Case Number: 1400762/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mr H Coles**

Respondent: **The Planning Inspectorate**

Heard at: **Bristol** **On: 27 and 28 February 2017 and 1, 2 and 3 March 2017**

Before: **Employment Judge R Harper**
Members Ms S M Pendle
Mrs E Burlow

Representation:
Claimant: **Mr A Line, Barrister**
Respondent: **Mr J Allsop, Counsel**

JUDGMENT

1. The claims of disability discrimination under Section 15 Equality Act 2010 ("EA") are dismissed.

2. The claims under Sections 20 and 21 EA are dismissed.

3. The claims under Section 26 EA are dismissed.

REASONS

1. The Tribunal heard evidence from the claimant, Mrs Brooks, Mr S Griffiths whose former name was Mr Hayward, Mrs N Coombs, Ms Hodgson, Ms Lorna Biggins, Ms E Martyn and Mr J Banks.

2. The Tribunal considered all the evidence to which its attention was drawn, making the point that if its attention was not drawn to a document then it has not considered it. It has considered all the written and oral evidence of the witnesses and also the oral and written submissions of both Counsel.

3. This is a disability claim alleging discrimination arising in consequence of disability, an alleged breach of the duty to make reasonable adjustments,

and harassment. It is not a claim for direct discrimination or unfair dismissal.

4. The Tribunal considered and applied Section 15 of the EA, Sections 20 and 21 EA, Section 26 EA, Section 136 EA relating to the burden of proof, Section 123 EA relating to time limits especially conduct extending over a period and Section 212 EA with regard to the definition of the word "substantial," which means more than minor or trivial.

5. The Tribunal considered the following cases and external source material:

   - Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305
   - Pnaiser v NHS England 2016 IRLR 170
   - IPC Media v Miller 2013 IRLR 707
   - Trustees of Swansea University Pension and Assurance Scheme v Williams 2015 IRLR 885
   - The extract from Harvey on industrial relations divider L3A43383.01
   - Paragraphs 6.2, 6.23 and 6.24 of the EHRC Code
   - R (on the application of Elias) v Secretary of State for Defence
   - Seldon v Clarkson Wright & Jakes 2012 UKSC 16
   - Environment Agency v Rowan 2008 IRLR 20
   - Carreras v United First Partners Research 2016 UKEAT/0266/15
   - Harvey on industrial relations divider L3B6399
   - Chapter 6 of the Statutory Code of Practice on employment 2011
   - Harvey divider L3CF421
   - Richmond Pharmacology v Dhaliwal 2009 IRLR 336
   - Chief Constable of Lincolnshire Police v Caston 2010 IRLR 327
   - British Coal Corporation and Keeble 1997 IRLR 336
   - Unite v Nailard 2016 IRLR 906
   - T Systems Ltd v Lewis UKEAT/0042/15
   - Nottingham City Transport Ltd v Harvey 2013 EQLR4
   - Fox v British Airways Plc UKEAT/0315/14
   - Salford NHS Primary Care Trust v Smith 2011 EQLR 1119

- Leeds Teaching Hospital NHS Trust v Foster 2011 EQLR 1075
- Brunfitt v MOD 2005 IRLR4
- Nazier and Another v Asseem 2010 ICR 1225
- Driscoll v Peninsula Business Services Ltd 2000 IRLR 151
- Chawla v Hewlett Packard Ltd 2015 IRLR 356
- Gallop v New Port City Council 2 2016 IRLR 395
- Prospects with people with Learning Difficulties v Harris 2012 EQLR 781
- General Dynamics Information Technology Ltd v. Carranza 2015 IRLR 43

6. Paragraphs 24 – 31 of the Basildon Judgment :

> *"The current statute requires two steps. There are two links in the chain both of which are causal though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus on the words "because of something" and therefore has to identify "something" and second on the fact that that something must be something arising in consequence of B's disability which constitutes a second causative consequential link. These are two separate stages. In addition the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising and that it is unfavourable to B."*

7. The passage from the Swansea case that requires to be highlighted is at paragraph 29 of the Judgment:

> *"The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be. Sometimes this may be obvious as, for example, where a person may suffer a life event which would generally be regarded as adverse. Taking the Malcolm case as an example eviction or being surcharged, being required to work harder, longer or for less. A person who is asked on pain of discipline to perform at a rate which he cannot achieve because of his disability would be treated unfavourably if he were then to be subjected to that discipline or threatened with it. This would not be directly because of his disability but because of that which arose from it. His inability to perform work at the same speed or with the same efficiency."*

8. The next passage to highlight comes from the Environment Agency case which sets out in paragraph 27 of the Judgment:

"In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A2 of the Act by failing to comply with a Section 4A duty must identify:

(a) The provision, criteria or practice applied by or on behalf of an employer;

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

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

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

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

Disabilities

9. The claimant relies on the following disabilities:

Rheumatoid arthritis, depression and irritable bowel syndrome.

Comparators

10. The comparators that the claimant relies upon are Graeme Nall and Kelly Frost.

PCP's

11. These are set out in the list of issues. Initially the PCP's were said to be the following:

Subjecting the claimant to daily targets.

Subjecting the claimant to a performance management process

Dismissing the claimant

12. During the course of the hearing the claimant made it clear that he no longer relied on dismissing the claimant as a PCPbut relies on that as an alleged substantial disadvantage only.

Dates of Employment

13. The claimant was employed between 6 April 1998 and 23 November 2015.

Date of ET1

14. The ET1 was filed at the Tribunal on 15 April 2016.

Date of Birth

15. The claimant's date of birth is 9 April 1954.

Case Management Orders

16. There were two case management hearings firstly, on 4 October 2016 before Employment Judge R. Harper and secondly, on 25 January 2017 before Employment Judge Goraj.

Time Limits

17. Paragraph 2 of the Order made on 4 October 2016 states as follows:

> *"The claim for disability discrimination will be allowed to continue as it is just and equitable to extend time for presentation on the ET1 so that the ET1 which has been served is hereby validated."*

18. That Order was clearly directed at whether the last allegation of discrimination was within three months of the date of the presentation of the claim. In that it is asserted that allegations of discrimination are made arising prior to the 23 November 2015 the Tribunal find that these are allegations of discrimination amounting to alleged conduct extending over a period and therefore the Tribunal has jurisdiction to consider them.

Policy

19. On page 8 of the bundle is the managing poor performance policy. At the bottom of the page there is a paragraph which says as follows:

> *"After each written warning there is a review period in which employees are supported to improve their performance. There is also the facility to appeal decisions. Managers and employees are advised to keep a written record of discussions. In instances that result in dismissal, it is expected that where line managers have robustly managed performance the procedure should take no longer than six months."*

20. On page 39 of the bundle is the managing poor performance procedure. Paragraph 2 on page 39 says as follows:

> *"In stages 1 and 2 the review period should not normally be longer than one month. In exceptional circumstances the review period may be extended to take account of reasonable adjustments as a result of disability and training needs up to a maximum of three months."*

21. On page 42 is a further extract from the same procedure. Under the heading Stages 1 and 2 Written Warnings the penultimate bullet point says

as follows:

> *"The duration of this review period and the date of the next meeting at the end of the period. The review period should not be normally longer than one month. In exceptional circumstances the review period may be extended to take account of reasonable adjustments as a result of disability and training needs up to a maximum of three months."*

22. The claimant said in his evidence "I still maintain that it was discriminatory because of the way in which they spoke to me only two weeks after the end of the course."

23. On page 68 is an extract from the harassment and bullying policy which, under the heading Firm Fair Management at paragraph 6.4.1, states as follows:

> *"Line managers are responsible for ensuring staff who report to them perform to an acceptable standard within the performance management framework. Firm management is not bullying and a manager's criticism of unsatisfactory work performance should not be confused with bullying. Managers are entitled to set standards and make clear any aspects of performance which are unacceptable providing they are consistent throughout the team."*

24. On page 70 from the same document paragraph 7.3.1 says as follows:

> *"We are all responsible for our own behaviour and ensuring that we treat each other with dignity and respect thereby contributing to a work environment which is free from bullying and harassment. You can help to do this by:*
>
> - *Being aware of your own behaviour and its impact on others.*
> - *Taking a stand if you think inappropriate jokes or comments are being made.*
> - *Making it clear to others when you find their behaviour unacceptable.*
> - *Intervening if possible to stop harassment or bullying and giving support to recipients of such behaviour.*
> - *Making it clear that you find harassment and bullying unacceptable.*
> - *Reporting harassment or bullying to your line manager or your Human Resources Advisor.*
> - *Supporting PINS in the investigation of complaints.*
> - *Not pre-judging or victimising the complainant or alleged harasser if a complaint of harassment or bullying is made."*

Medical

25. On 14 November 2008 a report was prepared from a Company called Health Management. This records that the claimant had been provided with an ergonomic keyboard which he found helpful. The Tribunal subsequently heard evidence that the claimant was provided with a particular hole punch which proved to be helpful as well.

26. On 24 April 2012 is a further letter from Health Management and the penultimate paragraph records as follows:

> "*In terms of a workplace context Mr Coles stated that he had a new line manager last summer and that he had been advised that there was a desire for an increase in his productivity from seven to ten files a day. Mr Coles explained to our doctor that he had attempted to meet these productivity expectations but in practice encountered a number of difficulties including the fact that his underlying rheumatoid arthritis disease was giving rise to joint pains in his wrists and fingers thereby slowing down his keying and inputting*."

27. There are further extracts to be found from this report on page 110. The penultimate paragraph records as follows:

> *"Evidently the other issue to consider will be his workload. If in the course of your ongoing discussions with Mr Coles you are able to reach a mutual agreement with him about the productivity expectations of his role then this in itself will go someway to alleviating his perception of stress and hence improving the prospects of him remaining well and in regular attendance in the future. Conversely if, despite your best efforts to resolve the situation with him, it transpires that there is some more fundamental mismatch between management expectations of productivity and Mr Coles' assessment of his own capability then it is foreseeable that he is liable to remain under strain and the foreseeable risk would be of poor psychological health and associated impact on his work. Means by which this particular aspect of his case might be resolved might include exploration of additional training or support that would be helpful to him as his underlying rheumatoid disease is likely to constitute a disability for the purpose of equality legislation it would also be appropriate to ensure what adjustment could reasonably be made in relation to this condition had been put in place."*

28. As an aside at this stage, and picking up the reference to targets in the medical report, the Tribunal highlights a passage on page 170 which was a meeting held with the claimant where the claimant is recorded as having said that "*he doesn't find the targets difficult and is confident that he can continue to meet them in the future*."

29. On 14 and 15 April 2015 the claimant attended refresher training on the software programme called Horizon.

30. Returning to the medical reports. On 8 June 2012 there is another document from Health Management and on page 113 it states as follows:

> *"As Howard specifically found the previous increase in his workload to be unachievable I would recommend that his workload be increased gradually in line with his hours to ensure he feels that his workload is manageable. It would be a reasonable adjustment to allow him to undertake a reduced caseload if because of his medical conditions he would find the higher levels of work impossible to achieve. A weekly meeting with his manager to discuss work levels would be beneficial in identifying what his maximum level of productivity is and then planning work accordingly. His productivity may however fluctuate according to his symptoms and this should be taken into account."*

31. On 14 July 2014 is a report from the University Hospital Bristol NHS Trust to be found at pages 116 and 117. That report concludes on page 116:

> *"He has been having difficulties with work because his productivity is not felt to be as great as that of his colleagues. The rheumatoid arthritis does affect his upper limbs predominantly his hands which results in stiffness of the joints and porosity of movement. His dexterity is reduced and the time it takes him to do simple tasks is extended."*

32. On 23 July 2015 is confirmation that the claimant suffers with irritable bowel syndrome.

33. On page 119 – 121 is a report from Health Management dated 1 August 2014. At the bottom of page 119 it records as follows:

> *"My assessment is that Mr Coles has quite severe arthritis in his right hand with characteristic changes of rheumatoid arthritis and early destruction of the knuckle joints at the index and middle fingers. His grip is poor for a right handed individual and reduced compared with the grip in his left hand which is less severely affected. His dexterity in the right hand is particularly reduced. The time it take him to do simple tasks is extended and he has a stiffness of the joints with reduction in movement."*

34. On page 120 under the heading do any temporary or permanent restrictions need to be applied and for how long it states:

> *"Mr Coles is going to have difficulty achieving the targets for an able bodied person due to symptoms from his arthritis. In particular, the severe arthritis he has in his right hand. I suggested to him that the targets for him are reviewed. He told me that he can manage twelve files a day at present and has managed to do this in his current state."*

35. At the bottom of page 120 it states:

> *"I consider it highly likely that Mr Coles' situation would be covered by disability legislation adjustments that you should consider would include adjustments to any workload targets as advised above and also provision of technologies to assist Mr Coles in his work."*

36. On page 121 it states:

> *"I suspect Mr Coles is highly unlikely to be able to achieve the performance targets for an able bodied person due to the arthritis he is suffering. This will be a permanent situation unless new medication transforms his current level of symptoms. If no changes are made to his medication or if any future changes affect no significant change in his symptom level, then it is likely that his arthritis will continue to progress with a commensurate reduction in his dexterity and overall hand function."*

37. On pages 122 to 123 is a report date 24 September 2015 from Health Management. At the bottom of page 122 it states as follows:

> *"Due to the adverse effect of his performance review plan on his IBS and overall state of health he feels that the performance review plan itself will impact his performance at work. From a medical perspective this point of view has merit and I would not seek to refute it."*

38. The penultimate paragraph on page 123 states as follows:

> *"In your referral you have asked a number of specific questions relating to Mr Coles' medical condition which I believe are covered above. In terms of any additional adjustments which may be required since your last report you do need to consider whether the fact that he reports that the performance improvement process is having an adverse affect on his depression and bowel disorder it would be possible to modify or postpone the process. It is for you as employers to determine the applicability of this advice within your work setting."*

39. The Tribunal's attention was repeatedly drawn to this particular paragraph. The claimant said in his evidence that he found that that last paragraph was a clear recommendation. However, the Tribunal's interpretation of it is that, as is stated in the final sentence set out above, it is ultimately for the employer's to determine the applicability of this advice within the claimant's work setting.

Daily/Weekly Targets

40. The Tribunal is satisfied that all members of the section were required to keep a daily records but reporting weekly and it was felt to be helpful to the claimant to report daily on his activities. The Tribunal refers, without repeating them, to the statistics set out at pages 147 and 148. On page 228 is an email dated 3 March 2015 from Liz Martyn who was the claimant's line manager to the claimant stating as follows:

> *"The reason I have asked for daily stats is because you are always late in submitting your weekly ones. If you send them to me each evening before you leave for the day then there is no need to submit them at the end of the week. No exceptions."*

41. On page 259 which is the letter dated 28 October 2015 which was the outcome of the appeal against the final written warning. Natalie Coombs who wrote this letter said in the last paragraph on page 259:

> *"I acknowledge the evidence you provided indicating that you are given daily targets whilst other members of the team are allowed weekly average targets. However, each individual in the team is required to provide evidence of their performance for each day worked."*

42. On page 273 is a letter dated 23 November 2015 written by Lorna Biggins. The penultimate paragraph on page 273 states, amongst other things, as follows:

> *"During the meeting you indicated that others doing the same role as you were set a weekly target and not the daily target and therefore you felt you were being treated differently. I have checked this and the Head of Service (Mr Hall) has confirmed that everyone undertaking the same role as you has a daily target. They may be asked to provide their data return on a weekly basis but must show what they have done each day."*

Medical Retirement

43. On page 282 which is part of a letter from the claimant in his appeal against dismissal dated 4 December 2015. It states as follows:

> *"No attempt was made by management either prior to or during the performance review process to explore the medical retirement or partial retirement as a possible alternative to dismissal."*

44. As Mr Banks said, and he was not challenged in cross examination on this point, in fact medical retirement was not appropriate for the claimant because at the time when this letter was written he was aged 61. It appears to be running in the background of this claim that the claimant was very aggrieved that the respondents would not consider medical retirement.

Mrs Coombs' Evidence

45. Mrs Coombs said in her oral evidence that she talked with the claimant about his disability and the claimant had said that he rarely told his line manager about his disability problems until after the end of the week. She told him that he needed to tell the line manager at the time. The reason for highlighting that is that the claimant would have been advised. He also had Trade Union assistance. It was not helpful for him not to report on a daily basis when he encountered any difficulties.

Findings of Fact

46. On 19 August 2014 there was the first weekly 1-2-1 meeting between Mrs Martyn and the claimant. The resulting document at page 150 – 151 states at the top of page 151:

> *"In your PMR objectives you are expected to process a minimum of*

120 lines a day. A reduction of 20% has been agreed. This brings the expected minimum to 100 lines per day."

47. In fact the reference to 100 was incorrect. It was subsequently amended.

48. In a meeting held on 22 October 2014 Liz Martyn records on page 152:

> *"We agreed that we would meet on 26 November to review how matters were proceeding. I said that if I felt that things were still not going well I would put you on to a PIP. The decision to be made following the meeting on 26 November. This is something that neither of us wants so you promise to prove your ability to carry out the role to me."*

49. This is an important reference because this is approximately a year or so before the decision to dismiss was subsequently taken. The claimant would have been left in no doubt of the seriousness of the situation by the passage recorded above.

50. At a meeting on 25 November 2014 between the claimant and Mrs Martyn it is recorded that:

> *"I explained I was slightly disappointed in the volume of work which you are producing. I was hoping that you would have been consistently reaching the targets required. We went through figures week by week starting with week commencing 20 October 2014 until the week commencing 17 November and overall your average just averaged out just under the target required."*

51. Further down the page it states:

> *"Overall I am pleased that you are heading in the right direction and not going backwards. We are to meet again in six weeks in January 2015."*

52. On 5 March 2015 there was a meeting between the claimant and his Union representative who was then called Mr Hayward (he is now called Mr Griffiths), Mrs Martyn and Mrs Hodgson.

53. In paragraph 7 of the claimant's statement he states:

> "*From the very start of the meeting Mrs Martyn was aggressive and confrontational and I found her very intimidating. She began saying that I did not get on with my previous manager at the registry team and stated I am beginning to see why. She also claimed I was not getting on with two members of my current team. Mrs Martyn became so angry that she was beside herself with rage to the point that she could no longer speak and Mrs Hodgson took over the meeting."*

54. Mr Griffiths gave evidence that indeed both sides lost something of control. Mrs Hodgson also said the same thing. One of the witnesses described the situation as being six of one and half a dozen of the other.

55. Whist it is undoubtedly the case, by our findings of fact Mrs Martyn behaved somewhat unprofessionally at that meeting by allowing emotions to become over fuelled, equally criticism can be made of the claimant for also losing his self control. We think a description of six of one and half dozen of the other is an accurate summary of what had occurred. Neither the claimant, nor Mrs Martyn, in the way that they behaved themselves at that meeting come out of it very well.

56. Paragraph 11 of the claimant's statement says as follows:

> *"On 30 April 2015 I had my annual review with Ms Martyn. During my review Ms Martyn asked me why there hadn't been any immediate improvements in my performance and she was critical of my work. According to the staff handbook employees are to be given a review period of given one month to adjust. If they are disabled employees they are to be given up to three months. This is another clear example of why I was being discriminated against due to my disabilities. At the end of the meeting Ms Martyn confirmed that she would commence formal poor performance procedure."*

57. The claimant was subject to firm cross examination in relation to this particular point and ultimately accepted that there was in fact no breach of the policy in relation to that particular paragraph.

58. On 18 May 2015 the respondent issued the **first written warning** to the claimant. This warning which is to be found at pages 241 – 242 of the bundle is in a relatively standard professional format and sets out clearly the warning and the consequences of a failure to improve.

59. On 26 May 2015 there was another 1-2-1 meeting and the minutes of that meeting are to be found on pages 162 – 163. It is clear from page 162 that

> *"if not achieved daily it was explained that you could risk receiving a second written warning."*

60. Significantly, there is a single sentence in the middle of 162 which says as follows:

> *"This discussion you agreed was useful and informative."*

61. On 10 June 2015 there was another 1-2-1 meeting at which the claimant was told that the required number of 96 lines or eight files a day was consistently not being achieved. The claimant was expected to deal with two types of appeal - a HAS appeal which involved not so much work and considerable mouse clicks rather than keyboard use, and planning appeals which were longer and took longer to process. The minutes on page 166 record that there were too many HAS appeals - four on one day and five on another.

62. On 15 June 2015 there was another 1-2-1 meeting with Liz Martyn and on page 167 she records:

> *"I pointed out that of the twelve files registered for Monday and*

Tuesday, nine were HAS which did not take that long."

63. A similar theme was developed by Mr Banks in his letter which rejected the appeal against dismissal to be found on page 301 of the bundle. He records towards the end of the page:

> *"As it was there were 30% of days where targets were not hit and a large number of other days where even though the eight cases per day target was hit this generally came with a low output of lines."*

64. On 15 July 2015 there was a formal meeting at which was present the claimant, Mr Dickson his Union representative, Liz Martyn and a note taker. That meeting records various adjustments that had already been made and agreed at an earlier meeting and those are:

> *(a)* "*Registering of types of appeals received online, by email or through the post.*
>
> *(b) Preparation of files ready for registering.*
>
> *(c) To help the despatch team PA files as and when required.*
>
> *(d) Be available to cover the phones between the hours of 0900 – 1700 hours."*

65. The page finishes on page 168:

> *"Liz asked Howard if he agreed with this and he confirmed that he did."*

66. It was recorded that since 13 May Liz and the claimant had met on three different occasions to discuss his progress and it is recorded:

> *"Howard agreed he found the meetings useful."*

67. In the middle of page 169 is a lengthy extract from what Liz Martyn said at the meeting. The Tribunal's attention was drawn to it on numerous occasions in cross examination. It states as follows:

> *"After listening to Howard Liz noted that Howard does appear to be moving in the right direction but needs to be consistent. She confirmed that Howard has not consistently met the required target as set out in the letter dated 18 May 2015 noting that Howard only achieved the target of 96 lines or above on 13 out of 32 working days and on at least three occasions a request for hard copies could have been sent as over 30 lines were involved. It should also be noted that the target of eight files registered was only reached on 3 days out of 27 days also out of these files 15 were HAS."*

68. This is an important paragraph to highlight because it is very much the thrust of the claimant's case that he feels aggrieved that, come the time of his dismissal, he was improving. The respondent counters that by saying that what it was looking at was a consistent achievement of a daily target although they acknowledged there was some improvement. Looking at the

review period there was not a consistent achievement of the daily target which was required by them. Such consistent achievement also formed part of the annual objectives set out for each of the people in this particular team.

69. On 21 July 2015 the claimant received his **final written warning** and this is set out at pages 246 and 247. Once again this is a fairly standard format and is professionally set out and makes it clear that there is this final written warning and the consequences of non compliance or a possible breach.

70. On 29 July 2015 the claimant appealed against this final written warning. It is of significance to note that that the claimant did not appeal the first warning. That appeal against the final written warning is to be found on page 248 and the appeal was on three very specific points.

> *"**Firstly**, a point of clarification on the daily requirements and whether I am treated differently from other team members, **secondl**y, that a full review of my Occupational Health issues is carried out and **thirdly**, that any appeal manager is not selected from case work procedure."*

71. In the way that it was set out it did not really address the issues which had resulted in the imposition of the final written warning.

72. On 27 August 2015 there was an appeal meeting conducted by Mrs Coombs and attended by the claimant and Mr Dickson his Union representative. The minutes of that meeting are found at pages 171 – 175 and in particular it is relevant to highlight page 173. On page 173 Mrs Coombs is shown as asking the claimant if he had any further evidence other than anecdotal of being treated differently. Although she was criticised in cross examination because of this reference the Tribunal are satisfied that in fact all she was trying to obtain from the claimant was anything else that he relied on. The reference to the word "anecdotal" was perhaps rather opaque but the tribunal is satisfied that that was the intention behind her question.

73. There was then a discussion at the same meeting about flare ups which the claimant described as being stress related, painful and unpredictable. Significantly on page 174 of the same document, when asked if the reasonable adjustments were working, it is recorded as follows:

> *"Asked if Howard felt his reasonable adjustments were working which Howard confirmed that they were. Natalie then asked if anything additional was needed and Howard explained that he was in the process of communicating with Paul about a replacement hole punch."*

74. As earlier recorded in these reasons a hole punch was subsequently provided.

75. On page 259 through to page 261 is a detailed letter dated 28 October from Natalie Coombs which rejected the claimant's appeal against the issuing of his final written warning. Despite criticism that she was subjected to in cross examination, it is clear that she did consider the medical evidence

because on page 260 it states as follows:

> *"A medical review has been undertaken with the Occupational Health Service. It is noted that the physician comments on the timing of this process and the impact on your conditions which are understandable. However, I feel this effect would be the same regardless of the timing."*

76. Also on 2 October 2015 there was another 1-2-1 meeting between the claimant and his line manager Liz Martyn at which it is recorded:

> *"You also confirmed that the equipment you currently have to assist you is also fine."*

77. On 15 October 2015 there was a performance review meeting between Liz Martyn, the claimant, and Mr Dickson in attendance as the Union representative together with a note taker. Mr Dickson arrived at the meeting after it had started and the respondent agreed to rearrange the meeting within five days.

78. That re-arranged meeting took place on 21 October 2015 and the minutes of that meeting are extensive and run between pages 179 – 184.

79. At page 180 at the top it states as follows:

> *"With regards to daily minimum targets Howard said that he felt more confident and that he was achieving and exceeding them"*
>
> And it was further recorded at the bottom of the page:
>
> *"Liz confirmed that Howard had not always met the minimum daily targets as required*."
>
> At page 183 in the middle of the page it is recorded as follows:
>
> "*Liz explained that taking into account all the information that is currently before her she is of the opinion that Howard has not achieved the required daily targets. It is therefore her intention to refer the matter to a decision maker*."

80. On 12 November 2015 there was a final performance review meeting and the minutes of that are to be found on pages 185 – 187 of the bundle. There was then a meeting on 23 November 2015 the minutes of which are to be found at pages 272 – 275. The outcome of that meeting letter is dated 23 November 2015 and that is on those pages where it is recorded, amongst other things, that the target was not met on average 30% of the time.

81. Ms Biggins was cross examined on that point. The Tribunal find that her assertion of the 30% figure was not really shaken as a result of the cross examination on that particular point. Of significance, on page 274, of the letter, it sets out the adjustments that have been set up for the claimant which are set out as follows:

> *"From October 2014 an overall reduction of your workload between 30 – 35% has been granted as a reasonable adjustment to your condition which included a reduction in daily targets. You have received additional training and support. A work station assessment is being carried out and specialist equipment has also been provided. Additional refresher training was provided in April 2015. Regular 1-2-1 sessions provided to offer support and help keep you up to date on your performance."*

82. In relation to the dismissal the claimant exercised his right by appealing against that dismissal. The appeal hearing was conducted by Mr Banks. Although the Tribunal would be critical of the short nature of Mr Banks' outcome letter, given the issues that he had to address, that does not of itself undermine the way in which he conducted the appeal. The Tribunal are satisfied that he considered all the relevant matters and allowed the claimant to have his say. The outcome letter above referred to is pages 301 – 302 of the bundle and makes the point that there is no further right of appeal.

Applying the Law to the Facts and vice versa

83. The Tribunal has again reminded itself of the burden of proof in Section 136 Employment Act.

Section 15 - Discrimination arising from disability

84. The parties had very helpfully agreed a list of issues. The Tribunal follows that list in the same order that the paragraphs are set out. Paragraph 1 of the list of issues states as follows:

> *"Was the reduced daily target insofar as it related to an expectation of productivity that was set for the claimant unfavourable treatment because of something arsing in consequence of the claimant's disability?*

85. The "something" that causes the unfavourable treatment need not be the main or the sole reason but it must have at least a significant or more than trivial influence on the unfavourable treatment. Unfavourable treatment is that which the putative discriminator does or says or omits to do or say which placed the disabled person at a disadvantage.

86. The reduced daily target was not unfavourable treatment. As earlier recorded it was part of the annual objectives each year to hit daily targets - that was clear from the evidence or Lorna Biggins. Seen as part of the general approach of the respondent, who was supportive of the claimant, this was an attempt to be helpful to him and provide him with a realistic achievable daily target which on page 170 he agrees that he did not find difficult to achieve. On page 180 the claimant said that he felt more confident that he was achieving and exceeding the targets. It is difficult to see how it could be contended by the claimant that a reduced daily target is unfavourable having regard to the dicta in the case of **The Trustees of Swansea University Pension and Assurance Scheme v Williams.**

87. The second issue to resolve:

> *"Was the frequency of the assessment of the claimant's targets on a daily rather than a weekly basis unfavourable treatment because of something arising in consequence of the claimant's disability?"*

88. It was earlier recorded the claimant was asked to provide daily information because his record on providing information in a reliable way was poor. All the members of his team had to record daily information. Frequency of assessment was not unfavourable treatment at all. It was attempting to help him from failing to comply with the request to provide regular information. The frequency of the assessment of the claimant's performance against the reduced daily target cannot be unfavourable treatment when his colleagues were assessed against their unadjusted targets.

89. Paragraph 3 of the list of issues says as follows:

> *"Was the conclusion that (a) the claimant had failed to reach his targets (b) the claimant's performance had not improved or (c) that the claimant had failed to provide adequate reasons for failing to reach targets and therefore in deciding to formally warn and performance manage him, unfavourable treatment because of something arising in consequence of the claimant's disability?"*

90. The dismissal was for reasons of his performance and in relation to the discharge of his duties rather than any ability arising from his disability especially as numerous adjustments had been in place since August 2014.

91. List of issues 4 says as follows:

> *"Was the claimant's dismissal on 23 November 2015 on the grounds of capability, unfavourable treatment because of something arising in consequence of the claimant's disability for which the Tribunal's response is as earlier set out in relation to the other paragraph above."*

92. In the alternative, if our conclusions on disability arising from dismissal are wrong, the Tribunal consider that there was a legitimate aim of ensuring productivity and efficiency and that the informal support and consequential steps to manage and subsequently dismiss the claimant were a proportionate means of achieving this aim.

93. In our findings the Tribunal agree with, without repeating in full, the contentions at paragraph 27 of the respondent's skeleton argument.

94. For all those reasons set out above the Tribunal finds that the burden of proof has not been established by the claimant in relation to a Section 15 claim and it is dismissed.

Reasonable Adjustments

95. The case of **Rowan v Environment Agency** requires clear identification of the PCP's relied upon.

96. In the case of **Carrenza** HHJ Richardson held that the function of a PCP is to identify what it is about the employer's operation which causes disadvantage to the employee with the disability.

97. In the case of **Nottingham City Transport Ltd v Harvey** it was held that a practice has to have an element of repetition about it, thus in that case one flawed application of a disciplinary procedure did not quality as a PCP. If the PCP relates to a procedure it must apply to others than the claimant otherwise there can be no comparator disadvantage.

98. In the case of **Fox v British Airways** it was held that it was hard to see how an individual dismissal could have itself be a PCP as opposed to the result of an application of a particular PCP. Of course in this case the claimant no longer relies on dismissal as a PCP.

99. The remaining PCP's, however, state "subjecting the claimant" which does not allow for any notion of comparison. The **Carreras** case stated that the PCP is to be widely construed. However, in this case the Tribunal agree with the submissions of the respondent that the PCP's put forward by the claimant are not capable of amounting to PCP's because they do not admit of any meaningful comparison. Subjecting the claimant to a performance management process does not fit with paragraph 20 of the Carrenza decision to define the PCP in a coherent manner. Therefore, despite the fact that the claimant is urging the Tribunal to interpret the PCP's in a flexible way, the PCP's have been drafted on behalf of the claimant by lawyers and the Tribunal find that, as stated, they are not PCP's. It is not alleged for example how they put the claimant to a substantial disadvantage. In any event Mrs Coombs confirmed in her oral evidence that the claimant confirmed that he had all the equipment that he needed. As was submitted by the respondent in oral submissions where one person underperforms in a team it decreases the collective output of the team and the claimant had the benefit of thirteen months or so, with much input, to ensure that he would meet targets.

100. As the Tribunal finds that the PCP's are not in fact PCP's that of itself results in the conclusion that the claim for reasonable adjustments fails. However for the avoidance of doubt the Tribunal go on to consider the reasonable adjustments that are set out in paragraph 10 of the list of issues.

101. With regard to the issue of redeploying the claimant into a vacant position in the reading team. Quite simply this was not possible because there were no vacancies.

102. In relation to the discount, or making an adjustment of his targets in respect of his absences as a result of his disability, this was done as is apparent from page 148 and also from the analysis of Mr Banks. In any event the Tribunal find that Mrs Martyn always tried to take into account the claimant's disability and the arguments and mitigations he put forward before making any decisions, and adjustments were also made.

103. In relation to extending time for the claimant to improve his performance following him taking IT training refresher course. He was given ample periods of time from the course to being put on a review and the Tribunal

agree with the observation in paragraph 34C of the respondent's skeleton argument that it is unclear as to how the alleged and precise adjustment of extending the time is related to the alleged PCP's.

The modification relating to the daily targets by moving to weekly targets**.** The Tribunal has already dealt with this earlier in its decision.

Modify or Postpone the Poor Performance Procedure. This is an open ended assertion and not a reasonable adjustment. It is not clear what is contended by the claimant as being modifying or the extent to which it is contended that the procedure should be modified or postponed. As Mr Allsop says in paragraph 34e of his submission the claimant faces the difficulty referred to in the Carrenza case as highlighted by His Honour Judge Richardson.

104. In relation to extending the time frame for the claimant to improve his performance this is really as the same as is alleged above.

105. Not dismissing him. As was asserted, any comparators would have been treated in the same way if there had been poor performance. The claimant does not really particularise what the alternative should have been. For all those reasons the claim for reasonable adjustments is dismissed.

Harassment under Section 26 of the EA

106. In relation to harassment the harassment would be unlawful if the unwanted conduct related to a relevant protected characteristic and it had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

107. The **Brunfit** and **Nazier** cases state that the harassment has to be related to the particular protected characteristic in this case disability. This requires the Tribunal to identify the reason for the harassment in the context of the particular case.

108. The Tribunal has considered the **Driscoll** case which states

> *"Although the ultimate Judgment as to whether the conduct amounts to unlawful harassment involves an objective assessment by the Tribunal of all the facts the claimant's subjective perception of the conduct in question must also be considered*.

109. On that point the Tribunal has considered the **Chawla** case. It is only reasonable if it was reasonable for the victim to hold this feeling or perception that the conduct will amount to harassment and much depends on context.

110. The Tribunal has also considered the divider of Harvey L3CF421 and also the authority that was provided by the claimant, by analogy, a race discrimination claim, of **Richmond Pharmacology v. Dhaliwal**. The Tribunal are asked to conclude by the claimant that the alleged harassing conduct had the purpose or effect of violating his dignity or creating an intimidating, hostile, humiliating or offensive environment for the claimant.

111. The Tribunal concludes that none of the evidence supports that contention as will be clear from the analysis below. The unwanted conduct must relate to a relevant protected characteristic. Many of the allegations do not so relate. In many of the allegations it is unreasonable for the claimant to consider that his dignity had been violated or that there had been an intimidating, hostile, degrading, humiliating or offensive environment being created.

112. Turning in the list of issues. Re 12A :The Tribunal makes the point, which it will not repeat each time, that the burden of proof is upon the claimant. It was incumbent upon the claimant to lead evidence on each issue. In relation to this issue he did not do so and has therefore not discharged the burden of proof. In any event the Tribunal find as a matter of fact that it is not related to disability and did not have the purpose or effect of violating the claimant's dignity. It was not reasonable for the conduct to have any such effect, for example, the **Chawla v Hewlett Packard** decision.

113. In relation to 12B of the list of issues. The claimant did not lead any evidence relating to this issue and Mrs Martyn was not cross examined on it. The allegation is very specific that Mrs Martyn "threatened" the claimant with the imposition of poor performance even before discussing his work at the start of the 1-2-1.

114. Firstly, there was no evidence of a threat. Secondly it is not sufficient to say that it does not matter when the issue was raised at the meeting. On the facts of this list of issues it does matter. The allegation is very specific, backed up by the words "even before". The evidence does not support the contention as alleged. The evidence was less than compelling that poor performance related to his disability.

115. In relation to list of issues paragraph 12C and F with both Counsel apparently happy for these two sub paragraphs to be dealt with together: There was a meeting on 5 March 2015 when Mrs Martyn behaved unprofessionally towards the claimant allowing herself to become emotional and triggering a similar response in the claimant. As earlier determined, the Tribunal find that this was six of one and half a dozen of the other. The evidence does not support the contention that at any of the other meetings Mrs Martyn behaved inappropriately or wrote inappropriate letters or emails. The assertion that Mrs Martyn was not "cordial" is not the same as saying that she was hostile and aggressive. There was no hostile or aggressive unwanted conduct by Mrs Martyn at the meetings which took place on 19 August 2014 to 23 November or on 15 July. The Tribunal find as a matter of fact that her approach was supportive of the claimant.

116. At the meeting on 15 July the fact of the claimant's disability was not ignored. The application of a procedure cannot amount to harassment see by analogy the case of **Prospects for People with Learning Difficulties v Harris.**

117. List of issues 12D. The issue of daily targets and weekly targets has been addressed elsewhere in these reasons. The imposition of such daily targets was not conduct which could be classified as harassment simply being measured on the assessment or productivity is not related to disability. This

is especially so when sometimes he met or exceeded targets yet he still did not consistently meet daily targets.

118. Issue 12E. Evidence did not support the contention that Mrs Martyn ignored the claimant's circumstances and that that she was generally unsupportive, in fact the reverse applies. The Tribunal were impressed with her evidence and that she was trying hard to help the claimant who was proving difficult to manage. For example, he repeatedly did not provide his figures; for a time he was substantially in excess of the permitted flexi deficit hours although he then got those back on track; and that he was late for a presentation for no reason and did not apologise. It is clear from pages 147 – 148 which are the statistics which show that the mitigating factors were taken into account. The evidence did not support a contention that Mrs Martyn was not supportive of the claimant.

119. For whatever reason the claimant never raised a grievance about Mrs Martyn's alleged conduct or her stance towards him. This is more surprising when one looks at the email on 30 April 2015 to be found at page 317 where he says

> *"I am not going to be her victim I intend to fight her than being bullied and victimised and I intend to make a complaint against her on the grounds of bullying, victimisation and disability discrimination."*

120. The claimant followed the advice of his Trade Union to keep a contemporaneous diary but even some of the allegations that he now makes to the Tribunal do not appear as entries in his diary, for example, the reference to "keeping him on his toes" which appeared for the first time in his statement.

121. In relation to list of issues 12F this has already been dealt with under 12C.

122. List of issues 12G. Mrs Martyn did make the comment attributed that "I am beginning to see why" but immediately retracted it. This comment is completely unrelated to his disability. In any event it was not a totally false allegation as the claimant had in fact fallen out with his former manager.

123. List of issues 12H. Mrs Martyn had asked to see him about his time to see if he had worked additional hours to see if he might have been entitled to more than the 7:24 hours that he attended for the course. The claimant's PIP had recorded that such training was necessary. This allegation was made no doubt to give the impression that the respondents were trying to deprive the claimant of his 7:24 hours for the course but that was not borne out by the evidence at all. The respondent was trying to make sure that if he had worked longer then he was entitled to claim for longer hours. However, in relation to all this it is not related to the claimant's disability.

124. In relation to 12I. This one has already been considered under 12A.

125. In relation to 12J. There is no evidence in the claimant's statement about this issue. He has not led any evidence and the burden of proof has not been discharged and in any event does not relate to the claimant's disability. No cogent reason was given for the lateness and the Tribunal

notes the contents of paragraphs 7 and 8 of the statement of Mrs Hodgson.

126. Having heard Mrs Hodgson, she impressed with her professionalism and the Tribunal find it highly unlikely that she "loudly and aggressively harangued the claimant" and the evidence did not support the contention that she subjected him to hostile and aggressive behaviour at a subsequent 1-2-1 meeting.

127. In relation to 12K. In the allegation the date of the letter is referred to as 2nd October. In fact it should be 28 October. This was the outcome letter of the appeal against the final written warning. It was not, and neither did it have the purpose or effect of, violating. It was a letter properly written as an outcome of a procedure. The claimant had made the appeal; he could reasonably expect an outcome; he received that outcome. He might not have liked the outcome but it was a considered conclusion for Mrs Coombs who particularly impressed the Tribunal with the thoroughness of her approach. It is incorrect to assert that Mrs Coombs did not consider the medical evidence for example, having regard to the passage earlier highlighted at the top of page 260.

128. In relation to list of issues 12L. The language used in the dismissal letter was professional. Arguably, this was not to do with disability. The letter was not indicative of the hostile etc management and neither is it indicative of an unsupportive management. By our findings we find that the respondents were trying to be supportive.

129. Although he was dismissed at a time when some improvement had undoubtedly been shown, over the whole review period he had not consistently achieved the daily target. That consistent achievement was the expectation in that reference period and, as earlier set out in these reasons at page 274, the various adjustments are set out there.

130. Having regard to paragraph 12M and 12N which can be considered together. The Tribunal has had particular regard to paragraphs 22 and 23 of the statement of Mrs Biggins. Again the Tribunal record that they were particularly impressed with the evidence of Mrs Biggins as being a very thoughtful and analytical witness. Mr Coles agreed to clear out his desk rather than go straight home and have his belongings sent on later. Nobody pretends that what happened was comfortable in clearing out his belongings in the way that he did amongst his work colleagues but the Tribunal find that that was unrelated to disability. Although it is not appropriate to factor this issue into our decision the Tribunal observes that this is a practice that is common within the respondent. It was not an act of harassment to pay notice in lieu and not require the claimant to work out his notice.

131. Allegation list of issues 12 O. The respondent did consider the times when the claimant met his targets. They had a not unreasonable requirement for there to be compliance, every day, with daily targets especially against a background of his tasks having already been reduced by around 30% to accommodate his disability. This is not an act of harassment and did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

132. For all those reasons the allegations in relation to harassment are rejected and that claim also is dismissed.

133. The respondent addressed us on the issues of Polkey and contributory fault but given the fact that we have not found for the claimant the Tribunal has not found it necessary to make a determination of those issues.

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Employment Judge R Harper

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Date: 20th March 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE