



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Wilson

Respondent: Driver and Vehicle Licensing Agency

Heard at: Cardiff **On:** 17th, 18th, 19th, 23rd, 24th & 25th
July 2018

(Chambers discussion: 25th & 26th
July 2018)

Before: Employment Judge Howden-Evans
Mrs B A Currie
Ms C Lovell

Representation:

Claimant: In person, supported by Mr Bull

Respondent: Mr J Walters (Counsel)

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is that the claimant's claim of disability discrimination is not well founded and is dismissed. The respondent has complied with its duty to make reasonable adjustments (Sections 20, 21(2), 25(2)(d), 39(2)(c) and 39(5) of the Equality Act 2010).

REASONS

Introduction

1. The claimant, Mrs Wilson, has been continuously employed by the respondent, the Driver and Vehicle Licensing Agency (“DVLA”), for just over 8 years. She commenced work with DVLA on 24th May 2010 as an administration officer at the DVLA Contact Centre in Swansea Vale.
2. By reason of her Myalgic Encephalomyelitis (“ME”) and Fibromyalgia, Mrs Wilson has a disability that has had a serious impact on her life since 2005. When she first experienced ME in 2005, she was so incapacitated by extreme fatigue, muscle pain, joint pain and headaches that she found everyday tasks such as getting out of bed, getting dressed, getting washed, reading a book, painful and completely exhausting. She was unable to work and resigned from her position as a call centre advisor with HSBC.
3. By 2010, her symptoms became more manageable and she attended an interview with DVLA, through their guaranteed interview scheme for applicants with a disability. She was appointed to work at the DVLA Contact Centre as a Drivers’ Customer Services Advisor which was an administrative officer (AO) grade.
4. DVLA accept that Mrs Wilson has a disability for the purposes of s6 Equality Act 2010 and that they had knowledge of her ME in 2010 and knowledge of her Fibromyalgia shortly after her diagnosis in April 2015.
5. During the period May 2010 to Winter 2013/2014, Mrs Wilson’s health was good; her ME was in remission. Whilst she experienced illness linked to her gall bladder (which caused 40+ days absence), during this period she was able to fully undertake her role at the DVLA, working variable shifts, and undertake the journey to and from home without difficulty. She was praised for the quality of her work and gained NVQs and a Star award for positive contribution to the business. She also enjoyed an excellent relationship with her immediate line manager, Mr Rhodri Thomas, and in turn praised him for supporting her.
6. In Winter 2013/14 she began to experience symptoms of a ME relapse and in 2014 / 2015 ME had a profound impact on her life again. This claim relates to the adjustments that DVLA did / did not make for Mrs Wilson during the period February 2014 to February 2016.
7. In February 2016, Mrs Wilson moved from the DVLA Contact Centre to the DVLA main site and commenced work in a different role in the Drivers’ Complaints team. Mrs Wilson was very happy with this move and accepts that this new role was well suited for her disabilities. She reports that her managers

in the Complaints team “go over and above” in supporting her in with her disability.

8. On 12th July 2017, Mrs Wilson contacted Acas. The period of Acas early conciliation lasted from 12th July 2017 to 14th July 2017.
9. By an ET1 claim form presented on 20th July 2017 Mrs Wilson complained of disability discrimination, namely that Ms Percival (a DVLA employee) had failed to comply with the duty under s20(3) Equality Act 2010 to make reasonable adjustments contrary to s21(2) Equality Act 2010.
10. In the ET1, Mrs Wilson had identified that DVLA had made temporary adjustments to her shift times but had refused to make these permanent. She also identified that additional travel time in her commute to work had worsened her condition.
11. At the Preliminary Hearing in Person, on 4th December 2017, Employment Judge P Davies:
 - 11.1. allowed the DVLA to be substituted as a respondent;
 - 11.2. accepted Mrs Wilson had complied with the ACAS early conciliation provisions;
 - 11.3. determined that the issue of whether the claim had been presented within time should be decided by the tribunal at the final hearing; and
 - 11.4. ordered Mrs Wilson to provide additional information about allegations of failure to make reasonable adjustments.
12. On 19th January 2018, Mrs Wilson complied with this Order, by providing the schedule set out in pages 80 to 83 of the tribunal bundle. This identified 10 discriminatory policies, criteria or practices (“PCPs”) that Mrs Wilson alleged had been applied.
13. Mrs Wilson is seeking compensation for disability discrimination: for injury to feelings, financial loss, personal injury and aggravated damages.

The Issues

14. Prior to the hearing, Mr Walters on behalf of DVLA, had prepared a draft written list of issues; this was provided to Mrs Wilson and at the outset of the hearing, the employment judge asked Mrs Wilson to consider this list and confirm she was happy it captured the issues. In addition, the employment judge took the parties to pages 80 to 83 of the bundle and explained these were the allegations of discrimination that the tribunal would be considering. By the time of closing submissions, the final List of Issues was as follows:

Failure to make reasonable adjustments (s20 & 21 Equality Act 2010)

- A. Has DVLA applied any of the following alleged provisions criteria or practices (“PCP”) to Mrs Wilson and to others not sharing her disability [*adopting Mrs Wilson’s numbering from her schedule at pages 80 to 83*]:
1. any PCP of requiring employees to undertake a competitive interview for training on email duties? *DVLA deny this PCP was applied.*
 2. any PCP of requiring employees to work variable shift patterns? *DVLA accept this PCP was applied.*
 3. any PCP of requiring employees to undertake a competitive interview for internal vacancies? *DVLA deny this PCP was applied.*
 4. any PCP of requiring employees to have 100% attendance to be eligible to apply for internal / external vacancies? *DVLA deny this PCP was applied.*
 5. any PCP of requiring employees to book short term leave 3 months in advance? *DVLA deny this PCP was applied.*
 6. any PCP of requiring employees to book “duvet days’ on the morning of the day required, by telephone and with only the first 10 people to get through being allowed this leave? *DVLA accept this PCP was applied.*
 7. any PCP of allowing employees to go home early if customer demand wanes in the order that the leave had been booked? *DVLA accept this PCP was applied.*
 8. any PCP of requiring employees to have 100% attendance and undertake a competitive interview to be moved to a role in the main site? *DVLA deny this PCP was applied.*
 9. any PCP of requiring employees to work shifts? *DVLA accept this PCP was applied. Both parties accept this is a duplication of PCP 2 listed above.*
 10. any PCP of ceasing fully paid sick leave after 6 months and half paid sick leave after 12 months? *DVLA accept this PCP was applied. During the hearing, Mrs Wilson accepted this was a common public sector sick pay practice and withdrew this as an allegation of failure to make reasonable adjustments.*

- B. If the respondent has applied any of the PCPs referred to in paragraph 14A (above) has this placed an interested disabled person (Mrs Wilson) at a substantial disadvantage in comparison with non-disabled persons? If so, what was Mrs Wilson's substantial disadvantage?
- C. If so, did the respondent breach the duty to make reasonable adjustments? Did the respondent take such steps as it was reasonable to have to take to avoid the alleged disadvantage?
 - 1. Were there further reasonable adjustments that could have been made?
 - 2. If so, would this adjustment have avoided the disadvantage?

Time limits

- D. Are any of these claims time-barred?
 - 1. Is there a continuing act of discrimination extending over a period of time, or a series of distinct acts? From what date(s) did the cause of action in relation to each claim begin?
 - 2. If any claim has not been presented within time, is it just and equitable for the time limit to be extended?

The Hearing

- 15. Throughout these proceedings, Mrs Wilson has represented herself; DVLA have been represented by the Government Legal Department, and at the hearing by Mr Walters, counsel.
- 16. The final hearing (which was to determine liability alone) had been listed with a time estimate of 7 days. Due to the tribunal's resources, only 6 days were actually available; the hearing took place on 17th to 19th and 23rd to 25th July 2018 at Cardiff Employment Tribunal. The tribunal had the benefit of an agreed bundle which was initially 579 pages. Further documents were added to the bundle during the hearing, including documents explaining the nature of ME and adjustments that can be made to support an employee with ME as well as emails that Mrs Wilson had exchanged with Mr Rutnam's office. Detailed witness statements had been prepared for each of the 4 witnesses.
- 17. The tribunal also had a very eloquent and moving witness statement from Mrs Wilson's son, Mr Connor Wilson. During the course of the hearing it transpired that Mr Wilson was not able to attend the hearing as he was starting new employment; the Tribunal did consider Mr Wilson's written evidence – Mrs Wilson agreed that primarily his evidence related to remedy rather than issues

in the liability hearing, and it was agreed that Mr Wilson would be called to give evidence at the remedy hearing if Mrs Wilson succeeded with her claim.

18. On Day 1, having met the parties, discussed the issues, discussed reading lists and a request for disclosure, the tribunal rose and read the witness statements and bundle of documents. On Day 2, we started hearing evidence. All witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: the tribunal had already read each witness's statement in full, so there was:

- 18.1. opportunity for supplemental questions from Mr Walters or for Mrs Wilson to respond to anything that had been mentioned in the DVLA witness statements; before
- 18.2. questions from the other side;
- 18.3. questions from the tribunal; and
- 18.4. any re-examination.

Mindful of Mrs Wilson's health and the needs of other witnesses, the tribunal ensured there were regular comfort breaks and that Mrs Wilson and any other witness felt able to stop at any time they needed to take a rest.

19. During the hearing, we heard evidence from:

- 19.1. Mrs Wilson on Day 2 of the hearing;
- 19.2. Mr Rhodri Thomas (Mrs Wilson's line manager until February 2016) on Day 4 of the hearing;
- 19.3. Mrs Nicola Percival (Senior Operations Manager who considered Mrs Wilson's requests for reasonable adjustments) on Day 5 of the hearing; and
- 19.4. Ms Shireen Thomas (Human Resources Business Partner who also considered Mrs Wilson's requests for reasonable adjustments) on Day 5 of the hearing.

20. On Day 6 of the hearing we heard closing submissions: both Mr Walters and Mrs Wilson had prepared written closing submissions and then expanded on these by oral submissions. At lunchtime on Day 6, (Wednesday 25th July 2018) the tribunal were able to retire to consider our decision. We continued and completed our chambers discussion on Thursday 26th July 2018.

21. During the course of the hearing, we had a number of case management applications to consider. Whilst we provided full oral reasons for our decisions at the time, we have briefly noted the contents of these applications here:

- 21.1. At the start of Day 1 of the hearing, on Tuesday 17th July 2018, Mrs Wilson made an application for disclosure of documents, including a redacted email from Philip Rutnam (Disability Champion across the Civil

Service) and any documents that existed after he and/or Department for Transport contacted the DVLA following a complaint by Mrs Wilson to Mr Rutnam's office. She explained she had asked Mr Rutnam's office to make enquiries of DVLA on her behalf, without naming her. She was upset when she discovered DVLA had her entire unredacted 11-page letter of complaint (which had been addressed to Mr Rutnam). This document was already in the bundle, but Mrs Wilson was keen to have disclosure of any other documents that existed after her complaint to Mr Rutnam. She considered these documents would be relevant to remedy as she thought they supported an aggravated damages award. As the employment tribunal could not see how the documents were relevant to the issues we had to decide at the liability hearing, we agreed to consider this application at a later point, having read the witness statements and bundle.

- 21.2. At the start of Day 3, Thursday 19th July, having finished giving her evidence the previous day, Mrs Wilson made an 8-page application to amend her claim to include allegations beyond the reasonable adjustments claim. In particular, Mrs Wilson wanted the tribunal to consider "other acts of discrimination and harassment" and "systemic abuse of disabled workers rights". The tribunal spent the morning of Day 3 listening to submissions and considering this application. Having considered the submissions and guidance from *Selkent Bus Company Ltd v Moore* 1996 ICR 836, the tribunal carefully considered the interests of justice and the hardship that would be caused to either party by allowing / refusing the amendment. Even in the application, the allegations of harassment were vague comments rather than detailed allegations and were wholly unclear. This was not a case of relabeling allegations that had previously been stated, the respondent and tribunal had no real information about what the new harassment allegations would be. Any allegations would relate to events that happened during 2014 & 2015 and were likely to rely on oral testimony. The tribunal considered witnesses would find it difficult to provide an account for the first time, 3 or 4 years after any alleged incident. The employment tribunal decided that in refusing to "look at wider discrimination allegations" it was not denying the claimant the opportunity to pursue realistic claims; these were vague assertions rather than distinct allegations of discrimination. The employment tribunal gave an oral decision with full reasons confirming that it was not granting permission to amend the claim to add further new claims of disability discrimination.
- 21.3. On Day 3, the tribunal revisited the application for disclosure of documents. Having read the witness statements and bundle of documents and having heard Mrs Wilson's evidence, the employment tribunal still could not see how these documents (in para 21.1 above) were relevant to the issues. Mr Walters explained the DVLA's position

was Mrs Wilson had (presumably accidentally) given Mr Thomas an unredacted copy of Mrs Wilson's letter to Mr Rutnam (which was in the bundle). The DVLA had at some point received a redacted copy of Mrs Wilson's letter to Mr Rutnam, but they no longer had a copy of this document. Mrs Wilson submitted that there must have been a lot of activity upon receipt of any complaint via Mr Rutnam, so there must have been more documents generated. Having considered their decision, the tribunal declined to make an order for further disclosure as the tribunal were not satisfied that further documents actually existed and the tribunal did not consider that any documents would be relevant to the issues we had to determine at the liability hearing.

21.4. On Day 4, the claimant made a detailed written submission that counsel for the DVLA had lied to the employment tribunal. The employment tribunal read this submission and checked their notes of the submissions that counsel had made on Day 1 and Day 3. The tribunal were satisfied that counsel had not lied or misled the tribunal at all. It was quite clear that counsel had always said his client "did not have" documents, rather than documents "had never" existed. The employment judge read to the parties, her note of what counsel had actually said and explained to Mrs Wilson the mistake Mrs Wilson had made. Then the employment judge explained to Mrs Wilson that whilst it was understandable that a litigant in person could make a mistake like this, her choice of language in this submission (which had gone well beyond saying counsel had lied) was unacceptable and was offensive; it was a personal attack on the character of a professional person. The tribunal accept that Mrs Wilson was passionate about her case and was perhaps overly tired when she wrote the submission - to her credit, on the final day of the hearing, Mrs Wilson apologised for her choice of language in this submission and for the upset it must have caused Mr Walters.

Findings of Fact

Background

22. As explained in the Introduction earlier (paragraphs 1 to 6), Mrs Wilson's ME has had a serious impact on her life since 2005 and had led to her resigning from her employment with HSBC.

23. By 2010 her health was improving and on 24th May 2010, Mrs Wilson commenced employment with DVLA, as an administration officer, working as a telephone advisor in the Customer Enquiries Group (CEG) at the DVLA Contact Centre in Swansea Vale.

24. The DVLA Contact Centre employs approximately 1,000 telephone advisors handling enquiries from the general public: half of these are handling vehicle enquiries and half are handling driving licence enquiries.

Relevant Contractual Terms and Policies

25. Mrs Wilson was offered and accepted a permanent full-time contract working in a team of 12 telephone advisors handling driving licence enquiries. Her employment contract included the following:

“It is a term of your employment that you will be restricted to this post in the Contact Centre and you will not be eligible to transfer to another post elsewhere within DVLA. You will however have the right to apply for promotion opportunities advertised in DVLA if you meet the advertised criteria and will retain the right to apply for publicly advertised posts in the civil service including in the DVLA.”

26. In evidence, both Mr Thomas and Ms Percival explained that this clause was necessary as working in the Contact Centre answering telephone calls was demanding work and colleagues were eager to move from the Contact Centre to the main DVLA site. Documents in the bundle demonstrate the Contact Centre had on average 42,696 telephone enquiries per day during the period March 2014 to September 2014. The DVLA had experienced difficulty recruiting enough telephone advisors to meet the business’s needs.
27. As posts in the main DVLA site were so attractive, the Contact Centre introduced a “Churn” policy which allowed Contact Centre staff to move to posts in the main site as and when new Contact Centre staff had been recruited. There was a Churn waiting list of staff that were waiting to move to the DVLA main site. In 2012, the Churn waiting list had 52 staff who had worked between 10 to 20 years; 252 staff who had worked 5 to 9 years and 127 staff who had worked 0 to 4 years in the Contact Centre, who were waiting for a post to come up in the DVLA main site.
28. In November 2013, the Contact Centre introduced “Personal Choice” days (also known as “duvet days”). An employee can phone in on the morning of the day they wish to take off and take that day as a day’s holiday. Only 10 staff from the drivers side and 10 staff from the vehicles side are permitted to take duvet days each day; these are allocated on a first come first served basis. In the first year of the scheme staff could take 3 duvet days per year (from their annual leave of 30 days (plus 8 bank holidays and 2 ½ privilege days)). In the second year of the scheme this increased to 5 days per year and subsequently in November 2015 this was reduced so an employee could take a maximum of 3 duvet days per year.

29. The DVLA Contact Centre allows staff to work up to an additional hour flexi-time each day, to accrue flexi-time holidays.
30. The managers of the DVLA Contact Centre use variable shift patterns to ensure there were sufficient operators to manage the phone lines across the working day into the evening and on Saturdays. There were 2 different full-time shift patterns and 13 different part time shift patterns available to employees. Employees were advised of their shifts 10 weeks in advance. Rotas ensured early, late and Saturday shifts were shared evenly amongst staff.
31. Staff are permitted to swap shifts with a colleague by using the live shift swap database.
32. If an employee wishes to change their shift pattern or their contracted hours on a temporary basis (up to 8 weeks) their manager (HEO level) is able to approve this request. If an employee wished to change for a longer period or on a permanent basis this has to be approved by the Change of Hours Panel (of senior managers) which meets every fortnight.
33. Mrs Percival and Mr Thomas explained (and Mrs Wilson accepted) that the most popular shift was the 8.00am to 4.30pm shift. The tribunal had the benefit of statistics showing the average number of calls per 15 minutes across the working day during the period March to September 2014. This demonstrated that between 8.00 and 8.15 am there would be on average 356 calls, whereas between 4.30 and 4.45pm (after the most popular shift had finished) there would be on average 1,051 calls and the calls would remain above an average of 500 calls per 15 minutes until 5.45pm. This is why the Contact Centre required telephone advisers to work variable shift patterns – it ensured they had sufficient telephone advisers to be able to answer calls quickly to meet varying demand across every minute of the working day.
34. Prior to 2014, Mrs Wilson worked full time, on shift pattern L (previously called shift pattern 1) which meant her shifts would be anytime between the hours of 8am and 8.30pm Monday to Friday and 8am to 5.30pm on Saturdays up until June 2014. From June 2014, the DVLA adopted a slightly shorter working day; shift patterns were between 8am and 7pm Monday to Friday and 8am and 2pm Saturdays.
35. The DVLA operates a staff bus that stops at the Contact Centre at 8am and collects from the Contact Centre just after 4.30pm. Mrs Wilson does not drive. The Contact Centre is a 15-minute drive away from Mrs Wilson's home. When Mrs Wilson was working the 8am to 4.30pm shift she was able to catch the DVLA work bus from home to the Contact Centre and from the Contact Centre to her home. When she was working other shifts she would either have lifts with family or work colleagues or would catch the public transport bus. Catching the public transport bus to work entailed walking for 30 minutes to the

nearest bus stop, travelling on the bus before walking a further 30 minutes from the bus stop to the Contact Centre. This would take up to 2 hours. Her journey home via public transport also took a similar period of time and entailed similar walking. This meant that when she was working any shift other than the 8am to 4.30pm shift, if she did not have a lift with a colleague or family, Mrs Wilson had a 4 hour commute to/from work.

Mrs Wilson's ME relapse in Winter 2013/14

36. By Winter 2013/14, when Mrs Wilson first started to experience symptoms of an ME relapse, she had worked for the respondent in the same role, in the same location and with the same variable shift patterns for over 3 years. She enjoyed an excellent relationship with her line manager, Mr Thomas. She had been praised for the quality of her work.

37. Her first sickness absence related to ME was in February 2014. Mrs Wilson recalled an occasion, in February 2014, when she finished work at 6pm and missed the 6.25pm bus as she could not walk to the bus stop fast enough. This meant she did not get home until 8.45pm and was too exhausted to eat that night.

38. Mrs Wilson was off work on 21st February 2014 with a migraine, but during her return to work on 22nd February 2014 she mentioned to Mr Thomas that she was experiencing symptoms of an ME relapse. On 28th February 2014, with Mrs Wilson's permission, Mr Thomas referred Mrs Wilson to occupational health ('OH').

First request for reasonable adjustments: temporary change of shift pattern to 8am to 4.30pm shift

39. On 1st March 2014, Mrs Wilson made her first written request to change working hours. This requested a "temporary change" of shift pattern to working the 8am to 4.30pm shift exclusively for 8 weeks to support her during an ME relapse.

40. On 4th March 2014, Mrs Wilson attended her OH appointment. The OH report of the same date confirmed Mrs Wilson was currently in work but was experiencing exacerbation of symptoms associated with ME. The report also noted that in addition to ME, Mrs Wilson was experiencing additional health issues which were being monitored by her GP but were not presently responding to treatment. The report recommended the DVLA "consider temporary adjustments at times symptoms are exacerbated, these may include reduced call line, general stressors, alternating duties, increased break allocation to accommodate posture changes and welfare facilities and changes to shift pattern" [tribunal's emphasis].

41. On 7th March 2014, Mr Thomas met Mrs Wilson to discuss the OH report. Mr Thomas made the following changes to Mrs Wilson's role:
- 41.1. she was given the 8am to 4.30pm shift "initially" for 4 weeks and this would be reviewed at end of the 4 weeks;
 - 41.2. she was to take 5 minutes OH break every hour to walk around / stretch;
 - 41.3. she would sit away from the EU3D turret desk;
 - 41.4. the number of "skills" areas that she would have to provide advice upon were reduced so she would only have to handle less complex calls;
 - 41.5. she was given alternating duties so that she would sometimes be undertaking administrative tasks rather than receiving telephone calls.
42. During this meeting, Mrs Wilson enquired whether she should move to the email team (where advisers respond to emails as well as taking telephone calls). Mr Thomas made enquiries with Mr Cobley, but they both felt this would create greater stress for Mrs Wilson as she would need to learn an additional area of work and there were additional targets entailed in that role. Mr Thomas explained this to Mrs Wilson. The tribunal accept Mr Thomas's evidence that Mrs Wilson did not pursue this enquiry any further. Rather she appeared to be happy in the telephone adviser role speaking to customers.
43. Between 10th March 2014 and 28th April 2014, Mrs Wilson was absent from work with ME related symptoms. There was regular communication between Mrs Wilson and DVLA.
44. On 31st March 2014, Mrs Wilson was referred to OH again. She attended an OH appointment on 3rd April 2014. The OH report of the same date confirmed Mrs Wilson was not yet fit to return to work and recommended when Mrs Wilson was fit to return, DVLA should reduce her contracted hours by up to 50% and gradually increase her hours up to full time working pattern over a 3 to 4 week period. The OH report noted that the nature of ME is that it "*can be fluctuating in symptom presentation. Symptoms can be manageable for long periods of time (remission) then flare up (relapse) for days, weeks or months.*"
45. On 7th April 2014, Mrs Wilson met Mr Thomas for a long-term sick review meeting and to discuss the latest OH report. During the meeting Mr Thomas confirmed that when Mrs Wilson was well enough to return to work, there could be a temporary or permanent change to her working hours or pattern of work and she would return on a phased return basis, ie she would start working 50% of her hours and would gradually increase this over a 3 to 4 week period.
46. On 28th April 2014, Mrs Wilson started her phased return to work. As the length of her absence had reached a trigger point in the DVLA's attendance management procedures at which Mr Thomas should consider a first formal written warning, Mr Thomas complied with the DVLA's attendance management procedures and held a meeting with Mrs Wilson at which he

considered a first formal warning. Mr Thomas exercised his discretion and issued an informal warning.

47. Between 6th May 2014 and 1st September 2014, Mrs Wilson was on sick leave with ME related symptoms.

Second request for reasonable adjustments: changing to part time contract

48. Following a third referral to OH, Mrs Wilson attended an OH appointment on 19th May 2014. At this appointment Mrs Wilson explained she was concerned she would not be able to “*return to full time work at all*”. In the OH report of 19th May 2014, it is noted Mrs Wilson was experiencing extreme symptoms of fatigue coupled with joint pain. Mrs Wilson was not fit for work and it was not possible to predict the duration of her absence as this depended on symptom presentation. The OH report recommended that when Mrs Wilson was well enough to return to work it should be on a phased return over a 3 to 4 week period. It was also recommended “*Management are also requested to conduct a meeting with [Mrs Wilson] on her return to work to discuss the possible options of reducing her hour’s [sic] long term. I have advised Mrs Wilson to seek additional support which might also prove beneficial.*” This final sentence was a reference to social security benefits that would be available to support Mrs Wilson financially.

49. On 2nd June 2014, Mrs Wilson attended a meeting with Mr Thomas to discuss her long-term sickness absence and the latest OH report. During the meeting, Mr Thomas discussed with Mrs Wilson the different reasonable adjustments that would be available when she was well enough to return to work. Mrs Wilson asked to move to a part-time contract and to work Monday Wednesday Friday, 8.00am to 4.30pm as she felt having a rest day in between working days would assist her. Mr Thomas made it clear he would support Mrs Wilson in this request.

50. During the same meeting Mrs Wilson asked to move to a different type of role in the main DVLA site as she felt she would have more flexibility with her hours and she believed the type of work undertaken in the main DVLA site would be less demanding. At that meeting, Mr Thomas explained the type of contract that Mrs Wilson was working on meant she was contracted to work in the Contact Centre; she would need to apply for promotion to move to the main site. In evidence, Mr Thomas also explained that if OH had concluded Mrs Wilson was permanently not able to perform more than 50% of her role, Mrs Wilson would have been placed on the Priority Movers List (“PML”) as this would have triggered the DVLA’s “Process for Medical Transfers”. Once an employee is on the PML, DVLA will take all reasonable steps to find an alternative suitable position across DVLA (including the main site). (In fact, Mrs Wilson was placed on the PML in December 2015 and subsequently moved to a new role in the main DVLA site, when OH advice was that Mrs Wilson

required a permanent change of shift pattern and DVLA were not able to accommodate this within the Contact Centre).

51. In June 2014, as Mrs Wilson remained on sick leave, she attended a further appointment with OH on 30th June 2014. In the fourth OH report (30th June 2014) it is noted that as well as experiencing extreme fatigue coupled with joint pain, Mrs Wilson was reporting low mood and morale which was affecting her mental health wellbeing. The only adjustment identified in this report was a phased return to work, when Mrs Wilson was well enough to commence this.
52. On 18th July 2014, Mrs Wilson attended a meeting with Mr Thomas to discuss her long-term absence and discuss the latest OH report. Mr Thomas confirmed DVLA would be able to support Mrs Wilson with phased return; temporary or permanent change to working hours or pattern of work; temporary or permanent change to Mrs Wilson's duties and any specialist aids or equipment that would assist Mrs Wilson to return to work. He gave Mrs Wilson a copy of the different part-time shift patterns that were available for her to consider. He explained she would need to complete a Request to Change Working Hours form which would be considered by the Change of Hours panel. Mrs Wilson confirmed she did not feel able to return to work yet. Mr Thomas encouraged Mrs Wilson to consider different shift patterns as he was concerned that at some point, given the level of previous absences he would need to consider whether the level of absence could continue to be supported, which might lead to considering dismissal.
53. At Mrs Wilson's request, Mr Thomas completed the Request to Change Working Hours form on her behalf on 30th July 2014. This requested a change of her shift to 8am to 4.30pm Monday, Wednesday, Friday; it was identified as being a temporary change for medical reasons.
54. Working Monday, Wednesday, Friday was not one of the 13 part-time shift patterns that was generally available in the DVLA Contact Centre. However, this request was approved for an 8-week period to commence on 1st September 2014. Mr Thomas explained in evidence that he anticipated that at the end of the 8-week period, Mrs Wilson would be well enough to return to her normal contracted hours. The tribunal find that this was a reasonable belief, as it is noted that in July 2014, Mrs Wilson was well enough to go away for a short holiday, so her condition was clearly improving around this time.
55. On 21st August 2014, Mr Thomas had a telephone conversation with Mrs Wilson. During this conversation, Mr Thomas explained Mrs Wilson could work the part-time 8am start Monday, Wednesday, Friday shift pattern she had requested for 8 weeks and for the first 4 weeks of this period she would be undertaking a phased return to work as recommended by OH.

56. On 28th August 2014, Mrs Wilson attended a further meeting with OH. In the fifth OH report (28th August 2014) it is noted that Mrs Wilson treatment had recently changed and that this was proving beneficial to her sleeping patterns. She was noted to be experiencing ongoing symptoms of extreme fatigue and muscle pain which had not changed considerably in presentation. She was planning a return to work but expressing concern as to how she would cope as her condition fluctuated in severity on a daily basis. The OH Advisor concluded Mrs Wilson was fit to return to work with adjustments and recommended (1) the phased return for 4 weeks, (2) part-time hours for 8 weeks with reduced call lines and (3) weekly progress reviews.
57. On 1st September 2014 Mrs Wilson started her phased return to work (working 8am to 11.45am, Monday Wednesday Friday in that first week). During the morning, she emailed Mr Thomas *"I don't know who told you adjustments to shifts / times can only be temporary but if you look at the enclosed information regarding disability law it shows that they can be made permanent....I've spoken to the union who have said they will look at my case with a meeting with management tomorrow....My energy is really scarce at the moment and if I am pushed to do too much either travelling or too many hours I am scared I will crash again. I might be better in eight weeks but this may last years as it did last time. I need to know that as long as I am symptomatic the adjustment to early shift and the three-day week will be available to me. I appreciate all the support both personal and from the Agency so far during this long illness."*
58. In evidence Mr Thomas explained that at this point he understood that temporary rather than permanent adjustments were appropriate as OH advice had recommended temporary adjustments and until Mrs Wilson tried the new shifts no one knew whether the adjustments would work (ie would they be effective in supporting her?)
59. On 3rd September 2014, Mr Thomas met Mrs Wilson to discuss the fifth OH report. Mr Wilson confirmed the arrangements for the phased return to work (Mrs Wilson would gradually build up her hours each week so that by week 5 she was working 8am to 4.30pm Monday, Wednesday, Friday). It was also confirmed that for 8 weeks she would be working the Monday, Wednesday, Friday, 8am start shift that had been approved. In addition, Mr Thomas explained he had *"a plan put in place to re-introduce [her] to telephony duties gradually by listening to colleagues initially, before taking calls on a reduction in skills. When [she was] ready, [she would] refresh [her] knowledge of medical through listening to colleagues, before returning to full skills."* These adjustments would be reviewed on a weekly basis.
60. On 9th September 2014, Mrs Wilson sought advice from Disability Law Service. In their letter of the same date, they advised Mrs Wilson upon the duty to make reasonable adjustments and the time limit for presenting a claim to the Employment Tribunal.

61. On 10th September 2014, as her previous absence had reached another trigger point in the attendance policy, Mr Thomas had an attendance management meeting with Mrs Wilson at which he decided to issue a First Formal Warning for Mrs Wilson having had 118 days of sick leave over 3 occasions between 23rd August 2013 and 29th August 2014. The trigger point at which a manager has to consider formal action is 12 working days (or 5 occasions) of absence in a rolling 12 month period. This formal warning meant Mrs Wilson would be subject to a 6 month review starting on 10th September 2014, during which period if she had more than 5 days absence or more than 3 occasions of absence further formal action would be considered. Mindful of Mrs Wilson's disability, Mr Thomas had adjusted the trigger points during the review period.

Third request for reasonable adjustments: request for “permanent for the foreseeable future” Monday Wednesday Friday, 8am-start shift

62. On 22nd September Mrs Wilson completed a Request to Change Working Hours form requesting the adjustments that she had in place on a temporary basis be made “*permanent for the foreseeable future*” “*...I need to be permanently on the 8-4.30 shift*” ...“*permanent ...whilst my condition is symptomatic*”. She explained later shifts caused her to get more tired increasing her symptoms. She also explained that she did not drive and had to take public transport if she could not get the work bus. She explained the four-hour commute. She also explained having a day off between working days gave her chance to recuperate. She concluded “*Both the adjustments I have requested have been recommended in my OH reports*”. This comment was not strictly correct, as the latest OH report had only recommended an 8-week adjustment and there had never been an OH report recommending she be given the 8am shift pattern, let alone be given it permanently. The third OH report had recommended reducing Mrs Wilson's hours long-term.

63. In September 2014, Mrs Wilson's recollection of what OH reports had actually recommended appears to be flawed; in an email of 23rd September 2014 to Disability Law Service she again says “*This makes no sense as the part time hours and early shifts I requested WERE recommended in my OH report so it appears whether it is recommended by OH or not they still say no.*” Whilst part time hours had been recommended by OH, at this point, there had been no OH recommendation for Mrs Wilson to be given an early shift. At this point, DVLA managers had complied with every OH recommendation, to the letter.

64. As an example of how keen Mr Thomas had been to support Mrs Wilson, the tribunal notes that the work bus dropped passengers off at the Contact Centre at 8.02am and picked passengers up from the Contact Centre at 4.40pm each day. On Fridays the bus picked up from the Contact Centre at 4.20pm. This meant when Mrs Wilson was travelling by works bus she was actually arriving for work slightly late every day and was leaving work earlier than the end of her

shift every Friday, which Mr Thomas was happy to support. It was also clear from Mrs Wilson's evidence, that she was very grateful for the lengths that Mr Thomas and other colleagues had gone to, to support her. For instance, Mrs Wilson's colleagues would give her lifts to/from work when possible.

65. The Change of Hours panel asked Mr Thomas to refer Mrs Wilson for further OH advice in particular on the shift pattern to be worked.
66. On Monday 29th September having worked for nearly 2 hours, Mrs Wilson became unwell and was admitted to hospital by ambulance. Subsequently it was confirmed she had gastroenteritis. On Wednesday 1st October she took a "duvet day". On Friday 3rd October she returned to work.
67. On 17th October 2014, Mrs Wilson had a meeting with the OH adviser. In the sixth OH report (22nd October 2014) it is noted the Monday, Wednesday, Friday shift pattern which had initially been recommended for 8 weeks had been extended to a 12 week period by DVLA. The OH adviser notes Mrs Wilson felt able to manage her attendance with the rest day in between, which was supporting a manageable work / life balance. It is also noted that any further increase in hours would be likely to affect Mrs Wilson's ability to function adequately when away from the work place. The OH adviser recommended management explore the possibility of reducing Mrs Wilson's hours on a permanent basis and *"consider shift patterns as this can also be difficult to manage as [Mrs Wilson's] symptoms tend to exacerbate as the day progresses. Therefore an earlier start might prove more beneficial."*
68. Mr Thomas met Mrs Wilson on 22nd October 2014 to discuss the latest advice from OH. He confirmed the Change of Hours panel were still considering her request. He also stated the temporary change of hours would remain in place as well as the reduction in skill advice areas Mrs Wilson was having to cover. He also explained Mrs Wilson could adjust her breaks / lunch if that assisted.
69. On 24th October 2014, Ms Percival wrote to Mrs Wilson confirming her request was still being considered and that in the meantime, her temporary shift pattern (Monday, Wednesday, Friday 8am to 4.30pm) had been extended to 28th November 2014.
70. By letter of 14th November 2014, Ms Percival wrote to Mrs Wilson explaining that the Monday, Wednesday, Friday 8am to 4.30pm shift pattern was not sustainable on a permanent basis. Ms Percival stated it would have a detrimental effect on DVLA's ability to meet customer demand and an impact on the performance of the business; staff were employed on flexible shift patterns to cover all hours of business. In addition to the part time shift patterns that were available to other employees, Ms Percival offered a unique part time shift pattern of Monday Wednesday Friday, variable shift pattern with shifts between 8am and 7pm. Ms Percival explained she had also made enquiries

with Job Centre Plus who run an Access to Work scheme which helps employees who find it difficult to use public transport. She provided contact details for this assistance and explained they could potentially help with taxis to / from work which would be either partially or fully subsidised. She explained Mrs Wilson's temporary shift pattern would revert to 37 hours Monday to Friday on 1st December 2014, but if Mrs Wilson wanted to pursue the alternative part-time pattern or any other shift pattern that was on offer, she should contact Ms Percival. For instance, there were part-time shift patterns that entailed working 8am to 2.30pm, 4 days each week.

71. By email of 17th November 2014, Mrs Wilson responded to Ms Percival *"Thank you for your letter refusing to make the reasonable adjustments to my shift times as requested by myself and supported by my Doctor and Occupational health assessments. I am currently considering my response."* Mrs Wilson went on to request detailed information about the provision of fixed shifts as part of a reward and recognition scheme, including statistics, impact assessments, discussions with staff etc. She requested this information as soon as possible as she wanted to organise a meeting with her union representative "this week".
72. Ms Percival's response of 24th November 2014, provided full information about a scheme that was being trialled as part of the reward and recognition process, to reward staff with more than 6 years service and 100% attendance and no formal warning. The aim of the trial was to retain longer serving staff and encourage 100% attendance. The trial had started on 27th October 2014 and so far 69 staff had taken up the offer of fixed shifts, of whom 68 had chosen the early shifts (ie 8.30, 9.00 or 9.30am start). This equated to 8.5% of all telephone advisors and if this increased the DVLA would have to review the scheme as it would impact on ability to meet customer demand. The tribunal notes this was a scheme that was only available to colleagues who had 6 years or more service with DVLA. The tribunal notes that of the 69 staff eligible to choose a fixed shift pattern, 68 chose to work the early shift, which demonstrates how unpopular the later shifts were. In fact, the scheme was brought to an end during the 6-month trial period, as management realised it was causing operational difficulties meeting customer demand across the DVLA's opening hours.
73. Having provided the detailed information requested, Ms Percival went on to explain *"To support you in times of difficulties when you are symptomatic your request for a temporary change of hours to this shift pattern has been approved, however in the long term this is not sustainable. This has been extended from 2 months to 3 months. You may wish to consider the 5 part time shift patterns which offer shorter days and earlier finish times and I hope that the information in relation to the "access to work" scheme has been of help to you"*. In evidence Ms Percival explained Mrs Wilson was the only employee in the DVLA to work the 3 fixed days per week, 8am start and that in the long-

term this was unsustainable as it was difficult to recruit to cover Tuesday and Thursday only shifts and to manage cover for the evening shifts; whilst Mrs Wilson was working this unique shift pattern, on Tuesdays and Thursdays, Mrs Wilson's team were under additional pressure as they were one person short. The 13 part time shift patterns had been devised to fit together to enable the DVLA to have sufficient advisers to respond to phonecalls throughout the day, across the working week.

74. On 25th November 2014, Mrs Wilson's GP wrote to the DVLA, *"As you know this lady suffers from ME. The progress of this condition is unpredictable and whilst she may be very well at times there will also be times when she is incapacitated for variable periods. During these times tiredness will exacerbate her symptoms. It is important she keeps active and so I would appreciate if she could avoid late shifts during exacerbations."*
75. Mrs Wilson's temporary shift pattern (Monday, Wednesday, Friday 8am start) was extended to 19th December 2014.
76. At some point in November 2014, Mrs Wilson appealed Ms Percival's decision. Carole Evans, the most senior manager in the Contact Centre was appointed to consider Mrs Wilson's appeal.
77. By email of 10th December 2014, Ms Percival asked Mrs Wilson whether she had been able to progress the access to work application. Mrs Wilson replied *"I spoke to someone from Access to Work yesterday and to be honest he was flabbergasted that the reasonable adjustments I have requested have not been granted. In his words "It is the law, they have no choice." If they were to give me funding they would be helping an employer break the law and therefore they will not give me any funding for transport. It is a pointless waste of taxpayers' money when if these adjustments were granted no help from Access to Work would be necessary..."*
78. The tribunal notes from the Access to Work records that John Goldsmith (Access to Work adviser) notes during a conversation with Mrs Wilson on 11th December 2014, *"I told customer we would not support TTW app as clear RA's have been identified for her to be on permanent early shifts, so employer is obliged to put these in place"*. The tribunal notes that neither the GP, nor OH adviser have recommended that Mrs Wilson be *"on permanent early shifts"*.
79. Mrs Wilson was absent from work with flu-like symptoms on 15th December 2014. As this was her third period of absence within the 6-month period following her attendance warning, technically this had triggered consideration of a final formal warning. Mr Thomas deferred considering a final warning, as a reasonable adjustment.

Fourth request for reasonable adjustments: request to extend Monday Wednesday Friday, 8am-start shift pending outcome of appeal

80. Mrs Wilson submitted this fourth request on 18th December 2014. It was supported by Mr Thomas and approved by the Change of Hours panel, pending Ms Evans determination of the appeal, in which Mrs Wilson was receiving support from her union.
81. On 22nd December 2014, Ms Percival emailed John Goldsmith in an attempt to support the application for Access to Work support with taxi fares. She provided Mr Goldsmith with the various shift patterns available in DVLA and the additional patterns that had been offered to Mrs Wilson. She also explained why the 8am shift, Monday Wednesday Friday could not be sustained permanently.
82. By letter of 31st December 2014, Mr Goldsmith wrote to Mr Thomas explaining Access to Work agreed to help support Mrs Wilson's travel to work. The Access to Work grant would pay for up to 6 taxi journeys per week (which would have covered every journey necessary in a 3 day working week), (from Mrs Wilson's home address to her work address) each at a maximum cost of £15 per journey of which Mrs Wilson would have to contribute £2.10 per journey. This support was offered for the period 5th January 2015 to 4th April 2015 in the first instance, until a medical opinion had been provided. Both Mr Thomas and Ms Percival understood Mrs Wilson had received a copy of this offer. It was not until later in February 2015 that Mr Thomas became aware that Mrs Wilson had chosen not to pursue this transport. Ms Percival was not aware that Mrs Wilson had not pursued this transport until December 2015, when Mrs Wilson told her that she had experienced financial difficulty accessing this scheme. Ms Percival's evidence was that if Mrs Wilson had told her of this difficulty sooner, Ms Percival would have been able to explore with HR the possibility of subsidising the remainder of the cost of transport.
83. On 31st December 2014, Mrs Wilson attended work but had experienced headaches, pain and insomnia the night before so was not feeling well. Upon her arrival at work she told Mr Thomas she would like to make a leave request to go home, if leave became available due to low customer demand. Mr Thomas agreed Mrs Wilson could come off telephone duties; Mrs Wilson advised him that she was well enough to be in work but not to perform telephone duties. During the day, leave did become available, but leave was allocated in the order in which it had been requested. Mr Thomas sought advice about Mrs Wilson's leave request. Mr Thomas's manager, Mr Cobley confirmed that if Mrs Wilson was unwell she should go home on sick leave. Mrs Wilson declined to go home on sick leave. Instead she remained in work.

84. On 6th January 2015, out of professional courtesy, Ms Percival wrote to Mrs Wilson's GP explaining the reasonable adjustments that had been offered to Mrs Wilson.
85. By email of 12th January 2015, Ms Percival wrote to Mrs Wilson explaining the DVLA could not permanently support the fixed Monday, Wednesday, Friday 8am shift. Shireen Thomas, (Human Resources Business Partner and Disabled Persons Officer) also explained this decision to Mrs Wilson's trade union representative. It appears that Carole Evans had determined Mrs Wilson's appeal, although this is something the tribunal has not heard direct evidence upon.
86. As Mr Thomas and Ms Percival believed the Access to Work grant had resolved the transport issue, arrangements were made for Mrs Wilson to revert to a variable shift pattern later in the week.
87. Between 13th January and 27th January 2015, Mr Wilson was signed unfit for work – whilst this was partly due to ME symptoms, Mrs Wilson was also experiencing difficulty with a sore throat / difficulty swallowing and was being investigated for goitre and Sjogren's syndrome.
88. By telephone conversation, Mrs Wilson confirmed she was well enough to take pre-booked leave between 28th January and 6th February 2015. Mrs Wilson took further sick leave between 9th and 13th February 2015.
89. By letter dated 9th February 2015, DVLA confirmed Mrs Wilson's new shift pattern would be Monday, Wednesday, Friday working 7 ½ hours per day with no shift finishing later than 5.30pm. The tribunal note that whilst this was not the 8am to 4.30pm shift pattern requested, the DVLA were making adjustments and creating another unique shift pattern for Mrs Wilson – the part time 3 day shift patterns routinely available were all variable shifts ending anytime up to 7pm.
90. On 16th February 2015, Mrs Wilson returned to work and worked the 8.15am to 4.45pm shift that week (Monday, Wednesday, Friday). The following week she worked the 8.30am to 5.00pm shift (Monday, Wednesday, Friday) and the week after the 9.00am to 5.30pm shift (Monday, Wednesday, Friday).
91. During Mrs Wilson's absence in early February 2015, DVLA had been trying to arrange a further OH appointment. On 3rd March 2015, Mrs Wilson met Dr Jones, who prepared the seventh OH report dated 11th March 2015. In his report, Dr Jones noted Mrs Wilson's main complaints were ongoing tiredness, muscle pain and general fatigue. He notes she had also been having problems with intermittent altered sensation and muscle spasms in her upper and lower limbs, for which she was due to see a neurologist. He notes she was experiencing dry throat and dry eyes and was being investigated for Sjogren's

disease. He notes Ms Wilson also had an under active thyroid and was taking replacement therapy which was keeping this condition stable. Dr Jones concludes *"it would be appropriate, where possible, to allow [Mrs Wilson] to avoid late shifts where possible and also afford her the option of some further flexibility with her working hours where possible...due to the sensation of dryness in her throat, and in the interim period while she undergoes further investigation, it may be prudent where possible to allow her to reduce the amount of telephone work....In addition...because of the fact that she does not drive...she indicated that working in the main site would make travel arrangements easier but clearly this would be a decision for management to consider....if the situation is such that Mrs Wilson continues to struggle to manage her 22 ½ hours per week it may be that a further reduction in her weekly working hours may need to be considered"*.

92. Mr Thomas met Mrs Wilson on 11th March to discuss the seventh OH report. It was noted that Mrs Wilson would not be working later than 5.30pm with the new Monday Wednesday Friday shift patterns. Mr Thomas explained he needed to seek extra advice about the telephony work and would need to refer to senior management the comment about working on main site rather than the contact centre. Mrs Wilson was also advised that a further reduction to hours could be considered if Mrs Wilson wanted to pursue this.
93. By email of 13th March 2015, Mrs Wilson complained to Mr Thomas that the DVLA did not appear to be taking her symptoms seriously. She felt DVLA should make adjustments to their short term leave policies to help her manage her attendance at work and they should also recognize that a role talking on the phone was not apt for someone with her conditions. Finally, she indicated she should be moved to a role on the main DVLA site.
94. Mr Thomas sought further advice from OH. By letter of 24th March 2015, (the eighth OH advice) Dr Grainger confirmed the advice regarding the use of the telephone related to Mrs Wilson currently being investigated for symptoms of a dry throat and dry eyes, which may or may not be indicative of an underlying connective tissue disorder. The GP was undertaking investigations to exclude this. *"This advice is clearly only temporary and may indeed not be required. It was purely an observation that I thought I ought to mention...I would therefore suggest that this particular part of her job is individually risk assessed and indeed these symptoms may not impact on her work ability at all."*
95. Between 2nd April and 13th April 2015, Mrs Wilson was off work with exhaustion and muscular / joint pain.
96. Following the further OH advice, Mr Thomas met Mrs Wilson on 13th April 2015 and agreed she should take 5 minute rest breaks to help with her throat condition. Mrs Wilson was unhappy that the OH additional advice appeared to have been provided by a different doctor. Mr Thomas wrote to OH again,

asking that Dr Grainger respond to the request for additional advice. Mrs Wilson also forwarded a detailed request to Doctors Grainger and Jones requesting a further report.

97. By email of 17th April 2015, Mrs Wilson wrote to Mr Thomas explaining she had been diagnosed with fibromyalgia. Her specialist had indicated she thought the dry throat symptoms were a side effect of anti-depressant medication, but further tests were being undertaken to rule out Sjorgren's disease and lupus. She requested a further referral to OH.
98. By letter of 22nd April 2015 (the ninth OH advice), the OH company responded by advising Mrs Wilson to take a plentiful supply of water for her throat difficulties but noted this did not appear to be helping. The OH adviser commented if simple measures did not control her symptoms it would become a capability issue at which point DVLA should ensure they gain further medical evidence to establish whether there was an underlying medical reason for Mrs Wilson's throat symptoms.
99. On 8th May 2015, Mr Thomas met Mrs Wilson to discuss the latest advice from OH. It was agreed Mrs Wilson would drink a plentiful supply of water and would continue to take a 5-minute break each hour. Mrs Wilson confirmed she had undergone recent blood tests. She confirmed she was "feeling a lot better lately" and felt the fentanyl back patches she'd been using were helping. She had stopped taking the medication the Rheumatologist thought was causing the dry throat and reported the dryness sensation had reduced but not gone completely.
100. On 22nd May 2015, as her sickness absence had reached another trigger point Mrs Wilson was invited to an attendance management meeting. This meeting took place on 3rd June 2015. As she had 11 days absence over 3 occasions, Mr Thomas issued a further First Formal Written Warning. This meant Mrs Wilson's attendance would continue to be monitored during the period, 3rd June to 3rd December 2015.

Fifth request to change shift pattern: request to increase hours

101. In May and June 2015, Mrs Wilson was experiencing better health. She did not raise any concerns about working the Monday, Wednesday, Friday (up to 5.30pm) shifts during this period.
102. On 20th July 2015, Mrs Wilson emailed Mr Thomas a request to increase her hours to 30 hours per week by working Thursdays in addition to her Monday, Wednesday, Friday shifts. Mrs Wilson explained she was making this request due to financial reasons; whilst her health had improved, she knew she was going to find it difficult to increase her hours.

103. Mr Thomas referred the request to the Change of Hours panel. This request was declined, as DVLA were concerned it would have an impact on Mrs Wilson's health. Mrs Wilson appealed this decision. The appeal hearing was due to take place on 26th November 2015.
104. Around this time, Mrs Wilson began experiencing pain in her ears and back pain from sitting in her chair. Mr Thomas referred Mrs Wilson to OH. Following a meeting with Mrs Wilson on 3rd August 2015, Judy Bolton advised, both Chronic Fatigue Syndrome and Fibromyalgia tend to have symptoms that are ongoing fluctuating intermittent and complex in nature. Symptoms include exhaustion, painful joints and muscles, "brain fog" which affects cognitive function. Individuals tend to feel low in mood which affects their general health and wellbeing. Ms Bolton explained Mrs Wilson was also being investigated for Sjorgren's syndrome. Ms Bolton noted Mrs Wilson reported experiencing pain in both ears from wearing earphones and was experiencing back pain from sitting for long periods. She also noted that 4 hours travelling each day appeared to have a negative effect on Mrs Wilson's energy levels.
105. In her report of 3rd August 2015 (the tenth OH advice), Ms Bolton recommended Mrs Wilson had:
- a DSE assessment,
 - 5 minute breaks in each 40 to 60 minute period,
 - a physiotherapy assessment including an assessment of Mrs Wilson's chair,
 - permitted time to attend physiotherapy and medical appointments,
 - variations in the headset used,
 - a "set shift pattern" for 3 months,
 - further OH appointment in 6 weeks, and
 - regular meetings with her manager.
106. On 3rd August 2015, Mr Thomas met Mrs Wilson and considered Ms Bolton's advice. He explained he would be able to put each of the recommendations into place – the only one he could not personally arrange was the "set shift pattern" for 3 months. He said he would refer this to the Change of Hours panel, who had authority for making this decision.
107. The referral was made to the Change of Hours panel on 14th August 2015. There was some confusion as to whether the request for the "set shift pattern" was initially declined by the panel - there appears to be a tick next to the word decline on this form.
108. On 27th August 2015, Kelly Joseph, Drivers Operational Manager, sent an email to Mrs Wilson confirming the DVLA had:

- previously agreed to Mrs Wilson working Monday, Wednesday, Friday, shifts ending no later than 5.30pm
 - recently agreed (at the Change of Hours panel on 21st August 2015) to Mrs Wilson's request to work fixed shifts, Monday Wednesday Friday 8am to 4.30pm for the next three months.
 - rejected the request to work Thursday in addition as DVLA felt this would not give Mrs Wilson time to rest which could have a detrimental impact on her health.
109. In the meantime, on 24th August 2015, Mrs Wilson had written a detailed 12-page letter of complaint to Philip Rutnam, the Civil Service Disability Champion. At the end of her letter she had requested Mr Rutnam set up an enquiry without telling DVLA who had made the complaint.
110. During cross examination, Shireen Thomas recalled that at some point in 2015 / 2016 Caroline Hirst and herself had been asked to respond to issues raised in a redacted document. No individual was named in this document; it made enquiries about how the DVLA Contact Centre approached requests for reasonable adjustments. She recalled it was making enquiries "in very general terms". She recalled responding that the DVLA would encourage any individual that needed assistance with reasonable adjustments to speak to herself or Caroline. She accepted there was likely to have been a written response at the time, but explained that usually documents are not retained for longer than 12 months.
111. During the tribunal hearing, Mrs Wilson felt aggrieved that somehow DVLA had received an unredacted copy of her complaint to Mr Rutnam. The tribunal accepts Mr Thomas and Ms Percival's evidence on this. Mr Thomas believes the document was sent to him by email, by Mrs Wilson in error. He cannot recall when this happened. He recalls mentioning it to Ms Percival, but they did not action it further as they realised it had been sent in error. The tribunal accepts this is the most likely explanation for an unredacted copy to be in the DVLA's possession. We note Mrs Wilson sent her email to Mr Rutnam late in the evening and she has sent other email correspondence late in the evening. We accept that it is more likely than not that this document was accidentally sent to Mr Thomas by Mrs Wilson.
112. Between 7th September 2015 and 4th January 2016, Mrs Wilson was on sick leave, with depression and anxiety as a result of her ME and fibromyalgia.

Sixth request for adjustments: to move to main site and change role

113. On 17th September 2015, Mrs Wilson sent an email to Mr Thomas which attached a "Request for Reasonable Adjustment..." document. In her request, Mrs Wilson requested a "*priority move to one of the 30 or so vacancies in Enforcement casework that have arisen at DVLA main site*".

She explained *“The biggest problem impacting on my health in terms of the workplace itself is travel to work. I cannot get to work alone as I do not drive and any journey I make via public transport has now been made impossible for health reasons (It takes a minimum of two hours each way with an hour of this journey being walking which I can no longer sustain). I cannot make use of the Access to Work scheme as I earn so little now being part time that I cannot afford to take £30 a day out of my wages to pay for the cabs required; in addition I believe that expecting me to do this shifts the burden of making the adjustment from the employer to the disabled employee which I believe is contrary to the Equality Act....If I am redeployed to ...main site, I can get the work bus in and out of work every day, which picks me up and drops me off right outside my house...I am also finding the noise of advisors around me talking all the time extremely distracting to the point of causing me headaches every working day....One of my most troublesome problems at the moment is the pain in my ears from the headphones....One of the symptoms of fibromyalgia is increased sensitivity to touchthis seems to be what is occurring on my ears.”*

114. Mrs Wilson was referred to OH for a further assessment. She attended an appointment with Ms Bolton on 12th October 2015. In her report of 14th October 2015, Ms Bolton notes *“[Mrs Wilson] informs me that the recommended set shift pattern for a period of 3 months was declined and she now feels not in a position to continue in the Contact Centre owing to the hours in association with previously reported commuting difficulties in addition to the nature of her role and the constant demands.”* Ms Bolton recommended Mrs Wilson have an appointment with the occupational health physician. The tribunal notes that Ms Bolton’s statement is incorrect; the Change of Hours panel had approved this 3 month shift pattern request, as had been confirmed to Mrs Wilson by email of 27th August 2015, from Kelly Joseph. (see paragraph 108 above)
115. On 4th November 2015, Mrs Wilson attended an appointment with Dr Devlin. In her report of 5th November 2015 (the twelfth OH report), in relation to work situation, Dr Devlin notes, *“on discussing the work related difficulties that she perceives have contributed to her current ill health, she stated that if working an 8 – 4.30 shift she can travel on the work bus but otherwise needs to travel by public transport; a journey that can take 2 hours each way, including 1 hour walking, which she feels unable to manage, due to her medical condition ...In terms of adjustments, working a set shift would be of benefit to her in managing her longstanding musculoskeletal symptoms as this would enable her to travel using the work bus. I appreciate that accommodating any such request would be a management decision based on business needs.”* [tribunal emphasis]
116. On 19th November 2015, Mr Thomas met Mrs Wilson to discuss her absence. Mrs Wilson was accompanied by a colleague, Ms Lovell. Mrs Wilson felt

aggrieved that DVLA had declined her request to increase her hours and had not agreed to her working a set shift pattern. Mr Thomas confirmed her appeal was due to be considered by Donna Griffiths. Mrs Wilson also felt aggrieved that the occupational health doctor had not really listened to her.

117. On 2nd December 2015, Ms Percival had a meeting with Mrs Wilson, Mr Thomas and Ms Lovell, to discuss the latest OH advice. Ms Percival noted the latest OH report recommended a fixed shift 8am to 4.30pm. She explained that as the Contact Centre could not accommodate this shift pattern on a permanent basis she would be recommending Mrs Wilson be placed on the Priority Movers List ("PML") for a role in the DVLA's main site. Mrs Wilson was happy with this suggestion. Ms Percival raised Mrs Wilson's request to increase hours; Mrs Wilson explained she could not increase hours in her current condition but would like to when she was feeling better. Ms Percival explained that when Mrs Wilson was well enough to return to work the Contact Centre would accommodate the 8am to 4.30pm shift pattern until Mrs Wilson had found an alternative post through PML. There were different headsets available which Mrs Wilson could trial to see if they assisted with her ear pain. She would also return on a phased return basis and would take breaks away from the phone as previously recommended by OH.
118. On 3rd December 2015, a PML Pen Portrait was completed for Mrs Wilson which explained she was interested in working 7.24 hours over 4 days and would need a set shift pattern of 8am to 4.30pm as this enabled her to catch the works bus.
119. On 4th January 2016, Mrs Wilson returned to work. On 22nd January 2016, Mr Thomas conducted a Final Formal Warning Review attendance meeting with Mrs Wilson and as a reasonable adjustment declined to issue a Final Formal Warning. He issued a further First Formal Warning which meant Mrs Wilson's attendance would be subject to a further 6 month review period.
120. Mrs Wilson viewed alternative employment options available in the main DVLA site. She was offered a post as an AO in Data Customer Assurances and Compliance Support in the Casework and Enforcement team. This was to work 30 hours per week immediately and then up to 37 hours per week in 6 months time. Mrs Wilson attended an OH appointment on 25th January 2016, to consider the suitability of this role. In the OH report of 28th January 2016, it is noted that Mrs Wilson reported she was coping well with her duties and is enjoying social interaction with colleagues. Dr Devlin reports Mrs Wilson "*does not have any concerns*" about the hours involved with the new job and she has previously asked to increase her hours. It is also noted the new job would enable Mrs Wilson to use work transport. Dr Devlin concluded Mrs Wilson was medically fit to undertake the new role. Mrs Wilson started work in this new role, at the main DVLA site on 9th February 2016, initially

working 4 days per week but subsequently increasing to 5 days per week (37 hours).

121. On 4th July 2016 Mrs Wilson made a request to reduce her hours to 32 hours per week (having Wednesdays off work to rest). This request was granted on 7th July 2016.
122. Mrs Wilson's first period of sick leave in the new role started on 28th July 2016 when she was off work with a flare up of fibromyalgia. She started a phased return to work on 12th September 2016.
123. On 3rd January 2017, Mrs Wilson requested a temporary reduction of hours to work 2 days only (Monday and Thursday) for a period of 3 months due to her ME and fibromyalgia. On 30th January 2017, she started her 2-day contract which was due to last until 30th April 2017.
124. Between 13th April 2017 and 18th May 2017, Mrs Wilson was off work with fibromyalgia. Her 2-day contract was extended to the end of July 2017. On 22nd May 2017 she returned to work on a phased return basis.
125. On 15th June 2017, Mrs Wilson attended a meeting with her new line manager, to consider her attendance. As a reasonable adjustment, her new line manager decided not to issue a warning.
126. On 12th July 2017, Mrs Wilson contacted ACAS. On 20th July 2017 the ACAS EC certificate was issued.
127. On 18th July 2017, Mrs Wilson started another period of ill health absence due to fibromyalgia.
128. On 20th July 2017, she issued the ET1 claim form in these proceedings.
129. On 27th July 2017 during a telephone conversation, Mrs Wilson advised her line manager that she had spoken to her GP that morning to *"tell him how she was feeling (depression) and for extra pain medication"*. Her line manager records *"Mrs Wilson] has changed her medication for depression and currently she is not finding it helpful."*
130. Mrs Wilson returned to work on 14th September 2017, following this period of ill health.

The Law

131. Section 39(2) Equality Act 2010 ("EqA") provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include (at Section 39 (5) EqA) that an

employer has a duty to make reasonable adjustments for a disabled employee.

132. EqA protects employees from discrimination based on a number of “protected characteristics”. These include disability (Section 6 EqA).

Disability Discrimination

133. As Baroness Hale explained in *Archibald v Fife Council* [2004] UKHL32, disability discrimination is different from other types of discrimination, as the difficulties faced by disabled employees are different from those experienced by people subjected to other forms of discrimination,

...[the Disability Discrimination Act 1995] is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminate against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.”

134. This element of more favourable treatment is reflected in the types of protection that are unique to disability: Section 20-21 EqA (failure to make reasonable adjustments) which requires an employer to take action in certain circumstances.

Failure to make reasonable adjustments

135. Disability discrimination can take the form of a failure to comply with the duty to make reasonable adjustments (see Sections 20, 21(2), 25(2)(d) and 39(5) EqA).
136. Section 20 EqA imposes, in three circumstances, a duty on an employer to make reasonable adjustments. They include, at Section 20(3) EqA, circumstances where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in comparison with those who are not disabled. The duty then requires an employer to take such steps as it is reasonable to have to take to avoid the disadvantage (Section 20(3) EqA).
137. Section 212(1) EqA defines "substantial" as "more than minor or trivial"; it is a low threshold. However this exercise requires the Tribunal to identify the nature and extent of the claimant's substantial disadvantage in meeting the

PCP, because of his disability (see Chief Constable of West Midlands Police v Garner EAT 0174/11).

138. Mrs Wilson bears the burden of proving each PCP put her at a substantial disadvantage in comparison with non-disabled colleagues. As the EAT stated in *Project Management Institute v Latif* [2007] IRLR 519:

We very much doubt whether the burden shifts at all in respect of establishing the provision, criterion or practice, or demonstrating the substantial disadvantage. These are simply questions of fact for the tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant. These are not issues where the employer has information or beliefs within his own knowledge which the claimant cannot be expected to prove. To talk of the burden shifting in such cases is in our view confusing and inaccurate.

139. When assessing whether there is a substantial disadvantage, the Tribunal must compare the position of the disabled person with persons who are not disabled. This is a general comparative exercise and does not require the individual, like-for-like comparison applied in direct and indirect discrimination claims (see *Smith v. Churchill's Stairlifts plc* [2006] IRLR 41 CA and *Fareham College Corporation v. Walters* [2009] IRLR 991 EAT). The House of Lords confirmed in *Archibald v Fife Council* [2004] UKHL 32 that an employer is no longer under a duty to make reasonable adjustments when the disabled person is no longer at a substantial disadvantage in comparison with persons who are not disabled.
140. There are supplementary provisions in Schedule 8 EqA. Paragraph 20 of that Schedule provides that the duty to make reasonable adjustments only arises where an employer knows (or ought reasonably to know) of both the disabled person's disability and of the substantial disadvantage to which the person is placed.
141. Once the duty has arisen, the Tribunal must consider whether the respondent has complied with it by taking such steps as it was reasonable to have to take to avoid the disadvantage. In many cases, the question of compliance with the duty will turn on whether a particular adjustment was (or, if not made, would have been) "reasonable". This is an objective test to be determined by the Tribunal and can be highly fact-sensitive. It is a rare example of Tribunals being permitted to substitute our own views for those of the employer where we consider, in effect, that it ought to have reached a different decision. Lord Hope explained in *Archibald v Fife Council* [2004] IRLR 651, that sometimes the performance of this duty might require the employer to treat a disabled person, who is in this position, more favourably to remove the disadvantage attributable to the disability.

142. The Tribunal has considered Mr Justice Langstaff's guidance in *The Royal Bank of Scotland v Ashton* [2010] UKEAT/0542/09 and notes the importance, in a reasonable adjustments claim, of considering the result, not the particular process by which it has been reached.
143. It is important to assess whether a proposed adjustment would have avoided the disadvantage – in lay terms, whether it would have worked. The factors that ought to be taken into account when determining whether an adjustment was reasonable are set out in paragraph 6.28 of the EHRC Code of Practice. They include: whether the steps would be effective; the practicability of the steps; the financial and other costs of making the adjustment; the extent to which it would disrupt the employer's activities; the extent of the employer's financial or other resources; the availability to the employer of financial and other assistance to help make the adjustment (such as advice through Access to Work) and the type and size of the employer.
144. In *Leeds Teaching Hospital NHS Trust v Foster* [2011] UKEAT/0552/10/JOJ Keith J confirmed that it was not necessary for the Tribunal to find there was a "real prospect" of the adjustment removing the particular disadvantage; it was sufficient for the tribunal to find that there would have been "a prospect" of that.

Time Limits

145. S123 EqA prescribes time limits for presenting a claim:
- (1) ...Proceedings...may not be brought after the end of-**
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or**
 - (b) such other period as the tribunal thinks just and equitable**
 - ...
 - (3) For the purposes of this section-**
 - (a) conduct extending over a period is to be treated as done at the end of the period;**
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.**
 - (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something -**
 - (a) when P does an act inconsistent with doing it, or**
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**
146. As Mr Walters has submitted, the leading authority on limitation in a reasonable adjustments claim is the recent Court of Appeal decision in *Morgan v Abertawe Bro Morgannwg University Health Board* 2018 EWCA CIV 640. The tribunal pay particular regard to Lord Justice Leggatt's explanation in paragraphs 11 to 16. He explains the failure to comply with the duty should be treated as occurring on the expiry of the period in which

the employer might reasonably have been expected to make the adjustment. The tribunal should ask itself at what point did it become clear or should it have become clear to the claimant that her employer was not complying with its duty to make reasonable adjustments.

Conclusions

147. The Tribunal started by identifying any provisions criteria or practices (“PCP”) that DVLA had applied to Mrs Wilson and to others not sharing her disability. Adopting Mrs Wilson’s numbering from her schedule at pages 80 to 83 in the bundle, we found:

Alleged PCP1: requiring competitive interview for training on email duties

148. There was no policy or practice applied to Mrs Wilson, of requiring her to undertake a competitive interview for training on email duties. We found that Mrs Wilson had only verbally expressed an interest in moving to emails in March 2014 and did not pursue this any further. Mr Thomas was clearly very supportive of Mrs Wilson throughout the time he was her line manager. When Mrs Wilson enquired about moving to emails, Mr Thomas discussed this with Mr Cobley and they both felt it would create additional stress for Mrs Wilson. We accept they were genuinely trying to support Mrs Wilson and trying to reduce stressors for her as had been advised by OH. Mrs Wilson had such an excellent relationship with her line manager Mr Thomas, we believe that if she had pursued this enquiry further, Mr Thomas would have assisted her to access this training. When email teams were being established shortly before August 2014, the procedure was that a person needed to complete an Expression of Interest form. Mrs Wilson did not complete an Expression of Interest form, nor did she raise this further with Mr Thomas.

Alleged PCP2 & PCP 9: requirement to work variable shift patterns / work shifts

149. There was a policy applied to Mrs Wilson and to other telephone advisors (that did not share her disability) working at the DVLA contact centre, requiring them to work variable shift patterns.
150. The tribunal accepts that when Mrs Wilson was experiencing a flare up of symptoms with ME and/or Fibromyalgia this policy did place her at a substantial disadvantage compared to persons that did not share her disability - when she was experiencing ME / Fibromyalgia symptoms, working later shifts would exacerbate her health condition. When she was experiencing ME / Fibromyalgia symptoms, having to catch public transport and the additional exertion of a lengthy commute (involving walking for a period of time) would also exacerbate her health conditions and cause her considerable tiredness and/or pain.

151. Both health conditions are permanent, however, both health conditions have a fluctuating severity of symptoms. Mrs Wilson was able to work variable shifts for 3 years when she joined DVLA – during this period of time, the PCP did not place her at a substantial disadvantage compared to persons that did not share her disability. She was able to work variable shifts and able to undertake the commute using public transport.
152. The tribunal concluded that Mrs Wilson was placed at a substantial disadvantage by this policy, when she was experiencing a flare up of ME / Fibromyalgia symptoms. This meant DVLA were under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage that Mrs Wilson was experiencing.
153. Mrs Wilson has asserted the reasonable adjustment would have been to allow Mrs Wilson to work the 8am to 4.30pm, Monday, Wednesday, Friday shift, from September 2014 permanently or until Mrs Wilson felt she no longer needed it.
154. The tribunal has set out in detail in the Findings of Fact, the adjustments the DVLA did make. In particular we note:
 - a. DVLA created a unique Monday, Wednesday, Friday shift pattern for Mrs Wilson and allowed her to work 8am to 4.30pm from September 2014 to February 2015, albeit this was expressed to be a temporary adjustment;
 - b. From February 2015 onwards, Mrs Wilson was able to work the unique Monday, Wednesday, Friday shift pattern, working no later than 5.30pm each day (rather than the standard shift pattern which includes shifts that finish at 7pm);
 - c. DVLA sought assistance from Access to Work and reasonably believed this to be a solution to Mrs Wilson's difficulty commuting to/from work. Transport to / from work by taxi would have been a better solution than catching the work bus as it would have kept Mrs Wilson's commute to a minimum period of time. Ms Percival was not aware of Mrs Wilson's difficulty implementing the Access to Work transport until December 2015 (nearly a year later) and explained that if Mrs Wilson had advised her of these difficulties she would have sought financial assistance from HR for Mrs Wilson.
 - d. DVLA repeatedly sought and complied with OH advice as to reasonable adjustments;

- e. OH advice during 2014 and 2015 indicated Mrs Wilson was experiencing and undergoing investigation into a number of symptoms, some of which may not have been related to her disability; and
 - f. The first time OH advice recommended or even implied that Mrs Wilson should be permanently given the 8am shift was Dr Devlin's report of 4th November 2015 - this led to Mrs Wilson being placed on the Priority Movers List and moving to the main site.
155. The tribunal finds it was reasonable for DVLA to keep making the temporary adjustments it did make in these circumstances. DVLA is a large employer and had particular difficulty recruiting for the Contact Centre and covering later shifts. It was entirely reasonable for the DVLA to require objective OH evidence for each reasonable adjustment and for there to be a period of temporary adjustments, when Mrs Wilson's conditions were still under investigation and when she was only at a disadvantage when her health conditions were particularly symptomatic. The tribunal finds that DVLA has discharged its duty to make reasonable adjustments in respect of this particular policy.

Alleged PCP3: requirement for competitive interview for internal vacancies

156. We did not hear evidence about any particular internal vacancy that Mrs Wilson pursued, so the tribunal cannot conclude any such policy was actually applied to Mrs Wilson.

Alleged PCP4: requirement for 100% attendance to apply for internal / external vacancies

157. During the course of proceedings, Mrs Wilson accepted the reference to 100% attendance was in relation to the reward and recognition pilot scheme that was introduced in October 2014; this pilot scheme applied to employees that had worked for DVLA for 6 years, so Mrs Wilson had insufficient service to be considered under this scheme. Mrs Wilson accepted this alleged PCP was not applied to her.

Alleged PCP5: requirement for short term leave requests to be booked three months in advance

158. The tribunal did not find there was a requirement for short term leave requests to be booked three months in advance. Again, there has been no such policy applied to Mrs Wilson and others that did not share her disability. From the evidence, the tribunal concluded the DVLA operated a policy of allowing staff to book leave in January, for the period January through to November. This leave could be supplemented by additional leave that was booked at any time

during the year (other than December when a different procedure applied), and could be booked at short notice, by requesting a day off via an employee's line manager. The line manager would need to check whether there was adequate cover on that day, but provided there was and provided the employee had leave entitlement outstanding, they would be able to take that day off.

159. There may have been occasions when Mrs Wilson requested leave at short notice, and it was not possible for Mr Thomas to approve the request due to other employees having already booked leave on those dates. Mr Thomas explained if the request for leave was because Mrs Wilson felt her symptoms were becoming worse it was more appropriate for Mrs Wilson to take sick leave. The tribunal accept it would not be appropriate for a manager to encourage a colleague to use their holiday entitlement if the reason for the request was ill health. Mr Thomas was right to encourage Mrs Wilson to take sick leave instead. Mr Thomas was aware he could exercise his discretion and make adjustments to the DVLA's Attendance Management procedures and he did make adjustments to these procedures in managing Mrs Wilson's attendance.

Alleged PCP6: requirement for "duvet days" to be booked on the morning of the day required, by telephone and with only the first 10 people to get through being allowed this leave

160. Mr Walters, on behalf of DVLA accepted this was the policy that was applied to Mrs Wilson and other employees. Mrs Wilson submitted this policy placed her at a substantial disadvantage as the phone lines opened at 7am which was the same time that she had to catch the bus to work. The problem with this submission is that everyone that wanted to catch the bus or that lived further away from the workplace was in the same position as Mrs Wilson – they were placed at exactly the same disadvantage as Mrs Wilson - so Mrs Wilson was not at a substantial disadvantage in comparison with persons who did not share her disability.
161. Again, in his evidence, Mr Thomas explained that if Mrs Wilson was feeling unwell, she should not be using a duvet day, which is in effect a day's holiday entitlement. Instead, she should phone in sick and take sick leave. Again, the tribunal accept it would be inappropriate for an employer to encourage a sick employee to take annual leave rather than a day's sick leave. By way of explanation to Mrs Wilson, statutory holiday entitlement is an important safeguard for all employees and it is even more important for an employee with a health condition like Mrs Wilson's, to have their full annual holiday entitlement – days when a person is sick should not be allowed to chip away at holiday entitlement, which is protected time for each individual's health, safety and wellbeing.

Alleged PCP7: policy of allowing employees to go home early if customer demand wanes in the order that the leave had been booked

162. DVLA accept this this was a policy that was adopted and applied to Mrs Wilson and employees that did not share her disability. The tribunal spent time discussing and trying to identify how Mrs Wilson could be placed at a substantial disadvantage by this policy, but cannot see how it disadvantaged her any more than a person without a disability – both Mrs Wilson and a telephone adviser without her disability had an equal chance of going home early – it depended who had booked leave first. Mrs Wilson submitted that her need to take leave might have been greater, if she was having a day when her symptoms were particularly bad. Again, the difficulty with this argument is as set out in paragraph 182 – if Mrs Wilson was unwell, her manager had to encourage her to take sick leave, rather than allow her to sacrifice annual leave.

Alleged PCP8: requirement for 100% attendance and competitive interview to be moved to a role in the main site

163. There was no such policy applied to Mrs Wilson. The terms of Mrs Wilson's contract were very clear – she was employed to work in the Contact Centre and was expressly advised she would not be eligible to transfer to work elsewhere in the DVLA. As explained in paragraphs 23 and 24 of this judgment, the DVLA experienced difficulty recruiting enough personnel to work in the Contact Centre and there was a long waiting list of staff waiting to move to the main site.

164. As previously explained, the DVLA did operate a Priority Movers List which supported employees by enabling them to move post when they required a transfer for medical reasons. Via the Priority Movers List, Mrs Wilson was moved to a role in the main site.

165. Having carefully considered each of the alleged PCPs, the tribunal finds the DVLA did not breach their duty to make reasonable adjustments for Mrs Wilson. The tribunal were pleased to see that the DVLA, and in particular Mr Thomas, had repeatedly sought appropriate advice as to the adjustments that could be made to support Mrs Wilson and had implemented this advice. The tribunal appreciates this is not the outcome Mrs Wilson had hoped for; we hope that when reading this judgment, Mrs Wilson will consider the position that the DVLA was in. Mrs Wilson has explained she felt she “slipped through the gaps” in policies. Like any large employer, the DVLA required independent objective medical evidence to be able to properly consider and fairly implement her reasonable adjustments. As soon as the occupational health advisers supported the particular adjustments that Mrs Wilson was seeking, the DVLA acceded to Mrs Wilson's request to move to the main site, to enable her to work the 8am shift and use the works bus permanently.

Time limits

166. For the sake of completeness, we have set out our findings on the time limit / jurisdiction submissions. At the start of the tribunal's discussion, we considered whether it was appropriate to determine the time issue first – to do so could have saved the tribunal considerable time, both in chambers discussion and in drafting this judgment. Given the effort and hard work that Mrs Wilson had put into preparing and presenting her claim, we felt she deserved us fully discussing and considering her allegations, even if ultimately we found the claim was issued out of time which meant we did not have jurisdiction to hear the claim.
167. When we turned to consider the time limit, we adopted Lord Justice Leggatt's approach in *Morgan v Abertawe Bro Morgannwg University Health Board* - we accepted any failure to comply with the duty should be treated as occurring on the expiry of the period in which the employer might reasonably have been expected to make the adjustment. As Mrs Wilson accepts that by 9th February 2016, DVLA had complied with its duty to make reasonable adjustments, the last possible date on which it could be said that Mrs Wilson could consider there to be a failure to make adjustments was 8th February 2016. This meant proceedings ought to have been issued no later than 7th May 2016.
168. S123 (1) b Equality Act 2010 provides the tribunal with a discretion to extend this time limit if it considers it is just and equitable. This is a wide discretion. The tribunal should properly consider the prejudice that each party would suffer as a result of the decision reached; all the circumstances of the case, including the claimant's disability; the length of and reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the employer has cooperated with requests for information; the promptness with which the claimant acted once she knew of facts giving rise to this claim; and the steps taken by the claimant to obtain appropriate advice.
169. In considering this discretion, in particular the tribunal noted, (in no specific order):
- a. If the tribunal declined to exercise this discretion, Mrs Wilson would be deprived the opportunity to pursue a claim that meant a great deal to her;
 - b. If the tribunal exercised its discretion to extend time, DVLA witnesses would be at a substantial disadvantage as they would be expected to defend decisions they made over 2 years and in some instances over 4 years ago and their memories of events that had occurred would be

less reliable than if these proceedings had been presented in a timely manner;

- c. If the tribunal exercised its discretion to extend time, DVLA witnesses would be at a greater disadvantage, as they did not have the benefit of being able to rely on contemporaneous documents they may have previously had; DVLA had a policy of only keeping documents for 12 months;
- d. The nature of Mrs Wilson's disability, through ME and Fibromyalgia is that she experiences symptoms of fluctuating severity. When her symptoms are at their worst she experiences extreme fatigue, pain throughout her body, difficulty getting out of bed and getting dressed, difficulty concentrating and depression. In January 2016, she returned to work after a lengthy period of sick leave. Dr Devlin examined her on 25th January 2016 and noted Mrs Wilson did not have any concerns about the hours involved in her new job and concluded Mrs Wilson was medically fit to undertake the new role. Mrs Wilson started her new role on 9th February 2016 and was able to work, initially 4 days per week and subsequently 5 days per week (37hours). It was not until 4th July 2016 that Mrs Wilson showed any signs of difficulty; on this date she requested to reduce her workload to 32 hours per week. Her first period of sick leave in her new role was 28th July 2016.
- e. It was not until July 2017, 14 months after the expiry of the primary limitation period (in May 2016) that, completely out of the blue, Mrs Wilson contacted ACAS to start their early conciliation period and issued proceedings. Mrs Wilson's reason for this delay was that she didn't want to issue proceedings against DVLA in 2016 – she was happy in her new job and wanted to concentrate on learning her new role. She explained that in Summer 2017 she underwent counselling and realised that she felt an injustice at what she perceived to be a delay in making reasonable adjustments for her disability in 2014 and 2015.
- f. DVLA have complied with requests for documents / information promptly and to the best of their ability. In particular, the tribunal notes the detailed information that Ms Percival provided in her written response of 24th November 2014, which was provided within a relatively short period of time in response to Mrs Wilson's enquiry.
- g. Mrs Wilson is very intelligent and highly educated. She has a First Class Honours Degree and a Masters with Distinction. She has written lengthy articulate submissions, both in these proceedings and in correspondence with her employer in 2015. In September 2014 she had sought advice from Disability Law Service and understood an

employer's duty to make reasonable adjustments and the time limits for presenting a claim.

- h. This is not a case in which a person has struggled to comprehend their legal rights. Nor can it be said that Mrs Wilson was experiencing depression that was having a significant impact on her wellbeing and ability to commence proceedings during the period February to May 2016; it was a period in which her health was much improved.
 - i. Unusually, it was whilst on sick leave and experiencing both physical and mental health illness, that Mrs Wilson was able to prepare and issue the ET1 claim form. This is an indication of how articulate Mrs Wilson is; in evidence she explained that she finds it easy to type lengthy written submissions, even when she is quite unwell.
170. In Spring 2016, Mrs Wilson was aware of her potential claim, the time limit for issuing proceedings and all the facts she needed to be able to issue the claim. She was also experiencing a period of better health and made a conscious decision to move on with her life rather than issue proceedings. In these circumstances and having considered the prejudice caused to either party as a result of its decision, the tribunal determined it was not just and equitable to extend the time limit by 14 months. Whilst the tribunal accepts Mrs Wilson is living with difficult health conditions with fluctuating and debilitating symptoms, in all the circumstances of this case, Mrs Wilson could have issued proceedings much sooner and should have done so. The respondent's witnesses have been substantially disadvantaged by this delay, as their documents have been shredded and they are having to rely on their memory to defend decisions they made up to 4 years ago.
171. The tribunal found the claim had not been presented within the time limits set out in s123 Equality Act 2010 and therefore the tribunal did not have jurisdiction to hear this claim. For this reason, further and alternatively, as the DVLA had, at all times, complied with its duty to make reasonable adjustments, Mrs Wilson's claim is dismissed.

EMPLOYMENT JUDGE HOWDEN-EVANS

Dated: 7th October 2018

Judgment posted to the parties on
10 October 2018

For Secretary of the Tribunals