EMPLOYMENT TRIBUNALS

Claimant: Miss N Undre

Respondent: Commissioners for Her Majesty's Revenue & Customs

Heard at: Lincoln

On: 3 March 2017, 6 – 9 March 2017, 1 September 2017, 4-7 September 2017 and 25 and 26 October 2017 (in chambers)

Before: Employment Judge Milgate
Members: Mr G Kingswood
Mr C Bhogaita

Representation
Claimant: Mr N Bidnell-Edwards of Counsel
Respondent: Mr J Hurd of Counsel

RESERVED JUDGMENT

1. The complaints of disability discrimination fail and are dismissed.

2. The Claimant was unfairly dismissed by the Respondent. The Claimant is entitled to a basic award, but the compensatory award is reduced by 100 per cent in accordance with the principles set out in **Polkey v AE Dayton Services Limited**.

REASONS

A. Claims and Issues

1. By her Claim Form presented to the Tribunal on 6 October 2015, the Claimant, who was dismissed by the Respondent following a period of sickness absence, brings a complaint of unfair dismissal and also various complaints of disability discrimination.

2. As far as the disability discrimination claims are concerned, at a Preliminary Hearing on 5 August 2016 Employment Judge Hutchinson decided that the Claimant suffered from two disabilities at the 'relevant time', namely hypothyroidism and stress and anxiety. Mr Hurd conceded, on behalf of the Respondent, that this meant that the Claimant was disabled by reason of the thyroid condition from the summer of 2014 and by reason of stress and anxiety from 22 September 2014. Mr Bidnell-Edwards did not take issue with either of these dates.

3. At the same Preliminary Hearing Employment Judge Hutchinson also granted the Claimant's application to amend her claim to include various claims of disability discrimination arising out of the Claimant's treatment under the Civil Service Compensation Scheme.

4. The individual complaints were detailed by the Claimant in Further and Better Particulars. These were supplemented by an agreed list of issues which was produced at the start of the hearing. However as various aspects of the discrimination complaints were far from clear, the Judge directed Mr Bidnell-Edwards to revise the list of issues. He did so, producing a final version (to which the Respondent took no objection) during the hearing. References in this judgment to the List of Issues are therefore to the revised document which disclosed the following disability discrimination claims:

3.1 4 complaints of direct disability discrimination;
3.2 24 complaints of indirect disability discrimination;
3.3 7 complaints of discrimination arising from disability; and
3.4 6 reasonable adjustment claims.

4A. At the direction of the Judge, Mr Bidnell-Edwards also produced a document headed 'Further Information' towards the end of the hearing which contained further clarification of the indirect discrimination and reasonable adjustment claims. Despite these efforts, as explained in more detail below, it was not always easy to understand parts of the pleaded case.

5. Having reviewed the claims in this case, the Judge noted that a number were pleaded in the alternative. (For example, the Claimant's dismissal gave rise to a number of discrimination claims.) In addition, some of the indirect disability discrimination claims appeared to lack coherence. She therefore suggested at the outset of the hearing that Mr Bidnell-Edwards might wish to refine the claim in the interests of proportionality. However, he indicated that he wished to pursue each of the pleaded claims and the case proceeded accordingly.

5A. Unfortunately there has been considerable delay in determining this claim. This was due, in the first instance, to the fact the matter went part heard in March 2017 and could not be relisted until September 2017. That delay was then compounded because the Judge suffered a sustained period of serious ill-health not long after the tribunal met to make its reserved decision. The Judge very much regrets this delay and is grateful to both parties for the patience they have shown in waiting for the promulgation of this judgment. Given the passage of time, the judgment and reasons have been read and approved by both of the Tribunal's wing members.

B. Evidence

6. The Tribunal heard evidence over 7 days. The Claimant gave evidence on her own behalf. She also called Mr Martin Page, Mr Alex Morgan, Mr Sanjesh Sodha, and Mr Jesal Jivanji. For the Respondent we heard from Mr Daniel Goad, Ms Dana Camm, Mr Jonathan Boat, Mr Adam Povey, Mr Daniel Gurr, Mr Kalpesh Patel, Mr Kishore Daudia, and Mr Lee Sales.

7. All the witnesses prepared witness statements which were taken as read. The Tribunal also had before it an agreed bundle of some 1440 pages.

8. Counsel for the parties prepared written submissions which were

supplemented by oral submissions on the final day of the hearing. Judgment was reserved. Our conclusions were unanimous.

C. Findings of fact

Background

9. The Claimant was employed as an administrative officer by the Respondent at their Leicester office from 8 December 2008 until her dismissal, which took effect on 12 June 2015. Prior to the events in this case she worked 6 hours per day, Monday to Friday, on the evening shift.

10. On or around 21 March 2014 the Claimant attended a performance review meeting with her then line manager, Miss Falguni Naik. Miss Naik told her she was to be graded as having 'achieved' rather than 'exceeded' her objectives for the year 2013/14. The Claimant was bitterly disappointed by this decision, feeling it was very unfair.

11. On 27 March 2014, the Claimant underwent a thyroidectomy. Following her operation, the Claimant was told that she had hypothyroidism and would be reliant on medication to be able to live a normal life. She remained on sickness absence until 26 June 2014 but was assured by Miss Naik that this post-operative recovery period (some 60 working days) would not count towards her sickness absence record. Although the Claimant informed Miss Naik on 2 June 2014 that she was taking '*levothyroxine for my under active thyroid which I'll be having bloods done for on the 20th to see if my levels are coming down*', she did not explain that she would have to take medication for the rest of her life.

12. The Claimant's GP advised that there should be a phased return to work, and it was agreed that the Claimant should work 2 hours per day for the first 4 weeks of her return, beginning on 26 June 2014. In addition, her working hours were brought forward to 2 - 4 pm so that she did not become overtired. A number of adjustments were also made to her working conditions, including providing her with a car parking space.

HR advice and relevant policies

13. The Respondent has an in-house Human Resources Department and managers involved in the Claimant's case were able to consult with HR as necessary.

14. As Mr Goad, one of the Respondent's HR Directors, explained to the Tribunal, the Respondent has significant problems with staff absence. Figures for average days lost for June 2014 to May 2015 (the relevant period for the purposes of this case) show that HMRC was performing badly when compared with private sector organisations and also with many parts of the public sector. At the Leicester office, where the Claimant worked, the problem was particularly acute, with absences considerably over target. As Mr Goad stated in his evidence to the Tribunal, these high levels of absence had considerable financial implications for HMRC. However, they also had an impact on customer service, on management time and on those employees who experienced an increased workload as a result of having to cover for absent colleagues.

15. The Respondent has adopted a number of policies, guidance documents and procedures for use when dealing with cases of sickness absence and disability. Those with particular relevance to this case are:

(i) Managing Continuous Absence Policy (Policy number HR 27008); supplemented by two guidance documents, namely 'Sickness absence: guidance for job holders policy' and 'Sickness absence: guidance for managers');
(ii) Sickness Absence: Phased Return to Work Policy;
(iii) Sickness Absence: Dental and Medical Appointments Policy;
(iv) Disability Adjustment Leave Policy
(v) Mental Health Policy
(vi) Disability: Reasonable Adjustments Policy; and
(vii) The Civil Service Compensation Scheme (and the associated guidance for managers and decision makers given in the 'Dismissal and Compensation on the Grounds of Poor Attendance Policy' HR20406).

<u>Managing Continuous Absence Policy (Policy number HR 27008)</u>

16. Turning to the detail of these various documents, the starting point when dealing with long term sickness absence is the 'Sickness Absence: Managing Continuing Absence Policy' ('the Managing Continuing Absence Policy'). This policy aims, amongst other things, to '*promote early intervention where… sickness absence levels are unsatisfactory*' and '*to consider whether the sickness absence can continue to be supported depending on the individual circumstances*'. The policy is applied to both disabled and non-disabled staff, albeit in the case of a disabled person it is read in conjunction with the Respondent's policies on disability, including the 'Disability: Reasonable Adjustments Policy' referred to further below. Under the policy a 'continuous absence' is deemed to be one which lasts for eight consecutive days or more.

17. So far as the detail of the Managing Continuing Absence Policy is concerned, it provides for three key stages. Firstly, where an employee's absence reaches one month, the manager is advised:

'*if you have not already done so, consider whether to invite the job holder to a formal meeting… You may defer the meeting if it is not appropriate at this stage, for example if the person is in hospital, but keep in touch and provide support for the jobholder on a regular basis.'*

The formal meeting referred to in this part of the policy is commonly referred to as a 'Month 1' meeting. However, it is clear from the quoted wording that the timing of the meeting depends on the circumstances and that the one-month threshold is merely a guide. The policy goes on to provide that the invitation to the 'Month 1' meeting must warn that if the jobholder is unlikely to return to work within a reasonable period, then all options will be considered including 'bringing their employment to an end'. The policy also states that one of the matters to be considered at the 'Month 1' meeting is whether occupational health advice is needed.

18. If, despite the measures taken at the Month 1 meeting, the absence reaches two months then the line manager is expected to take advice by means of a case conference with their manager to determine whether the business can continue to support the absence (this is the second stage of the process). Finally, where the absence reaches three months, the third stage is to refer the case to a senior manager to decide what action needs to be taken. At this point the referring manager should consider recommending dismissal where '*the jobholder cannot return to work or appears unable to reach or maintain a regular and effective service due to a continuing or deteriorating medical condition*' provided,

so far as relevant, that all '*appropriate adjustments have been made*' and a formal 'Month 1' meeting has been held (see guidance document HR20404 which also warns that dismissal proceedings are not to be put on hold where the jobholder is unco-operative).

19. Despite the three basic stages in the process, the Managing Continuous Absence Policy also provides that if '*at any point*' it appears unlikely that the jobholder will return to work within a reasonable period then, provided a Month 1 meeting has been held and certain other conditions (including obtaining up to date occupational health advice) have been satisfied, the procedure can be truncated and the case referred directly to a senior manager with a recommendation of dismissal, if appropriate.

20 The Managing Continuous Absence Policy is supplemented by two guidance documents. The first of these, entitled 'Sickness Absence: Guidance for Job-holders' advises that an employee who is off sick should:

> "... *keep in touch with [their] manager on an agreed basis during the absence ... [and] work with their manager ... to support the overall aim of satisfactory attendance across the Department.*"

The guidance also makes it clear that medical advice is to be obtained through occupational health, stating that:

> "*Your manager may decide that an occupational health referral is needed. We expect you to co-operate with the occupational health adviser - if you do not your manager may have to make decisions without the benefit of medical advice.*"

The policy therefore places a clear obligation on the jobholder to engage with management during their sickness absence and to co-operate with occupational health.

21. The second guidance document is the 'Sickness Absence: Guidance for Managers'. This stresses the manager's responsibility to ensure regular communication with the jobholder during the period of sickness:

> "*... [during a period of absence] it is essential to keep in touch with the job holder and do all you can to enable the job holder to be able to return work… In continuing absence cases a weekly telephone call is usually acceptable as a minimum. Keeping in touch will normally be between the manager and job holder though there could be a nominated keeping in touch contact… Don't put off making contact or keeping in touch…*

The policy goes on to provide that during the sickness absence the manager should consider options to support the jobholder, including making reasonable adjustments where appropriate. The policy also advises that during the absence the manager should '*consider making an occupational health referral if appropriate*'.

22. Within this basic framework, managers are given considerable flexibility to take account of individual circumstances. In addition, both the Managing Continuous Absence Policy and the Guidance for Managers document refer at several points to the need to consider reasonable adjustments for disabled jobholders and specific reference is made to the Respondent's 'Disability: Reasonable Adjustments Policy'.

Additional policies dealing with sickness absence

23. In addition to these policy and guidance documents, there is a 'Sickness Absence: Phased Return to Work Policy' which provides that the length of any phased return depends on the circumstances, but will '*normally be no more than a month*'. However, a manager may extend the phased return by a further two months and '*exceptionally, the manager may agree to support an extension past the end of three months, based on occupational health advice*.' The policy also states managers should review the phased return weekly with the jobholder and that "*where phased return to work is authorised, the un-worked hours count as sickness absence*". It is therefore clear that sickness absence continues to accrue during a phased return, to the extent that the employee is falling short of their contractual hours.

24. There is also a Sickness Absence: Dental and Medical Appointments Policy'. This states that employees are expected '*as much as possible to arrange medical… appointments in their own time*' and provides that '*managers will not normally give paid time off for routine, planned appointments*'. However, the policy makes it clear that the situation may be different where a disabled employee needs to attend an appointment connected with his disability and, in these circumstances, managers are referred to the Respondent's 'Disability Adjustment Leave Policy', which is discussed below. The policy also refers to the Respondent's Disability: Reasonable Adjustments Policy.

Compensation under the Civil Service Compensation Scheme

25. Where an employee is dismissed by the Respondent for poor attendance, he or she may be eligible for compensation under the Civil Service Compensation Scheme. Guidance for managers in relation to this scheme is set out in the Respondent's 'Dismissal and Compensation on the Grounds of Poor Attendance Policy'. This states that both the manager who recommends dismissal and the manager who actually takes the decision to dismiss must consider whether to recommend payment of a compensation award. These recommendations are then referred to an HR Director for a final decision.

26. There are set criteria for determining the size of any compensation award, which can be anything between 0% and 100% of the maximum allowed. These criteria are set out at the end of policy number HR20406 in the form of a compensation table and managers are expected to consult these guidelines when making recommendations or taking final decisions. The guidelines emphasise that the amount of any compensation payable will depend on *'the extent to which it can be demonstrated that the jobholder has co-operated and done everything within their power to alleviate the problem*.' Factors that might indicate a nil award include '*no or limited evidence that the problems were beyond the jobholder's control and that they have not co-operated in efforts to resolve the matter*'.

27. Employees who wish to appeal a compensation decision can do so internally or can make an external appeal to the Civil Service Appeal Board ('CSAB'). If they wish to appeal to the CSAB this must be done within 21 days of dismissal.

Policies relating to disability

28. As far as disability is concerned, the 'Disability: Reasonable Adjustments Policy' explains that HMRC requires all managers to '*take the lead in supporting staff who may require reasonable adjustments*'.

29. In addition, the 'Disability Adjustment Leave Policy' allows disabled job-holders, who are otherwise available for work, to be given reasonable paid time off work in certain circumstances, including for disability-related assessments or treatment. The policy advises that '*best practice is to treat a member of staff as disabled if they are… likely to meet the legal definition of a disabled person*.' It also provides that '*where disability adjustment leave is granted the absence will not count towards… assessing performance, promotion, attendance, selection for redundancy and similar issues*.'

30. Finally, the Respondent has a 'Mental Health Policy'. This sets out the Respondent's responsibility to support '*all jobholders who may be experiencing mental health condition*s'. However, the policy also refers to the employee's responsibility to '*work with their manager to find solutions to work related stress issues*', highlighting once again the employee's responsibility to engage constructively with management to resolve any problems associated with work-related stress.

The Claimant's initial return to work and the hospital appointment on 11 July 2014

31. As explained above, following her thyroidectomy, the Claimant began a phased return to work at the end of June 2014, working 2 hours each day as her GP had advised. She continued to be paid as if working her full contractual hours.

32. In early July 2014 the Claimant informed her line manager, Miss Naik, that she had a morning hospital appointment on 11 July 2014 (unrelated to her surgery) and asked whether she could have the day as paid leave. As noted above, the Respondent's 'Sickness Absence: Dental and Medical Appointments Policy' provides that medical appointments should normally be arranged outside of working hours. Miss Naik's response was therefore to suggest that the Claimant either work her two hours before the appointment or come in slightly later and work from 3 to 5pm. In the event the day was recorded as sickness absence, leaving the Claimant feeling very aggrieved.

The Occupational Health Report

33. On her return to work the Claimant was referred for an occupational health assessment. This took place by telephone on 14 July 2014. It was conducted by Claire McLure, an adviser working for the Respondent's occupational health provider. The Claimant's union representative, Peter Tinley, was with the Claimant throughout.

34. The Claimant explained in her witness statement that she understood the importance of co-operating during the assessment '*in order for the Respondent to better understand my condition… so that thereafter a suitable plan could be put in place to ensure a smooth phased return to work*'. She also accepted in cross-examination that the telephone format had not prevented her from communicating any relevant information and that she had answered all the questions that she had been asked.

35. During the assessment the Claimant told Miss McClure that she was

taking thyroid medication (levothyroxine) and that she would have to do so for the rest of her life. A report was produced by Miss McClure shortly afterwards. This recorded that the thyroid surgery had been successful, and that the Claimant had been prescribed levothyroxine post-surgery '*in order for her to progress towards a full recovery*'. However, the fact that the Claimant was on lifelong medication was not mentioned. Furthermore, Miss McClure concluded that the Claimant's thyroid condition was unlikely to be considered a disability because it had not lasted longer than twelve months and was unlikely to do so. The report also noted that the Claimant was experiencing symptoms of unrelated abdominal pain, but that '*the outlook in this matter must remain guarded until further medical information is known*'.

36. So far as the Claimant's return to work was concerned, the report noted that working two hours per day was causing the Claimant some fatigue and stated that the Claimant was fit for work, albeit '*in a very limited capacity*'. It advised that the Claimant work '*two hours each week initially for 4 week*s'. This was not very happily worded, but was taken by everyone to mean working for two hours *per day* for the first four weeks (as her GP had recommended). The report continued:

'…*this can gradually be increased by one hour each week thereafter until she has reached her normal working hours [of six hours per day*]'.

Again, this was ambiguous but on any sensible reading must have meant that the increase in week 5 should be to three hours per day. On that basis the Claimant would have been back to full hours after 8 weeks. Miss McClure also advised that the Claimant should '*meet with management for on-going support, at least weekly to discuss her progress and determine if she is able to increase her hours each week*'.

37. On 24 July 2014 the Claimant's union representative, Mr Tinley, emailed Miss Naik expressing his concern that there were a number of inaccuracies in the report. However, he did not challenge Miss McClure's conclusion that the Claimant did not fall within the statutory definition of disability.

Miss Camm becomes the Claimant's line manager

38. Following the Claimant's return to work, Dana Camm took over from Miss Naik as the Claimant's line manager at the end of July 2014. She immediately began to hold weekly support meetings with the Claimant. Although Miss Camm was an experienced manager with responsibility for about seven staff, she told the Tribunal that she had not been provided with any training on the Equality Act 2010 or on the impact of disability within the workplace.

Support meeting on 30 July 2014

39. The first support meeting with the Claimant took place on 30 July 2014. The Claimant, who attended with Mr Tinley, made it clear that she was still suffering from fatigue and could not yet increase her hours. Miss Camm agreed that the Claimant should continue working two hours per day (from 2-4pm) and did not pressurise her to increase her hours. Mr Tinley reiterated his concerns about the occupational health report. However, once again, he did not challenge Miss McClure's conclusion that the Claimant was not disabled for the purposes of the Equality Act 2010.

40. During the meeting the Claimant stated that she was dissatisfied with her

grade for the 2013/14 performance management review and the fact that her hospital appointment on 11 July 2014 had been recorded as sickness absence. She also told Miss Camm that she had a hospital appointment on 4 August 2014 to investigate her abdominal pains. Miss Camm told the Claimant that this appointment would also have to be treated as sickness absence, unless HR advised to the contrary.

41. On 31 July 2014 the Claimant obtained a fit note from her GP advising that she continue working 2 hours per day for the next two weeks (i.e. beyond the period recommended in the occupational health report).

<u>Support Meeting on 6 August 2014</u>

42. A further support meeting took place on 6 August 2014. At this and all subsequent support meetings the Claimant was accompanied by Alex Morgan, another trade union representative.

43. The issue of whether it was appropriate to treat the Claimant's attendance at hospital appointments as sickness absence was discussed. Mr Morgan suggested that thyroid disease might be covered by the Disability Adjustment Leave Policy and, if so, this would have allowed the Claimant to take the time as paid leave. In response Miss Camm informed him that the policy covered '*lifelong illnesses*' and so did not apply in the Claimant's case because she was expected to make a full recovery. At this point the Claimant informed Miss Camm that, following her surgery, she would have to take thyroxine for life. However, Miss Camm failed to appreciate the significance of this piece of information and pointed to the statement in occupational health report that the Claimant' illness did not amount to a disability. She explained that, for the present, she had to treat the two hospital appointments as sickness absence, although she would seek further advice from HR on this issue.

44. During the meeting Miss Camm told the Claimant that, in accordance with the Respondent's policies, her sickness absence would continue to accrue until she reverted to her contractual six hours per day (i.e. that while she continued to work just 2 hours per day, her un-worked hours would count as sickness absence). She also warned her that if the Claimant was unable to return to her full hours her case might have to be referred to a senior manager to consider whether she was capable of making a full return to work. There was then some discussion about the possibility of the Clamant temporarily reducing her contractual hours as a means of limiting her sickness absence, so as to avoid formal action under the Managing Continuous Absence Policy. However, no conclusions were reached.

<u>Support meeting on 13 August 2014</u>

45. Another support meeting was held on 13 August 2014. The Claimant was still working two hours per day. Miss Camm reported that there was a problem obtaining clarification in respect of the occupational health report as this could only be obtained by the referring manager, and he was currently off sick. The matter would therefore have to '*remain open*' for the time being.

46. During the meeting the Claimant stated that she was looking to increase her hours, but Miss Camm put no pressure on her to do so. There was further discussion of the possibility of the Claimant reducing her contractual hours.

47. On 15 August the Claimant emailed Miss Camm that she had worked 2.5 hours that day and that she would try to keep her hours at that level. She

received a supportive response from Miss Camm who stated: '*I don't want you to work more hours than you are capable of*'. [Bp273]

48. The same day HR emailed Miss Camm stating as follows:

> *'As the occupational health report states that the jobholder is not likely to be covered by [the Equality Act], DAL [i.e. the Disability Adjustment Leave Policy] and disability related sickness absence does not apply.'*

Support meeting on 21 August 2014

49. The next support meeting was held on 21 August 2014. The Claimant repeated that her thyroid disease was life-long and that she would have to take medication for life. Miss Camm explained that she was hopeful that clarification of the issues raised in connection with the occupational health report could soon be obtained but in the meantime, she had to work on the basis of the current assessment which indicated that the Disability Adjustment Leave Policy was not applicable. However, as the existing report was '*well out of date*' she went on to suggest that occupational health conduct a new assessment.

50. The Claimant declined the offer, stating that she had felt pressurised by the first referral. In addition, she stated that she saw little point in pursuing another referral until her '*additional symptoms'* (presumably her abdominal pains) had been diagnosed. In her view, without a '*unifying diagnosis*' the occupational health practitioner would be unable to make recommendations. The Claimant also stated that there was no guarantee the new report would be accurate and, in any event, it would take time to arrange and she would want a face to face assessment.

51. The Claimant's phased return was also discussed. There was some disagreement over what Miss McClure had meant when she advised increasing the Claimant's hours by 'one hour each week' but this proved somewhat academic as the Claimant explained that she was now experiencing '*immense abdominal pain*' and that she had a further fit note from her GP, advising her to continue on 2 hours per day until the end of August 2014. Miss Camm did not want the Claimant to increase her hours if she was unwell and confirmed that the Claimant could remain working 2hrs/2.5 hours per day until 29 August 2014. However, she explained she would then be looking for the Claimant to increase her hours to 3 hours per day with effect from 1 September 2014 with similar increases during the following weeks until she was back working her normal contractual hours of 6 hours per day. Once again Miss Camm explained that if the Claimant did not want to increase her hours in this way she could temporarily reduce her contractual hours to avoid accruing any further sickness absence.

52. Until this point the support meetings had been conducted in a relatively cordial atmosphere. However, once the idea of increasing the Claimant's daily hours on a planned basis was mooted, things started to become more difficult. The Claimant stated that it was unfair to expect her to increase her hours when she was already struggling and that she was effectively being forced to reduce her contractual hours. Miss Camm, for her part, explained that the initial period of working two hours per day had already been significantly extended beyond the 4 weeks recommended in the occupational health report and that a phased return could not go on indefinitely. She also warned the Claimant that if she did not increase her hours the case might have to be referred to a senior manager '*to determine whether she was able to return to work fully*'.

Support meeting on 28 August 2014

53. The next support meeting was held on 28 August 2014. The Claimant volunteered to increase her hours to 3 per day. In response Miss Camm confirmed that the increase should take effect from 1 September 2014 and reiterated that the Claimant would then be expected to increase to 4 hours per day the following week. Once again, the Claimant was unhappy with this planned approach, stating that increases should only be determined on an ad hoc, week by week basis. Miss Camm repeated that the Claimant had been allowed to continue working two hours per day for a much longer period than originally envisaged. She also emphasised that the Claimant would not be forced to work extra hours if she was unable to do so but insisted that there had to be a plan in place for the Claimant's phased return and that what she was proposing was in line with the occupational health report. She also reminded the Claimant that if she was not able to return to her contracted hours within the timeframe her case could be referred to a senior manager.

54. This was clearly a tense conversation, which greatly upset the Claimant. As she explained to the Tribunal, she felt that the Respondent's insistence that she follow the '*obsolete*' phased return plan amounted to a denial of support and that the '*regimented increases*' being asked of her were quite unfair. She felt that she was being pressurised to increase her hours and the suggestion that her case might be referred to a senior manager came as *'an extremely unpleasant surprise'*. For her part, Miss Camm felt the Claimant was being rude and unreasonable during the meeting.

55. The Claimant had other grievances. Although by this stage she accepted that her hospital appointment on 11 July 2014 should be treated as sick leave, she continued to maintain that the appointment on 11 August 2014 should be treated as paid leave. In addition, she was still unhappy with the approach being taken to her performance review grade and felt a growing sense of frustration, believing that insufficient progress was being made on all these matters.

56. A few days later, the Claimant made a formal request that her contractual hours be temporarily reduced to four hours per day. She was very reluctant to do this as it would affect her pay, but felt she had no other option. Her request was fully supported by Miss Camm as she hoped this would enable the Claimant to avoid the accrual of further sick leave. In addition, Miss Camm was conscious, given the Claimant's medical problems, of her duty of care to the Claimant and '*the need to ensure that her work is not adversely affecting her health*'.

57. By this stage Miss Camm had obtained consent to discuss the existing occupational health report with Miss McClure. This discussion took place in mid-September 2014, following Miss McClure's return from annual leave. Miss Camm was told that once the Claimant's stressors had been removed, the work-related stress would in all probability cease.

The dispute over the Performance Management Review

58. The Claimant's performance review grade for the year 2013/14 was still an issue. Having investigated the matter in mid-September 2014 Miss Camm told the Claimant that her grade was to be recorded as 'achieved', rather than 'exceed', and that the matter was now closed, subject to any appeal.

The Claimant begins to suffer from work related stress

59. The Claimant's contractual hours reduced to four per day from 15 September 2014, as she had requested. Unfortunately, the Claimant struggled to work the new hours and we accepted the evidence of Miss Camm, which was supported by a contemporaneous message to HR, that the Claimant had to leave an hour and a half early on the first day and then called in sick (with tonsillitis) on the next, although Miss Camm allowed her to record this as annual leave.

60. On 17 September Miss Camm informed the Claimant that, following advice from HR, she had decided to treat the Claimant's time off for both hospital appointments as sickness absence.

61. On 22 September 2014 the Claimant's GP signed the Claimant off work for a further four weeks. From this point there was no mention of the Claimant's thyroid condition and her sick note described her condition, for the first time, as 'stress at work'. This was the start of a prolonged period of stress-related sickness absence which lasted until her dismissal the following year. However, the sick note gave no indication of the severity of the Claimant's illness or the causes of the stress.

62. As a result, on 23 September 2014 Miss Camm sent the Claimant a text in the following terms:

> '*I would like to know if you want to have an occupational health referral done? It will be beneficial for you so we can find ways to support you. I can arrange weekend and face to face appointments if you would prefer this? I will also need to keep in regular contact with you so I am thinking on a weekly basis*…'

This was the second time Miss Camm had raised the issue of a further occupational health referral and she was hopeful that the Claimant would respond positively.

63. Miss Camm was to be disappointed. The next day the Claimant sent her the following response:

> '*I would like to take my GP's advice to not think about work issues or anything related to work during the time away… Regarding occupational health, I don't want to commit to anything at present, because I don't feel that I'm currently in the best frame of mind for decision making. I will eventually take advice from relevant sources and make an informed decision when I feel less stressed*.'

She also stated that she wanted to '*politely decline*' weekly contact and preferred to keep in touch every fortnight and that in any event did not want to be contacted before 7 October 2014 when she next saw her GP. This was the last time the Claimant contacted Miss Camm directly prior to her dismissal.

64. By this stage Miss Camm was beginning to feel deeply frustrated with the Claimant's attitude. Although she did not appreciate that work-related stress could amount to a disability, she was nonetheless anxious to understand the triggers for the Claimant's stress-related condition and for occupational health to consider the situation. However, she felt that the Claimant was behaving unreasonably and placing obstacles in the way of a constructive dialogue. As a result, she contacted HR for advice, stating that the Claimant had been '*difficult and unco-operative*'. Her referral to HR contained the following passage:

> '*The Claimant declined an Occupational health referral… However, I am concerned regarding her own well-being, as this is not leading me to know the causes of her stress at work, which would enable me to address them… the guidance for sick absence states that they expect the jobholder to cooperate … this is clearly not happening – what action can we take? As a business we are paying her salary, even though she is on sick and as a minimum I would expect her to cooperate*….'

<u>The Claimant's hospital admission</u>

65. On 25 September 2014 the Claimant's partner, Mr Sodha, informed Miss Camm by text message that the Claimant had been admitted to hospital the night before as she was '*run down through stress*'. He asked Miss Camm not to contact the Claimant directly as she was in an '*extremely delicate state*' and that her GP had advised '*that she is not to be stressed or made to feel anxious as it may have a detrimental effect on her current state'*. Although he asked Miss Camm to use him as a contact point, Miss Camm was advised by HR that she could not discuss the Claimant's medical details with a third party without the Claimant's prior authorisation. As a result, she did not feel able to use Mr Sodha as a channel of communication at this stage.

66. It was unnecessary for the Claimant to remain in hospital and on 2 October 2014 she was seen by her GP. She was prescribed a 50mg daily dose of sertraline, which is used to treat patients with anxiety and depression and remained on sick leave.

67. In accordance with the Claimant's request, Miss Camm waited until the Claimant had seen her GP before contacting her again. She then wrote to her on 9 October 2014 to explore the best way to communicate in the future. Her letter stated:

> '*If you do not feel you can talk to me, then I can arrange for you to talk to another manager. If you do not feel you personally can keep in touch in any capacity at the present time, please confirm how you would like to keep in touch with me so I can provide any help and support you may need…*'.

68. Miss Camm also asked for details of the factors causing the Claimant's work-related stress and informed her that a further occupational report was required '*so that [occupational health] can advise me on your condition and any support I may be able to give you'*. This was the third time Miss Camm had asked the Claimant to attend a further occupational health assessment. The letter enclosed a copy of the 'Sickness Absence: Guidance for Job-holders' document to remind the Claimant of her obligations in terms of keeping in touch as well as a number of other documents (including a consent form for an occupational health referral).

<u>The invitation to the 'Month 1' meeting</u>

69. There was no immediate response to Miss Camm's letter. By this stage it was well over three months since the Claimant had returned to work after surgery and she had been unable to sustain a work level of more than 2/2.5 hours per day. In addition, the Claimant had refused to attend a further occupational health assessment and failed to disclose any information as to the cause of her work-related stress. Without further engagement by the Claimant, Miss Camm was not in a position to consider the triggers for the Claimant's stress and to take further

measures to support her back to work. In those circumstances, she felt that she had no option but to begin a formal process under the Managing Continuous Absence Policy.

70. As a result, she wrote to the Claimant on 10 October 2014 inviting her to a formal 'Month 1' meeting on 17 October 2014. The letter, which was based on a standard template, stated as follows:

'*I need to meet with you to… consider how we can help you to return to work as soon as you are able, or to consider if other arrangements can be made. As part of this we will complete a Fit for Work Plan to record and monitor measures that need to be in place to help facilitate your retur*n.'

The letter also warned, in accordance with the Managing Continuous Absence Policy, that if it appeared that the Claimant was unlikely to be able to return in the near future then the Claimant's continued employment could be affected. (The letter also referred to the Claimant having been off sick for 'over six months'. In fact, this was a mistake on Miss Camm's part as the period of absence for the Claimant's thyroid surgery should have been discounted as a 'one-off absence'.)

71. The Claimant was very distressed to receive this letter. She did not respond immediately but shortly before the Month 1 meeting was due to go ahead on 17 October 2014 Miss Camm received the following letter from Mr Sodha:

> '*Nabila's GP has advised her to avoid any work-related matters … as they cause her undue stress… The series of events which have taken place in the workplace have been a contributing factor to inducing Nabila's stress…*
> *Your proposal for an occupational health referral has been considered by Nabila however she respectfully declines….*
> *At present Nabila's pulse rate is higher than average… Any further elevation to her heart rate, pressure and pulse can put her in a position where she may face heart attack or stroke and this can ultimately become fatal. Therefore your actions can have a direct impact on Nabila's health and can potentially put her in harm's way.*
> *For [these] reasons Nabila will not be able to attend the [Month 1] meeting… Nabila has an appointment booked to see her local GP… at approximately the same time. Given that her health and wellbeing must take priority she will not be cancelling [this] appointment to attend your meeting…*'
> *Please extend her temporary decrease in hours for a period of ten weeks.*'

The letter also contained an authority for Mr Sodha to communicate with the Respondent on the Claimant's behalf.

72. The same day the Claimant obtained a GP fit note signing her off for a further four weeks. Her condition was described as 'palpitations and abdominal pain and work-related stress'. There was no reference to the possibility of a heart attack or stroke or to a risk to her life.

Miss Camm's efforts to progress matters

73. By this stage Miss Camm considered it very unlikely that the Claimant would attend another meeting or return to work in the near future. She sent an

email to Mr Sodha on 20 October 2014, asking whether there was anything she could do to support the Claimant's return to work. She explained that she wanted to rearrange the Month 1 meeting to '*discuss and agree measures to support her return and make any adjustments where possible*'. She gave two possible dates and added that any further meeting could be conducted at the Claimant's home if that was more convenient, adding:

> *'If Nabila cannot attend the meeting I will need to know the reasons why. I also need to establish the exact reasons that are preventing Nabila from returning to work, as there may be adjustments we can make.'*

She also confirmed that she had extended the Claimant's temporary reduction in hours for a further 10 weeks, as requested.

74. Mr Sodha responded on 23 October 2014, explaining that the Claimant was still unwell and that any meeting would therefore have to be postponed, although it was hard to give 'an exact time frame' for rescheduling. He continued:

> '*As for providing you with an explanation for the exact reasons which are preventing her from returning to work… this is an extremely wide subject which I feel can only be interpreted by Nabila herself and we should wait until she is well enough to explain what it is exactly that is causing her undue stress in the workplace*. '

75. Miss Camm was prepared, for the most part, to communicate with the Claimant via Mr Sodha. However, as the Claimant's manager, she wanted to maintain some form of communication with the Claimant and felt that formal letters and notifications should be sent to the Claimant directly. Accordingly, on 10 November 2014, Miss Camm wrote to the Claimant, explaining she would continue corresponding with Mr Sodha by email but would on occasion write to the Claimant. Once again, she asked the Claimant to explain the causes of her work-related stress and emphasised that a meeting was necessary to establish what the stress triggers were, so that solutions could be created to remove them. She added: '*In this case I may have to make decisions in your absence without these discussions taking place*'. She also reiterated the need for a further occupational health assessment (the fourth such request) in the following terms:-

> '*It is… important that you engage with an occupational health referral. If you still wish to decline the referral please tell me the reasons for this. The occupational health referral is to help support you and provide advice based on your medical conditions so that I can make any reasonable adjustments. In the absence of an occupational health referral I may have to make decisions that are not based on any medical advice.*'

Miss Camm also informed the Claimant that if her sickness absence continued she would have to go down to half pay from 12 December 2014.

76. On 11 November 2014 the Claimant's medication was increased and she was provided with a sick note for a further month. That evening Miss Camm emailed Mr Sodha explaining, once again, how important it was for her to understand the causes of the Claimant's work-related stress. She added:

> '*I need to reiterate that I am able to fully support Nabila if I know what adjustments can be made or what concerns she has regarding work… Let her know I want to support her and I am willing to listen to any concerns she has*'.

77. In the absence of any further information from the Claimant (and the fact that the Claimant had still not consented to a second occupational health report) Miss Camm sought advice from HR. On the basis of her fit notes the Claimant was likely to be absent until at least 14 December 2014 and it seemed extremely unlikely that she would return to work within the foreseeable future. She therefore started to consider whether she should recommend the Claimant's dismissal.

78. Miss Camm received advice from HR on 17 November 2014. This noted that, despite the efforts made by the business to support the Claimant, she had failed to engage in the sickness management process, with the result that Miss Camm was unable '*to establish the reason/cause of the work-related stress, complete the Month 1 meeting, arrange an occupational health referral or undertake any KIT contact*.' In those circumstances, if it appeared unlikely that the Claimant would return to work within a reasonable period then, under the Managing Continuing Absence Policy, she could refer the matter directly to a senior manager for a decision.

79. On 18 November 2014 Mr Sodha advised Miss Camm that the Claimant was still un-well and that progress was '*extremely slow*'. He stated that the Claimant was getting advice from a trade union representative and that he could not give any more information about her work-related stress '*until we have been presented with all the information we require to make a calculated and justified action point for resolving these stresses*'. However, he gave no timescale. It is clear from the Claimant's evidence that at this point she was at her lowest ebb and had no idea when she would be able to return to work.

The recommendation to dismiss

80. Having made no further progress Miss Camm wrote to the Claimant on 4 December 2014 in the following terms:

> '*During the period 22 September 2014 to 5 December 2014 you have taken 55 days of sickness absence. As there appears to be no prospect of you returning to work within a reasonable time…. I must now make a decision about your future in the department.*
> *I have decided to recommend ending your employment with the department on the grounds of continuing absence due to ill-health…*'

Her letter explained that the Claimant's case would be referred to a decision maker, who in this case would be Mr Jonathan Boat, and that if he decided to end the Claimant's employment she might be entitled to a compensation award under the Civil Service Compensation Scheme.

81. Miss Camm had prepared a report to accompany her recommendation of dismissal. It was the first time she had drafted such a document and there were some mistakes within it. For example, she stated that the Claimant had previously been off work with long term stress and recorded the Claimant's post-operative absence in March-June 2014 as sickness absence, even though this should have been treated as a 'one-off'. The report was also critical of the Claimant, stating as follows:

> '*Nabila does not seem to take any accountability for managing her own health and blames management for causing her condition yet has not stipulated the reasons. I have been told not to be in direct contact with Nabila or discuss anything work related because I could 'cause her harm*

in the way of a heart attack or stroke".

82. The report also highlighted the negative impact the Claimant's absence was having on resources within the Claimant's team. Miss Camm was spending so much time dealing with the Claimant's case that she did not have sufficient time to perform some of her other duties and that this was beginning to have a negative impact on other members of her team. It also reflected Miss Camm's concern that, since going off sick on 22 September 2014, the Claimant had not been prepared to communicate with her directly. Miss Camm's conclusions included the following:

> '*I do not feel that the business can continue to support Nabila's absence. It is not likely that Nabila will return to work any time soon. A copy of a new fit note was provided on 14/11/14 for a further month…There is no medical evidence of Nabila's condition because all occupational health referrals have been declined. It has been made more difficult to make any adjustments for her without having medical advice or knowing the reasons causing her work-related stress…*'

83. Miss Camm's report also considered whether there were any grounds for making an award under the Civil Service Compensation Scheme. She consulted the relevant policy document. As noted above, this indicated that a nil award would be appropriate where there is '*no or limited evidence that the problems were beyond the jobholder's control and that they have not co-operated in efforts to resolve the matter*'. Miss Camm noted that in the Claimant's case there was no medical evidence to suggest that the Claimant's illness was beyond her control. In addition, given the Claimant's refusal to go for a further occupational health assessment, attend a Month 1 meeting or explain the reasons for her work related stress, she took the view that there had been '*little or no engagement with the department*', that the Claimant had '*a negative attitude*' and that she had not '*taken responsibility for her own return to work*'. Overall, she concluded that there had been a '*lack of co-operation, engagement and compliance with the department's procedures*'. She therefore recommended a nil award.

84. The Claimant saw her GP again on 9 December 2014. By this stage she was suffering from panic attacks. Her GP gave her a further sick note until 6 January 2015. The Claimant's contractual sick pay reduced to half pay on or around 18 December 2014.

<u>The Claimant's preparations for the decision maker's meeting</u>

85. The capability hearing (known within HMRC as a 'decision maker's meeting') was held on 9 January 2015. To support her case, the Claimant provided the Respondent with a letter dated 24 December 2014 from the practice manager at her GP surgery. This summarised the consultations that had taken place in relation to her stress-related condition between 22 September 2014 and 9 December 2014.

86. It was clear from this letter that there had been a gradual deterioration in the Claimant's health. She had initially described feeling '*stressed, unable to cope and tearful*'. However, by 9 December 2014 she had reported a range of more serious symptoms to her GP including palpitations and abdominal pains (which the GP attributed to stress), poor sleep and appetite and panic attacks. The letter recorded that she had been prescribed Sertraline for '*anxiety and depression*' on 2 October 2014 and that her medication had been increased on 11 November 2014. The letter also stated that the Claimant had been given the

following advice:

> '*To try and help alleviate Nabila's anxiety she was recommended to try and relax by removing elements of stress from her day to day life. This includes not thinking about the work-related issues as this was a big cause of the anxiety that Nabila was facing and what had been the cause of the palpitations.*'

The letter also recorded that the Claimant had been referred for cognitive behavioural therapy and included copies of the relevant parts of her GP notes.

87. Beyond this, the letter did not provide any information about the causes of the Claimant's work-related stress. Nor did it contain any indication of when she might be ready to return to work. There was no reference to her hospital admission or to any risk of heart attack or stroke. In addition, although the Claimant had clearly been advised not to think about work-related issues, the letter contained no suggestion that the GP had told the Claimant she was not well enough to engage with occupational health or that she should have no contact with her line manager.

88. The assertion by the Claimant that her GP had advised her not to have direct contact with her line manager, not to engage with occupational health and not to comply with keeping in touch requirements was a fundamental part of her case (see for example paragraphs 176-178 of Mr Bidnell-Edwards' submissions). However, for a number of reasons, we were not persuaded that her GP had given her any such advice. Firstly, in the Tribunal's experience, whilst GPs may well tell patients suffering from work-related stress to try not to dwell on workplace issues, it would be very unusual for a GP to advise against co-operating with Occupational Health or to suggest that there should be no contact with the patient's line manager. Certainly if that was the GP's approach in this case we would have expected to see some reference to that advice either in the Claimant's medical notes or in the letter from the GP surgery. Yet there was none. As the letter from the surgery demonstrated, her GP merely advised her *not to think about work issues*, which is a very different proposition. Secondly, although the Claimant had had ample opportunity prior to the Tribunal hearing to ask her GP for further evidence to support this aspect of her case, no such evidence had been obtained. Thirdly, the Claimant's witness evidence on this issue was somewhat limited. So, for example, she stated that her GP had told her that she '*needed to leave any work related matters alone and concentrate on feeling less stressed*' and '*not to think about or engage in activity relating to the Respondent*'. Yet this fell a long way short of advising her to desist from any communication with her manager or to refuse to engage with Occupational Health and in our view that advice was never given. We therefore concluded, on the basis of the evidence before us, that the Claimant's interpretation of her GP's advice was erroneous and, to a large extent, self serving.

89. It should be added that we did not accept, as Mr Bidnell-Edwards argued, that Mr Boat and Mr Povey conceded in cross-examination that the Claimant '*had received advice from her GP to avoid stressful situations and that this included both communicating directly with Ms Camm and attending Occupational health referrals or thinking about the same*'. On the contrary, the Judge's notes record that Mr Boat categorically rejected the proposition that it was implicit in the GP's advice that she should avoid contact with her manager. Similarly, neither Mr Boat nor Mr Povey accepted that there was before them any evidence to the effect that the Claimant's GP had specifically advised her not to engage with occupational health.

90. Having obtained the letter from her GP surgery, the Claimant also began preparing a 35-page response to Miss Camm's recommendation that she be dismissed. This document contained, amongst other things, criticisms of the occupational health report prepared by Miss McClure. It also detailed her objections to various aspects of Miss Camm's recommendation to dismiss, including the fact that Miss Camm appeared to have taken her post-operative sickness absence into account and Miss Camm's comment that the Claimant had not taken responsibility for managing her own health. So far as the phased return was concerned, she made the point that, taken literally, the occupational health report only required an increase of one hour per week, whereas her manager had adopted an '*interpretation of convenience*' and assumed it meant one hour per day and that this was one of the many reasons why clarification of the report was necessary. She also stated that by the end of September 2014, when Miss Camm made her second offer of an occupational health assessment, her GP had advised her '*to avoid any thoughts or activities that caused me anxiety*'. She suggested that agreeing to a further referral would have been tantamount to ignoring the advice of her GP. We accepted Mr Sodha's evidence that this document was difficult for the Claimant to produce, given her poor state of health. In the event Mr Sodha gave her a great deal of assistance and in cross-examination the Claimant accepted that the document contained all the points she wanted to make.

91. Towards the end of this document the Claimant addressed the fact that she could not yet give a likely return to work date:

> '*I do understand and appreciate that sickness absence cannot be indefinite, and that there does need to be at least some form of approximate time frame by which my return should be expected. Unfortunately…I still do not have a unifying diagnosis for my physical symptoms… Until this is obtained it is difficult to be able to predict whether the treatment I'm receiving for my symptoms will bring about the desired improvement or not. Furthermore the earliest appointment … for a Cognitive Behavioural Therapist … was 28/1/15…*'

91A. The Claimant therefore asked the department to consider allowing her unpaid leave '*for a reasonable amount of time*' so that she could '*recuperate with the intent to return to work successfully*'. When asked in cross-examination about what she meant by 'reasonable', the Claimant confirmed to the Tribunal that 'the worst-case scenario' was six months. However, she did not make this known at the time.

92. The Claimant was signed off for a further 4 weeks on 5 January 2015. Again, her condition was described as '*palpitations, abdo [sic] pain and work-related stress*'. The following her day the temporary reduction to her contractual hours was extended for the second time to 13 March 2015.

93. On 7 January 2014 Mr Sodha wrote to Mr Boat requesting that there be breaks in the decision maker's meeting '*to alleviate [the Claimant becoming anxious and avoiding a panic attack*'.

The Claimant's grievance

94. On 8 January 2015 the Claimant lodged a three-page formal grievance. This document detailed her dissatisfaction with a number of issues including her performance review grade and the treatment of her hospital appointment on 4

August 2014 as sickness absence. She also alleged that the way Miss Camm had treated her had '*forced her to go off sick*' and disputed some of the contents of the recommendation to dismiss. She also wanted to discuss the issue of her sick pay which was due to reduce to nil later that month. Mr Sodha assisted the Claimant in the production of this document and once again the Claimant accepted in cross-examination that it contained all the points she wished to raise.

95. Miss Camm was very upset when she read the grievance, believing it to be malicious response to her recommendation to dismiss.

<u>The decision maker's meeting on 9 January 2015</u>

96. The decision maker's meeting went ahead on 9 January 2015, chaired by Mr Jonathan Boat. He was a Higher Officer, responsible for managing front line managers and their teams. The Claimant attended, supported by Mr Sodha and her union representative, Mr Morgan.

97. Prior to undertaking his role as a decision maker Mr Boat had undergone training on 'unconscious bias' and 'equality and diversity essentials'. However, it was clear from his evidence that this training was fairly basic, involving onscreen delivery of information, complemented by a 'tick box' assessment. There was no face to face training, enabling managers to ask questions or discuss problem areas. Although Mr Boat confirmed, in answer to a question from the Judge, that he had some understanding of the principle of 'deduced effects', whereby the impact of any medication or treatment has to be ignored when considering the effect of an impairment on the employee's day to day activities, he also stated that he regarded the issue of disability as being one for HR and that he relied on their advice on this issue.

98. We made a number of findings about the decision maker's meeting;

(i) We accepted the unchallenged evidence of Mr Morgan that the meeting was difficult for the Claimant '*who struggled emotionally at several points and in general appeared to be in very poor health*'. That evidence was corroborated by the minutes of the meeting which referred to the Claimant becoming upset and requiring a break.

(ii) Mr Boat allowed the Claimant to cover all the points she wanted to raise (which included her complaints relating to her performance review grade and the treatment of her hospital appointments as well as an allegation that she had been rushed into reducing her contracted hours). Despite that, neither the Claimant nor Mr Morgan challenged the assumption made in the occupational health report that the Claimant was not disabled. In cross-examination Mr Morgan accepted that, with hindsight, that had been a mistake and that he had got bogged down in other matters such as the Claimant's unhappiness with her performance review grade. As a result, the question of disability was not discussed, and Mr Boat dealt with her case on the basis she did not suffer from a disability.

(iii) During the meeting the Claimant gave no indication that her health had improved and was unable to provide Mr Boat with a return to work date.

(iv) The Claimant also confirmed that the Department had made all the reasonable adjustments she had requested, with the absence of 'training and support'. In cross-examination the Claimant explained that this phrase was a reference to the fact that there had been no support meetings in July 2014 before Miss Camm became her

manager, and also to Miss Camm's subsequent approach to increasing her hours. She also told Mr Boat that she disagreed with Miss Camm's view that she had been fully supported at every possible opportunity.

(v) In Mr Boat's experience it was very unusual for an employee to refuse an occupational health referral – indeed he had never managed anyone who had done so. He went through each of Miss Camm's requests for a further occupational health referral, discussing each in turn. Despite this discussion, the Claimant gave no indication that her position in respect of a further referral had changed and Mr Boat did not expressly ask her whether she had changed her mind on this issue. The Claimant did not suggest that Mr Boat should contact her GP for an update on her condition and he did not consider doing so.

(vi) Mr Boat told the Claimant that he would delay giving her his decision about dismissal pending the outcome of her grievance.

99. Mr Boat considered his decision whilst the matter was fresh in his mind. The only medical evidence he had before him before him was the disputed occupational health report, the GP's letter and the Claimant's fit notes.

100. He considered the Claimant's argument that she had not received sufficient support during her phased return. However, in his view that was simply not the case. He noted, for example, that a number of adjustments had been made to facilitate her return, that from the end of July 2014 there had been regular meetings with her manager and that Miss Camm had done her best to deal with the various points raised by the Claimant or make the relevant enquiries. Yet, despite this support, the Claimant had been unable to return to her contracted hours and had accrued considerable sickness absence since going off sick with stress on 22 September 2014. Moreover, there was no indication that the Claimant's health was improving and no prospect of a return to work in the foreseeable future. He also noted that the Claimant had refused offers of a further occupational health assessment and had failed to engage with her manager as to the causes of her stress, thereby making it very difficult to offer her any additional support. However, his main concern was the length of the Claimant's absence and the fact that it appeared to be open-ended. This was creating a cost to the business and having a detrimental impact on the rest of the Claimant's team. As a result, he came to a provisional decision that he should uphold Miss Camm's recommendation that the Claimant's employment should terminate on the ground of her continuous absence and drew up a draft report, setting out his deliberations. However, although Mr Boat reached this provisional decision within a few weeks of the decision maker's meeting, he gave credible evidence that if the Claimant's grievance had been upheld he would have revisited his decision.

101. Mr Boat also considered whether the Claimant should receive any compensation under the Civil Service Compensation Scheme. Having consulted the relevant criteria he recommended that there should be a nil award and adopted Miss Camm's reasons in this respect. He sent his recommendation to Mr Joe Corcos, an HR Director, because under the relevant policy it was for Mr Corcos to make the final decision on the compensation award.

102. At the end of January 2015, the Claimant was given a sick note for a further month by her GP. Her condition was now described as an 'anxiety state'. Around this time the Claimant's contractual sick pay entitlement finished.

103. The Claimant began to see a cognitive bahavioural therapy (CBT) practitioner at the end of January 2015. The practitioner advised the Claimant to remain off work until the outcome of her grievance was known. However, this piece of advice was never communicated to the Respondent.

Investigation of the Claimant's grievance

104. Mr Hamal Gukani was appointed to investigate the Claimant's grievance. He held a number of investigation meetings with relevant personnel during February 2015. During this process Miss Camm told him that the Claimant had made her feel uncomfortable in the support meetings and that the Claimant would try to intimidate and undermine her if she did not agree with her decisions. His meeting with the Claimant took place on 4 February 2015, when she presented him with another long document (again over 30 pages) detailing her various concerns. Although there was some overlap between this document and the information provided to Mr Boat, it had still taken a great deal of time to prepare.

105. Minutes of the investigation meetings were sent to each of the participants for their comments. This process took a number of weeks. In the meantime, the Claimant continued to be on sick leave and gave no indication of a return to work date – or any indication that her condition was improving.

Consideration of a compensation award

106. In view of Mr Boat's provisional decision to dismiss the Claimant, it fell to Mr Joe Corcos to consider whether the Claimant should be given an award under the Civil Service Compensation Scheme. Mr Corcos considered the matter in March 2015, albeit this was inevitably a provisional decision as Mr Boat was still waiting for the outcome of the grievance before making a final decision on whether to terminate the Claimant's employment .

107. Mr Corcos considered the recommendations of both Miss Camm and Mr Boat. He noted, amongst other things, the Claimant's refusal to attend a further occupational health assessment, her refusal to attend a Month 1 meeting, and her failure to state the reasons for her work-related stress, all of which had frustrated the efforts of her manager to support her. In addition, she had failed to engage with HMRC to explain the reasons for her stress, so as to enable specific measures to be put in place to support her. He therefore '*fully agreed*' that there should be a nil award.

The grievance hearing

108. On 16 April 2015 the Claimant, who was still on sick leave, was sent a copy of Mr Gukani's Grievance Investigation report. During the next few weeks she compiled a lengthy written submission (over 20 pages) in response to the report. Although her health had started to improve by this stage, she was still taking anti-depressants and receiving CBT.

109. The grievance hearing was held on 27 April 2015. It was chaired by Mr Doug Aitkin. The Claimant, who was accompanied by Mr Sodha and Mr Morgan explained that her preferred outcomes were as follows:

(i) the leave she had taken on 4 August 2014 should be removed from her sickness record;

(ii) she be given an opportunity to appeal her 2013/14 performance

management review grade; and

(iii) she be given unpaid leave until she was fit enough to return to the business.

110. When questioned during the meeting the Claimant gave no indication that her condition was improving. Nor did she provide a possible return to work date or suggest that she would be able to return once her grievance was addressed. The Claimant also made it clear that if her grievance was upheld she expected the Respondent to look into the behaviour of Miss Camm and other managers, particularly as in her view Miss Camm had made a number of 'false statements' about her. At the end of the meeting she confirmed that she felt she had had a fair hearing. At no stage of the grievance process did she assert that she was disabled.

111. Mr Aitken decided to reject the Claimant's grievance and informed her of his decision on [13 May 2015]. His letter stated as follows:

> "*I am uncertain as to how serious [the Claimant] viewed these issues [ie the various matters raised in the grievance] prior to the recommendation to dismiss which could be viewed as a desperate attempt to undermine Dana Camm who made the recommendation to dismiss… Inexperience [of Miss Camm] leading to some mistakes has been identified but I find that [the Claimant] has been treated fairly and equitably. Decisions have been made on a firm and fair basis*.'

The Claimant is informed of the decision to dismiss

112. Mr Boat learnt that Mr Aitken had dismissed the grievance on 13 May 2015. He decided there was no reason to alter his provisional decision to dismiss, particularly as there was no indication that the Claimant's health had improved and no suggestion of a return to work date. He therefore wrote to the Claimant the same day, informing her that she was to be dismissed with notice 'on the grounds of continuing sickness absence'. Her last day of employment was therefore 12 June 2015.

113. Mr Boat's decision letter explained that, in taking his decision, he had focused exclusively on the Claimant's absence since 22 September 2014. His letter went on to explain his decision in the following terms:

> '*It is this latest absence that is at the root of the recommendation and what I have concentrated on when making my decision… In our meeting on 9 January you could not provide me with a likely return to work date and to date your latest sickness absence which started on 22 September 2014 has lasted 7 months with no indication of a return to work*.'

His letter also informed the Claimant that, in his view, she had been managed correctly and noted that she had not engaged with the keeping in touch process or met with her manager to discuss the reasons for her absence, thereby disabling the department from assisting with a return to work. He added that he had considered her request to have unpaid leave, but the Respondent's policies did not provide for this.

114. Mr Boat's letter also rejected the Claimant's allegation that she had been rushed into reducing her contracted hours and indicated that Miss Camm could not be blamed for following the most up to date occupational health advice - particularly given the Claimant's refusal to attend any further occupational health

assessments. He reminded the Claimant that '*both the manager and the jobholder should share fully in the occupational health process*'. He also felt that Miss Camm had shown flexibility in accepting communications via Mr Sodha.

115. Finally, his letter informed the Claimant of Mr Corcos's decision to award nil compensation, explaining the reasons. His letter also informed the Claimant that she had the right to appeal the compensation decision either internally or to the Civil Service Appeals Board. The letter made it clear that if she chose the latter she had 21 days to notify the Board of her intention to appeal. In the event the Claimant made an internal appeal but chose not to appeal to the Board within the 21-day timeframe.

The Claimant's appeal against the grievance outcome

116. During her notice period the Claimant's submitted an appeal against her dismissal and a separate appeal against the outcome of her grievance. She also submitted an internal appeal against the decision to the refuse to make her a compensation award.

117. Mr Daniel Gurr dealt with the appeal against the grievance outcome and held an appeal hearing on 29 June 2015. The Claimant was represented by Mr Morgan. The meeting took two hours and afterwards Mr Gurr conducted further investigations, including speaking to Mr Boat. On 13 July 2015 he informed the Claimant that her appeal had been unsuccessful, stating that although he had minor criticisms of Miss Camm's management there had been no bullying, harassment or discrimination and that he was supportive of the grievance decision.

The Claimant's appeal against her dismissal

118. Mr Adam Pavey was nominated to hear the Claimant's appeal against her dismissal and Mr Dan Goad, an HR Director, was nominated to hear the appeal about compensation. Clearly the latter appeal was dependent upon the outcome of the dismissal appeal – compensation would be irrelevant if the decision to dismiss was overturned.

119. Under the Respondent's policies, an appeal against dismissal does not take the form of a rehearing. Instead its purpose is essentially to review the process, check that the correct procedures have been followed and that the decision appears to be fair and in line with similar cases. This was the first time Mr Povey had acted as an appeal manager. Like the other managers in this case he had received 'on screen' training on unconscious bias and equality and diversity.

120. The Claimant emailed a copy of her appeal to Mr Povey on 22 May 2015. This document restated, in some detail, her complaints about the management of her phased return, the way her performance review for 2013/14 had been dealt with and the treatment of her hospital appointment on 4 August 2014 as sickness absence. She also repeated her contention that in failing to engage with her manager she was only following her doctor's advice. However, she gave no indication that her health was improving and did not provide any further medical evidence or give a likely return to work date.

121. Mr Povey contacted the Claimant on 13 June 2015 to say he was working through the documentation in her case and would be arranging a meeting in due course. She then heard nothing further and on 6 October 2015 she presented her

claim to the Employment Tribunal. Finally, on 7 December 2015 – over six months after she had given notice of appeal - Mr Povey wrote to her inviting her to an appeal hearing on 18 December 2015. The delay was due to the fact that he had been inundated with work in the intervening period and because he had also experienced some personal issues. In addition, Mr Povey had mistakenly understood that a case-worker from HR would need to attend the appeal hearing and as no such person had been appointed he believed he could not progress matters. In cross-examination Mr Povey recognised that, with hindsight, he should never have taken on the appeal, given his inexperience and the size of his workload.

122. The letter inviting the Claimant to the appeal hearing arrived on 15 December 2015, giving her just three days to prepare. It did not contain any apology or explanation for the delay. It also stated:

> '*If you decide not to attend the meeting or do not reply by 14 December I will make a decision based on my consideration of the representations in your written statement of appeal*.'

The Claimant assumed from this that, as the deadline had passed, there was no point in attending the hearing. She therefore replied by letter of 16 December 2015 that '*given… your letter was received outside the deadline afforded to me to respond, I look forward to receiving a copy of the reached outcome in due course…*'

Her letter did not reach Mr Povey until 13 January 2016. In the meantime, the appeal hearing went ahead without the Claimant on 18 December 2015.

123. Mr Povey was still under considerable work pressure and began to work on his decision in March 2016. He explained to the Tribunal that there was nothing in the documentation relating to the Claimant's case that alerted him to the possibility that she might be disabled and accordingly he treated her as if she were not. He finally took his decision, which was communicated to the Claimant by letter of 21 April 2016. Having finally apologised for the '*delay in coming back to you*' he told her that her appeal had been unsuccessful. In his view '*the original decision maker reached the correct view … due to your on-going sickness absence and your sickness absence history*'. A summary of his deliberations was attached. This included the following:

> *'The Department have tried to obtain up to date OH advice but Ms Undre was unwilling to engage with the process… The recommendation of dismissal was made due to continuous absence which began on 22 September 2014. During this absence Miss Undre did not engage with the keeping in touch process to enable the department to assist with her return to work. There is plenty of evidence that Ms Undre has been given sufficient support to assist her back to work but she could not provide the Decision Maker with a likely return to work date and the latest absence had lasted seven months with no indication of a return in the near future… There is plenty of evidence that Sickness Absence policies/procedures have been adhered to by the manager and the Decision Maker and that specialist advice has been sought as appropriate'.*

Appeal against nil compensation award

124. The Claimant's appeal against the nil compensation award was considered by Mr Dan Goad, an HR Director, shortly afterwards. Mr Goad had

considerable experience of making assessments under the scheme having been involved in about 100 such cases. In his experience employees normally co-operated with requests for occupational health assessments and worked with their managers to put in place any reasonable adjustments.

125. The Claimant's appeal did not contain any new medical evidence, but her submissions included the following passage:

> '*…my manager, Dana Camm, was made aware of my GP's advice on numerous occasions; that due to my condition I had been asked not to think about or participate in any activities relating to the cause of my stress (ie work). Therefore… in order to safeguard my health and prevent severe palpitations, panic attacks and aggravating my abdominal pains due to stress, I had to take my GP's advice at the unfortunate expense of being viewed unfavourably by …management. I refer the appeal manager [to the GP letter of 24 December 2014]*
> *…the truth is that my mental (and physical) health condition was entirely the reason why I was unable to communicate directly with the department, or partake in meetings or an occupational health referral at that given time. The fact of the matter was that I was just not physically or mentally fit at that time and I was simply following my GP's advice.'*

126. Mr Goad took about half a day to consider the matter. Having consulted the guidelines he decided that, on the basis of her submissions, the following factors pointed to a 25% award:

> '*The nature of the problem is beyond the jobholder's control and is sufficiently severe to prevent them returning to work…*
> *The jobholder has co-operated with a few of the suggested measures to improve their difficulties (for example co-operating with NHS solutions but not those provided by the Department's health services)*'

127. He noted that whilst the Claimant had engaged with the NHS to improve her health she had not been prepared to undergo a second occupational health assessment and had failed to attend a Month 1 meeting. In addition, he considered that her failure to engage with HMRC to explain the reason for her stress so as to enable measures to be put in place to support her was not justified by her GP's advice not to think about work related matters. He felt she could nonetheless have engaged 'via a friend or colleague'. He also noted that it was only when she appealed against the nil award that she had provided any detailed evidence to suggest her failure to engage was beyond her control. In light of all these circumstances he decided a nil award was too severe and replaced it with an award of 25% of the maximum allowed under the compensation scheme (a sum of £869.59).

128. His decision letter was sent to the Claimant on 16 May 2016. The letter informed her that if she wished to appeal to the Civil Service Appeal Board she had 21 days to do so. In fact that was misleading as any external appeal had to be made within 21 days of the decision to dismiss. However, as noted above, the correct information had been included in Mr Boat's decision letter, so the Claimant had been made aware of the time limit at the relevant time.

D The Disability Claims: Knowledge of Disability

The relevant law

129. A number of the claims of disability discrimination (namely the reasonable adjustment claims and the claims of discrimination arising from disability) were dependent upon the Claimant proving that the Respondent had knowledge of her disabilities at the relevant time. So much is clear from section 15(2) of the Equality Act 2010 which provides that liability for discrimination arising from disability does not arise if '*A [the alleged discriminator] shows that A did not know, and could not reasonably have been expected to know, that B [the Claimant] had the disability*'. Similarly, there is no duty to make reasonable adjustments if the employer '*does not know and could not reasonably be expected to know… that B has a disability*' (Equality Act 2010, Sch 8, para 20). The burden of proof falls on the employer in this regard. What is reasonable will depend on all the circumstances but paragraph 5.15 of the Equality and Human Rights Commission's Employment Code ('the EHRC Code') states that '*an employer must do all they reasonably can be expected to do to find out if a person has a disability*'.

130. Case-law establishes that a reasonable employer should consider for itself whether an employee is disabled and form its own judgment: see **Gallop v Newport City Council** [2014] IRLR 211, CA. As a result, a reasonable employer should not simply 'rubber stamp' the opinion of an Occupational Health advisor but should bring its own judgment to bear on the matter.

<u>Knowledge of disability</u>

131. In this case it is agreed that neither Miss Cam, Mr Boat nor any of the other decision makers had actual knowledge of the Claimant's disabilities when they were involved with her case. The question is therefore whether they could reasonably have been expected to know she had a disability (sometimes referred to as 'constructive knowledge'). According to Mr Bidnell-Edwards, it would have been reasonable for the Respondent to have recognised there was a 'real possibility' that the Claimant was a disabled person, in respect of the thyroid condition, from 30 July 2014 or, failing that, from 6 August 2014. So far as stress and anxiety was concerned, he argued that the Respondent had constructive knowledge from 25 September 2014 when the Claimant's partner informed the Respondent that she had been admitted to hospital suffering from acute stress - or at the latest 24 December 2014 when the Claimant provided the letter from her GP surgery summarising her treatment for stress and anxiety. As constructive knowledge is a precondition of the duty to make reasonable adjustments and for claims of discrimination arising from disability this was an important issue for our determination.

The thyroid condition

132. Dealing first with the thyroid condition, we decided that at the time of the support meeting on 30 July 2014 the Respondent did not have constructive knowledge that this condition might amount to a disability. At this point all Miss Camm knew was that the Claimant had been off sick as a result of her thyroid surgery and that, although she was still far from well, a phased return was planned that would see a return to her contractual hours within a matter of weeks.

133. In our judgment, although a lay person like Miss Camm can be expected to appreciate that thyroid surgery is a serious matter, it is unreasonable to expect them to understand the long-term prognosis, unless given some information to put them on notice of the position. That had not occurred at this point. The Claimant's message to Miss Naik of 2 June 2014 suggested that her need for future medication would be determined by blood tests and certainly did not state

that life-long medication would be necessary. Equally, the occupational health report did not mention the need for long term medication. Furthermore, although the Claimant's trade union representative complained about errors in the report, he did not challenge the occupational health adviser's conclusion that the Claimant was unlikely to satisfy the statutory definition of disability. In those circumstances we do not consider that Miss Camm could be reasonably expected to know, at this stage, that the Claimant's thyroid condition amounted to a disability.

134. However, we viewed the position after the support meeting on 6 August 2014 rather differently. There are a number of reasons for this. Firstly, Miss Camm now had a significant new piece of information, namely that the Claimant would have to take thyroxine for the rest of her life. Had she had even the most basic training on the meaning of disability (which an organisation the size of HMRC could be expected to provide) this should have alerted her to the possibility that, without drug treatment, the effects of the Claimant's hypothyroidism on her ability to carry out day to day activities could well be both substantial and long term and so satisfy the statutory definition.

135. Secondly, the Claimant's trade union representative specifically raised the issue of disability, suggesting the Claimant's thyroid condition might qualify for Disability Adjustment Leave. This clearly put Miss Camm on notice that disability might be an issue. Indeed, one of the action points following the meeting was for Miss Camm to confirm whether the Claimant's condition fell within the statutory definition of disability.

136. Thirdly the knowledge that the Claimant was on long term medication put the occupational health report in a new light, as it made no reference to life-long drug therapy. This should have alerted Miss Camm to the possibility that the occupational health advisor had not been in possession of all the relevant information - or even that the report had not been prepared with the level of competence that might normally be expected, particularly as the Claimant had repeatedly raised issues about its accuracy.

137. Finally, Miss Camm also had the opportunity to discuss the matter with an HR case-worker. That case worker, as a member of an HR department of some size, could be expected to be well-versed in disability issues including the principle of deduced effects and should also have been aware that, following the decision in **Gallop**, employers need to be wary of placing unquestioning reliance on an occupational health report, particularly in a situation like this one where new information had come to light. Taking all those factors together we decided that by mid-August 2014, by which time Miss Camm had received advice from HR, the Respondent could reasonably have been expected to know that the Claimant's thyroid condition amounted to a disability, regardless of whether the Claimant was prepared to undergo a further occupational health assessment.

Stress and anxiety

138. So far as stress and anxiety is concerned, we rejected the Claimant's submission that the Respondent had constructive knowledge that her stress related condition amounted to a disability from 25 September 2014, when Miss Camm was notified by Mr Sodha that the Claimant had been admitted to hospital '*due to being run down from stres*s'. In coming to this conclusion, we noted that at this stage the Respondent had very little information about the Claimant's stress related illness. Her first fit note dealing with the matter, dated 22 September 2014, simply referred to 'stress at work'. In addition, although Mr Sodha informed Miss Camm about the Claimant's hospital admission, his

message was to the effect that the Claimant had suffered from an acute stress related episode. Beyond this there was no medical evidence about the hospital admission and nothing to put the Respondent on notice that the Claimant's stress related condition might have a substantial, long-term effect on her day-to-day activities.

139. We therefore considered whether the Respondent had constructive knowledge at a later stage. We noted that, although the Claimant's fit notes from October to December 2014 gave no indication of the severity of her stress-related condition or the likely prognosis, this was not the only medical evidence available to the Respondent. By the time Mr Boat held the decision maker's meeting he was in possession of the letter from the Claimant's GP surgery and the accompanying medical notes. These documents clearly described a deteriorating condition, as a result of which the Claimant was experiencing a range of symptoms (including palpitations, poor sleep and panic attacks). Whilst we agree with Mr Hurd's submission that a lay person could not reasonably be expected to understand the precise significance of some of the available evidence (such as doubling the dose of Sertraline to 100mg per day) the overall picture was nonetheless clear. The Claimant was suffering symptoms that might be expected to have a significant effect on her day to day activities and her condition was showing no signs of improvement. Moreover, if there was any remaining doubt about the severity of her symptoms that was resolved at the decision maker's meeting, when we know from Mr Morgan's unchallenged evidence that the Claimant presented as being 'in very poor health'.

140. In addition, so far as the prognosis was concerned, by the time of the decision maker's meeting the Claimant had been off sick for some three and a half months and there was no prospect of a return in the short or even the medium term. Medication had not cured the illness and the Claimant was not scheduled to start CBT – the only other treatment on offer - until the end of January 2015. It was therefore unlikely that there would be a speedy resolution of her condition. In our view there was therefore material available to Mr Boat from which he might reasonably have concluded that it was likely that the effect of the Claimant's condition was long term in the sense that it was likely to last for at least a year (bearing in mind that, according to the case-law, 'likely' is a low bar for the Claimant to cross, meaning something less than more probable than not).

141. Nonetheless, Mr Boat did not consider the issue of disability. As he explained to the Tribunal, the possibility that the Claimant might be disabled '*didn't cross my mind*'. As far as he was concerned, the issue of disability was solely a matter for occupational health. As a result of this ill-informed approach (which in our view owes much to the inadequacy of the training offered to managers), he made no attempt to consider the true nature of the Claimant's health problems at the decision maker's meeting, although it was obvious that she was very far from well. As far as he was concerned that was not his function and he therefore ignored the issue. In light of that failing, and in view of the evidence referred to above, we decided that the Respondent had failed to show that it could not reasonably have been expected to know that the stress and anxiety suffered by the Claimant amounted to a disability. The Respondent therefore had constructive knowledge that the Claimant's stress-related illness amounted to a disability from 9 January 2015 onwards.

142. We should add that in coming to this conclusion we considered the fact that the Claimant had refused to attend a second occupational health assessment on a number of occasions in 2014. However, we did not consider that this absolved the Respondent from its own responsibility to consider the

available evidence. Although occupational health advice can be, and usually is, of great assistance, the decision on disability is ultimately that of the employer, as the **Gallop** decision recognises. In this case there was other evidence available that should have alerted the Respondent to the issue of disability. Similarly, we were not swayed by the fact that Mr Morgan failed to raise the issue of disability in the decision maker's meeting. The employer should not be able to rely on the shortcomings of a representative to avoid its obligations under the equality legislation.

E. The reasonable adjustment claims

The relevant law

143. Section 39(5) of the Equality Act 2010 provides that an employer is under a duty to make reasonable adjustments. Under section 20 of the Equality Act 2010 the duty arises in a number of situations. These include:

> '*where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled*'.

144. In such circumstances, the employer has a duty '*to take such steps as it is reasonable to have to take to avoid the disadvantag*e': see the Equality Act 2010, section 20(3). A failure to comply with section 20(3) is a failure to comply with the duty to make reasonable adjustments and, as such, is an act of discrimination (see sections 21(1) and (21(2) of the Equality Act 2010).

145. The phrase '*provision, criterion or practice*' ('PCP') is not defined in the Equality Act 2010. However, some guidance is provided by the EHRC Code which states that the term '*should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, pre-requisites, qualifications or provisions. A [PCP] may also include… a 'one off' or discretionary decision*.' This approach is confirmed by the case-law which suggests that a Tribunal should adopt a liberal rather than an overly technical approach to this issue: see **Carreras v United First Partners Research** EAT 0266/15. It is for the employee to identify the PCP upon which they are relying: see **Allonby v Accrington and Rossendale College** [2001] EWCA Civ 529, a case decided when the statutory language referred to a requirement or condition rather than a PCP, although the same principle would appear to apply to the current wording.

146. So far as substantial disadvantage is concerned, substantial means '*more than minor or trivia*l' (see section 212(1) of the Equality Act 2010. In addition, the wording of section 20 of the Equality Act 2010 makes it clear that a comparative exercise has to be carried out to ascertain whether the disabled person is put at a particular disadvantage, *vis-a-vis* persons who are not disabled. This is a different exercise to the like for like comparison carried out in claims of direct discrimination. There is therefore no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as those of the disabled person: see **Fareham College Corporation v Walters** [2009] IRLR 991, EAT and **Griffiths v SOS for Work and Pensions** [2017] ICR 160, CA. Indeed, in some cases it may not even be necessary to identify the non-disabled comparators, as the facts will often speak for themselves.

147. Consideration of the duty by a Tribunal will usually be guided by the principles set out in the well-known case of **Environment Agency v Rowan [2008] IRLR 20.** This approach requires the Tribunal to identify:

a) the PCP applied by or on behalf of the employer;
b) [not relevant to this case]
c) the identity of non-disabled comparators (where appropriate); and
d) the nature and extent of the substantial disadvantage suffered by the claimant.

148. So far as the burden of proof is concerned, it is not enough for the Claimant simply to identify a substantial disadvantage caused by a PCP. As Elias P commented in **Project Management Institute v Latif** [2007] IRLR 579, EAT:

> '… *the Claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made… we do think it would be necessary for the respondent to understand the broad nature of the adjustment proposed…*'

149. The test of whether a particular adjustment is reasonable is an objective one: see **Smith v Churchills Stairlifts plc** [2005] EWCA 1220. The EHRC Code lists a range of factors which might be taken into account when deciding if a step is reasonable for an employer to have to take. The list includes (a) the extent to which taking the step would be effective in preventing the substantial disadvantage and b) the practicability of the step.

150. Where an employee complains that he has been dismissed on account of disability-related absence, it appears that the matter is usually best dealt with as a complaint of discrimination arising from disability under section 15 of the Equality Act 2010 rather than as a reasonable adjustments claim. This was the view of HH Judge Richardson in the **Carranza** case, where he pointed out that such a case can be difficult to analyse in terms of the reasonable adjustment duty, particularly if the absence has been long-term and there is no imminent prospect of return. In such circumstances it is not easy to identify the 'step' that would enable a person who has already been absent for a substantial period to retain employment – which is a key ingredient of a reasonable adjustment claim. His views were endorsed by Elias LJ in **Griffiths v SOS for Work and Pensions** [2017] ICR 160, CA.

151. As noted above, there is no duty to make reasonable adjustments if the employer does not know or cannot reasonably be expected to know that the person is disabled (see paragraph 139 above). However, there is an additional feature in relation to knowledge in the case of a reasonable adjustments claim, namely that the duty does not arise if the employer did not know and could not reasonably have been expected to know that the employee was likely to be placed at a substantial disadvantage compared with persons who are not disabled: see the Equality Act 2010 Sch 8, Part 3, para 20.

Applying the law to the facts of this case.

152. The reasonable adjustment claims are set out below by reference to the adjustments contended for by the Claimant in the Further and Better Particulars.

1) The Respondent should have 'deferred reaching a conclusion on whether the Claimant was disabled or not until such time as the Claimant had been seen by occupational health in person'.

Was there a valid PCP?

153. The PCP pleaded by the Claimant in relation to this claim was '*the Respondent's practice of assessing the Claimant via a telephone Occupational health referral in July 2014*' (PCP1). As the Further Information document provided by Mr Bidnell-Edwards made clear, the disability relied on in respect of this claim was the Claimant's hypothyroidism.

154. In response to this claim, the Respondent accepted that it had a policy of conducting occupational health assessments by telephone, at least initially, and that this policy was applied to the Claimant in July 2014. However, as Mr Hurd pointed out, thereafter there was flexibility on this issue and indeed on 23 September 2013 Miss Camm told the Claimant she was willing to arrange a face to face assessment if that was what the Claimant preferred. On that basis we find, taking a liberal approach, there was a valid PCP but that it was only applied to the Claimant until 23 September 2014. Given our finding that the Respondent did not have constructive knowledge of the relevant disability (hypothyroidism) until mid-August 2014, the duty to make reasonable adjustments in relation to this PCP arose for a relatively limited period, namely mid-August 2014 to 23 September 2014.

Substantial disadvantage

155. We then turned to consider the issue of substantial disadvantage. The Claimant's case, as set out in the Further and Better Particulars, was that the PCP was likely to disadvantage the Claimant as someone who was suffering from '*a disability with developing symptoms*' who '*did not have sufficient information about her condition and was not able to articulate or to take steps to explain her medical condition to the occupational health adviser… If the Claimant had been able to communicate her medical needs she would have avoided [application of the Respondent's Managing Continuing Absence procedure]*'. Mr Bidnell-Edwards also made the point (at paragraph 169 of his submissions) that it was '*obvious*' that '*any disabled person experiencing the developing symptoms of an undiagnosed disability is likely to be disadvantaged by a telephone assessment*'.

156. We did not accept that the PC put the Claimant at a substantial disadvantage as compared to persons who are not disabled for the following reasons:

(i) As noted above, the relevant disability in relation to this claim was the Claimant's thyroid condition. However, neither the Claimant's witness statement nor the medical evidence before the Tribunal contained any suggestion that her thyroid condition affected her ability to communicate the details of her condition. Moreover, far from having problems explaining her condition, the evidence suggests that the Claimant participated fully in the assessment by Miss McClure and did not encounter any difficulty in articulating her medical needs. As she conceded in cross-examination, she was able to discuss all the points she wanted to make and answered all the questions she was asked. We therefore do not accept the premise on which the argument for substantial disadvantage is based. In our view the Claimant was more than able to communicate her medical needs.

(ii) That conclusion is buttressed by the fact that the Claimant's witness evidence contains no complaint about the length or conduct of the telephone assessment. (She does state that the occupational health advisor did not have her medical records, but that is not something that arises from the fact that the assessment was by telephone). In

addition, her union representative raised no objection to the method of assessment at the time. As for the assertion that her symptoms were '*developing*' that would have been the case even if the assessment had been conducted on a face to face basis. We therefore do not accept that the method of assessment placed her at a substantial disadvantage.

(iii) In any event, the Claimant's submissions do not explain how carrying out the assessment by telephone placed her at a substantial disadvantage '*in comparison with persons who are not disabled*'. There was no evidence that any drawbacks associated with a telephone assessment put her, as a disabled person, at a greater disadvantage than would be experienced by non-disabled colleagues who were assessed in the same way. The reality is that the Claimant's real complaint was not the method of conducting the assessment, but rather that Miss McClure did not make an accurate record of all the information she was given.

The Claimant has therefore failed to satisfy the burden of proof and this complaint fails.

<u>2) The Claimant should have 'waited until the Claimant had obtained an assessment of her medical condition from her GP'.</u>

Was there a valid PCP?

157. Once again, the PCP pleaded by the Claimant in relation to this claim was '*the Respondent's practice of assessing the Claimant via a telephone occupational health referral in July 2014*' (PCP1) and the disability in issue was hypothyroidism. Accordingly, the comments made in paragraph 154 apply, with the result that in our judgment although this was indeed a valid PCP, it was only applied to the Claimant until 23 September 2014.

Substantial disadvantage

158. As before, we went on to consider the Claimant's arguments on substantial disadvantage, which were identical to those set out in paragraph 156 above. We therefore did not accept the suggestion in the Further and Better Particulars, that the Claimant experienced difficulties '*communicating the full extent of her illness*' as a result of her thyroid condition. Moreover, we find it difficult to understand how she could communicate her medical needs to her GP (as this claim pre-supposes), but not to an advisor from occupational health. Nor do we accept, for the reasons given above, that she suffered any disadvantage as compared with non-disabled persons. This complaint also fails.

<u>3) The Respondent should have suspended the Managing Sickness Absence policy until such time as an up to date and thorough review of the Claimant's condition had been completed.</u>

Was there a valid PCP?

159. The PCP in relation to this complaint is set out in the Further and Better Particulars in the following terms:

'*The Respondent's practice of relying on a statement made in July 2014 as the basis on which to regard the Claimant's hospital appointments and absences thereafter, without recognising that the July assessment no longer provided a safe basis on which to proceed.'* (PCP2)

160. Mr Hurd accepted that the Respondent had a practice of relying upon the

advice of occupational health practitioners. However, he rejected any suggestion that the Respondent had a practice of relying on *outdated* occupational health reports, as the wording of this PCP suggests. We agree with Mr Hurd's submission. There was no evidence to support the Claimant's contention. On the contrary, the evidence shows that with effect from 21 August 2014, when Miss Camm first suggested that a second occupational health report be obtained, she recognised full well that the occupational health report was out of date and for that reason was anxious to obtain a second assessment so that the correct support could be put in place. The PCP as pleaded did not exist.

Substantial disadvantage

161. However, even if the Respondent's reliance on the July 2014 report could be regarded as a PCP, we were not persuaded that it put the Claimant at a substantial disadvantage in comparison with persons who were not disabled.

162. Both disabilities (the Claimant's thyroid condition and her stress-related illness) were relied on in relation to this claim. However, we agreed with Mr Hurd that relying on an out of date occupational health report would disadvantage any employee, regardless of disability, whose condition had altered since the previous assessment. So, whilst we accepted Mr Bidnell-Edwards' submission that Miss Camm failed to recognise the full extent of the Claimant's medical problems, that failure was not the result of any such PCP but stemmed from the Claimant's refusal to consent to a further occupational health referral after September 2014. The burden of proof does not shift, and this complaint fails.

4) <u>The Respondent should have halted the progression of the Managing Sickness Absence policy until the Claimant had been assessed by Occupational health in person and/or an assessment had been obtained from the Claimant's GP</u>

Was there a valid PCP?

163. The PCP in relation to this claim was set out in the Claimant's Further and Better Particulars as follows:

> '*the Respondent's use of the Sickness Absence: Dental and Medical Appointments policy (the Respondent's 'Sickness Absence Policy'). This is… alleged to have been an on-going policy and practice which was to the Claimant's detriment as a disabled person up to and including the date of her dismissal*' (PCP 3).

The Respondent accepted that it had such a policy and that it was applied to the Claimant. Accordingly, we accept there was a valid PCP.

Substantial disadvantage

164. According to the Further and Better Particulars the PCP put the Claimant at a disadvantage because '*she needed to attend numerous appointments, was not able to work her full contractual hours and was not fit to work on a number of occasions due to her disability. The policy did not make allowances for the Claimant to attend medical appointments but instead counted these as sickness absence. The Claimant was therefore at a disadvantage in comparison with someone who is not disabled, because a person without the Claimant's disability would not have incurred the same medical-related absences…*'

165. In considering this claim we noted that both of the Claimant's disabilities were said to be in issue. However, we were only provided with evidence in relation to two medical appointments, namely the appointment on 11 July 2014

and a later appointment on 4 August 2014. We therefore do not accept that the Claimant needed to attend 'numerous appointments'. Moreover, by the end of August 2014 the Claimant had conceded that the Respondent's policies had been correctly applied to the appointment on 11 July 2014, so the only potential disadvantage related to the appointment in August 2014. However, the August appointment was concerned with abdominal pains, which the medical evidence attributed to the Claimant's stress–related condition rather than her thyroid illness. However, as that stress-related condition did not amount to a disability until 22 September 2014 (see the Respondent's concession referred to in paragraph 2 above), our primary finding is that the duty to make reasonable adjustments simply did not arise in relation to this appointment.

166. However, even if we are wrong on that point, we decided any disadvantage suffered by the Claimant was *de minimis*, rather than substantial, there being no suggestion that the sickness absence recorded for that one day had any significant bearing on the subsequent decisions made in the case. Once again, the Claimant has failed to satisfy the burden of proof and this complaint also fails.

5) <u>In circumstances where the Claimant was requesting a return to work as quickly as possible on 9 January 2015, the Respondent should have ascertained whether the Claimant was disabled or not with an occupational health interview in person or by requesting her GP's opinion before reaching a conclusion that the Claimant did not have the capability to perform her role.</u>

The first PCP

167. There were 2 PCPs associated with this alleged breach of duty. The first was pleaded in the Further and Better Particulars as "*The Respondent's criteria and/or practice when determining the Claimant's capability to perform her role'*. (PCP4)

168. On one level, taking a technical approach, this pleading is circular and fails to identify the PCP in question. However, the case-law demands a liberal approach and, taking a lead from paragraph 178 of Mr Bidnell-Edwards' submissions (which refer to keeping in touch requirements and attendance at occupational health assessments), we understood the essence of this PCP to be the requirement that an employee should keep in touch with the Respondent during a period of ill-health absence and co-operate with occupational health assessments in accordance with the Respondent's Managing Continuous Absence Policy and accompanying guidance. On that basis we accepted there was a valid PCP.

Substantial disadvantage

169. The disability relied on in respect of this claim was stress and anxiety. According to the Claimant's submissions the application of this PCP put her at a disadvantage in comparison with non-disabled persons because, as a disabled person suffering from a stress-related condition, she was not able '*to communicate directly with her line manager to meet the keeping in touch requirements and to attend occupational health*', as a result of which '*she was put through the capability process and dismissed*' (see paragraph 178). (This was somewhat different to the case as pleaded in the Claimant's Further and Better Particulars which referred to the disadvantage suffered by the Claimant as a result of her high level of disability-related absence. As the submissions were, by their very nature, the later of the two documents, we relied on them as a definitive statement of the Claimant's case. In any event, arguments relating to the

Claimant's disability-related absence are dealt with in paragraphs 172 to 176 below.)

170. We decided that the Claimant had failed to establish that the PCP put her at a substantial disadvantage for the following reasons:

(i) It was not at all clear from Mr Bidnell-Edward's submissions whether the Claimant's position was that she was too ill, on account of her stress-related condition, to engage with her employer or whether she was simply asserting that she was following her GP's advice not to communicate with her manager or attend any further occupational health assessments (see paragraphs 176-178 and 192 of Mr Bidnell-Edwards' submissions). If she was relying on the latter proposition, then, as our findings of fact make clear, we did not accept that her GP gave her any such advice (see paragraph 88 above).

(ii) Nor did we accept that the Claimant was too ill to attend an occupational health referral. Not only was there no medical evidence to this effect, she was clearly able to discuss her stress-related condition with her GP on a face to face basis on a number of occasions in the period September to December 2014. There was no evidence that she could not have done the same with an occupational health adviser either during this period or later, particularly as she had previously been permitted to have her union representative in attendance and so there was no reason to believe she could not have had similar support during a further assessment. Accordingly, any disadvantage the Claimant suffered as a result of her failure to attend occupational health assessments flowed not from the PCP but from the fact that she made an active choice to interpret her GP's advice as absolving her from any obligation to co-operate in obtaining a further occupational health report.

(iii) So far as the failure to keep in touch was concerned, although we accepted that the Claimant's health deteriorated as a result of her stress-related illness in September 2014 and that she experienced serious illness in the months that followed, there was no medical evidence to support her submission that she was incapable of communicating with her employer during this period, particularly as Miss Camm indicated in her letter of 9 October 2014 that she was willing to be flexible both as to the means and point of contact. Certainly, as noted in paragraph 88 above, the letter from her GP surgery falls a long way short of sustaining such a proposition. Moreover, as an email from Mr Sodha makes clear, by 18 November 2014 the Claimant was receiving advice about her work situation from her trade union representative which suggests an ability to discuss work-related issues where she felt it was in her interests to do so – even though, on her own evidence, this was the stage when her health was at its worst. We therefore accept Mr Hurd's submission (at paragraph 148) that there was no evidence why the Claimant could not maintain a basic level of contact with the Respondent (eg by sending updates by text message) or why she could not have instructed Mr Sodha to engage more fully in discussing the causes of her stress and to attend the Month 1 meeting on her behalf. In any event, given our finding on knowledge of disability at paragraph 151 above, the duty to make reasonable adjustments did not arise in respect of stress and anxiety until 9 January 2015. By that point, as Mr Hurd pointed out at paragraph 122 of his submissions, the Claimant was clearly well enough to communicate with her employer about her condition, as

demonstrated by her detailed written submissions (starting with her grievance of 8 January 2014) and her subsequent engagement and full participation in the capability and grievance process.

Accordingly, this complaint fails.

<u>*The second PCP*</u>

171. The second PCP associated with the adjustment set out above was identified in the Further and Better Particulars as '*the Respondent's criteria and/or practice when determining the Claimant's dismissal*' (PCP 5). Once again, the formulation of this PCP can be criticised as disclosing no identifiable PCP. However, doing the best we can, it appears to be referring to the fact that the Respondent applied its Managing Continuous Absence Policy (which uses length of absence as a trigger for intervention) when determining whether the Claimant should be dismissed. We accepted that on that basis there was a valid PCP.

Substantial disadvantage

172. The disability in issue was said to be stress and anxiety and the substantial disadvantage relied on by the Claimant was described in the Further and Better Particulars as follows:

> '*As a result of being a disabled person the Claimant had a higher number of absences for medical appointments and for ill-health. In punishing these absences with dismissal on the grounds of capability the Claimant was subject to a disadvantage'.*

The Respondent accepted that the Claimant, who had a high period of absence as a result of her disabilities, was placed at a substantial disadvantage when compared with non-disabled colleagues by the application of its Managing Continuous Absence Policy. Given our finding that the Respondent could reasonably have been expected to know that the Claimant's stress-related condition amounted to a disability from 9 January 2015 onwards, we considered that it necessarily followed that the Respondent also had constructive knowledge of the substantial disadvantage from the same date (see Equality Act 2010, Sch 8, Part 3, para 20 referred to in paragraph 151 above).

Reasonable adjustment

173. The question was therefore whether the adjustment contended for (namely that the Respondent should have obtained a face to face occupational health report or an opinion from her GP before determining whether to dismiss her) was reasonable. We noted that the adjustment proposed by the Claimant is premised on the basis that the Claimant was requesting a return to work as early as 9 January 2015 when the decision maker's meeting took place. However, that does not accord with the facts as found by the Tribunal. At no stage during the decision maker's meeting did the Claimant indicate she was in a position to return to work; nor did she provide a timescale within which a return was likely. On the contrary, her position was that she required an unspecified period of unpaid leave to improve her health. Indeed, that remained her position as late as 27 April 2015 when she attended the grievance hearing. Even at that stage she still required a further open- ended period of sick leave.

174. In light of that position (ie that there was no prospect of a return to work in the foreseeable future) and bearing in mind that the Claimant had refused a further occupational health assessment on no less than four previous occasions, it was not reasonable to expect the Respondent to wait and obtain a further face to face assessment before taking decisions in this case, not least because all the

indications were that the Claimant would have refused to co-operate - as she had done previously. Certainly, she gave no indication either at the decision maker's meeting or subsequently that her position had changed and equally clearly the Respondent could not force her to go for an assessment. (As noted above, Mr Boat discussed each of the four requests for a further occupational health assessment at the meeting on 9 January 2015, giving the Claimant ample opportunity to say that she had changed her mind, yet to no avail.)

175. Similarly, in our view, it was not reasonable to expect the Respondent to depart from its Managing Continuous Absence Policy and obtain medical evidence from her GP, rather than occupational health. In the first place, occupational health is a specialist form of medical advice which is designed to take workplace considerations into account. Secondly, at the time of the decision maker's meeting, a recent report was already available from the Claimant's GP surgery – and there was no reason to think that a further report would have advanced the matter.

176. In addition, it is far from clear that obtaining a further occupational health or GP report would have addressed the pleaded disadvantage. Even if such a report had suggested that the Claimant was disabled, we were not persuaded that there was any likelihood that it would have provided a return to work date, in which case Mr Boat would have still decided to dismiss in May 2015. This complaint also fails. (We would add in passing that this complaint illustrates the difficulties inherent in trying to formulate a reasonable adjustments claim in the case of long term sickness absence: see the comments of Judge Richardson in the **Carranza** case, referred to at paragraph 150 above.)

6) <u>In assessing the Claimant's compensation under the Civil Service Compensation Scheme the Respondent should have recognised that the Claimant's conduct during this period was a result of her medical condition, beyond her control, and to make no reduction to her compensation.</u>

Was there a valid PCP?

177. The PCP as pleaded by the Claimant in the Further and Better Particulars was as follows:

> *'The Respondent applied a policy of reducing the Claimant's compensation and refusing an appeal in respect of the same on the basis of (i) failing to explain the reasons for her own condition; (ii) failing to speak with Occupational health; (iii) not meeting with her line manager; and not providing fit notes without reminders or otherwise remaining in contact'. (PCP 6)*

178. The essence of this PCP appears to be that the Respondent applied its policy on reducing compensation (principally the criteria set out in the Compensation Table) to the Claimant. That was certainly how Mr Hurd understood the PCP and, on that basis, we accepted that the PCP was valid. (This is however subject to one point in connection with the alleged refusal of an appeal. As noted above, under the Respondent's policies an employee has 21 days from the date of dismissal to appeal to the Civil Service Appeal Board against a decision to refuse an award of compensation. This was made clear to the Claimant in her dismissal letter. However, she failed to bring an appeal to the Board within the time limit. An employee is also entitled to bring an internal appeal against a nil award. As we have seen the Claimant did so, albeit this was not dealt with in a timely manner. Nonetheless, we do not accept that the

Claimant was refused an appeal.)

Substantial disadvantage

179. According to the Further and Better Particulars the substantial disadvantage suffered by the Claimant was that she was made an award of 25% of the maximum allowed. That can certainly be regarded as a disadvantage in comparison to a full award. However, we do not accept that she was put at that disadvantage *by reason of her disability* (ie her stress-related condition) as Mr Bidnell-Edward argued. The disadvantage appears to have been predicated on the basis that her inability to engage with her employer, whether in terms of her keeping in touch or attending a further occupational health referral, was a symptom of her stress-related disability and hence beyond her control. Yet, as explained in paragraph 170 above, there was no convincing evidence, medical or otherwise, that the Claimant's condition prevented her from participating in 'keeping in touch' requirements or attending an occupational health assessment, particularly after January 2015. On the contrary any disadvantage flowed from the Claimant's own erroneous (and self-serving) interpretation of the GP's advice and her own personal decisions in relation to these issues.

The reasonableness of the adjustment

180. In any event we accept Mr Hurd's submission that it would not have been a reasonable adjustment to have awarded the Claimant 100% compensation. To do so would have undermined the guidance set out in the Compensation Table, which stresses the importance of co-operation on the part of the jobholder and establishes the criteria for various levels of awards. In the absence of any compelling medical evidence to show that the employee's poor level of engagement was on account of her doctor's advice or beyond her control and/or a symptom of her condition (and there was no such evidence available in the Claimant's case), it was reasonable to apply those criteria consistently to ensure fairness between employees.

F. The Indirect Discrimination Claims

The relevant law

181. Indirect discrimination recognises that criteria that appear neutral on their face can have a disproportionately adverse effect on people with a particular protected characteristic. The concept is defined in section 19 of the Equality Act 2010 as follows:

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

182. The Claimant bears the burden of proof in relation to the first three conditions in section 19(2). Accordingly, she must identify the PCP (as to which see paragraph 145 above) and establish both group and individual disadvantage.

183. As far as group disadvantage is concerned, it is no longer the case, as Mr Bidnell-Edwards pointed out in his submissions, that the Claimant must identify a particular pool to establish his or her case. However, as he also pointed out, it is still necessary for the Claimant to show some disparate adverse impact on the group which possesses the protected characteristic.

183A. In this regard section 6(3)(b) of the Equality Act 2010 is relevant. This states that in relation to disability '*a reference to persons who share a protected characteristic is a reference to persons who have the same disability*'. As a result, if the Claimant is to succeed in a claim of indirect disability discrimination she must be able to show that the particular disadvantage affects those who share her disability. However, this may be difficult. People with the same disability will not necessarily have the same symptoms and so may not experience the same disadvantage. As a result, it is often easier to bring a claim as a failure to make reasonable adjustments under section 21 of the Equality Act 2010 or as a claim for discrimination arising from disability under section 15 of the Equality Act, as these causes of action are tailor made for the protected characteristic of disability. However, there may be circumstances where a claim of indirect discrimination is appropriate, particularly because a Claimant does not need to show the employer had actual or constructive knowledge of their disability in order to succeed.

184. So far as individual disadvantage is concerned, the Claimant has to show that the PCP puts or would put her at the same disadvantage as that experienced by the group.

185. Finally, if the Claimant establishes the first three conditions set out in section 19(2), then the Respondent will defeat the claim if it can show that application of the PCP was a proportionate means of achieving a legitimate aim within section 19(2)(d) of the Equality Act 2010. This is often referred to as the 'justification defence'.

186. The key elements of the test of justification were set out by the European Court of Justice in **Bilka-Kaufhaus Gmbh v Weber von Hartz** [1986] IRLR 317 and applied by the House of Lords in **Rainey v Glasgow Health Board** [1987] ICR 129. More recently, in **Homer v Chief Constable of West Yorkshire Police** [2012] UK SC15 Baroness Hale in the Supreme Court summarised the principles in **Bilka-Kaufhaus** as follows, at paragraph 19:

> "*The approach to justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim.'*

187. She then went on to cite with approval the following extract from Mummery LJ's judgment in **Secretary of State for Defence v Elias** [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]

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

Accordingly, it is clear that, when considering justification, the Tribunal is required to perform a balancing exercise, weighing the reasonable needs of the undertaking

against the potentially discriminatory effect of the PCP and then assessing whether the appropriate balance has been struck.

188. Whether an aim is legitimate is a question of fact for the Tribunal (see **Ladele v London Borough of Islington** [2010] IRLR 211 at paragraph 45). However, the aim must be legal, cannot be discriminatory and must represent a real, objective consideration.

189. The availability of alternatives to the potentially discriminatory means being considered will be relevant to the question of whether the means adopted are proportionate. In addition, it is clear that cost savings alone cannot justify prima facie discriminatory measures (**Woodcock v Cumbria Primary Care Trust** [2012] EWCA Civ 330). Equally the test is an objective one with the result that the Tribunal should not determine the matter solely by reference to the employer's reasons for the decision.

190. Finally, convincing factual evidence is required to support a justification argument, so that an argument based on subjective impressions or stereotypical assumptions will not succeed. However, case-law makes it clear that Tribunals should not leave their common sense behind. As Elias P put it in **Seldon v Clarkson, Wright and Jakes** [2009] IRLR 267, at paragraph 73:

> '*We do not accept the submission… that a Tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature… Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the Tribunals must leave their understanding of human nature behind them when they sit in judgment*.'

This statement was subsequently affirmed on appeal by both the Court of Appeal and the Supreme Court.

Indirect discrimination: the individual complaints

191. The Claimant brought no fewer than 24 complaints of indirect disability discrimination. Mr Bidnell-Edwards explained to the Judge that in each case the Claimant relied on one or more of the PCPs identified in the reasonable adjustment claims. The complaints themselves were set out by Mr Bidnell- Edwards in the List of Issues and are reproduced more or less verbatim below.

(1) *The Respondent assessed the Claimant's health via a telephone occupational health referral on 14 July 2014* (PCP1);

(2) *The Respondent relied on the statement in the telephone occupational health report dated 14 July 2014 that the Claimant was not disabled and the extent of the required adjustments for her return to work between 30 July 2014 and April 2016 [sic]… in the meeting on 30 July 2014 where the C's queries were addressed as if she was not disabled by Miss Camm such that the Sickness Absence Policy [ie the Managing Continuous Absence Policy] was applied, and consideration was not given to the applicability of the Respondent's policies relating to disabled people* (PCPs 2 and 3);

(3) *On 5 August 2014 Miss Camm began exploring the necessary steps to commence the capability procedure with the Claimant, as result of her on-going need for reduced working hours* (PCPs 2&3);

(4) *On 6 August 2016 Miss Camm refused to consider the Claimant to be a disabled person on the basis of the occupational health report, and declined possibility of treating time at medical appointments as time off on that basis* (PCPs 2 and 3);

(5) *On 6 August 2014 the Claimant was warned that if she could not return to her previous contractual hours a decision maker [i.e. a senior manager] could assess whether the Claimant was capable of making a full return to work* (PCPs 2 and 3);

(6) *On 6 August 2014 Miss Camm discussed the Claimant's available options in terms of reducing her contractual hours, or accusing further sickness absence, instead of discussing possible further reasonable adjustments for a disabled employee* (PCPs 2 and 3);

(7) *On 13 August 14 Miss Camm discussed the Claimant's available options in terms of reducing her contracted hours or accruing further sickness absence, instead of discussing possible further reasonable adjustments for a disabled employee* (PCPs 2 and 3);

(8) *On 21 August 2014 Miss Camm again refused to accept the Claimant could be disabled on basis of the occupational health report and told the Claimant that the only way to establish disability was via occupational health or an Employment Tribunal* (PCPs 2 and 3);

(9) *On 21 August 2014 the Claimant was told that she could not qualify for Disability Adjustment Leave because she had not been diagnosed as disabled by occupational health* (PCPs 2 and 3);

(10) *On 21 August 2014 the Claimant was told that Miss Camm had no choice but to accept the occupational health report until further clarification had been obtained* (PCPs 2 and 3);

(11) *On 21 August 2014 Miss Camm began to pressure the Claimant to increase her hours on the basis of the occupational health report* (PCPs 2 and 3);

(12) *Even though additional symptoms had been reported by the Claimant on 21 August 2014, Miss Camm did not commence any investigation to determine whether C was disabled because of the telephone occupational health report* (PCPs 2 and 3);

(13) *On 28 August 2014 the Claimant was refused time off for medical appointments because of the occupational health assessment* (PCPs 2 and 3);

(14) *On 28 August 2014 Miss Camm put pressure on the Claimant to increase her working hours* (PCPs 2 and 3);

(15) *On 17 September 2014 Miss Camm again confirmed that the Claimant's time at medical appointments would not be treated as time off* (PCPs 2 and 3);

(16) *On 22 September 2014 Miss Camm did not accept the Claimant's medical evidence of work related stress because there had not been an occupational health report about it* (PCPs 2 and 3);

(17) *On or about 10 October 2014 Miss Camm chose to contact C directly in spite of requests that she not do so. Miss Camm also provided questions about the Claimant's health, [made] a request that the Claimant explain what her work-related stress had been caused by, [included] an Accident Report form, guidance to complete it, a consent form for an occupational health referral along with HR27004 guidance [i.e. the Sickness Absence: Guidance for Job-holders document] stipulating what the keeping in touch requirements were and the latest HMRC Pulse magazine* (PCPs 2 and 3).

(18) *On 10 November 2014 Miss Camm again contacted the Claimant directly and put pressure on her to think about work, to attend meetings with Miss Camm and to meet with occupational health* (PCPs 2 and 3);

(19) *Miss Camm recommended that the Claimant should be dismissed on 4 December 2014 as a result of her assessment of the Claimant's capability* (although the List of Issues only referred to PCP4, during the hearing Mr Bidnell-Edwards explained that PCPs 2 and 3 were also engaged);

(20) *Mr Boat dismissed the Claimant on 13 May 2014* (PCP 4, expanded during the hearing to include PCPs 3 and 5);

(21) *That decision was upheld by Mr Povey on appeal on 21 April 2016* (PCP 5, expanded during the hearing to include PCPs 3 and 4);

(22) *Miss Camm recommended that the Claimant should not receive any termination compensation on 4 December 2014* (PCP 6);

(23) *Mr Boat approved the recommendation that C should not receive any termination compensation on 13 May 2015* (PCP 6); and,

(24) *On appeal, Mr Goad awarded the Claimant 25 per cent of the total possible* (PCP 6).

<u>Applying the law to the facts of the case</u>

192. As discussed above in the context of the reasonable adjustment claims, we accepted that all the pleaded PCPs were valid, with the exception of PCP 2. However, as explained below, there were considerable problems with the Claimant's arguments with regard to group and individual disadvantage. We considered each PCP in turn.

<u>PCP1: The Respondent's practice of assessing the Claimant via a telephone occupational health referral in July 2014.</u>

Group disadvantage

193. As noted above, where the protected characteristic is disability, then under section 6(3)(b) of the Equality Act 2010 the Claimant has to show that disabled persons *sharing the Claimant's particular disability* (in her case hypothyroidism and/or stress and anxiety) are adversely affected by the PCP. If this cannot be shown there is no group disadvantage and the claim must fail.

194. According to the Claimant, the disability said to be engaged in respect of PCP 1 was the Claimant's hypothyroidism. Accordingly, we had expected to see a submission explaining how the PCP would put others with this specific disability at a particular disadvantage. However, Mr Bidnell-Edwards' submissions (set out at paragraph 1 of the Further Information document) do not mention this condition. Instead they state simply that the Respondent's practice '*was likely to disadvantage the group of its employees who suffer from unconfirmed disabilities, with developing symptoms*'.

195. Our primary decision is that this group is far too vague and generalised to establish group disadvantage, bearing in mind the provisions of section 6(3)(b) of the Equality Act 2010 referred to above. However, even if we are wrong on this point and the pleaded group is valid, Mr Bidnell-Edwards could not point to any evidence to support a finding that such a group would be placed at a disadvantage by a telephone, rather than a face to face, assessment. The best he could do was argue that it was 'obvious' that any person in the group would be disadvantaged by this type of assessment. With respect we disagree – any difficulties experienced by disabled employees within the pleaded group would stem not from the fact the assessment was by telephone but from the nature of their developing symptoms, which would make it more difficult – whatever the method of assessment - to take a view on issues such as disability and reasonable adjustments.

Individual disadvantage

196. Furthermore, there was no evidence that the Claimant herself was placed at a particular disadvantage by the PCP. On the contrary, as explained in more detail in paragraph 156 above, the evidence suggests that the Claimant participated fully in the telephone assessment conducted by Miss McClure and did not encounter any difficulty in articulating her condition or her medical needs.

197. The Claimant has therefore failed to establish either group or individual disadvantage in relation to this PCP with result that claim 1 fails.

<u>PCP 2: The Respondent's practice of relying on a statement made in July 2014 as the basis on which to regard the Claimant's hospital appointments and absences thereafter, without recognising that the July assessment no longer provided a safe basis on which to proceed.</u>

Validity of PCP

198. As explained in paragraph 160, although the Respondent had a practice of relying upon the advice of occupational health practitioners we do not accept that it had a practice of relying on *outdated* occupational health reports, as the wording of this PCP suggests. We therefore did not accept that this was a valid PCP.

Group and personal disadvantage

199. For completeness, we would add that we decided there was no group or individual disadvantage either. So far as group disadvantage was concerned, although both disabilities were said to be in issue in relation to this PCP, Mr Bidnell-Edwards made his submission on group disadvantage in more general terms, arguing that the decision to rely on the assessment of 14 July 2014 was likely to disadvantage '*any of the hypothetical group of its employees who suffered from unconfirmed disabilities with developing symptoms at the time of a telephone occupational health assessment*'. In our view, for the reasons given in paragraph 195 above, this group is far too vague and generalised to establish group disadvantage

200. In any event, there was no evidence to support the submission that the group would be placed at a particular disadvantage by the PCP when compared with non-disabled employees or employees with different disabilities to those suffered by the Claimant. After all, relying on out of date occupational health reports would disadvantage any employee whose condition had altered since the previous assessment. All claims founded on PCP 2 therefore fail.

<u>PCP 3: The Respondent's use of the Sickness Absence: Dental and Medical Appointments policy</u>

Group disadvantage

201. The disabilities said to be in issue in relation to this PCP were hypothyroidism and stress and anxiety. However, once again, group disadvantage was expressed in the following, very general terms:

'*disabled employees would be disadvantaged under the policy since they would be dismissed because of their disabilities and absences arising from them*'.

The group contended for therefore appears to be disabled persons generally – which is far too wide for these purposes, given the provisions of section 6(3)(b) of the Equality Act 2010.

202. In any event, we do not accept the premise upon which the pleading is based. The 'Sickness Absence: Dental and Medical Appointments Policy' expressly provided for disabled employees to be given disability adjustment leave for medical appointments connected with their disability, thereby preventing such absences from accruing under the Managing Continuous Absence Policy. In addition, the policy made express reference to the Respondent's reasonable adjustments policy. We therefore did not accept that disabled employees as a group would be placed at a particular disadvantage by the application of the policy –the need to consider reasonable adjustments was explicit. There was therefore no group disadvantage.

Personal disadvantage

203. Nor did we accept that the application of this policy to the Claimant placed her at any particular personal disadvantage within section 19(2)(c) of the Equality Act 2010. In the first place, her only complaint in relation to this policy related to her hospital appointment on 4 August 2014. However, the fact that attendance at this appointment was recorded as sick leave was insignificant in the scheme of things. There was no evidence that this single day's absence had any material effect on Miss Camm's decision's when applying the Managing Continuous Absence Policy and it certainly had no bearing whatsoever on Mr Boat's decision to dismiss.

204. Secondly, the August appointment was to investigate the Claimant's abdominal pains. The medical evidence suggested that these were stress-related. There was no evidence to suggest they had anything to do with her thyroid condition. That being the case, the Claimant was not entitled to disability adjustment leave in respect of this appointment because as of August 2014 her stress-related condition did not amount to a disability. (As noted in paragraph 2 above, the Respondent conceded that her stress-related condition fell within the statutory definition of disability, but only from 22 September 2014 onwards. The Claimant did not take issue with that date.) The Tribunal therefore finds that the Claimant did not have the disability in issue at the relevant time and so could not be said to have suffered any personal disadvantage so as to fall within section 19(2)(c) of the Equality Act 2010. All claims founded on PCP 3 must therefore

fail.

PCP 4: The Respondent's criteria and/or practice when determining the Claimant's capability to perform her role.

205. As noted in paragraph 168 above, we understood this PCP to be the requirement that an employee should keep in touch with the Respondent during a period of ill-health absence and co-operate with occupational health assessments in accordance with the Respondent's Managing Continuous Absence Policy and accompanying guidance.

Group and personal disadvantage

206. The disability relied on in respect of PCP 4 was the Claimant's stress-related condition. Yet once again, rather than relying on a pool of employees with this particular condition, Mr Bidnell-Edwards drew the pool more widely, arguing that '*disabled employees who were advised by their GPs not to communicate with their employers directly and/or attend meetings and who were absent due to their disabilities would be likely to be disadvantaged under the Respondent's Managing Continuous Absence Policy in that they would be dismissed*'.

207. We agreed with Mr Hurd's submission that this was a highly artificial group which paid no heed to the wording of section 6(3)(b) of the Equality Act 2010 and for that reason alone would have found that the necessary group disadvantage had not been demonstrated. However, in addition, we did not accept that the evidence relied on by the Claimant was sufficient to show the pleaded group disadvantage, According, to the Claimant's submissions such disadvantage was '*apparent from the Claimant's named comparators and from the evidence given by the Respondent's witnesses*'. However, we did not accept that this was the case. Certainly, we could not understand why the named comparators were relevant, particularly as none of them had been advised not to communicate and/or attend meetings. Nor had any of them been dismissed. The Claimant has therefore failed to show the necessary group disadvantage and on this ground alone all claims dependent upon PCP 4 must fail.

208. For completeness, we would add that the Claimant also failed to persuade us that the PCP put her at the pleaded disadvantage. As noted above, there was no convincing evidence that she been advised by her GP not to communicate with her managers or attend meetings. On the contrary she had simply been advised not to think about work-related issues, as the letter from her GP surgery made clear. Accordingly, all claims founded on PCP 4 fail.

PCP 5: The Respondent's criteria and/or practice when determining the Claimant's dismissal'.

209. As noted in paragraph 171 above, we took this PCP to be referring to the fact that the Respondent applied its Managing Continuous Absence Policy (which, broadly speaking, used length of absence as a trigger for intervention) when determining whether the Claimant should be dismissed. Mr Bidnell-Edwards informed us that the disability relied on in this connection was the Claimant's stress-related condition.

Group disadvantage

210. According to the Further Information document supplied by the Claimant, the group contended for in relation to this claim is '*disabled employees who had not been able to attend occupational health assessments confirming their disabilities. They would be put at a disadvantage in that their capability to perform*

their roles would be assessed on the incorrect basis that they were not disabled.'

211. Once again, the construction of this group is artificial and appears to ignore the requirements of section 6(3)(b) of the Equality Act 2010. Furthermore, the evidential basis for the existence of such a group (or hypothetical group) is doubtful. Certainly, the evidence before us suggested that it was extremely unusual for managers to encounter a sustained refusal to attend occupational health assessments. In this regard the Claimant's situation appears to have been more or less unique.

212. In addition, when describing the evidence relied on to show the pleaded group disadvantage the Claimant's submissions state that '*it is obvious that assessing an employee's capability without medical evidence to determine disability will only disadvantage those who are in fact disabled*'. With respect, this appears to be referring to a somewhat different PCP to the one pleaded, namely a practice of assessing the issue of disability without medical evidence. It is not relevant to PCP 5. For all these reasons we did not accept that the Claimant had demonstrated the requisite group disadvantage.

Personal disadvantage

213. Similarly, we were not persuaded that the Claimant had satisfied the burden of proof in relation to personal disadvantage. Firstly, for the reasons given in paragraph 170, we did not accept that the Claimant had been unable to attend a second occupational health assessment – and so we rejected the factual premise on which the personal disadvantage was based. Secondly, and in any event, there was no evidence that a further occupational health assessment (even if consented to) would have provided evidence of a return to work date, so as to cause Mr Boat to take a different view. On the contrary, as late as 27 April 2015, when the grievance hearing was held, the Claimant was still asking for a further period of unpaid leave with no return date and there was no indication that her health had improved sufficiently to allow her to return to work, even on a phased basis.

Justification

214. For those reasons alone, we would dismiss this claim. However, for the avoidance of any doubt, even if the pleaded claim had been that application of the Managing Continuous Absence Policy (the PCP) put employees with stress-related disabilities at a particular disadvantage because of their disability related absences and also put the Claimant at that disadvantage (and there is a hint of that argument in paragraph 181 of the Claimant's submissions and also in the Further and Better Particulars but not in the Claimant's submissions), we would nonetheless have dismissed the claim. This is on the basis that the Respondent's decision to dismiss the Claimant and uphold that decision on appeal could be objectively justified for the reasons given in paragraphs 233 - 239 below.

PCP 6: The Respondent applied a policy of reducing the Claimant's compensation and refusing an appeal in respect of the same on the basis of (i) failing to explain the reasons for her own condition; (ii) failing to speak with Occupational Health; (iii) not meeting with her line manager; and not providing fit notes without reminders or otherwise remaining in contact.

215. As noted in paragraph 178 above, the essence of this PCP appears to be the application of the Respondent's policy on reducing compensation (albeit we do not accept that the Claimant was refused an appeal).

Group disadvantage

216. The group contended for by the Claimant was defined in the Claimant's submissions as follows:

'… *disabled employees with high levels of absence and who are unable to communicate directly with their employer because of their disabilities, or are advised to avoid such situations*'.

Once again this appears to be a highly artificial group which fails to take account of section 6(3)(b) of the Equality Act 2010 and so we do not accept that group advantage has been demonstrated.

217. However even if the group were to be restricted to disabled employees sharing the Claimant's stress-related condition, we would still have found there was no group disadvantage. In the first place, stress-related disabilities can manifest themselves in various ways and there was no evidence that such employees would, as a general matter, be unable to communicate directly with their employer as a result of their condition. On the contrary it is the industrial experience of the panel that employees suffering from stress and anxiety are usually able to keep in touch with their employer during sickness absence.

218. Secondly, the basis for the alleged disadvantage appears to be misconceived. According to the Claimant's submissions it is '*obvious that the Respondent's criteria [for reducing compensation] are more likely to put disabled employees who are unable to communicate directly with their employer at a disadvantage, since other employees with high levels of absence are likely to maintain communication*'. However, this misses the point. The criteria referred to in the compensation table do not penalise an employee for lack of communication *per se*. Rather they require the decision maker to take account of the jobholder's level of co-operation and the extent to which the jobholder has done '*everything within their power to alleviate the problem'*. If the problem is beyond the jobholder's control, then it does not count against them. For all these reasons we are not persuaded that there is group disadvantage.

Personal disadvantage

219. Similarly, for the reasons already given, we did not accept that the Claimant was unable to communicate directly with her employer. The PCP therefore did not put her at the disadvantage claimed. For these reasons the claims associated with PCP 6 fail.

G. The Claims of discrimination arising from disability

The relevant law

220. Discrimination arising from disability is focused on making allowances for disability (see **Carranza v General Dynamics Information Technology Ltd** [2015] IRLR 43, per HHJ Richardson). It is defined by section 15 Equality Act 2010 in these terms:

> '*15(1) A person (A) discriminates against a disabled person (B) if-*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.'*
>
> *15(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.'*

221. It follows that, where there is knowledge of disability (whether actual or constructive), then section 15 requires a disabled Claimant:

(i) to show that he or she has suffered unfavourable treatment;
(ii) to identify the 'something' and show that it arises in consequence of his disability and
(iii) to show that the unfavourable treatment was because of that something.

If the Claimant establishes these matters then it is for the employer to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

222. Although the term 'unfavourably' is not defined in the Equality Act 2010 it has the sense of '*placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person...*' and involves an objective assessment of '*that which is adverse as compared to that which is beneficial*' (see the comments of Langstaff J in **Trustees of Swansea University Pensions Scheme v Williams** EAT/0415/14, subsequently upheld by the Court of Appeal [2017] EWCA Civ 1008).

223. The unfavourable treatment must occur '*because of something arising in consequence of B's disability'*. There must therefore be a causal link between the unfavourable treatment and the 'something arising' from the Claimant's disability (as opposed to the disability itself). As explained by Laing J in **Hall v Chief Constable of West Yorkshire Police** [2015] IRLR 893 and Simler P in **Pnaiser v NHS England** [2016] IRLR 170, EAT the focus is on the mind of the alleged discriminator and an examination of their conscious and unconscious thought processes may be necessary. Furthermore the 'something' that caused the unfavourable treatment need not be the main or sole reason for the unfavourable treatment – it is sufficient that it had a significant (in the sense of more than trivial) influence so as to amount to an effective cause of the treatment. In this context motive is irrelevant.

224. It is also clear that something can arise '*in consequence of B's disability*' even though there is more than one causal link between the disability and the something that causes the unfavourable treatment. However, the more links there are in the chain the harder it will be to establish the requisite connection. In addition, this issue requires an objective assessment by the Tribunal. It does not depend on the thought processes of the alleged discriminator.

225. So far as the justification defence is concerned, the relevant principles are set out in paragraphs 185-190 above in the context of the indirect discrimination claims. The Tribunal is therefore required to undertake a balancing exercise to determine whether the discriminatory effect of the Claimant's treatment was appropriate and reasonably necessary to achieve the employer's legitimate aim or whether the same aim could have been achieved by less discriminatory means. As a result, the fact that the employer has an apparently sound reason for the treatment in question is not sufficient. The employer must also demonstrate that the reasons for the treatment are strong enough to overcome any discriminatory impact.

<u>Discrimination arising from disability: the individual complaints</u>

226. There were seven complaints of discrimination arising from disability:

1) application of the Managing Continuous Absence Policy to the Claimant without first obtaining further medical evidence between 30 July 2014 and 21 April 2016.
2) criticism by Miss Camm in the support meetings and also in the recommendation for dismissal in relation to the Claimant's level of absences;

3) Miss Camm's conduct in 'continually' contacting the Claimant about her absences from September to December 2014;
4) Miss Camm's recommendation of dismissal;
5) the Claimant's dismissal
6) the decision of Mr Corcos to make an award of nil compensation; and
7) the decision by Mr Goad to deny the Claimant 100% compensation on appeal

227. Mr Bidnell-Edwards explained that the disability being relied on in respect of all these claims was the Claimant's stress-related condition. He also explained that it was the Claimant's case that the 'something' arising from the Claimant's disability was two-fold, namely (i) the Claimant's disability related absences and (ii) her alleged inability to communicate with the Respondent about her absences and disabilities.

228. Mr Hurd, for his part, did not dispute that the treatment relied on in relation to each complaint could be described as unfavourable. He also accepted that the Claimant's disability related absence was clearly 'something arising from disability'. However, he regarded the Claimant's alleged inability to communicate with the Respondent as a rather different matter and he argued that her failure to attend a further occupational health referral or to communicate with her manager did not arise from her stress-related condition. For the reasons set out at paragraph 170 above, we agreed with that proposition, with the result that the Section 15 claims were entirely dependent upon the Claimant establishing that there was a causal link between the Claimant's disability related absence and the unfavourable treatment giving rise to the individual complaints. We therefore considered each complaint in turn.

Applying the law to the facts of this case

Claim 1: Application of the Managing Sickness Absence Policy to the Claimant without first obtaining further medical evidence between 30 July 2014 and 21 April 2016

229. It is clear from our findings in relation to knowledge of disability (namely that the Respondent did not have constructive knowledge of the Claimant's stress-related disability until 9 January 2015), that there can be no liability under section 15 Equality Act 2010 for decisions taken by the Respondent prior to that date and so to that extent this complaint fails and is dismissed. So far as treatment of the Claimant on or after 9 January 2015 is concerned, we consider the Respondent's decision to dismiss (and the decision to reject the Claimant's appeal against dismissal) in our discussion of Claim 5 below.

Claim 2: Criticism by Miss Camm in the support meetings and also in the recommendation for dismissal in relation to the Claimant's level of absences

230. Given our finding in relation to knowledge of disability this complaint also fails. The support meetings and the recommendation to dismiss occurred in the second half of 2014, some weeks before the Respondent knew or could reasonably have been expected to know that the Claimant's stress-related illness amounted to a disability.

Claim 3: Miss Camm's conduct in continually contacting the Claimant about her absences from September to December 2014 (Claim 3) and Claim 4: Miss Camm's recommendation of dismissal (Claim 4)

231. These complaints fail for the same reason. Miss Camm's keeping in touch letters and her recommendation to dismiss occurred some weeks before the Respondent had constructive knowledge of the Claimant's stress-related disability.

Claim 5: The Claimant's dismissal

232. Mr Hurd accepted that the Claimant had been dismissed (and so had been treated unfavourably) because of her disability related absence. The causation test in **Pnaiser v NHS England & Coventry City Council** had therefore been satisfied. Accordingly, the sole issue in relation to this claim was whether the treatment could be justified.

Justification

233. The Claimant's submissions in relation to the issue of justification were short and not particularly helpful, simply stating:

> '*There is no way the Respondent can justify closing its eyes to all medical information or potential sources of medical information apart from that provided by occupational health. Similarly, the Respondent cannot justify punishing and criticising the Claimant for what it accepts were the consequences of the advice received from her GP.*'

234. We have already explained that we do not accept the premise on which the second part of this submission is based. The Claimant's GP did not advise her to refrain from engaging with managers or to refuse an occupational health referral, although the Claimant chose to interpret what the GP told her in that fashion. As for the first part of the submission, the argument appears to be that the Respondent should not have proceeded with the capability process and taken the decision to dismiss without first obtaining further medical evidence about the Claimant's condition, whether by means of another occupational health referral or by obtaining a report from her GP and that its conduct in pressing ahead and taking the decision to dismiss without such further evidence was not a proportionate means of achieving a legitimate aim.

Was there a legitimate aim?

235. We considered, first of all, whether there was a legitimate aim. The Respondent argued that in dismissing the Claimant, and then upholding her dismissal on appeal, the Respondent was pursuing a legitimate aim, namely to '*manage sickness absence so as to allow the effective and efficient running of HMRC'*. We agreed with that submission. As we have seen, levels of sickness absence were at comparatively high levels, creating a cost to the public purse. In those circumstances It was legitimate to strive to manage that absence, supporting a return to work wherever possible, so that HMRC could provide an effective and efficient public service. In coming to this conclusion, we noted that paragraph 4.29 of the EHRC's Code of Practice on Employment states that '*reasonable business needs and economic efficiency may be legitimate aims*'.

Was the Claimant's dismissal a proportionate means of achieving that aim?

236. We therefore turned to the issue of proportionality and the assessment of the means adopted by the Respondent in pursuing that aim in this case. The Managing Continuous Absence policy, as supplemented by the various guidance documents, was designed to support employees on long term absence so far as possible so that they could return to work, whilst also allowing for termination in some cases. The

importance of making appropriate adjustments and working with the employee to try to achieve their return to the workplace were key aspects of the process, as was the need to obtain occupational health assessments to inform management decisions. However, the Respondent's ability to manage the process constructively was, to a very large degree, dependent upon the jobholder co-operating and communicating with the Respondent. Yet that co-operation and communication was strikingly absent in this case, despite Miss Camm's repeated efforts to get the Claimant to engage more fully. As a result, it became difficult, if not impossible, to identify barriers to a return to work, formulate a plan to facilitate that return or assess the extent to which HMRC could support the jobholder's continued absence in the future. This lack of engagement flew in the face of the Respondent's guidance to jobholders, which emphasised the need to co-operate with occupational health and also warned that without this co-operation managers might have to take decisions without the benefit of medical advice. Indeed, by the time Mr Boat conducted the decision maker's meeting, the Claimant had declined an occupational health referral on no less than four occasions for reasons that, in our judgment, had little obvious merit.

237. Moreover - even though each of Miss Camm's requests for a further occupational health referral was discussed in some detail at the decision maker's meeting - the Claimant gave Mr Boat no indication that she had changed her mind on the issue of a referral. (Indeed, she failed to do so at any point prior to the decision to dismiss being made.) Her intransigence on this issue was exceptional – Mr Boat giving credible evidence that he had never dealt with an employee who had behaved in this way. That put the Respondent in a very difficult position. There was nothing in the 35-page document prepared for the decision maker's meeting – or in the Claimant's evidence to the Tribunal - to suggest that she would have attended a further occupational health assessment even if Mr Boat had suggested one – and, as noted above, Mr Boat could hardly have forced the Claimant to attend. In those exceptional circumstances we think it was proportionate to consider dismissal without obtaining a further occupational health assessment.

238. Mr Bidnell-Edwards suggested that, as an alternative to a further occupational health report, Mr Boat should have obtained a GP report before taking the decision to dismiss. However, as noted above, Mr Boat had before him a very recent letter from the Claimant's GP surgery which enclosed the relevant GP notes. The letter gave no indication of a return to work date and there was no evidence to suggest that a further report could have given any detail as to the cause of the Claimant's stress or the likely prognosis. Certainly, there was very little in the GP notes to shed light on this matter.

239. Moreover, there was no other evidence before the tribunal (medical or otherwise) to suggest that a return to work was possible in either the short or medium term – even viewing the situation as late as May 2015, when the decision to dismiss was finally made. Indeed, as late as 27 April 2015, when the grievance hearing was held, the Claimant was far from well and certainly not well enough to return to work for the foreseeable future. Yet by this stage the Claimant had been off sick for more than seven months, there was no prospect of a return and the Claimant's absence was having a negative impact on her team (see paragraph 82 above). In light of all those factors and balancing the reasonable needs of the business against the discriminatory treatment of the Claimant we concluded that the Respondent's actions in taking the decision to dismiss without obtaining further medical evidence - either from occupational health or from the Claimant's GP - was a proportionate means of achieving a legitimate aim.

Claim 6: The decision of Mr Corcos to make an award of nil compensation and Claim 7: the further decision by Mr Goad to deny the Claimant 100% compensation on appeal

240. The success of these complaints depends entirely on the premise that the Claimant was unable to engage with management and occupational health, which then had a significant influence on the decisions taken in relation to the award of compensation. So, for example, paragraph 158 of Mr Bidnell-Edward's submissions, which deals with the initial nil award, argues that '*the inability of the Claimant to pass [details about her health] through the gateway of occupational health or to attend keeping in touch meetings with Miss Camm has prevented any understanding on the part of Miss Camm, Mr Boat or Mr Corcos for the original decision (sic)*'. Similarly, his submissions in relation to the appeal argue that the Claimant was wrongly penalised for a perceived lack of co-operation and failure to keep in touch (see paragraphs 160-161). However, as noted above, we do not accept the Claimant's failure to engage arose from her stress-related condition and so these claims necessarily fail.

H. The direct discrimination claims

The relevant law

241. Direct discrimination is defined by Section 13 of the Equality Act 2010 as follows:-

> "*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.*"

By virtue of section 4 of the Equality Act 2010, disability is a protected characteristic.

242. It is clear from section 13 that in determining whether there has been less favourable treatment because of protected characteristic, a comparison is required between the Claimant's treatment and that of an actual or hypothetical comparator. In either case when determining whether there has been less favourable treatment, a Tribunal must compare like with like and so "*there must be no material differences between the circumstances relating to each case*" (see section 23(1) of the Equality Act 2010). The EHRC's Code on Employment gives the following guidance in relation to this provision:

> '… *it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator*.'

Where the protected characteristic is disability, the circumstances relating to a case include a person's abilities (section 23(2)(a) of the Equality Act 2010).

243. In recent years the courts have recognised that it is easy for a Tribunal to become bogged down when considering whether a particular individual is or is not an appropriate comparator (see for example the speech of Lord Nicholls in **Shamoon v Chief Constable of the RUC** [2003] IRLR 285). The case-law therefore suggests that, instead of asking whether the claimant has received less favourable treatment and then going on to consider whether the less favourable treatment was on the proscribed ground (as tended to happen in the past), it is usually more pertinent for a Tribunal to focus on the *reason why* the claimant was treated in the manner complained of. If there was a discriminatory reason, then it will follow that the

claimant has been treated less favourably than the relevant comparator. (Statements to this effect can be seen in **Islington Borough Council v Ladele** [2009] ICR 387 and **Cordell v Foreign and Commonwealth Office** [2012] ICR 280, where it was recognised that the use of comparators may be of evidential value in determining the reason why the claimant was treated in a particular way, but that the "reason why question" was fundamental.) It follows from this that if it is shown that the protected characteristic played no part in the decision maker's treatment of the Claimant then the complaint cannot succeed and there is no need to construct a comparator (see Elias J in **Law Society v Bahl** [2003] IRLR 640.)

244. Where the act complained of is not inherently discriminatory then it will be necessary, when determining the reason for less favourable treatment, to explore the mental processes, both conscious and subconscious of the alleged discriminator to discover what facts operated on his or her mind (**R v Governing Body of JFS** [2010] IRLR 136.) The motive or intent behind the treatment is irrelevant.

245. Direct evidence of discrimination is rare, and Tribunals often have to infer discrimination from all the material facts. Section 136(2) of the Equality Act 2010 deals with the burden of proof in such cases, providing that "if there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold the contravention occurred." Section 136(3) provides that this does not apply if A shows that A did not contravene the provision.

246. Until recently the principles to be applied when applying the burden of proof in a direct discrimination case were clear. The leading case was the Court of Appeal decision in **Igen Ltd v Wong** [2005] ICR 931 which suggested that there are two stages to the enquiry. The first stage places a burden on the claimant to establish a *prima facie* case of discrimination. So, for example in a direct discrimination case this means that it is for the claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer treated the claimant less favourably because of a protected characteristic. If the claimant does not prove such facts the claim will necessarily fail. However, if the Claimant does prove such facts, then the second stage is engaged, and the burden moves to the employer. The employer can only discharge this burden by proving on a balance of probabilities that the treatment was "in no sense whatsoever" on the prohibited ground. That approach was approved by the Supreme Court in **Hewage v Grampian Health Board** [2012] ICR 1054.

247. However, the case of **Efobi v Royal Mail Group** [2017] UKEAT 2003 challenged the orthodox view and suggested that under section 136(2) the Claimant did not have to prove anything. Instead the burden of proof is neutral with the result that the tribunal has to consider all the evidence, so as to decide whether or not there are facts from which it can infer discrimination.

248. Submissions in the present case were made not long after the **Efobi** case was reported and before the Court of Appeal handed down its judgment in **Ayodele v Citylink Ltd** [2018] IRLR 114. **Ayodele** decided that the EAT's decision in **Efobi** should not be followed and that previous decisions of the Court of Appeal, including **Igen v Wong,** remain good law. As explained below, the decision in **Ayodele** actually strengthens the Tribunal's conclusions and, as a result, the parties have not been asked to make further submissions on this issue.

249. It is important to note that the mere fact that a Claimant is treated unreasonably does not suffice to justify an inference of unlawful direct discrimination (see **Glasgow City Council v Zafar** [1988] ICR 120). Similarly, the bare facts of a

difference in sex and a difference in treatment are not sufficient to make out a prima facie case of direct discrimination (see **Madarassy v Nomura International** plc [2007] ICR 867).

Direct discrimination: the individual complaints

250. The Claimant's List of Issues contained the following alleged acts of direct disability discrimination:

(i) '*Disciplinary/capability proceedings; see below PCP3*' (The reference to the PCP was somewhat confusing as a PCP has no relevance to a claim of direct discrimination. However, it was established at the hearing that this is a complaint that the Respondent applied the Managing Absence Policy to the Claimant throughout the period 30 July 2014 to 21 April 2016.)
(ii) '*Criticism, including the conduct and the report of Miss Camm*'. Again, it was established at the hearing that this referred to remarks made by Miss Camm in the support meetings and in her report recommending dismissal, whereby she criticised the Claimant's high number of absences, her failure to maintain communications and her failure to take responsibility for her own health.
(iii) *The recommendation of dismissal on 4 December 2014*; and
(iv) *The act of dismissal itself*.

251. When the Judge went through the claims on resumption of the hearing on 4 September 2017, Mr Bidnell-Edwards confirmed that these were the only complaints of direct discrimination. As a result, although two further claims of direct discrimination were included in the Claimant's submissions (namely the allegations that Miss Camm 'continually contacted' the Claimant about her absences and that she failed to suspend the Managing Continuous Absence Policy without first obtaining further medical evidence) these were disallowed by the Tribunal. It was far too late to amend the claim.

252. The less favourable treatment was pleaded in two ways. Firstly, it was alleged that the Claimant had been treated less favourably than 3 named comparators, A, B and C. Secondly, in the alternative, that she had been treated less favourably than a hypothetical comparator. Our findings of fact in relation to the comparator evidence, which are supported by the documentary evidence, are set out below.

Comparator evidence

Comparator A

253. Comparator A was absent for four months from 15 February 2010 to 18 June 2010 as a result of anxiety following a physical assault outside the workplace. When she returned to work in June 2010 she did so on reduced hours. However, she was able to increase her hours and by the fifth week of her return she was working normally. Upon her return she agreed to be referred to occupational health to see what further support could be provided. Her line manager (Mr Kalpesh Patel) decided that, as she was expected to make a full recovery, her absence should be treated as a 'one-off' and discounted for the purposes of her sickness absence record. As a result no further, formal action was taken in respect of this period of absence.

254. A was subsequently absent for a further 22 days from 3 March 2015 to 1 April 2015. This was because she had needed an operation to treat a long-standing condition (endometriosis). No action was taken in respect of this period of absence because Mr Patel was himself off sick when she returned. However,

he gave credible evidence that, had he been in the office, this second period of absence would also have been discounted as a one-off, as the operation was intended to remedy her condition.

255. Shortly afterwards, Comparator A had a third period of sickness absence (31 days) from 11 May 2015 to 23 June 2015, due to an illness connected with her surgery. She successfully completed a phased return, returning to her full contractual hours within six weeks. However, she was warned that any further absences might lead to formal action under the Managing Absence Procedure.

256. She was off sick again between 26 August 2015 and 28 August 2015, due to endometriosis. She agreed to be referred to occupational health and her condition was deemed likely to be a disability. As a result, these three days of absence were discounted as a reasonable adjustment.

257. Finally, she had a further period of 58 days sickness from 5 October 2015 for endometriosis as a result of which she was invited to a Month 1 meeting. This took place just over a month after this period of absence commenced.

258. During all these periods of absence Comparator A complied with the Respondent's keeping in touch requirements. At no point did Mr Patel recommend dismissal.

Comparator B

259. Comparator B had two periods of long-term absence. The first lasted 97 days from 2 October 2012 to 6 January 2013, following surgery to his knee. He kept in touch throughout his absence. As B was expected to make a full recovery, his absence was treated as a 'one-off' and discounted for the purposes of the company's formal procedures.

260. The second period of long term absence (around 97 working days) was from 27 January 2015 to 12 June 2015 following further knee surgery. He complied with the keeping in touch requirements and attended a Month 1 meeting on 25 March 2015, two months after his absence began. At this meeting his manager (Mr Kishore Daudia) suggested a further occupational health referral. However, B explained that he wanted to wait until he had commenced physiotherapy and indicated he should be able to return to work in the near future. A few days later B told his manager that his physiotherapy would start on 20 April 2015 and that he thought that he would be able to return after a couple of sessions. A further occupational health assessment was then arranged.

261. By this point B had been absent for two months and so the case was reviewed at a case conference in accordance with the second stage of the Managing Continuing Absence Policy. It was felt that B was doing everything he could to work towards an early return to work and it was therefore decided to defer making a decision until the occupational health report was available. That report, which was received on 30 April 2015, suggested that B's knee condition amounted to a disability under the Equality Act and advised that B was unfit to return to work. However, it also stated that the prognosis was good and that he should be referred back to occupational health in 3-4 weeks' time.

262. Once B's absence reached three months, it was decided to obtain a further occupational health report before considering whether to make a recommendation to dismiss. A telephone assessment was carried out on 2 June 2015 and B began a phased return on 12 June 2015. A face to face occupational health assessment took place on 23 June 2015. That confirmed that the knee

problem was likely to be classed as a disability and it was agreed that the phased return should be extended for a further six weeks. The return was then completed successfully. Subsequently B told his manager that he was paying privately for additional physiotherapy to avoid any further sickness absence. No recommendation to dismiss was made. However, Mr Daudia gave credible evidence that had C's absence continued for much longer there was a real prospect that he would have been referred to a decision maker.

Comparator C

263. Comparator C was absent from 4 November 2013 until 6 March 2014, initially because of back pain but then for depression, stress and anxiety. He kept in touch with the Respondent throughout his absence. In particular he spoke to his manager (Mr Lee Sales) on 9 January 2014 and gave him some limited information about the cause of his stress. He also advised that he was looking to return to work on 1 February 2014. He indicated he did not want an occupational health assessment at this stage but might be interested in a referral immediately before his return to work.

264. In the event, he was not well enough to return at the start of February 2014 and Mr Sales held a Month 1 meeting with him on 12 February 2014, some three months into his absence. At this meeting there was further discussion as to the reasons for his stress and C confirmed it related to a domestic issue. He also agreed to an occupational health referral. Mr Sales also warned him that his absence could not be open-ended and that failure to return in the near future could lead to his employment being terminated. A four-week phased return was subsequently agreed, and C returned to work on reduced hours on 6 March 2014. Had this not happened, the second stage of the policy (the case conference) would have been invoked. The phased return was successful and C was back to normal working by 7 April 2014. No recommendation of dismissal was made.

Applying the law to the facts of this case

Claim 1: Application of the Managing Absence Policy to the Claimant

265. Claims relating to the application of absence management policies to disabled employees are usually pleaded as reasonable adjustment claims or claims of discrimination arising from disability. However, Mr Bidnell- Edwards made it clear to the Judge at the start of the hearing that he wished to pursue a claim that the application of the Managing Continuous Absence Policy to the Claimant in this case amounted to direct disability discrimination.

266. However, we were not persuaded by his arguments. As noted above, the Managing Continuous Absence policy was used by the Respondent to manage all cases of ill health absence, subject to the duty to make reasonable adjustments in appropriate cases. This did not mean that the policy was applied in an identical way in every case - even if the duty to make reasonable adjustments did not apply, managers were given considerable flexibility to respond to individual circumstances. However, as a general matter (and that is how this claim was pleaded) the policy was applied to every employee with sickness absence of eight days or more. Accordingly, application of the policy was not, in and of itself, unfavourable treatment of the Claimant because of her disabilities.

267. This conclusion is supported by the evidence relating to the named comparators, all of whom were managed under the policy, whether they were regarded as disabled or not. So, for example, the first two stages of the policy (i.e.

the Month 1 meeting and the case conference) were applied to Comparator B in respect of his absence from Jan to June 2015. Similarly, Comparator C was invited to a Month 1 meeting and there was every prospect that the second stage would have been invoked in his case had he not returned to work in March 2014. Equally, although both Comparator A and Comparator B were allowed to treat some periods of absence as 'one-offs', exactly the same approach was applied to the Claimant's post-operative absence from March to June 2014, which was also treated as a 'one-off' and therefore ignored for the purposes of Respondent's formal procedures.

268. As a result, in light of all the evidence, we decided there were no facts from which we could infer direct discrimination and, applying the approach to the burden of proof set out in **Efobi**, we decided that the claim failed. (It should be added by way of a postscript to the decision that this conclusion is all the stronger in light of the recent **Ayodele** decision as, taking the traditional approach, the Claimant has the burden of proof and she clearly failed to establish a *prima facie* case.)

Claims 2 and 3: Criticism, including the conduct and the report of Miss Camm, and the recommendation for dismissal

269. In the Tribunal's view, the evidence pointed clearly to the conclusion that the reason why Miss Camm criticised the Claimant and then decided to recommend dismissal had nothing whatsoever to do with either of the Claimant's disabilities.

270. So far as criticism of the Claimant in the support meetings was concerned, as the month of August 2014 progressed, Miss Camm became more and more frustrated by the Claimant's attitude. She was trying to offer the Claimant support but felt that her best efforts were being thwarted by the Claimant's refusal to co-operate and attend a further occupational health referral or to engage with a plan for a phased return. As she explained to Mr Gukani during the grievance process, she began to feel uncomfortable in the meetings and felt the Claimant was trying to intimidate her. It was this behaviour that prompted her criticisms. It had nothing to do with the fact that the Claimant had a thyroid condition or was suffering from stress and anxiety.

271. By the time Miss Camm came to make the recommendation to dismiss, her frustration had increased. By this stage the Claimant had refusing a further occupational health assessment on no less than four occasions. She had also declined two invitations to attend a Month 1 meeting (including an offer of a home visit). In addition, she had failed to keep in touch directly or give any indication of the reasons for her work-related stress. Moreover, Miss Camm was spending so much time on the Claimant's case she was neglecting other members of her team. In light of those factors, and faced with the Claimant's on-going and open-ended sickness absence, she felt there was nothing more that she could do to support a return to work. Accordingly, she compiled her report and made the recommendation to dismiss. We therefore concluded that the Claimant's disabilities were not the reason for the recommendation to dismiss. Nor did we accept that Miss Camm's actions were influenced by a stereotypical view of persons suffering from a thyroid condition or from stress and anxiety, as Mr Bidnell-Edwards claimed in submissions. On the contrary, the cause of Miss Camm's actions was two-fold, namely the Claimant's sickness absence and her refusal to engage whilst on sick leave. Whilst the former reason might give rise to a claim of discrimination arising from disability, neither is sufficient to found a claim for direct discrimination which has to be based on disability *per se*. So once again, the facts did not give rise to an inference of discrimination (**Efobi**) and/or the Claimant did not establish a prima facie case of discrimination (applying **Igen v Wong** and **Ayodele**). These claims fail.

272. We should add that in coming to this decision we gained no assistance from the named comparators. There was, in our view, a material difference between the circumstances of each of the comparators and those of the Claimant, namely their attitude during the management of their sickness absence. By contrast with the Claimant, the comparators complied with the Respondent's keeping in touch procedures, co-operated with the formulation of return to work plans, attended Month 1 meetings when requested and agreed to occupational health assessments. That was markedly different to the Claimant's approach and was a relevant circumstance because it was the Claimant's attitude that led to Miss Camm's criticism of the Claimant and which was responsible in part for her recommendation to dismiss, and which ultimately played a part in the decision to terminate her employment. (It is true that Comparator B asked for one occupational health assessment to be deferred for a short period to allow him to start physiotherapy and that Comparator C also declined an assessment, suggesting initially that such an assessment was best carried out immediately before his return to work. However, in neither case was there a blanket refusal – C consented to a referral at his Month 1 meeting and B had several assessments during the course of his absence. There was none of the intransigence associated with the Claimant's attitude). We therefore accepted Mr Hurd's argument that they were not valid comparators. In addition, so far as a hypothetical comparator was concerned, as the evidence showed that disability played no part in the treatment complained of, we decided there was no need, following **Law Society v Bahl**, to construct such a comparator.

Claim 4: The Claimant's dismissal

273. Once again, we focused on the 'reason why' the decision to dismiss was taken. Having done so, we were not persuaded that the Claimant's disabilities had any bearing on the decision or that either Mr Boat or Mr Povey were influenced by stereotypical views of the Claimant's thyroid condition or her stress-related illness. As explained below, in the context of the unfair dismissal claim, we accepted Mr Boat's evidence that the principle reason for his decision to dismiss the Claimant was her long-term absence with no prospect of a return. The Claimant's unco-operative attitude was also a factor. Beyond that, as Mr Boat explained in cross-examination, the issue of disability '*didn't cross my mind'*.

274. Nor did we consider that the named comparators were helpful in determining whether there has been less favourable treatment in this case, as they were not in the same material circumstances. In addition to the fact that they had all co-operated in the management of their sickness absence, at no point were any of them in the Claimant's position, namely with a sickness absence record of over seven months and no prospect of a return to work date.

275. So far as a hypothetical comparator is concerned, we agreed with Mr Hurd that the appropriate comparator is an employee with a similar level of continuous absence who cannot provide a return to work date, who has failed to co-operate with the Respondent's Managing Continuous Absence Policy and who is not disabled or who has a different disability. However, there is no evidence to show that such an individual would have been treated more favourably than the Claimant. On the contrary it was clear that it was the *consequences* of the Claimant's disability (i.e. her long-term absence) coupled with her intransigent attitude (which was not a symptom of her disability) that led to the decision. However, as noted above, that is not the same as dismissing her because of her disability, as section 13 of the Equality Act 2010 demands.

276. Finally, Mr Bidnell-Edwards placed considerable emphasis in his submissions on the Respondent's alleged unreasonable treatment of the Claimant during the

management of her sickness absence. As noted above, the mere fact that a Claimant is treated unreasonably is not, in itself, sufficient to justify an inference of direct discrimination. In any event, as our decision in relation to the unfair dismissal claim (given below) demonstrates, we rejected all the accusations of unreasonable process, save for criticism levelled at the delay in holding the appeal. However, as our findings of fact make clear, the reasons for that delay had nothing to do with the Claimant's disabilities but sprang from Mr Povey's workload and his personal circumstances at the relevant time coupled with his inability to say no when he was originally asked to conduct the appeal.

277. So once again, the facts did not give rise to an inference of discrimination (applying **Efobi**) and/or the Claimant did not establish a prima facie case of discrimination (applying **Igen v Wong** and **Ayodele**).

I. The Unfair Dismissal Claim

The relevant law

278. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 ("ERA 1996"). Section 94(1) of that Act provides that an employee has the right not to be unfairly dismissed by the employer. Section 98(1) provides that in determining whether the dismissal of an employee is fair or unfair it is for the employer to show the reason (or if more than one the principal reason) for the dismissal and that it is one which the law regards as being potentially fair.

279. A list of potentially fair reasons is set out in Sections 98(1)(b) and 98(2) of the ERA 1996. This includes a reason which "*relates to the capability of the employee for performing work of the kind which he was employed by the employer to do*": see section 98(2)(a). This includes the situation where the employee is suffering from ill-health, particularly if this has led to him being absent from work.

280. If the employer can show that there is a potentially fair reason then the Tribunal has to consider whether the decision to dismiss for that reason was fair within section 98(4) of the ERA 1996. This section provides as follows:

> "*The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating [conduct] as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case*".

The burden of proof on the issue of fairness under section 98(4) of the ERA 1996 is neutral. The assessment of fairness is therefore one for the Tribunal to make, having regard to all the circumstances.

281. As a general matter, when considering the employer's conduct under section 98(4) of the ERA 1996, it is important to appreciate in line with the reasoning in such cases as **Iceland Frozen Foods -v- Jones** [1982] IRLR 439, **Foley -v- Post Office** [2000] ICR 1283, **Sainsbury's Supermarkets -v- Hitt** [2003] IRLR 23 and **Turner v East Midlands Trains** [2013] IRLR 107 that different employers may reasonably react in different ways to a particular situation. This means that the Tribunal must not ask what it would have done had it been in the Respondent's shoes and then substitute its own view for that of the Respondent. Instead the question is whether

the Respondent acted within the range of reasonable responses open to a reasonable employer both in terms of the actual decision to dismiss and the procedure by which that decision is reached. As Elias LJ made clear in the **Turner** case, the range of reasonable responses test requires an objective assessment of the employer's behaviour, always remembering that just because an Employment Tribunal might have reached a different conclusion to that of the employer does not mean that the dismissal was necessarily unfair.

282. Turning to case-law that deals specifically with dismissal for long term illness, it is clear that where the employee has been off work for some time, the Tribunal should ask '*whether in all the circumstances the employer can be expected to wait any longer [for the employee to return] and if so how much longer?*': see **Spencer v Paragon Wallpapers Ltd** [1977] ICR 30. Further, according to the Court of Session (Inner House) in **S v Dundee City Council** [2014] IRLR 131, the Tribunal must expressly address this question, balancing all of the relevant factors including the nature of the employee's illness, the likely length of his absence, the size of the Respondent's undertaking and the '*unsatisfactory situation of having an employee on very lengthy sick leave'*.

283. The **Dundee City Council** case also considered whether it was necessary to take length of service into account in such cases and concluded there was no hard and fast rule. '*The critical question is whether the length of the employee's service and the manner in which he worked during that period yields inferences that indicate that the employee is likely to return to work as soon as he can.*'

284. Case-law also makes it clear that the Tribunal should consider the fairness of the procedure adopted by the Respondent in cases of long-term sickness absence. This generally calls for consideration of whether there has been adequate consultation with the employee, a thorough consideration of the true medical position and a search for suitable alternative employment. In **S v Dundee City Council**, referred to above, the Court of Session stated as follows:

> '… *If the employee states during consultation that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him.*'

The issues for determination

285. In the present case there were two issues for determination in relation to liability for unfair dismissal:

(1) Was there a fair reason for the Claimant's dismissal?

(2) If so, had the Respondent acted fairly (as defined by section 98(4) of the ERA 1996) in treating capability as a sufficient reason for dismissing the Claimant?

The reason for dismissal

286. The Respondent contended that the principal reason for the Claimant's dismissal was her long-term sickness absence, with the result that this was a capability dismissal falling within section 98(2)(a) of the ERA 1996. The Claimant for her part argued that she had been dismissed '*because of her disabilities and/or because of her absences and difficulty communicating which both arose from the Claimant's disabilities*' (see paragraph 2 of the List of Issues). We

preferred the Respondent's submissions on this issue for the following reasons.

287. Firstly, as Mr Boat's decision letter of 13 May 2015 made clear, the main reason he decided to terminate the Claimant's employment was her long-term sickness absence coupled with the absence of any return to work date. As he explained in his letter, it was this state of affairs that lay 'at the root' of the decision to dismiss. So, whilst we accept that the Claimant's lack of co-operation with management was indeed a factor in his decision, we are persuaded that the principal reason for the Claimant's dismissal was her long-term absence with no prospect of a return. That reasoning was approved at the appeal. As Mr Povey put it: '*the original decision maker reached the correct view … due to your on-going sickness absence and your sickness absence history*.'

288. Secondly, as explained in paragraphs 273 - 277 above, we rejected the argument that the Claimant was dismissed because of her disabilities. In our view the Claimant's disabilities were never factors in the decision-making process. The Claimant was therefore dismissed for a reason relating to her capability, which is a fair reason.

Was the dismissal fair within section 98(4) ERA 1996?

289. We then turned to consider whether the dismissal was fair within the meaning of section 98(4) of the ERA 1996.

290. So far as the substance of the decision was concerned, we noted that Mr Boat discounted both the Claimant's post-operative sickness absence and any sickness absence associated with the phased return when coming to his decision. Even so, by 13 May 2015 when he finalised his decision, the Claimant had been off work with stress and anxiety for over seven months. This was having a negative effect on HMRC's operations, and there was still no prospect of a return to work in either the short or medium term. In addition, although Mr Boat should have realised that the Claimant was disabled by the time the decision to dismiss was taken, it was apparent that the Respondent had gone to considerable lengths to support the Claimant during her sickness absence (for example by providing her with a car parking space and making other adjustments on her return and by extending her phased return to work and allowing her to reduce her contractual hours). Moreover, the only adjustment that the Claimant or her union representative was suggesting to help support a return to work was an open-ended period of unpaid leave. There was no precedent for agreeing to such a suggestion and, in any event, it did not resolve the crucial issue, namely that there was simply no prospect of the Claimant resuming her role in the near future. (The Claimant was not suggesting, for example, that she could attempt a phased return in the short or medium term). In these circumstances it cannot be said that no reasonable employer would have dismissed on grounds of long-term sickness absence – even if they had realised she was disabled.

291. We then considered the procedure adopted by the Respondent. So far as the management of her return to work was concerned, we did not accept that Miss Camm had taken an unsympathetic or unsupportive approach or that she 'trivialised' the Claimant's condition as Mr Bidnell-Edwards suggested. On the contrary, although the Respondent's policies indicated that a phased return would normally be completed in three months, she allowed the Claimant to work for 2 hours per day for a substantial period - far beyond the four weeks recommended by occupational health. In addition, Miss Camm did not act unreasonably in trying to formulate a plan for the Claimant's return at the end of August 2014. The Claimant's ongoing absence was likely to have an effect on the

department in which she worked and, as her manager, she could not simply allow her case to be left in abeyance. Moreover, once it became clear that a return to full hours would be difficult for the Claimant to achieve, Miss Camm encouraged the Claimant to apply for a temporary reduction of her hours in the hope that this would enable her to avoid accruing further sickness absence, would help regain her health and so lead to a successful return.

292. In addition, we did not accept the Claimant's argument that the Respondent had acted unreasonably by applying the wrong policy in this case. As noted above, the Managing Continuous Absence Policy was intended to apply to all cases of continuing sickness absence, subject to any duty to make reasonable adjustments in the case of disabled employees. The fact that managers used this policy as the basis for their decisions was therefore not unreasonable in and of itself, given that reasonable adjustments were made.

293. Similarly, it was not unreasonable to expect the Claimant to keep in touch and engage with the process. There has to be some form of communication between manager and jobholder during sickness absence – otherwise it is impossible to manage the absence. Furthermore, in the Tribunal's view, it was reasonable for the Respondent to insist on some form of authorisation from the Claimant before agreeing to contact her via Mr Sodha. After all, the Respondent was not aware of the exact nature of their relationship and the communications would include reference to some highly sensitive issues such as the Claimant's health. Nor, in our view, was it unreasonable for Miss Camm to attempt to maintain a direct channel of communication with the Claimant and to write to her from time to time, particularly in the absence of any medical evidence to suggest that this might be detrimental to the Claimant's health.

294. Nor were we persuaded that the invitation to the 'Month 1' meeting, was premature. In the first place, the Managing Continuing Absence Policy is not prescriptive about when the first formal meeting takes place and in the Claimant's case the first suggested date for the meeting was 17 October 2014, just 5 days short of a month's absence. Secondly, by the time Miss Camm sent the invitation (9 October 2014) the Claimant had been admitted to hospital and it was reasonable to assume she might be away for longer than the four weeks indicated by her most recent sick note, particularly as the Claimant had been unable to resume her normal hours during her phased return. Thirdly by this stage the Claimant had declined a further occupational health assessment and had given no indication of the causes of her stress. In those circumstances it was reasonable to believe that the meeting would provide an opportunity for the Respondent to gather more information about the Claimant's absence. Equally we were not persuaded that the reference to the possibility of termination in the Month 1 letter was unreasonable. This was not a threat but simply warning the Claimant of the worst case, in accordance with good industrial practice.

295. So far as the recommendation to dismiss was concerned, we did not accept that Miss Camm was acting unreasonably in deciding to recommend dismissal in early December 2014, given the circumstances. Whilst there were some inaccuracies in her report (such as the reference to Claimant's post-operative sickness absence), and whilst her criticisms of the Claimant could have been expressed in less forthright terms, the Claimant had, by this stage, been off sick for some 55 working days. She had never managed to work her full contractual hours since her surgery and there was no apparent prospect of a return. Moreover, the Claimant's failure to co-operate was creating a stalemate. Miss Camm wanted to consider the causes of the Claimant's stress and whether any reasonable adjustments could be made to support her return. However, she

was essentially disabled from doing this by the Claimant's own refusal to engage with the 'keeping in touch' procedure and with further occupational health assessments. The consequence was that despite repeatedly requesting further information from the Claimant, Miss Camm was largely kept in the dark about the Claimant's diagnosis, her prognosis and whether or not the Claimant might be capable of providing effective service in the future, despite repeatedly asking for further information. In addition, there was no medical evidence to suggest that the Claimant's health would prevent her attendance at a formal meeting (be it a Month 1 meeting or the decision maker's meeting) or that the Claimant's failure to engage was a symptom of her ill-health. In those circumstances it was not unreasonable for Miss Camm to have concluded that the Claimant was simply being difficult in refusing to engage with the Respondent's procedures. The decision to recommend dismissal therefore fell within the range of reasonable responses. Indeed, in the absence of any up to date medical evidence or information about the causes of the Claimant's work-related stress, Miss Camm had little option but to progress the matter in this way.

296. We also considered whether Mr Boat acted precipitately in taking the decision to dismiss without a further occupational health report or evidence from the Claimant's GP. However, for the reasons set out in paragraphs 236-239 above we did not believe this was the case. All the indications were that the Claimant would have refused to co-operate with a further occupational health assessment. Yet it was this intransigence that gave rise to the fundamental inconsistency in her case. On the one hand, she had repeatedly refused a further occupational health assessment and yet, on the other, she complained that the Respondent had relied on '*obsolete*' evidence when taking the decision to dismiss. The Respondent was only too aware that the July 2014 occupational health assessment was out of date. Yet in the absence of co-operation from the Claimant and/or any signal that she had changed her stance on the occupational health issue, it was reasonable for the Respondent to assume that her position remained unaltered and to proceed to take decisions without a more up to date assessment. Similarly, in the absence of any indication from the Claimant that a further report from her GP would provide significant additional information, the failure to approach her GP before deciding to dismiss did not take the dismissal outside the band of reasonable responses. The Respondent already had a recent GP report about her health as well as copies of her GP notes. These revealed almost nothing about the causes of her stress or the prognosis and there was no reason to suppose an additional approach would have revealed any further information.

297. Furthermore, we did not accept that Mr Boat acted unreasonably in delaying his final decision on the Claimant's case until the outcome of the grievance was known. This approach accords with good industrial practice and, although not directly in point, we note that paragraph 46 of the ACAS Code of Practice on Disciplinary and Grievance procedures states that, where an employee raises a grievance during a disciplinary process, the disciplinary process may be temporarily suspended in order to deal with the grievance. It was not unreasonable to adopt the same approach in the Claimant's case. Nor did we accept that the grievance process was unnecessarily protracted. Mr Gukani carried out a very detailed and thorough investigation of all the issues the Claimant had raised, interviewing the relevant members of staff, holding a hearing and then producing a detailed report. That inevitably takes time. In addition, he had other responsibilities and could not reasonably have been expected to prioritise the Claimant's grievance above all other matters. There was a balance to be struck.

298. Nor did we accept that Mr Boat acted unreasonably in failing to allow the Claimant unpaid time off work as an alternative to dismissal. By the time he came to make his final decision in May 2015 the Claimant had effectively had a period of unpaid leave, yet there was no evidence this had made any difference to the prognosis. Indeed, at the grievance hearing on 27 April 2015 the Claimant could still not provide a return to work date. In addition, the period being requested appeared to be open-ended, which was at odds with the Managing Continuous Absence Policy which encouraged close management of long-term absence with a view to supporting an employee back to work as quickly as possible.

299. However, we took a different view of the way the appeal process was managed. The right to a timely appeal is a vital part of a fair process as the ACAS Code of Practice makes clear. Yet the Claimant had to wait over six months for a hearing date and a further six months beyond that for a decision. Such a significant delay could be expected to undermine the Claimant's faith in the integrity of the process and, whatever the personal circumstances of Mr Povey, no reasonable employer would have allowed such drift, particularly not one the size of the Respondent. Accordingly, the delay in dealing with the appeal falls clearly outside the band of reasonable responses and renders the dismissal unfair.

300. Finally, we considered the fact that, as a result of our decision, the Claimant's dismissal for long term absence has been found to be unfair whereas her claim that the dismissal amounted to discrimination arising from disability has failed. However, we did not consider that this was inconsistent, bearing in mind that we found the decision to dismiss to be substantively fair and that it was a procedural error at the appeal stage – which arose for reasons that were totally unconnected to the Claimant's disability - that proved fatal to the fairness of the dismissal for the purposes of section 98(4) of the ERA 1996.

J. Remedy for Unfair Dismissal

301. Finally, we considered a number of matters that were relevant to remedy for unfair dismissal. In this context the Respondent argued that any award of compensation should be reduced under the principles set out in **Polkey v AE Dayton Services Ltd** 1988 ICR 142 and/or because the Claimant contributed to her own dismissal. The Claimant opposed any such reduction.

The compensatory award

302. We considered first of all whether it would be just and equitable to reduce any compensatory award to reflect the fact that there was a chance that the Claimant would have been dismissed in any event had a fair procedure been followed (a 'Polkey' reduction). Mr Bidnell-Edwards argued that such a reduction would be '*hopelessly speculative*'. We disagree. Had the Claimant's appeal been held in timely fashion a few weeks after her dismissal, the evidence suggests that she would still have been dismissed. The grounds of appeal set out in her letter of 22 May 2015 contained no new evidence and simply restated the arguments made at the decision maker's meeting. There was no suggestion that her health was improving and no indication – even at that stage - of a return to work date. The principal reason for dismissal remained cogent. (In coming to this decision, we noted that in cross-examination Mr Povey agreed with Mr Bidnell-Edwards that if he had considered that the decision to dismiss was potentially unsafe then he could have upheld the Claimant's appeal. However, we regarded this as a general statement, not a concession that he would have decided the matter differently had he considered the Claimant's appeal at an early stage, particularly as Mr Povey stressed in other parts

of his evidence that his primary focus had been on the Claimant's continuing sickness absence with no return to work date.) In those circumstances we decided that an appeal manager considering the matter in timely fashion would still have rejected the appeal and that a reduction of one hundred per cent would therefore be appropriate under this head.

The basic award

303. We then considered whether to reduce the basic award. The tribunal's power to make such a reduction is set out in section 122(2) of the ERA 1996. This section allows a reduction where the Tribunal considers that any conduct of the Claimant prior to dismissal is such that it would be just and equitable to make a reduction. It clearly gives the Tribunal a wide discretion and the Respondent argued that we should make a substantial reduction, bearing in mind the Claimant's intransigence over the occupational health referral and her lack of engagement with her manager. Whilst we accepted that the Claimant's attitude made the management of her sickness absence extremely difficult, we decided that it would not be just and equitable to make any reduction, particularly as she is not to receive a compensatory award. The Respondent's lengthy and unjustified delay in conducting the Claimant's appeal was a very serious failing and although, at the end of the day, we consider that it made no difference to the outcome of the appeal, a full basic award nonetheless recognises that a serious procedural error occurred.

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Employment Judge Milgate

Date: 13 April 2018

JUDGMENT SENT TO THE PARTIES ON

17 April 2018

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FOR THE TRIBUNAL OFFICE