declined. She said the lack of action and support, together with isolation at work and a lack of social support, had caused her multiple mental health issues. The Claimant said; "At times I have had a rope around my neck last year," [this was a literal not figurative statement]. She went on to say: "It is difficult to think about the future. I am still trying to survive. Part of the problem is having to constantly break through barriers and poor practice". The Claimant also referred to the fact that the Diversity Council was known to be ineffective, but nothing had been done about it; and to nothing being

done about the lorry incident. The Claimant said there were no opportunities for an engineer like her. The Claimant said that locks on the ladies' toilets could cause graduates on the placements in manufacturing to question the environment at JLR and lead to "urban myths about how bad JLR is as an employer". The Claimant finished by saying: In terms of aspirations about what role in the team I might be interested in, part of me wonders how long I will work here due to the things above, but my thoughts would be around how to move on and put my past behind me and at the same time step up. I also offered to be a Trade Union Steward but I am not sure if this will happen. I previously discussed moving departments with Amy Reynolds but this was ignored. I suspect my lack of input is due to depression and the sense of hopelessness. Maybe I should move to HR as they need a bit of help." [218C&D]. On 1 February 2018, Mr Poole emailed said that this could be discussed the following day in a one-to-one.

90. On 31 January 2018 there was a further Occupational Health report which did not take the position forward any further.

91. On 1 February 2018, as a result of the Claimant's email to Mr Poole of the 30 January 2018, Ms Suzanne Beaumont contacted the Occupational Health Department to say that there were serious concerns about the Claimant's mental health and well-being, in particular because she had mentioned having suicidal thoughts. Ms Kate Warley from OH replied that day saying that if the Claimant was currently in work and voicing such thoughts, she should present to the Treatment Nurse for assessment and appropriate signposting; and that if the Claimant was absent, there should be a management referral marked: "For early intervention" [218B]. Mr Morrison responded to that saying there was a planned one-to-one the following day, but he was concerned that if Mr Poole suggested OH again, the Claimant would decline, because she felt the support was not effective. Mr Morrison asked for guidance on additional words Mr Poole could use and said: "This can only work if there is something different or better that can be offered [218B-A]. Ms Warley replied saying: "If the employee has declined, or does decline, Occupational Health support, there is nothing in addition we can do as it is their choice to attend or engage with what we provide."

92. On the 2 February 2018, there was a one-to-one meeting between the Claimant and Mr Poole which was undocumented. The purpose of the meeting, amongst other things of course, was to discuss the content of the Claimant's email. In paragraphs 23 and 24 of the Claimant's witness statement, she described having talked about needing support and said Mr Poole looked at his feet and told an anecdote about a long-haired man who was whistled at on the manufacturing track. The Claimant said this made her feel hopeless and because her concerns were not being listened to. The Claimant said it was unpleasant and she felt that Mr Poole was making jokes at her expense. Mr Poole's witness statement did not refer to that meeting, but did confirm he recalled referring to that person being whistled at. His evidence was that he did so to express empathy with the Claimant's situation and because he had felt at the time that it was inappropriate for the long-haired man to be treated the way he was. Mr Poole denied intending to make a joke about it. That may well be true, and

we have no reason to doubt him, but, given the context, which was that the Claimant at this point had told him about suicidal ideations and serious mental health problems, the remark was beyond insensitive. It was clear to us that by this point Mr Poole was completely out of his depth and was receiving no meaningful support or guidance to assist him.

93. On 6 February, the Claimant recorded that as she was leaving a building on the site, someone in a group of men said: "Oh my God! Wow!" [69 & 379]. The Claimant explained in her witness statement that this was directed at her because she was wearing women's clothing that day and went on to say: "It hurt me that people were able to say things that their colleagues would not say were wrong".

94. On 8 February 2018, Ms Vanessa Morris sent an email to the Claimant saying that she was concerned that the Claimant did not feel her grievance had been dealt with in a timely manner and adding that it was presently still open at the claimant's request. By way of explanation, at an earlier point in time, Mr Glithero had expressed an intention of closing the grievance, but the Claimant had opposed that. Ms Morris went on to say that the Claimant had been asked what she was looking for to resolve the grievance. She listed a series of "Actions to Date" which were: three full grievance meetings; several informal meetings including a one-to-one from Mr Glithero; a statement of clarity with regard to the toilets after the first meeting; and facilitating the Claimant having some work time to engage in the LGBT+ network activities. Ms Morris stated: "You declined to give us a specific example of the people making bullying and harassing comments including no names, this has prevented us investigating these any further and taking any action that we deem appropriate".

95. On the 8 February 2018, the Claimant emailed Ms Laura Bache seeking clarification on how to access toilet facilities on manufacturing sites. She said that she accepted why the toilets were being locked as an interim containment action, but that the respondent should acknowledge that permanent corrective action was required [226]. Ms Laura Bache responded that the Claimant would be able to access the ladies' toilet facilities at manufacturing sites, but the sites would need to be contacted beforehand: "I know this isn't ideal, but it would mean that you would be able to access the facilities you feel comfortable in using. If you should experience difficulties in accessing Site Services and the code in your next visit to a manufacturing site, we can obviously pick this up". She agreed with the Claimant's point about the locks being an interim solution and expressed the view that it was a much bigger issue than diversity and inclusion and was a behavioural and cultural issue at the manufacturing sites [226].

96. The Claimant did some research and managed to get a contact name for Site Services. She emailed Mr Robert Parkes, Site Services Manager, on 9 February 2018 [225]. She said: "Apologies for the email out of the blue, I am trying to work out how to use the toilets in manufacturing locations when some facilities are locked. I contacted HR who say it's a Site Services issue but I can't find any other details of how to contact Site Services, I am a transgender employee and I have been made aware that the female toilets within Solihull and CB (Castle Bromwich)are locked. I

don't know how to get access as this places me in a stressful situation. Is it possible to advise how I can be provided with a code?" Mr Parkes responded on 13 February 2018 apologising for the delay, which was due to being off work, and confirming that Site Services did fit punch-locks on some female toilets to prevent damage and abuse of the facilities. He asked which particular toilets the Claimant was referring to. He said: "I only cover Solihull, but if you can tell me which areas, I should be able to find the numbers". The claimant replied saying: "Oh, that wasn't the response I was expecting and I guess I was expecting maybe one code per site [224]. Mr Parkes replied later that day saying that the all the female toilets on the Solihull site and the same number, and providing it. It is fair to say that the prompt and decisive action by Mr Parkes to resolve the problem was in stark contrast to other action taken by the Respondent in respect of the issues raised by the Claimant. The claimant updated Ms Bache.

97. On 13 February 2018, the Claimant received an email from Ms Bache saying that she would be away on training for some time. She added that she was currently prioritising gender-neutral pilot toilet facilities on the Whitley and Gaydon sites; and that she agreed the short-term solution on the manufacturing side, wasn't ideal, but it protected the privacy of all who needed to use the facilities on a daily basis. She said that the reality was that she had to prioritise because she was unable to tackle all the changes that needed to be made.

98. On 14 February, the Claimant forwarded the email chain to Mr Glithero, explaining about where she had got to regarding access to site toilet facilities and making reference to the "Oh my god! Wow!" comment. Mr Glithero replied on the 15 February saying that he tended to agree with Ms Bache about priorities. He also made reference to the network. He made no reference to the comment.

99. On 21 February 2018, the claimant completed Incident Report Forms about the accident on 18 January and the incident on the 24 January 2018 [page 229 & 230]. The respondent had an incident self-reporting system predominantly, we presume, to monitor accidents and take steps to prevent them, as part of its duties under health and safety law. The Claimant's explanation for completing the form was that she had become aware that this was another possible mechanism of raising concerns. In line with the system, the forms were forwarded to the Claimant's line manager Mr Poole, for comments on 21 February 2018.

100. Mr Poole later emailed Mr Glithero and Mr Morrison, saying that the Claimant had mentioned the incidents to them a while ago and that: "Suddenly out of the blue these notifications appeared as normal with no prior mention of raising these near misses or asking for any action" [230A]. In our judgement, it is fair to say that Mr Poole is clearly very able at his engineering job, but has no expertise in equality and diversity issues. He cannot be criticised for that, but the respondent can be criticised for not providing support and training to managers.

101. At around this time, the Claimant had published an article in Pioneer Magazine which is a publication for engineers [230D]. The article was about the LGBT+ Network at JLR, and described the Claimant's work (mostly in her own time) going into schools to mentor school pupils and explain LGBT+ issues. The Claimant said: "If you define yourself as LGBT+ then how can you perform your best if you hide who you are due to the daily risks of bullying? I am one of the first non-binary transgender engineers to come out in the workplace and I am passionate to support the business to promote diversity. I think that engineering is still perceived as a traditional industry, but I want to be an advocate for product engineering and showing how we can take on this challenge to raise awareness and work towards acceptance for all."

102. The Claimant was cross-examined about her LGBT+ work. It was suggested that her situation could not have been as bad as she said if she was prepared to be the public face of LGBT+ for JLR at internal and external events. The Claimant's explanation was that she thought it really important to raise the profile of LGBT+ in order to make JLR a more inclusive and welcoming employer. We completely accepted that.

103. On 21 March 2018, Ms. Bache sent an email to the LGBT+ Committee members asking for input to a proposed transitioning at work policy and supporting documentation [249]. The Claimant did not respond to that email, but already expected to be involved in that work because she had been told she would be when she first raised the issue.

104. On 5 March 2018, the Claimant was the subject of an unwanted comment from a female colleague who said: "Don't take this the wrong way, but I saw you as the top half and it didn't match the bottom half" [paragraph 26 of the Claimant's witness statement]. The Claimant said the colleague then sent her an email which said: "(and perhaps I shouldn't put this in an email), I think you're beautiful and standing talking with you very much increased that perception" followed by a number of smiley faces [231]. We fully accepted that this was unwanted conduct towards the Claimant, however it had been intended.

105. On 14 March 2018, a female colleague said (of the Claimant); "Oh my God!" and a male colleague replied: "Do you know what <u>it</u> is?" [280]. The respondent does not dispute this occurred.

106. On 9 March 2018, there were emails between Mr Glithero, Mr Poole and Ms Morris relating to the two incident reports referred to above. Mr Glithero expressed the view that the reports were not related to medical issues [231A and B].

107. On 9 March 2018, Mr Glithero also wrote to the Claimant proposing (again) to close her grievance. He referred to the wider picture and the network. He also made reference to the Dignity at Work Policy and described it as including all employees, agency, customers, and suppliers regardless of various protected characteristics. He did not mention the harassment which the Claimant was experiencing notwithstanding the existence of the policy.

108. On 12 March 2018, the Claimant replied [233-234]. She referred to two strands of work: short-term containment actions and longer-term company strategy. The Claimant said: "I have to contend with continuous tension that affects my mental health. There have never been any timescales communicated [in respect of] the grievance. There are timescales within the policy, but these are ignored. I have no expectation as to how long this should go on or what the plan regarding the toilets is…. I wonder why this is not taken seriously. I find it exhausting that no leader will take time to understand the issue and do something about it. An equal company does not just happen, it takes action". She went on to say: "I can understand that LGBT people might be scary, so I thought I would make a simple request in my area. On International Women's Day, I asked my managers whether they would offer support to women engineers? The request was simple - to make a gesture, you go to a site, download a pledge and post it on the Women's Network, but the result was that not one leader did". The Claimant made it clear she did not agree to the grievance being closed. She also observed that as Ms Bache was about to go on maternity leave it was unclear where Diversity work was going. The Claimant followed up by a further email saying: "Just to add on, I raised an additional ticket regarding formally reporting hate crime incidents, I think there should be a zero-tolerance approach" [213].

109. The response from HR to the hate crime ticket was to say that they were awaiting further details from the Claimant to be able to proceed with investigations into the comments. It went on to say: "Should you decide to report the matter by external channels, then this would be a breach of confidentiality, therefore I would advise you to provide further details so this can be investigated in line with our internal procedure". So, as the Claimant accurately observed, she was being told that to report any incidents externally would breach confidentiality – which she took to be a warning not to do so. It was also clear that for matters to be dealt with internally, she must provide further information about the identity of the perpetrators.

110. On 15 March 2018, the Claimant had sent an email to Vanessa Morris and Michael Glithero concerning the grievance saying: "As previously communicated, the grievance has not resulted in any plan or outcome, the lack of support over the last ten months has been unbearable from [suicidal] ideation to self-harm, the lack of willingness to learn and attempt to support is unbelievable. I have exhausted the company processes as the grievance has been frustrated by the lack of any plan to close or resolve [it]" [194].

111. Mr Glithero wrote to the Claimant on the 16 March 2018 closing the grievance and sending the outcome [239-241]. He identified the two strands to the grievance i.e. long-term corporate strategy and short-term action. He acknowledged that the latter included the claimant's complaints of lack of support for her emotional welfare and being subjected to comments of a bullying and harassing nature [239]. The outcome letter went on to deal with matters relating to the network and corporate strategy, then under "Short-term Containment Actions", reference was made to referrals to OH and Care First. Mr Glithero also said he had made himself available to meet the Claimant as one-to-one support and

that support would continue via her local management team. Mr Glithero said that: "Several times during the grievance investigation, we have made it clear that the company does not tolerate bullying, harassment or victimisation and agreed to investigate the comments made to you in the workplace. You declined to give us further details on these comments which were the names of the other parties involved, dates and witnesses and this has prevented a formal investigation being undertaken by the company". He concluded by saying that the local HR management team was assessing a proposed dignity and diversity reminder to staff. We found the use of the "assessing" rather troubling in this context – why would taking steps to end harassment require assessment or debate of any kind? In that context we refer to our earlier finding that Mr Glithero accepted there should be no greater priority and that a strong message could have been sent out. That had happened in relation to the gifts and hospitality policy and also happened regularly in relation to health and safety issues. My colleague, Mrs Pelter, has asked me to point out that on a proper analysis this was a health & safety issue as regards the Claimant's mental health, but was not treated as such.

112. The Claimant presented an appeal on the 21 March 2018 [243-248]. She said she was given no support during the grievance process and would have preferred LGBT representation. She complained that the process had taken about six months with no plan for how it was going to be tackled and said that leaving things hanging had, of course, caused additional stress. The Claimant said: "We would not build cars without a plan B [being] communicated". There was an attachment to that document [244 onwards]. Parts of the document referred to the wider long-term strategy, and it is unnecessary to refer to those parts here. Paragraph 1 of that document made reference to no workplace support and said JLR had no understanding of what support is: "Having a chat does not help if it causes isolation and places the burden on the victim to educate the leaders". The claimant described this as: "Wearing and one-sided". She said there were no LGBT+ allies and that her transition at work ticket (135758) had resulted in no action and that the person dealing with it, Ms Amy Reynolds, had left the business. In paragraph 2, the Claimant referred to anxiety around using the toilets. She said the punch-locks caused problems because she was unable to plan ahead properly and because use of the toilets could involve difficult conversations with local staff. The Claimant said it was important to be mentally prepared to deal with awkward situations. She made reference to a transitioning colleague on the Whitley site who had been told to use the disabled toilets which resulted in complaints from a disabled staff members. That colleague has developed IBS. The Claimant said she had managed to obtain a code for the ladies' toilets on the Solihull site through emailing a stranger. The Claimant asked for involvement in the transitioning at work policy. She also said that she had given details of one incident in particular (the lorry incident) but it had not been investigated. At the end of the document [paragraph 11] the Claimant queried why JLR was not letting hate incidents/crimes be reported to the police. She also queried who was responsible for her safety on site and said: "I don't feel safe. You know I get comments and [you] choose to look the other way" [248].

113. The 21 March 2018 was also the date when Ms Bache wrote to the LGBT+ Committee seeking volunteers to comment on the transitioning at work policy and supporting documentation [249]. As noted, the Claimant did not reply to that email, but had expected to be involved in that work.

114. On the 22 March 2018, a Stage 2 grievance appeal investigation commenced. Ms Morris from HR was responsible for providing support to the person who heard the appeal - Mr Bingham (a more senior manager than Mr Glithero, with an engineering background). Ms Morris held a meeting with Ms Bache. Mr Bingham and the Claimant were not present. Ms Morris made notes [251 onwards]. She recorded that Ms Bache told her that HR had dealt with the toilet issue and that the Claimant was not being treated differently to anyone needing access to the female toilets. She said that the Claimant had got the access code for the Solihull site, and that it would not be unreasonable for her not to be given the code for Castle Bromwich if she did not have to travel there. She said the Claimant was given guidance on use of toilets, and that the reference to a colleague at Whitley developing IBS was just hearsay, or they would have raised it themselves. Ms Bache took issue with the Claimant having described needing to "train her up" and said that the Diversity Agenda was broader than LGBT+. As regards hate incidents being reported to the police, Ms Bache said that the Claimant could do so but had not exhausted the internal processes. Ms Bache said that if the Claimant did not feel safe on site, the Dignity at Work procedure could be used, and she could be given an emergency contact number. Bearing in mind the Respondent's failure to put any proper measures in place to protect the Claimant from harassment, and to prevent her having to deal with challenges over the toilets she was using, the tenor of the meeting seemed dismissive of her concerns.

115. On 26 March 2018, the Claimant was walking passed a bus shelter on site when a colleague said: "Are you not fem today?" and went on to say that they had trans and lesbian friends and wanted to say something when it was quieter, and that the Claimant was "very brave". The Claimant was not happy with those comments. She also explained to us that the term "brave" is frequently used to describe transgender people who are visible, but that the reality is that it is not bravery, but a need to be the person you really are. We accepted her evidence on those points.

116. On 10 April 2018, there was a team meeting which a new team structure was discussed. This centred around moving team members to work on a new project to be headed by Mr Mark Carter who had joined as a Navigation Technical Specialist. In his evidence, Mr Poole explained that the draft structure omitted the Claimant and some other colleagues because he and Mr Carter were planning for the future. Consequently, only two thirds of the team had been populated onto the structure chart. He said it was presented as a work in progress and the purpose of the meeting was to give an interim update. Mr Poole said the Claimant had not made any comments about the presentation during the meeting or queried why she was not included in the structure. Mr Poole also said the general emphasis during the meeting was there was too much work and not enough people to do it and they wanted to make sure they best used the resources within the team.

117. The Claimant agreed that she had not challenged the new team structure. We accepted Mr Poole's explanation for the Claimant's name not being on the chart. We also accepted that the Claimant felt upset and excluded at this point.

118. On the same date (10 April 2018), the Claimant was notified that the Grievance Appeal would be heard by Mr Bingham on the 24 April 2018 [256].

119. Also on 10 April 2018, the Claimant submitted a letter to Mr Poole which was described as a letter as notice of leaving employment. The Claimant said: "My last day of employment will be the 29 June 2018 subject to my health. Thank you for giving me the opportunity to work with you for a number of years. This is not a resignation as such, but rather that the continued issues I face are not being addressed, so I feel this is the best course of action in the interests of protecting my health and wellbeing. Finishing at the end of June allows me time to finish work on launching the LGBT+ network at JLR". The Claimant confirmed that during that time she would be available to hand over work. The Claimant had given a longer notice period than she was contractually obliged to give.

120. My colleagues and I had real difficulties with the way that the Claimant was cross-examined about her letter. I shall quote some of what is recorded in my notes (the content of which was confirmed by my colleagues). In evidence, the Claimant confirmed that the letter had not been described by her as a "resignation" and she had not spoken to anyone about the content. The Claimant said she did not know whether to use the term "constructive unfair dismissal" or not and did not really understand what it meant at that point. She said: "That's why I talked of the continued problems plus my health." The Claimant said that she had worked for the Respondent for a long time. It was suggested that if things were so bad, she would have resigned immediately and not waited until the end of June. The Claimant replied that at the time the letter was drafted and submitted, she did not know if she could make it to the end of that day, let alone the end of June, but thought an end point might help and that she wanted to see the network through. It was put to the Claimant that she could have spoken to Mr Poole first. The Claimant replied: "I did not know what to do. They knew my health was declining. There was no way they were dealing with these problems, what could I do?". It was then put to her that if she had sat down with Mr Poole and Mr Glithero, she would have had the opportunity to obtain help and support and had given away that opportunity. The Claimant refuted that and said: "They knew of the harassment and had no plan to deal with it, they were watching me break". Pausing there, the simple fact is the Claimant had raised the issue on numerous occasions and nothing had been done. It seemed to us to be somewhat of a stretch to suggest that raising the matter yet again with Mr Poole and/or Mr Glithero would have achieved anything. We accepted that the Claimant submitted the letter because she felt compelled to leave for health reasons, and had no idea whether she would be able to continue working until the end of June. It was suggested that although the Claimant had no close personal friendship with Mr Poole, talking it through with him may have made him realise what the Claimant

was going through. We found this fanciful given the events outlined in paragraph 92.

121. In my notes it is recorded that it was again put to the Claimant that if she had been in such a bad state that she wanted to die, the immediate action of resigning straight away would have removed her from the situation. The Claimant responded by saying that she had been advised by OH to continue going into work (which, in our experience, is likely), but that the problems were wearing her down. She said she was completely unstable and worried about what she might do if she was at home alone. The Claimant explained that she had depression and was not in the position to make decisions. It was yet again put that if it had been so bad, the Claimant would have left immediately. The Claimant said: "I didn't know what to do. I had told them of the problems, the self-harm. They weren't listening. I was falling off a cliff-edge." It was then suggested that the Claimant had a choice and if it had been that bad, she could have left immediately, to which she replied: "I didn't know whether I would even last until the end of the day. I was going to walk until I dropped". We found that a particularly distasteful line of questioning, especially because it was repeated, albeit in different ways. It was uncomfortable and unpleasant to listen to. We presumed it must have been done on instructions and therefore Ms Ferrario should not be criticised. It would undoubtedly have caused additional distress to the Claimant. This is an example of why we decided to award aggravated damages in relation to, amongst other things, the conduct of the hearing (see Conclusions below).

122. On 10 April 2018, Mr Poole forwarded the Claimant's letter to Mr Morrison. He said that he had spoken to the Claimant to try and understand why she felt this course of action was necessary, and that: "Ultimately it comes down to *her* view that nothing has changed and nothing will". Mr Poole also said that he had asked the Claimant numerous times whether this was a step she wanted to take, or whether she wanted to sleep on it, but that disappointingly the Claimant confirmed she wanted to submit the letter. In paragraph 30 of her witness statement, the Claimant explained that she felt she had to go because of her declining health and acute depression and she was not sure how long she could keep going. Her account was that Mr Poole approached her shortly after the letter sent to him and had told her: "My job between now and the end of June was to get you to change your mind… you won't find anywhere better." Mr Poole accepted that he may well have said this.

123. Mr Morrison met the Claimant on 11 April 2018 to discuss the letter. He later informed Ms Beaumont that he had not taken notes during the meeting, but had recorded his recollection directly afterwards. He said it was a difficult conversation punctuated with gaps of silence. He said he had not challenged the Claimant on a number of points where he felt there was a tangible and obvious counterpoint: "Or else I would have been perceived (a) as negative and (b) it would have taken the rest of the day as we'd have circled around on previously fruitless chats". He said that he had told the Claimant he was disappointed and asked if she was really serious. Mr Morrison said that she told him that she had had enough and felt isolated in JLR with no peer support and needed to leave because it was affecting her health, that she had asked for help but had not got it,

and that she had tried to be a catalyst for change but could not do it by herself. Mr Morrison said that he told the Claimant to sign the letter if she was serious about leaving, and that she did so. Mr Morrison recorded that he had told the Claimant that he was pleased she would be working for as long as possible. He said that he asked the Claimant if she had a plan about what was she going to do next, and she said there was no plan but JLR was not the right place for her and she would forsake the salary for better treatment [268-9].

124. Also, on 11 April 2018, the Claimant submitted a written statement for the grievance appeal. She covered the same concerns as previously. She added she used a Stay Alive I-phone app by Network Rail to help with her depression. She said: "Each day I come to work wondering what harassment I might get today and this affects my mental health." The Claimant referred to the letter she had submitted the day before and said: "I am not resigning, but I am leaving JLR. My last day is 29 June. [It is] in response to the way I have been treated over a considerable period. The ongoing harassment has worn me down to the point that I have no confidence in JLR. Although no notice is required, I think it is the responsible thing to do". She said she selected the date so as to be able to see through work on the launch of the network. The Claimant made reference to requests for help, short-term support, and to move, and said nothing was done. She referred to the lorry incident not being investigated. As to the time frame, the Claimant said: "I am transgender and transitioned in June 2017. I have had time off work with depression and in September 2017 and a company grievance started at that time…" [261]. She gave detail of the unacceptable comments made to her and other events from 8 September 2017 to the 10 April 2018. Finally, the claimant referred to the "tough email" regarding the Dignity at Work procedure which we have made observations about above [264].

125. In terms of that last point, i.e. the message featured in "People Talk" on 4 April 2018, Mr Bingham was unable to recall seeing it and did not know whether it had any connection with the Claimant's grievance.

126. Mr Bingham had what he described as either one or two lengthy meetings with Mr Glithero. He took brief notes in one (see paragraph 127 below). It was clear that his approach to the appeal was informed by Mr Glithero's account of the situation and information received from HR i.e. Ms Morris.

127. A summary of the notes Mr Bingham made in one of the meetings with Mr Glithero on 24 April 2018, recorded that Mr Glithero said: "I was clear if there were individual incidences (hate comments) and if she wanted actions, I needed to know who it was, what it was and she declined". Mr Glithero also said; "It was becoming a crusade for [her]". Rather worryingly, Mr Glithero is also recorded as saying that the Claimant made "a throwaway comment [about] putting a noose around [her] neck". When Mr Glithero gave evidence, he said he could not remember whether he said that or not [281-282]. We concluded that he did say that because it was in Mr Bingham's notes of the meeting. It was a truly unacceptable thing to say and, in our judgement, undoubtedly influenced the way that Mr Bingham dealt with the appeal. Clearly, by this point the Claimant's

concerns about her personal health and welfare, and about the abuse she had been experiencing, were being trivialised as is demonstrated by the use of the words “crusade” and “throwaway remark”.

128. On the 24 April 2018, the Grievance Appeal opened, and a note was made that the appeal would be dealt with on the papers.

129. On 1 May 2018, a chain of emails passed between the Claimant and Ms Morris. The Claimant reported another incident that had taken place on the 30 April where she had been asked by a male colleague what she thought of the trans verses TERFs debate. [The term TERFS refers to Trans Exclusionary Radical Feminists i.e. feminists who take a strong view that female spaces are for people with biologically female characteristics]. The colleague went on to say that: “Trans should not use female spaces until they’ve had the operation”. Ms Morris replied saying that if it was part of the appeal, then Mr Bingham could consider it. She went on to say: “she had Googled TERFs, and that if the Claimant would like to tell them who had made the comment, they would of course investigate because: “The ideology behind TERF is not appropriate in any workplace”. The Claimant responded saying that she was not prepared to name the person, adding that: “Transitioning is a very sensitive time and maybe a few years down the line things would be different” [289-286].

130. On 4 May 2018, the Claimant reported another incident to Ms Morris of two people saying about her: “What the hell is <u>that</u>?” [our emphasis added] again in relation to the Claimant. Ms Morris replied saying that Mr Bingham had reviewed the documents with her the day before, but he needed more time to complete his investigation into the appeal” [289-286]. Mr Bingham did not uphold the appeal although the Claimant was not notified of this until 28 June 2018. It is fair to say that it was wholly unclear that any further investigation was carried out. When asked about this, Mr Bingham was unable to identify anything.

131. It was completely clear to us from his evidence, the documents, and the actions he did (or did not) take, that Mr Bingham did not engage with the Claimant’s complaints or give independent consideration to them at all. He adopted the line that had been taken throughout to the allegations of harassment i.e. nothing could be done unless names were named.

132. One of my colleagues put it to him that his attitude was “dismissive”. Mr Bingham did not accept that, but did accept that he could, and would, have done things better had he known then what he knows now. Hindsight did feature prominently in the Respondent’s evidence in this case. We are mindful that hindsight may be the counsel of perfection in some instances, but in others (such as this) it highlights real and avoidable shortcomings. It was, in the words of the Claimant’s Counsel, a wanton disregard for the gravity of the situation. We fully endorse that sentiment. The remarks made by Mr Glithero, and the way he and Mr Bingham dealt with the grievance, plus the Respondent’s complete failure to take any action to protect the claimant from unacceptable harassment, are examples of why we decided to award aggravated damages (see Conclusions below).

133. The mid-year performance review and end of year performance review for the Claimant for 2017-2018 showed that she was a high performer [82-89]. Mr Poole who was the relevant manager, noted in the mid-year review that: "The past few months have been a period of significant change for *the Claimant* and *her* life at JLR, as *she* has transitioned in the workplace and taken steps to encourage and shape JLR's engagement in diversity and the LGBT community, a courageous step. It is clear *the Claimant* is passionate, driven and committed to helping the business on this journey and being the catalyst" [84]. In the end of year review, about six weeks before the Claimant's employment ended, Mr Poole described many examples of strong behaviours in relation the Claimant in her role as Navigational Technical Lead, and in respect of her LGBT+ activity for JLR. He said: "The LGBT+ Employee Network is the most developed network… In a little over a year, other networks have been progressed i.e. Woman's Network, Christian Network, Islamic Network" [85]. Mr Poole recorded that the Claimant had: taken the LGBT+ committee to the Student Pride event in February 2018; taken steps to introduce the network to other industry figures; and taken other actions such as encouraging the Respondent to work with Stonewall, and taking the Diversity Manager to inter-engineering workshops about equality at the National Grid in Warwick. Mr Poole said: "*The Claimant* goes quietly and effectively about *her* NGI business [i.e. her engineering role], *she* works well within the team ensuing all his tasks are completed thoroughly and accurately, *she* is very supportive of *her* peers and readily helps and guides the less experienced members of the team. He said the Claimant took the initiative and looked for ways to improve the way the team operated. Mr Poole recorded that the Claimant was passionate about the LGBT+ work and believed the resultant changes would benefit JLR and its staff. He added that there must be a balance between the core business objectives and that work [88].

134. The Claimant's post-feedback comments were: "Diversity was non-existent before I started discussions of change. I have inspired and influenced all those around me, setting up the first Employee Resource Group in the company and running it alone for the first 12 months. It caused HR to ask questions like: "What is an Employee Resource Group?" and encouraged other staff to start forming their own. It now has enough momentum to create change for years to come, saving millions and improving the health of staff. My work is not valued (sad faced emoji)" [89].

135. On 19 May 2018, the Claimant sent an email to Mr Poole stating that following the end of the year review, she thought she would like to list some examples of support [292]. We infer that the Claimant did so because there was a discussion about lack of support in the workplace during the review. The Claimant gave 26 examples of different things that could be done to show support. Examples were: "(1) read email I sent on support that is unread; (5) talk to someone at work who is trans about what it is like to transition, I can help with that; (8) wear a rainbow lanyard (10;) research what an LGBT+ ally is and become one; and (11) investigate how supported I might be [in] other companies". We shall pick up on one of those, Mr Poole was questioned about wearing a rainbow

lanyard and replied by saying he never wears a lanyard, but accepted that he could have done.

136. On the 22 May [291] the Claimant sent a further email with examples, making the total number of examples 50 [291].

137. In Mr Poole's witness statement, he said: "At all times I tried to support the Claimant as much as I could. I kept pushing those involved to ensure that the gender-neutral toilets in block 523 were introduced and I wanted progress to be made at the Claimant's desired rate. I thought it was really sad that the matter had escalated to the stage where she felt the need to resign when she had made such progress on LGBT+ matters for the business as a whole [paragraph 15]. By contrast, in the Claimant's witness statement, she said that when she provided Mr Poole with the fifty examples, his response was to laugh at her and make it clear that he was not prepared to do anything to support her [paragraph 31]. In evidence, Mr Poole denied having laughed at the Claimant. The Claimant's contemporaneous record of the exchange was as follows: "My Manager read my list of 26 items, he laughed at me at the suggestion of wearing a rainbow lanyard and spun around in his chair. When I sent the list of 50 issues, he said: "No more!" and that he had a job to do [381]". Under cross-examination, the Claimant was asked why she did not email Mr Poole to object to his behaviour over the list and replied that by that point she knew he was not listening. We had no hesitation in preferring the Claimant's evidence on this point. It appeared to us that by this time Mr Poole was heartily sick of the Claimant raising the issue of lack of support for her, and that it was very likely that he laughed at her list. He certainly did not discuss the list with the Claimant or explore whether any of the items would be feasible for him to do.

138. On 21 May 2018, the Claimant emailed Mr Poole stating: "Due to recent developments, I have withdrawn my notice of leaving. There are almost 6 weeks until the end of June" [293]. The Claimant also gave him a hard copy, which led to a brief discussion (see paragraph 140).

139. We shall note in passing that at the bottom of that email was an email to the Claimant from someone called Louise in HR confirming that the Claimant's notice letter had stated it was not a resignation as such. Louise continued by saying that an email she had sent relating to the Claimant about termination of employment was still relevant and the information would apply to any person who retired/resigned as well as someone in the Claimant's position.

140. On 21 May 2018, Mr Poole emailed Mr Morrison and to Ms Beaumont saying he had met the Claimant briefly, and was given a letter stating she was withdrawing her notice of leaving. Mr Poole said: "When I enquired as to what had brought this about, she commented that her friend would be joining the business as an agency worker and she felt she would get more support." Towards the end of the email, he stated: "On the topic of "support" she also sent me an email on Saturday evening which comprised of a list of some 26 points (copied below) where she felt that support was needed from Management (me). Whilst we did not discuss this in any detail, I did acknowledge receipt."

141. We thought it telling that at this point Mr Poole put the term "support" in inverted commas. Mr Poole was unable to explain to our satisfaction why he would have done so. To our minds the only way it can be read is as a sarcastic comment. We though it demonstrated the mindset he had at that time. We concluded he regarded the Claimant as a nuisance. This supports the Claimant's evidence that he laughed at her list. Furthermore, it suggests that Mr Poole knew the recipients shared that mindset – they certainly did not reply by questioning that usage. This was consistent with the kind of remarks Mr Glithero made to Mr Bingham (see paragraph 127) and Mr Bingham's approach to the grievance appeal (see paragraph 132).

142. On 22 May 2018], Ms Morris acknowledged receipt of the letter of the 21 May: "Which I have discussed with the relevant parties". She continued by saying: "As per my email of the 16 May 2018, your resignation of the 10 April 2018 was accepted by JLR on the 11 April 2018 following a meeting with your senior manager and your off-boarding has now been processed. Your last working day remains 29 June 2018" [294].

143. The Claimant replied the same day, saying: "Who are the decision makers and does Peter Bingham agree?" [294].

144. Ms Morris replied saying: "The normal stakeholders were contacted over your letter. I am sure that you are aware that case management is a supporting function and not the decision maker. My role was just to update you." She also clarified that Mr Bingham had not been involved in the decision not to allow the Claimant to retract her notice. She said this was because he was being kept independent as the person hearing the grievance appeal.

145. There are a number of points to be made about the reply from Ms Morris. Firstly, the question of who the "relevant parties", "decision makers" and/or "normal stakeholders" were, had not been addressed, save to clarify that it was not Mr Bingham. Ms Morris also made it very clear that she/HR was not a decision maker.

146. Secondly, the decision not to accept the Claimant's wish to withdraw her notice of termination of employment was not covered in the witness statements by Mr Poole or Mr Morrison. In his evidence, Mr Bingham said that he would have thought that the normal stakeholders in this context were likely to be the line manager and senior manager i.e. Mr Poole and Mr Morrison. When being cross-examined, Mr Poole denied being "a stakeholder" but did say that Mr Morrison had asked for his opinion. When Mr Morrison gave evidence, he accepted that he was "a stakeholder" but asserted that he was "not the decision maker". He also accepted that the answer the Claimant received from Ms Morris on this point failed to address the question.

147. Thirdly, it was suggested in cross-examination by Miss White, that the Employment Tribunal could view with suspicion the fact that evidence about this important decision not to allow the Claimant to remain in employment, had been completely omitted from both their witness statements. We did consider it to be suspicious because that decision led

to these proceedings, and consequently was highly material. It also begged the question that if Mr Poole and Mr Morris had really wanted to retain the Claimant, which is what they asserted in evidence, who took the decision and why?

148. The ostensible reason put forward put by both of them in evidence, was that the Claimant had explained to Mr Poole that she had changed her mind because her friend was joining JLR as an agency worker. They both said that "one person" did not seem like a good enough reason to change her mind. They did not seek any further information from the Claimant about who that person was, or why the Claimant thought they would make a difference. It transpires that the relevant person had been very active in an LGBT+ network at National Grid. They were a transgender person and had organised an event attended by the Claimant, where she (the Claimant) saw, for the first time, some high powered transgender individuals speaking about their experience of transitioning in the workplace. For the record, we are referring to the "one person" as "that person" or "they" because the Claimant did not want us to identify any of the LGBT+ people referred to in these proceedings, and we agreed it was unnecessary to do so (in the same way that it was not necessary to identify the people responsible for harassment).

149. The Claimant was cross-examined about her change of heart. She said the best outcome for her would be to transition and work for JLR, but there was a need to protect herself. She explained that she thought the person from National Grid would be able to provide her with the kind of support missing up to that point. It was put to the Claimant that if she was right in saying Mr Poole had laughed at her, how could it be that one person could change the situation. The Claimant replied that person was a role model, as she herself was to children in terms of LGBT+ work with schools and students. The Claimant explained that she had met this individual a couple of times, probably three times. She accepted that this person would be based at a different site, but said she was sure they could and would support her. It was then put to the Claimant that if her life had been so unbearable it would have taken more than one person to have changed her view and want to stay working for JLR. The Claimant replied by saying: "[That person] was a unique individual. There were no role models at JLR and I knew [that person] could help me". The Claimant gave further example, which was that her representative (Miss White), in the course of these proceedings had managed to achieve changing the Claimant's name from her birth name to her preferred name of Ms. Rose Taylor. As to the proposition that "it couldn't have been that bad" if the Claimant had changed her mind so easily, the Claimant explained that when she gave notice, it was because she had to do something about the situation because she thought she would die, but that she believed this one individual could make a difference. For the reasons already stated, we found the: "It can't have been that bad… " line of cross-examination insensitive, bearing in mind that the Respondent's witnesses did not dispute that the Claimant was regularly subjected to harassment because she was transitioning. Our comments at paragraph 121 apply and need not be repeated.

150. We shall now turn to the question of whether one person can make a difference. All of us, and probably everyone in this room, can recall at least one teacher who made a profound difference to their lives. Without going into detail about the history of the equalities movement, it is absolutely apparent that one person can make a difference, and on many occasions has. They were not always people who had any intention of being a champion – they were people who by their actions brought about change. We, as an Employment Tribunal, have come up with a brief list of people who have made the world a better, and more equal, place. We could have added many more. Our list was: Rosa Parks, Doctor Martin Luther King, Harvey Milk, Mio Yamamoto, Baroness Jane Campbell, Sir Bert Massey, Pele, Viv Anderson, and Dame Tanni Grey Thompson. Specific to the legal field, our list was: Baroness Hale, Judge Tess Gill (of El Vino fame) and, sadly, recently deceased, Ruth Bader-Ginsberg (who rejoiced in being referred to on social media as "The Notorious RBG"). In terms of the present case, it is fair to say that the Claimant has been a person who has made a difference at JLR, albeit at great personal cost. The Claimant would, in turn, nominate her representative.

151. We concluded that Mr Poole and Mr Morris, were the likely decision makers. For the above reasons, we were convinced that the reason they gave for not allowing the Claimant to remain in employment, did not hold water. Clearly, and for understandable reasons, neither was comfortable being associated with that decision, but we concluded that it was their decision, and that deep down they know that. We also concluded that they took the decision because the Claimant was continually raising harassment and the lack of support from them, which resulted in a grievance, and had come to be regarded as a nuisance because of that.

152. At the beginning of June 2018, there were some issues over the signage that was put up when the gender-neutral toilets were finally opened (specifically that the sign appeared to show a male and a female holding hands, rather than a male and female). Although this point was raised before us, we decided it was not relevant.

153. On 9 June 2020, the LGBT+ launch event went ahead successfully. The Claimant's managers attended, although the Claimant said that this was because a more senior manager had agreed to attend. The Claimant was helping out at the event.

154. The Claimant contacted ACAS on 18 June and an Early Conciliation Certificate was issued on 26 June 2018.

155. On the 20 June 2018, the Claimant contacted Ms Morris, detailing further unacceptable comments. On 11 June, a colleague shouted to a group of men to draw attention to the Claimant. On the same day, a colleague looking the Claimant in the eye and 'checked out' her legs. The Claimant also recorded on the 18 June that a male colleague said to her: "The trans-community ought to be grateful. Some of their antics have nearly damned near turned me TERF [305]. That was the same male colleague who had previously used the term TERF.

156. In the same email, the Claimant also said a colleague told her that on 13 June they had raised LGBT+ problems at JLR with Mr Nigel Blenkinsop (the Board Member who had by this point taken on responsibility for equality and diversity) and that Mr Blenkinsop said he did not recall LGBT+ being discussed at Board level ever [305].

157. The Claimant informed Ms Morris she was self-medicating hormones under supervision of her doctor to monitor her liver function. She asked about the arrangements for ceasing employment [305].

158. On 28 June 2018, the Claimant received the appeal outcome in writing from Mr Bingham [306-310]. As already noted, the appeal was dismissed. Mr Bingham accepted in evidence that for the most part the outcome letter was drafted by Ms Morris. The first part mirrored the grievance outcome by setting out the two strands i.e. the corporate strand on the short-term actions. In terms of lack of workplace support, the letter said that the Claimant had been referred to OH. Reference was also made to the Dignity at Work Procedure (although, as noted, Mr Bingham said he had not actually looked at it). The letter also mirrored what the grievance outcome letter said about the LGBT+ network, and use of toilets. In response to the point made by the Claimant about reporting hate crimes, the letter said the Respondent did not prevent any employee from escalating serious matters to the Police, but if the incident was related to employment, then the Respondent asked that the internal procedure should be followed so that the organisation could investigate and take action. In terms of site safety, the letter said there was an emergency number for business protection that staff could use if they felt threatened or concerned about their welfare. In relation to concerns raised about the Claimant's health, the letter stated: "The local management team and HR are not qualified to give guidance on issues such as self-harming, suicidal thoughts etc" and that a referral to OH had been made. The letter concluded by saying: "The grievance process can only investigate the concerns related directly to you. If other employees have work concerns, they need to raise these directly or escalate via the LGBT+ Committee. We reserve the right to investigate these concerns without an employee's involvement, but without relevant names, this is impossible."

159. On the 29 June 2018, the Claimant's employment came to an end.

160. In our bundle of documents, specifically pages 121E onwards, was a document adopted by the Respondent 2019. It is titled Transitioning Guidelines, Guidance and Support for Line Managers [121F]. Amongst other things, it explains that for all individuals transition is a journey and one that will differ from person to person. It states: "It is important to recognise that the final destination of any transition may not be clear at the outset and that this is OK…. We want to provide the support the individuals need whilst on their transition journey wherever it may lead" [121G]. It explains that if a member of a team approaches their manager with the intention to transition, the manager's support is critical. It goes on to say: "In the first instance, raise a ticket with HR who will assign a Caseworker who will support you and your colleague throughout the process" [121H]. "The Manager must be aware of the actions from colleagues and address expectations, goals and related matters because

this is critical in order to achieve a positive outcome". The policy explains this involves being available to answer questions and differentiating between personal beliefs and appropriate behaviour. It states that involving the transitioning employee in the education of colleagues is recommended if the individual is comfortable doing so.

161. This is a very good policy but came too late for the Claimant. It is very much in line with guidance the Government issued in 2015 on the recruitment and retention of transgender staff [T3]. It is very likely to have been based on advice and information from Stonewall. There is similar guidance for employees.

162. There is a major difficulty with that document. The Respondent's Managers who gave evidence had not been aware of it until they saw the final bundle for these proceedings (as the numbering indicates, it was inserted recently). They all agreed it would have been very useful to them when they were involved in the Claimant's transitioning journey. From this, it can be readily inferred that although the Respondent has a very good policy, none of those who were supposed to be implementing it, knew it existed. Similar comments apply to other policies referred to previously – if the Respondent's witnesses knew they existed, they were not familiar with the content, and were not advised to look at them. It was particularly surprising to us that this was the situation in September 2020, given that the Claim Form was presented on the 28 September 2018, the Response was submitted on the 5 November 2018, and the Respondent knew about these proceedings since ACAS Early Conciliation which pre-dated the effective date of termination of the Claimant's employment. What was even more surprising, was that the Respondent continued to rely on the statutory defence (see Conclusions below).

163. The resulting Case Management led to the allegations being set out in Schedules in the list of Further and Better Particulars [69H to S] and in the List of Issues [69T to U] which are dealt with below.

Submissions

164. In the interests of brevity, we will not deal with the submissions in relation to the various claims and allegations, which we shall cover when we set out the law, the allegations, and our conclusions. We shall deal with the statutory interpretation point at this stage.

Statutory Interpretation

165. Section 4 of the Equality Act Part 2, 2010 "the EA10") identifies characteristics which are protected. This includes gender reassignment. The subsequent sections define certain of those protected characteristics. Section 7 defines gender reassignment as follows:

> (1) A person has the protected characteristic of gender reassignment if the person is undergoing or has undergone a process

(or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

(2) A reference to a transsexual person is a reference to a person who has protected characteristic of gender reassignment.

(3) In relation to the protected characteristic of gender reassignment:

(a) A reference to a person who has a particular characteristic is reference to a transsexual person; and

(b) Reference to persons who share a protected characteristic is reference to transsexual persons

Respondent's submissions

166. In paragraph 3 of her closing note [R3], Ms Ferrario referred to a report produced in 2016 by the Women and Equality Select Committee titled "Transgender Equality" which made 35 recommendations for the purpose of tackling everyday transphobia.

167. Ms Ferrario highlighted two recommendations. Firstly, page 10, recommendation 4, of the Report was: "The Government must look into the need to create a legal category for those people with a gender identity outside that which is binary and the full implications of this". The Government's response was that this would be kept under consideration. Secondly, page 12, recommendation 10: "The protected characteristic in respect of trans people under the Equality Act should be amended to that of 'gender identity'. The Government's response said (amongst other things): "Wider categories of transgender people such as cross-dressers, non-binary and gender-fluid people are protected if they experience less favourable treatment because of gender reassignment, for example, if they are incorrectly perceived as undergoing gender-reassignment when in fact they are not, or incorrectly perceived to be male or female… We will keep this under review."

168. The Respondent's representative submitted that because no changes were made to the EA10 to reflect those recommendations, therefore non-binary, or gender-fluid, persons are not recognised or protected, which might be far from satisfactory, but is the legal position. The Respondent also argued that the sole example given by the Government concerned incorrect perception that a person is undergoing gender reassignment when they are not, and that this was unequivocal and did not apply to the claimant's situation.

169. The Respondent's case was that at the material time, the Claimant was not undergoing gender-reassignment because she was gender-fluid and, during cross-examination, had accepted she was non-binary. It was submitted that the fact that the Respondent had looked to support the Claimant through transition with gender-fluid status, to try and make her work environment a comfortable as possible, was not a legal admission that she was protected under the EA10. It was argued that once the claim

was issued and legal advice obtained, the Respondent's Solicitor quite properly explored whether the Claimant was entitled to protection, that the issue was legitimately raised, and that the Respondent should not be criticised for doing so.

Claimant's Submissions

170. In her submissions [C5], Ms White dealt with this legal point by reference to extracts from Hansard [C2]. She highlighted remarks made by the Solicitor General. The Claimant's representative submitted that Column 170 recognises that gender is a spectrum and that Column 171 makes it clear that that there was no need for medical, let alone surgical, intervention for person to be protected from the purposes of gender-reassignment. It was further argued that Column 172 makes it clear that "someone who has a gender-identity that is different from that expected from a person of their recorded natal sex" is covered. Ms White submitted, by reference to Column 204, that a person who starts to dress, or behave, like someone who is changing their gender, or is living in an identity of an opposite sex, is protected. Finally, by reference to Column 205, it was submitted that the Bill did not use a medical model and that gender reassignment concerns a personal journey and moving a gender identity away from birth sex.

171. The Claimant's representative also submitted that the Respondent's reliance on the 2016 Select Committee Report, was misplaced because it does not show what was in the mind of Parliament at the time; and that the fact that recommendations were made, was not evidence that the proposed changes were legally required.

172. Ms White also submitted that documents which we had drawn to the attention of the parties i.e. the Equality Act Explanatory Notes [T1]; and the Equality and Human Rights Commission ("EHRC") Guidance on the Equality Act 2010 [T2], specifically paragraphs 2.23-2.26, were of no assistance because they took us no further than the definition contained in the EA10. The final document T3 was the document we have referred to above – Government guidance for employers on the recruitment and retention of gender staff [T3]. It was submitted that this was merely guidance and not a definitive statement of the law

Our conclusions on this point

173. It is correct to say that there appears to be no binding legal authority, or even first instance decision on this important legal point. It is also fair to say that the definition in section 7(1) EA10, specifically the phrase "proposing to undergo", could be interpreted in a number of ways, covering a spectrum encompassing "is actively considering", intends to" and "has decided to". The remainder of section 7(1) ""is undergoing, or has undergone, a process (or part of a process)…. by changing physiological or other attributes of sex" [our emphasis added], is, in our view, less problematic.

174. Consequently, and unusually, it was important to consider the intention of Parliament in enacting section 7(1) EA10. One of the issues the EA10

sought to deal with (and to some degree has) was moving away from medicalising protected characteristics. It is not clear that that has entirely been achieved in relation to the definition of disability. Be that as it may, in terms of gender-reassignment, the intention was to make it clear that a person need not intend to have surgery, or indeed ever have surgery, in order to identify as a different gender to their birth sex. We consider that the words we have highlighted in paragraph 173 make it clear, and beyond dispute, that gender reassignment need never be a medical process.

175. Turning then to the words "proposing to undergo", we accepted that Ms White was correct to argue that, to the extent those words are ambiguous and/or capable of a number of interpretations, the intention of Parliament is an aid to statutory interpretation. We concluded that the Select Committee Report, and the documents we drew to the intention of the parties, were not of great assistance. It is right to say that the Explanatory Notes and EHRC Guidance [T1 and T2] are not a definitive statement of the law and do not, in any event, add to section 7(1). T3 (Guidance for employers) concerns good practice, rather than law. We drew those documents to the attention of the parties for the sake of completeness, but have not found of help. As regards the Select Committee Report, we endorse the observations made by Ms White.

176. Consequently, we decided that the only useful aid to interpretation was Hansard. In that regard, the remarks of the Solicitor General, who was the sponsoring Minister i.e. the Minister charged by the Government with moving the Equality Bill, as it then was, through Parliament, were the relevant parts for our purposes (interesting though some of the other contributions undoubtedly are).

177. We had regard to the following extracts. In Column 168: "It concerns a personal move away from one's birth sex, into a state of one's choice… a personal process which may be proposed but never gone through. It may have happened. Its nature may be medical one. It may be choosing to dress in a different way, and moving a gender identity away from birth sex". In Column 179: "Someone who was driven by a characteristic would be in the process of gender reassignment, however intermittently it manifested itself". Column 171: "Gender reassignment, as defined, is a personal process, so there is no question of having something to do something medical, let alone surgical, to fit the definition". Column 172: "Fourthly [as regards the definition], someone who has a gender-identity that is different from that expected from a person of their recorded natal sex is covered too. Where is the deficiency in our clause?". Finally, Column 204: "At what point [proposing to undergo] amounts to "considering undergoing" a gender reassignment is pretty unclear. However, "proposing" suggests a more definite decision point, at which the person's protected characteristic would immediately come into being. <u>There are lots of ways in which that can be manifested – for instance, by making their intention known. Even if they do not take a single further step, they will be protected straight away. Alternatively, a person might start to dress, or behave, like someone who is changing their gender or is living in an identity of the opposite sex. That too, would mean they were protected. If an employer is notified of that proposal, they will have a clear obligation not to discriminate against them</u>" (our emphasis added).

178. We thought it was very clear that Parliament intended gender reassignment to be a spectrum moving away from birth sex, and that a person could be at any point on that spectrum. That would be so, whether they described themselves as “non-binary” i.e. not at point A or point Z, “gender fluid” i.e. at different places between point A and point Z at different times, or “transitioning” i.e. moving from point A, but not necessarily ending at point Z, where A and Z are biological sex. We concluded that it was beyond any doubt that somebody in the situation of the Claimant was (and is) protected by the legislation because they are on that spectrum and they are on a journey which will not be the same in any two cases. It will end up where it does. The wording of section 7(1) accommodates that interpretation without any violence to the statutory language Consequently, there is jurisdiction to hear the gender reassignment claim.

The Law

179. The relevant legislation in respect of the allegations of direct discrimination is contained in the EA10. The legislative intention behind the EA10 was to harmonise the previous legislation and modernise the language used. Therefore, and in general terms, the intention was not to change how the law operated unless the harmonisation involved codifying case law or providing additional protection in respect of a particular protected characteristic (see above, for example). Because of that, much of the case law applicable under the predecessor legislation is relevant, as has been confirmed by the higher courts on many occasions.

180. Gender reassignment and sexual orientation are protected characteristics. as defined by section 4 of the EA10. Sections 39 and 40 of the EA10 prohibit unlawful discrimination against employees in the field of work.

Section 39(2) provides that:

“An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B; or

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

Section 39(4) provides the same protection in respect of victimisation and section 40 concerns unlawful harassment in the field of work. Section 120 EA10 confers jurisdiction on an Employment Tribunal to determine complaints relating to the field of work. Section 136 of the EA10 provides that: “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". This provision reverses the burden of proof if there is a prima facie case of direct discrimination or victimisation. The courts have provided detailed guidance on the circumstances in which the burden reverses[1] but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two-stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred (see discussion below).

181. In summary, the EA10 provides that a person with a protected characteristic is protected at work from prohibited conduct as defined by Chapter 2 of it. In addition to the statutory provisions, Employment Tribunals are obliged to take in to account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights.

Direct discrimination

182. Direct discrimination is defined in section 13(1) of the EA10 as "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".

184. In the predecessor legislation, the words "grounds of" were used instead of "because of". However, subsequent case law has confirmed that the change in wording was not intended to change the legal test. This means that the legal principles in respect of direct discrimination remain the same.

185. The application of those principles was summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, which has since been upheld:

(a) In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was.[2] In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(b) If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.[3]

(c) Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the

[1] Barton v Investec [2003] IRLR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA

[2] By reference to Nagarajan v London Regional Transport [1999] IRLR 572 HL

[3] By reference to Nagarajan and also Igen v Wong [2005] IRLR 258 CA

requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.[4] The wording in s136 of The EA10 has not changed the way the burden of proof operates – the claimant still has to show a prima facie case of discrimination.[5]

(d) The explanation for the less favourable treatment does not have to be a reasonable one.[6] In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation.[7] If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

(e) It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee.[8]

(f) It is incumbent on an Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.[9]

(g) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the

[4] By reference to Igen
[5] By reference to Efobi v Royal Mail Group Ltd [2019] EWCA Civ 18
[6] By reference to Zafar v Glasgow City Council [1998] IRLR 36 HL
[7] By reference to Bahl v Law Society [2004] IRLR 799 CA
[8] By reference to Brown v London Borough of Croydon [2007] IRLR 259 CA
[9] By reference to Anya v University of Oxford [2001] IRLR 377 CA

reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was.[10] However, as the EAT noted (in Ladele) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.[11]

186. If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between the two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question).[12]

Victimisation

187. Section 27 of the EA 2010 defines victimisation as follows: "A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act."

188. The definition is substantially the same as under the previous legislation, save that reference was made to "less favourable treatment" rather than "subjecting to detriment". The former definition technically required a comparator, although there was a real question as to whether a comparator was necessary.[13]

189. The starting point is that there must be a protected act. That was not in dispute in this case. If there has been a protected act, the Employment Tribunal must then consider whether the claimant was subjected to detriment and, if so, whether that was because of it.

Harassment

[10] By reference to Shamoon
[11] By reference to Watt (formerly Carter) v Ahsan [2008] ICR 82 EAT
[12] See for example Shamoon and Nagarajan v London Regional Transport[199] IRLR 572 HL
[13] St Helens MBC v Derbyshire [2007] IRLR 540 UKHL

190. Harassment is defined in Section 26 of the Equality Act 2010 as follows:

> "(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 circumstance of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

191. It is also relevant to note that Section 212 EA10, which deals with general interpretation, provides at section 212(1) that " 'detriment' does not, subject to subsection 5, include conduct which amounts to harassment." Subsection 5 is not relevant because it applies where the act does not prohibit harassment in respect of a particular characteristic, such as pregnancy or maternity. The harassment provisions do apply to gender reassignment and sexual orientation (section 26(5) EA10). Consequently, where detrimental treatment amounting to harassment is alleged, that should be considered before considering whether the act complained of amounted to direct discrimination, because it cannot be both. That does not, of course, prevent a Claimant from pleading in the alternative, and it would usually be prudent to do so.

192. The wording of section 26 makes it clear that a distinction is to be drawn between conduct with "the purpose of… " which will amount to harassment as a matter of law, and conduct with "the effect of… " In the latter case the test is partly subjective ("the effect on B" and, arguably, "the other circumstances of the case") and partly objective ("whether it is reasonable for the conduct to have that effect").

Statutory Defence

193. In this the Respondent seeks to rely upon the statutory defence contained in Section 109(4) of the EA10 in respect of the allegations brought under the Equality Act: "In proceedings against A's employer ('B') in respect of anything alleged to have been done by A in the course of A's employment, it is a defence for to show that B took all reasonable steps to prevent A from doing that thing, or from doing anything of that description". In this section A is the alleged discriminator, usually a colleague.

Time limits

194. Section 123(1) provides that a complaint must be brought within the period of three months from the date of the act complained of, or such other period as the employment tribunal considers just and equitable. If acts extend over a period i.e. form part of a continuing course of conduct, limitation is judged by reference to the last act. The test is broad but C must show a link (see Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 EWCA). If an act is out of time, there is a wide discretion to extend time, but the Claimant must show time should be extended on a just and equitable basis (see Robertson v Bexley Community Centre [2003] IRLR 434 EWCA). However, that is essentially a question of fact for the Employment Tribunal (see Lowri Beck v Brophy [2019] EWCA Civ 2490).

Constructive unfair dismissal

195. The relevant legislation as regards constructive unfair dismissal is section 95 of the Employment Rights Act 1996:

> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

Sections 95(2) is not relevant in this case.

196. The legal framework for constructive unfair dismissal claims is well established by case law. In order to claim constructive dismissal there must have been a breach of contract by the respondent, which was a fundamental or significant breach going to the root of the contract (Western Excavating (ECC) Ltd v Sharp [1979 IRLT 27 CA). It can be a breach of an express contractual term or an implied contractual term. In this case the claimant was alleging breaches of the implied term of mutual trust and confidence. In the case of Malik v BCCI [1997] IRLR 462, the House of Lords considered the implied term of mutual trust and confidence. It was held that the implied obligation extends to any conduct by the employer calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. There must be an objective consideration of the conduct concerned. In addition, the conduct must be without reasonable or proper cause. If the conduct concerned is, viewed objectively, likely to cause damage to the relationship between the employer and employee, a breach of the employer's obligation may occur. The motive of the employer is not relevant (see also Lewis v Motorworld Garages Ltd [1985 [IRLR] 465 CA). It has also been established that the function of the tribunal is to look at the conduct as a whole and to ask whether, judged reasonably and sensibly, the employee cannot be expect to put up with it (Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 EAT). Any breach of the

implied term will amount to a fundamental breach of contract (Woods). In addition, it has been established that the fundamental or significant breach of contract could be an individual incident or could be a series of events that cumulatively amounts to a breach of the term. The final straw must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. It does not have to be of the same character as the earlier acts, but must contribute something to the breach, although what it adds may be relatively insignificant (London Borough of Waltham Forest v Omilaju [2005] IRLT 35 CA)

197. If there has been a fundamental breach of contract, the claimant must prove they resigned in response to it, and that they did not delay in doing so, thereby affirming the breach. If the claimant establishes the above, their resignation is to be treated as a dismissal - a constructive dismissal. If there has been a constructive dismissal rather than a resignation, the tribunal must technically move on to consider whether the dismissal is fair or unfair, in accordance with the provisions of section 98 of the 1996 Act. In practice, this point arises infrequently.

Discussion and Conclusions

198. The schedule of allegations was not the most helpful document, because it divided the allegations into different categories e.g. there was a section dealing with allegations of direct discrimination and another dealing with allegations of harassment, which contained much the same acts. In addition, there was a schedule for acts relied on in relation to the grievance process and another for the purposes of constructive unfair dismissal – again listing many of the same acts. Furthermore, there were separate schedules for the protected characteristics of gender reassignment and sexual orientation, which also contained duplication. There was one allegation of victimisation, which was not contained in the schedule, but in the list of issues.

199. For the reasons explained above (see paragraph 192) we decided to consider the allegations of harassment related to gender reassignment first [69Q].

Harassment – gender reassignment

200. Working our way through the Schedule at 69Q, allegation 1 (which was really three allegations) concerned the Claimant's discussion with Mr Poole on 24 May 2017. They were:

(a) the Claimant was described as "not normal" by Mr Poole having disclosed her intention to transition;

(b) that the Claimant was told that she could not dress according to gender; and

(c) when asked about toilet facilities was told to use the disabled toilet as such other staff had been required to do previously.

201. We accepted that allegation 1(a) was partly factually correct – we found that Mr Pole described the situation as "not normal" rather than the Claimant. Allegation 1 (c) was factually correct. Allegation 1 (b) failed on the facts, because Mr Poole did not tell the Claimant not to dress according to gender – he did ask the Claimant to delay attending work in female-type clothing until Mr Morrison was back. We did not accept that 1(a) amounted to harassment because it was not said with the purpose of "harassing" the claimant (by reference to the definition) and could not reasonably be said to have that effect. Similarly, we concluded 1(c) did not amount to harassment because it was not said with the purpose of "harassing" the claimant (by reference to the definition) and could not reasonably be said to have that effect . This meant 1(a) and (c) fell to be considered as allegations of direct discrimination because of gender reassignment.

202. We can deal with the following allegations together:

Allegation 2: On 30 June 2017, a comment was directed at the claimant: "I was checking out your dress, saw it was you and my jaw dropped".

Allegation 4: On 10 July 2017, a male colleague said to the Claimant: "So what's going on? Are you going to have your bits chopped off?".

Allegation 5: On 22 July 2017, the Claimant was told "not to be sensitive" by Ms Suzanne Beaumont of HR in relation to issues raised regarding transition at work.

Allegation 6: On 7 August 2017, The Claimant overheard two colleagues saying: "Have you seen it" and "I saw it in the atrium". When the Claimant reported this to Ms Kirsty Pitcher of HR, she replied: "Well what else do you want them to call you?"

Allegation 7: On 27 September 2017, the Claimant was asked by a male colleague: "How do you get around in them? It looks hard work."

Allegation 8: On 12 October 2017, a female colleague looked at the Claimant and said: "Oh my God!".

Allegation 9: On 31 October 2017, a male contractor seeing the Claimant dressed in female clothing (and not Halloween clothing) asked "Is this [i.e. her outfit] for Halloween?".

Allegation 10: On 17 November 2017, the Claimant was told by a female Engineer: "It's nice to see you here in your attire. You have cracking legs".

Allegation 11: On the 24 January 2018, the Claimant was beeped at aggressively by a male lorry driver who worked for a contractor affiliated to the Respondent.

Allegation 13: On 6 February 2018, the Claimant heard someone say about her: "Oh my God. Wow!"

Allegation 14: On 5 March 2018, a female colleague said to the Claimant; "Don't take this the wrong way, but saw you as the top half didn't match the bottom half".

Allegation 15: On 14 March 2018, the Claimant overheard a conversation about her, in which one colleague said: "Oh my god!" and the other replied: "Do you know what *it* is"?

Allegation 17: On 26 March 2018, a male colleague said to the Claimant: "Are you not fem today"?

Allegation 18: On 17 April 2018, a senior male colleague said to the Claimant: "In Gaydon today and noticed the great outfit".

Allegation 19: On 30 April 2018, a male colleague said to the Claimant: "What do you think of trans versus TERFS? I don't think trans should use female spaces until they have the op".

Allegation 20: On 4 May 2018, a colleague said to another colleague, (making reference to the Claimant): "What the hell is <u>that</u>?"

Allegation 21: On 21 May 2018, Mr Poole laughed at the Claimant for suggesting that he might wear a rainbow lanyard.

Allegation 22: On 7 June 2018, the Claimant was copied into an email from a male colleague saying: "I am looking in the back of my wardrobe for my tutu, by the way… but I can only find my stillies".

Allegation 23: On 11 June 2018, a male colleague "Hi" to the Claimant and stared at her [legs] in a manner that made her feel uncomfortable.

Allegation 24: On 18 June 2018, a male colleague (the same colleague who is referred to in allegation 19) said to the Claimant: "the trans community ought to be grateful because some of their antics have damn-near turned me TERF".

203. We have made findings that all of the above occurred (see findings of fact). In fact, none were disputed (apart from Mr Poole's assertion that he did not laugh – see allegation 21, where we held that he did). Indeed, the Respondent's witnesses accepted the Claimant was subjected to offensive remarks over a long period. It is clear that all (with the possible exceptions of allegations 10 and 18) had the purpose of harassing the claimant because of gender reassignment. Assuming allegations 10 and 18 did not have the purpose of "harassing" the claimant (as defined), we accepted that she found the comments humiliating and degrading and that, viewed objectively, it was reasonable for her to do so. Consequently we found for the Claimant on the allegations set out in paragraph 202.

204. Allegation 12 was that on the 2 February 2018, Mr Poole responded with a joke about a man with long hair who was whistled at, in response to the Claimant seeking to ask him to take an interest and provide some support in relation to transitioning. Mr Poole accepted he said this, but not as a joke. He accepted that it was extremely tactless to do so. We did not

think that his comment related to gender reassignment, so we did not find for the Claimant on this allegation. It did, however, demonstrate Mr Poole's inability to support the Claimant, because the respondent had not equipped him with the skills, or given him the support, to do so.

205. Allegation 16 was that on 16 March 2018, the Respondent did not address in adequate detail, issues raised by the Claimant regarding lack of support, including lack of LGBT+ and lack of adequate toilet facilities. We were unclear as to why the Claimant chose that date, probably because it was the date of the stage 1 grievance outcome. In any event, we found for the Claimant in part in respect of that allegation, because the proposals made to enable the Claimant to access toilet facilities were inadequate and insulting, and exposed her to potential confrontation and embarrassment. Consequently they had the effect of creating an intimidating, hostile, degrading, or offensive environment for her when viewed objectively. To that extent, allegation 16 is upheld.

206. Allegation 25 was undated, and was that a transitioning checklist was not carried out to ensure the Claimant had everything she needed to transition. That was factually correct, but we did not consider it to amount to harassment or direct discrimination related to/because of gender reassignment. We thought it was more properly characterised as a step which the Respondent could have taken, to avoid behaving unlawfully in respect of the protected characteristic of gender reassignment. As will be clear from our findings of fact, the Respondent did not have the slightest idea what a transitioning checklist was.

207. Allegation 3 is more properly an allegation in respect of sexual orientation and is dealt with below at paragraph 209.

208. Consequently, we found that the claimant's allegations of harassment because of gender reassignment in respect of allegations 2, 4 to 11, and 13 to 24 of the harassment schedule were well-founded. We decided that these allegations were clearly part of a continuing course of harassment and were therefore in time. In the alternative, it would have been just and equitable for them to be heard.

Sexual orientation harassment

209. Allegation 3 of the gender reassignment harassment schedule was that on the 19 June 2017, the Claimant overheard a male colleague say he would like to: "Get rid of all gay people". We accepted that it happened. We considered that this allegation was more properly categorised as harassment related to sexual orientation rather than gender reassignment. Harassment does not need to be directed at the complainant, nor does the complainant have to possess the protected characteristic. The comment clearly amounted to harassment because of sexual orientation. However, this was not part of a continuing course of conduct, it was a one-off act, it was out of time, and we did not consider it just and equitable to extend time. Consequently, there was no jurisdiction to hear it, and we dismissed it.

210. The remaining allegations in the sexual orientation schedule were more properly classed as allegations relating to the protected characteristic of gender reassignment, and have been dealt with already.

Direct discrimination – gender reassignment

211. The direct discrimination schedule has, of course, become much shorter because of our findings in relation to the harassment claim.

212. The only allegations remaining are those described above at 1(a) and 1(c) of the gender reassignment schedule, and also at 1(a) and (c) of the direct discrimination schedule. We concluded that Mr Poole describing the situation i.e. the Claimant's transitioning as "not normal", and his instruction to use the disabled toilets (albeit that the latter was in good faith based on previous practice) both amounted to direct discrimination because of gender reassignment. A person who was not transitioning would not have been treated that way. The allegations are out of time, but are of a similar ilk to the harassment claims and, as such, form part of a continuing course of conduct, so there is jurisdiction to hear them. We concluded there was direct discrimination because of gender reassignment in relation to allegations 1(a) and (c).

Victimisation

213. There is one allegation of victimisation which, as noted above, is contained in the agreed list of issues [69T & U at 69U]. It is worded as follows: "It being admitted that the Claimant's grievance was a protected act, was the Claimant subjected to a detriment by the Respondent's failure to permit the Claimant to retract her resignation, such that liability under section 27 EA10 is established?". The short answer to that, for the reasons set out in our findings of fact, in particular paragraph 151, is that the decision did amount to unlawful discrimination because the decision makers were influenced by the claimant's grievance and, indeed, more generally had come to see her as a nuisance because of her complaints about their lack of support. The Claimant was notified of the decision on 22 May 2018, so that allegation was in time. We concluded that the Respondent victimised the Claimant by failing to permit her to retract her resignation.

Lack of support – grievance schedule

214. There was a schedule of allegations of lack of support and/or about the way the grievance was handled. It really added very little to the allegations we have already dealt with. It will be abundantly clear from our findings of fact that the Claimant was not supported properly, and that no action was taken to afford her protection from being exposed to serious harassment. The consequence was that her mental health seriously deteriorated. The Respondent was in a position to take action, and failed to do so. It is not necessary to elaborate further. The facts speak for themselves.

The statutory defence

215. We found it surprising, to say the least, that the Respondent continued to rely on the statutory defence (Section 109(4) EA10) Since arguments about it were included in the Respondent's closing submissions, it appeared to still be a live issue, despite concessions made by the Respondent's witnesses. In order to make out the statutory defence, it is necessary for the Respondent to show that it took all reasonable steps to prevent employees committing harassment or discrimination in the workplace. Given that the Respondent had some policies but did little or nothing to publicise or implement them, we found it hard to believe that the statutory defence continued to be pursued. As will be apparent from our findings of fact, the argument was totally without merit.

Constructive unfair dismissal

216. There was a schedule of allegations relied on as amounting to a breach of trust and confidence. The Claimant gave notice on 10 April 2018 so clearly any acts after that date did not contribute to her decision. As to the acts complained of before that date, the schedule added very little to the allegations we have already dealt with and all the points are covered in our findings of fact. It will be abundantly clear from those findings of fact that at the point the Claimant gave notice, there had been a fundamental breach of the duty of mutual trust and confidence by the Respondent. The Respondent did not have reasonable or proper cause for acting as it did. The Claimant was entitled to affirm that breach, and she did so, albeit that she did not use the term "resignation" or the term "constructive dismissal".

217. We did not accept the Claimant's decision to remain in work (if her health permitted) until the end of June 2018, constituted an affirmation of the breach. She had reasons for doing so, and she did not know if she would be able to. Nor did we accept that the Claimant's request to retract her notice was any form of affirmation of that breach. The Claimant's reasons for doing so, were that one person could make a difference and certainly had nothing to do with any change in the Respondent's behaviour. Furthermore, she was still unwell. It is possible that if the Respondent had allowed the Claimant to retract her notice, she would have affirmed the breach – but that was not the position.

218. The Respondent's Counsel, in her submissions, raised the possibility that there was a potentially fair reason for dismissal i.e. some other substantial reason. That argument would seem to be reliant on the proposition that there was a mutual loss of trust and confidence. We did not accept that was the case. The Claimant had not acted in any way that went to the heart of the contract, as is evidenced by her performance reviews.

219. Furthermore, to the extent that the Respondent's argument was reliant on the proposition that the unlawful decision to fail to permit the claimant to retract her notice was made because the Respondent had lost trust and confidence in her, we rejected it. The proposition that the respondent could rely on its unlawful conduct to defeat the constructive unfair dismissal claim is unattractive, to say the least. By analogy to HMPS v Beart No.2 [2005] EWCA Civ 248, the chain of causation as regards victimisation would not be broken in any event, so the Respondent's

argument, if correct, would make little difference to compensation, save as regards the basic award and loss of statutory rights. For those reasons we did not accept there was a potentially fair reason for dismissal. Consequently, we concluded that the Claimant was constructively unfairly dismissed.

The remaining allegations

220. The remaining allegations were dismissed.

Remedy - aggravated damages, recommendations, and ACAS uplift

221. The parties requested us to decide whether it would be appropriate to award aggravated damages in this case. We decided that it was beyond any doubt that this was a case which cried out for such an award. There were two reasons for that. Firstly, because of the egregious way the Claimant was treated when being subjected to serious harassment (see paragraphs 127, 131, 132 and 141 for examples of this). In this day and age such treatment was frankly unconscionable. Secondly, the very insensitive approach taken by the Respondent in defending this case, which resulted in the cross-examination referred to in our findings (see, for example, paragraphs 121 and 149), did nothing but compound existing injury to feelings. Some of the points put were bordering on offensive, such as suggesting the Claimant was "hypersensitive", that "the situation can't have been that bad" and that the Claimant had taken things "out of proportion because she was depressed and had no personal support in her home-life which made her feel isolated".

222. For the record, we consider that Ms Rose Taylor was (and is) a remarkably resilient person and continued to be so, despite being made very unwell by the Respondent's total and abject failure to protect her from harassment. It is praiseworthy that she made a real difference in relation to diversity and equality, especially in relation to LGBT+, at JLR. It is regrettable that the burden of doing so fell on her, and that the Respondent sought to use her willingness and commitment to doing so, against her in the hearing before us. We come back to the question of what else could be a greater priority than preventing an employee from suffering harassment in the workplace, and the acknowledgement that there should not be.

223. For the avoidance of doubt, our comments regarding the conduct of these proceedings, related to the hearing before us, and not to the Respondent's conduct of the proceedings up to that point. Furthermore, we do not criticise the Respondent for raising the section 7 EA10 interpretation point in the slightest. It is a proper argument and goes to jurisdiction.

224. We told the parties that we were minded to consider making recommendations in order to alleviate the Claimant's injury to feelings by ensuring the Respondent corporately, takes positive steps to avoid this situation arising again. Such recommendations would, of course, benefit the Respondent, because they would help to ensure that a claim such as this does not arise in the future.

225. As regards the other remedy point, the ACAS uplift, the Claimant submits that 20% would be appropriate because of the Respondent's wholesale failure to deal with her grievance properly. We concluded that was an appropriate sum bearing in mind the Respondent's size and resources, and the extent of the failure.

Other matters

226. We told the parties that we wanted to make it absolutely clear that we would regard very dimly any attempt by the Respondent to suggest that the failings in this case were the responsibility of the individual managers. That is simply not the case. Mr Poole, as we have observed, was completely out of his depth and looking for a lifeline, which was not there. That applies equally to Mr Morrison, Mr Glithero and Mr Bingham. They are employed as Engineers and we have no doubt they are experts in their chosen field. The Respondent did not give them the tools or support to deal with a situation such as this, which was completely outwith their area of expertise. The advice from HR was woeful, but they cannot be blamed for relying on it.

227. We thought it astounding that there was nothing in the way of proper support, training and enforcement on diversity and equality until the Claimant raised the issue in 2017, bearing in mind how long the legislation has been in force. We had not seen a wholesale failure in an organisation of this size in our collective experience as an industrial jury. This case came about as a result of the culture of the organisation. The culture is not aligned to the Respondent's policies, agreements, or statements of intent. This is a lesson that has to be learnt at the highest level. It is a systemic failure and demonstrates that the Respondent values its employees' ability to perform their key roles far more than their personal welfare and wellbeing. We were pleased that the Respondent sent some of its senior managers to hear our oral reasons, and we are hopeful that this will lead to meaningful change.

228. Written reasons were requested by both parties.

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Employment Judge Hughes

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Date: 26 November 2020

REASONS SENT TO THE PARTIES ON
30 November 2020

Krishan Dhariwal

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FOR THE TRIBUNAL OFFICE

Postscript

The Employment Tribunal reconvened to consider Remedy on 2 October 2020. The parties had agreed compensation and recommendations. We considered that only one of those recommendations fell within our statutory remit, but the others have been Ordered by consent. We are pleased that the Respondent has thus far shown commitment to bringing about change for the better. The Claimant has an outstanding costs application which is listed for 22 January 2021. An Order has been made in respect of that hearing, which is timetabled to allow the parties the opportunity to consider these reasons before preparing for that hearing. The Remedy Judgment had already been promulgated and is reproduced below, for information only.

Remedy Judgment

The unanimous decision of the Employment Tribunal is that:

1 We make a statutory recommendation that the Respondent's Board of Directors read and discuss our written reasons for this judgment at a Board meeting on or before 1 March 2021. A copy of the minutes recording that this has taken place is to be sent to the claimant by 15 March 2021.

2 The Claimant's application for costs will be heard on 22 January 2021 and directions about that have been made in a separate Case Management Order.

By consent:

3 The Respondent's Board ("JLR") agrees to appoint one of its number as a Diversity and Inclusion Champion.

4 The Respondent's Board shall commission a report by a recognised diversity organisation, such as Stonewall, to investigate diversity and inclusion throughout JLR (to include speaking to the claimant) and produce a report setting out the current position and the steps necessary for JLR to become a "standard setting organisation" in the diversity and inclusion field across all the protected characteristics.

5 Thereafter, for the next five years, an expert appointed in the same way will produce an annual report of progress by reference to the original report.

6 The report referred to in paragraph 4 above, and the annual reviews referred to in paragraph 5 above, shall be made public and sent to all employees and workers at JLR, and to the Claimant.

7 The Respondent agrees to pay the sum of £180,000 to the claimant in full and final settlement of this claim. This amount does not include the claimant's costs application.