EMPLOYMENT TRIBUNALS

Claimant: Miss J Manokore

Respondent: Care Quality Commission

Heard at: London Central **On:** 29 October to 2 November 2018 and in chambers on 22 and 28 January 2019

Before: **Employment Judge K Welch**
Ms T Breslin
Mr S Ferns

Representation
Claimant: Miss S Sleeman, Counsel
Respondent: Mr D Massarella, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that all claims of disability discrimination fail and are dismissed.

REASONS

The Complaints

1. This is a claim brought by the Claimant against her current employer, the Care Quality Commission ("CQC"). By an ET1 received on 8 January 2018, the Claimant, who remained in the Respondent's employment as an inspector, claimed disability discrimination.
2. The Claimant suffers with chronic back pain and has done so since 2004. The Respondent conceded that the Claimant's back condition was, at all material

times, a disability under the Equality Act 2010 ("EqA"). Further, the Respondent accepted that it knew of the Claimant's disability from October 2016, which pre-dated the alleged acts of discrimination.

3. The Claimant alleged that the Respondent had discriminated against her:
    a. in treating her unfavourably because of something arising from her disability (Section 15 EqA);
    b. in failing to make reasonable adjustments (Section 21 EqA);
    c. by harassing the Claimant (Section 26 EqA);
    d. by victimising the Claimant (Section 27 EqA).
4. The tribunal had before it an agreed bundle of documents of approximately 600 pages and read the documents each party directed it to. References to page numbers in this Judgment are to page numbers in that bundle. Additional documents were handed into the Tribunal during the hearing. These included a table of inspections carried out by the Claimant and other inspectors in the Claimant's team. This was the background information that the Respondent had used to create a document already in the bundle at page 452. It was agreed that this could be added to the bundle. However, the Claimant objected to the inclusion of the notes of a call between the Claimant and Ms Golden on 3 October 2017. Having considered the objection, we allowed the notes to be adduced into evidence since they were highly relevant to some of the claims that the Claimant was pursuing. We considered that, in accordance with the overriding objective, and allowing the Claimant additional time to consider the new evidence and make submissions as to its authenticity, that the document should be included.
5. We heard evidence from the Claimant, Mr Poole, Miss Allinson, Mr Tempest and Ms Golden on behalf of the Respondent. The tribunal was helpfully provided with a number of documents, which had been agreed between the parties, namely a brief chronology, a cast list and an agreed list of issues. However, it was accepted that the first issue in the agreed list of issues was no longer live, since the Respondent conceded knowledge of the Claimant's disability at all relevant times. However, it was accepted by the Claimant that the Respondent's aim was relied upon from the discrimination for the Section 15 complaint were legitimate aims, although still reserved her position on whether they were proportionate means of achieving those aims.

The issues

6. We have not resolved each and every dispute and issue of fact within this claim, however, our relevant findings in relation to the present issues are set out below.

7. The issues had been agreed and the Respondent had usefully provided particulars to the issues, which were subsequently agreed by the Claimant, as follows:

Discrimination arising from disability

8. Did the Respondent treat the Claimant unfavourably as particularised in paragraph 4 of the Further & Better Particulars of Claim? I.e:

   a. Did Mark Tempest invite the Claimant to attend a meeting on 15th August 2017, which he described as a return to work meeting? Without prior warning, did he inform the Claimant that the Respondent intended to apply a performance management/ informal capability management process to her?
   b. Did the Respondent commence the informal capability management before the Respondent had carried out the occupational health and TAP processes and before reasonable adjustments were put in place?
   c. On 3rd October 2017, did Ms Golden state, "that the Claimant was not doing well in her job and performing poorly at work….that the procedures the Claimant underwent in July 2017 for her back condition were not surgical procedures….[did she ask] why the Claimant had not informed her previously of her back condition and [state] that she had been surprised to learn about her back condition."?
   d. Did Mark Tempest, 'set objectives that did not take account of the Claimant's back condition so that she was more likely to fail to meet them and progress to the formal capability management process' specifically on 11th January 2018:
      'the requirement to produce an inspection report for review by the Inspection Manager within a 10 day period as a performance criteria…which all other London inspectors were not obliged to comply with such an objective.'?
   e. At the same meeting did Mark Tempest refuse to make adjustments, specifically

i. 'taking time owed on a post-inspection day'; and
ii. 'two 20-minute posture breaks per day…which did not have to be repaid.'

f. At the same meeting did Mark Tempest make unfavourable remarks to the Claimant, specifically
   i. "you should consider finding alternative employment as your health prevents you from doing your role and completing your reports.";
   ii. "Jackie, you are always in pain, you want to be treated differently to other inspectors so you cannot do your job";
   iii. "look at your TAP, you are always asking for extra days to do your reports which shows you cannot do your job, and then asking for rest time after an inspection day and with your posture breaks it is up to you to make up that time at the end of the day"?

g. Did Mark Tempest email the Claimant on 7th February 2018 to inform her that he had decided to progress the capability management process to a formal stage 1 of the policy?

9. What caused this treatment? Was it the Claimant's disability related sickness absences from work and the symptoms related to her back condition?
10. Is that cause something arising from the Claimant's disability?
11. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Claimant accepted that the following were legitimate aims
    a. Ensuring that inspections and reports were completed within a reasonable time scale;
    b. Ensuring that any evidence gathered in the course of the inspections was properly recorded;
    c. Ensuring that reports were of the required standard;
    d. Ensuring that inspectors communicated necessary information to colleagues and service providers in a timely manner;
    e. ensuring that miscellaneous enquiries relating to the services on an inspector's portfolio are dealt with in a timely and appropriate manner;
    f. ensuring that organisation targets, such as key performance indicators, were consistently met;

g. ensuring that inspectors were clearly informed of the standards of performance expected of them;
h. dealing appropriately, and in a timely manner, with any performance concerns;
i. where appropriate, dealing with performance concerns by way of an informal process before escalating to a formal process;
j. applying a formal process where an informal process has not led to the required improvement.

Failure to make adjustment (section 21)

12. Did the Respondent apply the following PCPs to the Claimant as set out in her particulars of claim and Amendment to Particulars of Claim?
    a. When requested to attend a 1-2-1 meeting in London HQ on 5 October 2017 by Mark Tempest?
    b. To attend a 5 day conference in London in September 2017?
    c. To allocate a greater caseload and more cases which required enforcement action?
    d. When the Respondent directed as part of the informal capability process that the Claimant must meet the performance criteria for submitting her inspection reports within 10 days of the inspection visit?
    e. When the Respondent required the Claimant "pay back" the time she needed to take during the working day as posture breaks, usually 2 x 20 minute breaks, by working additional time at the end of each working day?
    f. When the Respondent required the Claimant to work a full working day on days following an inspection visit?
13. Who does the Claimant say is her non- disabled comparator in respect of each PCP?
14. Did each PCP place the Claimant at a substantial disadvantage as compared to those non-disabled persons?
15. Would it have been reasonable to make the following adjustments in respect of the PCPs set out at paragraph 12 above, and if so would they have avoided the disadvantage:
    a. To hold meetings by Skype?
    b. To attend the conference by Skype and obtain handover information from colleagues?

c. To lower the Claimant's workload?
d. To adjust the 10 day target to 20 days following an inspection visit?
e. To remove the requirement to pay back the 2 x 20 minute posture breaks?
f. To shorten her working day the day after an inspection visit by taking any time owed to her?

16. Did the Respondent fail to make the reasonable adjustments set out in the Particulars of Claim and Amended Particulars of Claim dated 26 April 2018?

Harassment (section 26)

17. Were the statements identified in the Particulars of Claim paragraph 29 ever made or not? The Claimant alleges that Michele Golden (MG) made the following remarks at a meeting on 3rd October 2017
    a. MG stated to the Claimant, 'You will come in whether you like it or not'
    b. MG stated to the Claimant that the procedures she had undertaken – nerve root blocks – did not amount to 'back surgery' and that she was 'shocked' to learn the Claimant had a back condition or disability. The Claimant considered MG was again minimising her long term health condition and marginalising her disability, creating an unsupportive and hostile environment.
    c. MG challenged the Claimant about her grievance complaint of disability discrimination and stated: 'as you know your grievance was not upheld by an impartial panel, and your grievance was against me, and I take that very seriously."
18. If so, did any statement amount to unwanted conduct related to disability?
19. Did the conduct have the purpose or effect identified in section 26(1)(b) EqA?
20. Was it reasonable for the conduct to have that effect?

Victimisation (section 27)

21. Did the Respondent subject the Claimant to any detrimental treatment because she did any of the following protected acts?:
    a. The Claimant's grievance dated 10 March 2017;
    b. The Claimant's grievance appeal dated 19 July 2017;
    c. The conversation the Claimant had with MG on 3 October 2017 during which she had complained of the Respondent's ongoing failure to take account of her disability and to make appropriate adjustments.

22. In particular, did the alleged detrimental treatment identified in the Particulars of Claim paragraph 31(ii) occur at all and if so, was that treatment because of any protected act? Namely,

    a. Did MG subject the Claimant to the following detrimental treatment during the telephone call with the Claimant on 3 October 2017:

        i. MG said "You will come in [to London HQ for the 1-2-1 meeting] whether you like it or not", and this comment was delivered in an uncaring and aggressive manner, causing the Claimant to feel unsupported and victimised;

        ii. MG confronted the Claimant in an aggressive way about the grievance she had raised, which had included complaints about MG, MG stated, "as you know your grievance was not upheld by an impartial panel and your grievance was against me and I take that very seriously." The Claimant felt threatened by MG's comments and considered them to be intimidating. The Claimant [interpreted] MG's comments as entirely negative due to the way they were said, in an aggressive, uncaring, unprofessional manner – and felt upset and began to cry during the telephone call with MG. The Claimant defended her actions in raising her formal grievance complaint of discrimination to MG and contended she should not be made to feel by the Respondent that she had done something wrong by having complained of discrimination.

Time Limit

23. Have all the claims been submitted within the relevant 3 month time limit? If not, do any claims form part of a continuing act of discrimination and if not is it just and equitable to extend the time limit?

Findings of Fact

24. The Claimant commenced employment as an inspector for the CQC on 21 September 2015, working on inspections for primary healthcare providers, mainly GP practices, in the North West London Team.

25. The Claimant's role required inspections to be carried out, either desk based (i.e. on the papers) or, more often, by attending GP practices and then writing a report. The role included managing risk and dealing with general enquiries

within portfolios and, where necessary, to conduct enforcement action against providers who failed to meet the regulatory requirements.

26. As this was the first inspection programme for GPs practices, the Respondent would not have known which practices were likely to require enforcement action. There was insufficient advance intelligence to enable the Respondent to knowingly give the Claimant more difficult inspections. Therefore, the panel, in light of the evidence given by the Respondent's witnesses, did not accept the Claimant's assertion that the Respondent had tasked her with more difficult practices.

27. The Claimant's role was home based, although the Claimant was required to attend meetings at the Respondent's headquarters in Buckingham Palace Road, Central London and to visit the various healthcare providers' practices in order to carry out inspections.

28. The Respondent has a statutory requirement to publish reports of inspections in a timely manner. There were two key performance indicators ("KPIs"), which the Respondent used in relation to report writing. Firstly, the inspectors were required to submit draft inspection reports to their managers within 10 working days of the date of the inspection. This has subsequently been reduced to 5 working days. It was clear from the Claimant's final probationary assessment form dated 29 October 2015 [page 125] that one of the Claimant's objectives was to "*complete reports within the 5 day framework*" which is indicative of the fact that there was a timeframe around submission of interim reports.

29. The second KPI was that inspection reports were required to be published within 50 working days of the date of the inspection. The reason for this KPI was to ensure that patient care was not compromised and that the Respondent complied with its statutory duty to publish reports within a timely manner.

30. The Claimant gave conflicting evidence surrounding the first 10 day KPI. She initially said that she was the only individual to have this applied to her, but subsequently confirmed that others had had this KPI applied to them also. She also stated that this KPI had been adjusted for them. The Claimant gave evidence that she only became aware of the 10 day KPI whilst being managed by Mr Tempest, although we find that this was a KPI consistently applied to inspectors during the period of the Claimant's employment as evidenced by her action plan dated 15 August 2017 [page 368], which made this clear. There was also evidence that Mr Tempest had emailed the Claimant on 15

August 2017 [page 358] confirming this KPI by attaching a copy of the action plan.

31. We accept the evidence of Ms Golden and Mr Tempest that the 10 day KPI was consistently applied across the inspectors within the Claimant's team. We understand that this was necessary in order to try and ensure that the final report was ultimately published within the 50 day KPI time limit. We are satisfied therefore that this was not a requirement created by Mr Tempest, although acknowledge that he may have been the first to enforce it as far as the Claimant was concerned.

32. The panel accepted the evidence from both parties that, at the time of the allegations, the Respondent was falling short of meeting its KPI target relating to publishing reports within the 50 day period. The Respondent appeared to be only publishing approximately 31% of its reports within the 50 working days [page 277], although the panel accepted that it was entirely appropriate for the Respondent to seek to improve this in order to comply with its statutory requirements.

33. At the start of the Claimant's employment, she had a number of line managers. Although we accepted that most, if not all, of these line managers, had concerns over the Claimant's performance since she was initially told that her probationary period would be extended for a further 3 months in April 2016 as she had not met the required standard. However, following a referral to Human Resources by the Claimant and, as due process had not been followed in relation to the extension of the Claimant's probation, this decision was reversed. It was clear, however, that the Respondent had had concerns over the Claimant's performance from an early stage of her employment.

34. The Claimant suffered with anaemia and a chronic back condition. The Claimant relied only on her back condition for her disability discrimination complaints.

35. In 2016, the Claimant was first referred to Occupational Health ("OH"). This was in relation to fatigue brought on by her anaemia; the referral was to see whether there were any reasonable adjustments which could be made to assist her. When the first report was obtained dated 18 October 2016 [page 173] it focussed entirely on the Claimant's back condition and did not refer at all to her anaemia. The OH report gave advice to try and reduce the amount of off-site visits or to find ways to engage in meetings using technology so as to avoid prolonged periods of sitting, standing, driving or walking.

36. On 7 November 2016, there was a phone call between Mr Poole and the Claimant at which Mr Poole expressed his surprise that there was no mention of anaemia in the report. Therefore, Mr Poole contacted the OH adviser by email on 9 November 2016 querying this. The OH adviser responded saying that the adjustments were likely to be the same in essence as advised in the OH report "*ie minimising the impact of demanding days*" [page 181].

37. Mr Poole had a meeting with the Claimant on 11 November 2016 where the only concern mentioned by the Claimant was the travel into London. The meeting explored what changes were required to assist the Claimant. The Claimant confirmed that she could cope with driving to inspections since she controlled the manner in which this was done. At the meeting, she did not say that she could not travel using public transport. Instead, she said that travel into London was better outside of the rush hour as she was more likely to get a seat. Mr Poole confirmed that, as the Claimant was responsible for arranging supervision meetings with him (the one to ones) these could be timetabled so as to allow this. Mr Poole also agreed to trial the use of skype for these meetings, although had some reluctance to do so as he had concerns over the Claimant's performance and felt that these discussions were better held face to face. The team meetings were already timetabled to start at 10am, which he considered allowed travel outside of rush hour.

38. Mr Poole therefore adjusted his individual meetings with the Claimant so that link calls (which we believed to be similar to skype) were used for every other one to one meeting held with her. This was confirmed in an email Mr Poole sent to the Claimant on 18 November 2016 [page 197A].

39. Additionally, Mr Poole agreed to later time slots for quality assurance panels to allow the Claimant to travel outside of rush hour. Mr Poole also gave the Claimant details on the priority seating scheme run by Transport for London.

40. The Claimant sent an email to HR on 29 November 2016 [pages 212-214]. This email raised many concerns concerning her employment with the Respondent including feeling unsupported, receiving "*constant and relentless criticism and negative feedback*" and being treated unfavourably. Her grievance referenced;

> "*I feel the management chose to ignore my occupational health report. The report itself clearly said to limit the number of off-site journeys into London but since I approached HR, there has been pressure on me and I have been forced to attend meetings or "extraordinary panels"*

outside their allocated time and I have not seen this happen with/to any other inspectors. There is also pressure to attend regional panels in person, yet there are a large number of inspectors that dial into panel without any issues even if they have inadequate reports."

41. The Claimant went off sick from 1 December 2016 until 24 February 2017 (inclusive) following exacerbation of her back condition when travelling into London by train for an extraordinary panel meeting for the Respondent on 28 November 2016, for which a separate personal injury claim has been presented. A further OH referral was therefore made on 24 February 2017 [page 221].

42. The Claimant was due to return to work on 27 February 2017 and the return to work meeting was scheduled for this date. However, the Claimant called her manager to say that she didn't think that she would be fit enough to travel. Her manager, therefore, asked whether she was fit for work since she would be unable to travel to meetings, trainings and inspections. The Claimant was unable to confirm this. Whilst there was a phone call on this date, the return to work phone call did not go ahead. It was not clear whether the Claimant was fit to return to work at that point. On the evidence before us, we concluded that the Claimant remained at home before she went off sick again from 3 March to 4 April 2017.

43. It appears that the OH referral in the bundle dated 24 February 2017 was submitted on 3 March 2017. There is a reference to this in an email from Mr Poole to HR dated 3 March 2017 [page 230A]. OH responded on 10 March 2017 providing an interim report which provided little additional detail [page 244], although confirmed that a further assessment of the Claimant would be arranged and a full report provided. This report stated that her absence continued due to back and stress problems. It stated that the Claimant may require surgery but was seeing her specialist shortly after and, therefore, a follow up assessment was to take place after this.

44. The Claimant raised a formal grievance on 10 March 2018 [pages 232-243]. Again, the grievance raised a number of concerns relating to the Claimant's employment. We are satisfied that this grievance was a protected act for the purpose of the Claimant's victimisation complaint since it included, amongst other references to her disability:

"*I felt that I received unfavourable treatment because of my back problem and the treatment I received could not be objectively justified, as reasonable adjustments were not fully considered or implemented*."

45. On 30 March 2017 the Claimant was assessed by OH and a report was generated the same day [page 247]. This confirmed that the Claimant had been "*struggling to undertake some aspects of her work, especially in regards to the requirement to travel to London by train on a regular basis*" and that the Claimant "*feels that previous OH advice has been overlooked and, as such, she has experienced further exacerbation leading to her submitting a grievance last month*". It was not clear whether the Claimant attended the appointment in person.

46. The recommendations provided in the report were working from home on a phased number of hours with no long distance travel, e.g. London, during the first 2 weeks. It went on to say, "*then to re introduce travel commitments over* the *following weeks as her symptoms allow*" [page 248]. This phased return to work plan was to commence on 3 April 2017 and would be phased over 5 weeks. The OH report also recommended the Respondent, "*consider a reduction in travel commitments, especially to London*" and allow the Claimant to dial in for one to one meetings where practicable to do so. A trolley bag was also suggested to minimise the strain on the Claimant's back and avoidance to travel during peak hours where the Claimant might be unable to get a seat. Finally a stress risk assessment was suggested.

47. A grievance meeting took place on 30 March 2017, the minutes for which appear at pages 250-261. Ms Allinson was the investigating officer for the grievance.

48. A return to work interview was carried out in person with Mr Stephenson, the Claimant's new line manager, on 4 April 2017. This meeting was held closer to the Claimant's home so that her travel was reduced and she did not have to travel into central London. Mr Stephenson agreed to all of the recommendations from the OH report in this meeting. This included a phased return to work with no travel to London within the first 2 weeks. He agreed to discuss with HR to make suitable arrangements for a light trolley bag. We understand that this was subsequently provided, although there may have been some delay in obtaining this.

49. We are satisfied that Mr Stephenson did require the Claimant to make up time for breaks taken during the day at a later time as evidenced by his email to Mr

Poole at page 395 confirming what adjustments he had put in place for the Claimant. At a later date, Mr Tempest did not require the Claimant to make up time for breaks taken during her working day.

50. The return to work meeting also confirmed that Linda Williams would support the Claimant as a mentor. The Respondent had a buddy and mentoring system, which was running parallel. The Claimant's original evidence was that she did not have a buddy until January 2018 but her representative confirmed, during the hearing, that the Claimant agreed that she had had a buddy since 29 September 2017, which had continued up until the date of the hearing. We are satisfied that the Claimant had buddies and mentors during the majority of her employment and has had the same person over the last year as her buddy.

51. The Claimant's grievance was not upheld by Ms Allinson, who found there was no case to answer. An outcome letter was sent to the Claimant dated 18 May 2017 [pages 274-275]. The letter included the investigation report [pages 296-308]. In particular, Ms Allinson's findings were that the Claimant had not been singled out in the way she had been treated. Also, that Miss Golden's style was professional but direct and that there had been performance issues with the Claimant's report writing from the start of her employment, but that these had not been properly addressed.

52. The outcome letter made a number of recommendations including

"(a) you should be managed by SP so that previously agreed support can be enacted

(b) the local inspection team should consider if mediation would assist in repairing conceptions

(c) the local team should consider if any other reasonable adjustments are necessary to support you in your work."

53. A stress risk assessment was carried out by Mr Stephenson on 13 June 2017 [pages 333-337]. There was reference to breaks in the document at page 334 where it was stated, "*agreed that flexibility with time worked and breaks is okay as long as breaks are appropriately recorded in her outlook and work hours are agreed…flexibility to move her work hours around the necessary breaks*" [page 336].

54. The Claimant was given the right to appeal against the grievance outcome, which she did on 10 June 2017 [wrongly dated 2016 on pages 309-324]. The appeal letter raised a number of issues concerning the Claimant's treatment but also included, "*for MG to say that she is unsure that a nerve root block is*

a surgical procedure is quite shocking for someone with a medical history and for CQC as the health regulator". This had not been raised in her original grievance and, therefore, had not been dealt with by Ms Allinson.

55. The appeal hearing was held by Ms Stanford by skype on 19 July 2017. There did not appear to be actual minutes of the hearing but reference to what was said appeared in the case management summary grievance appeal hearing [pages 346-351], which was sent to the Claimant with the appeal outcome letter [pages 352-353]. The appeal was not upheld.

56. Ms Stanford found that there was no evidence to suggest that the Claimant had been subjected to bullying and harassment by the individuals she had named. It went on to state that Ms Stanford could find no evidence that the Claimant had been subjected to discrimination.

57. A number of further recommendations were made in the summary of the appeal outcome, which included implementing a tailored adjustment agreement [plan] ("TAP") for the reasonable adjustments required, consider a re-referral to OH and a permanent team move to be considered [page 351].

58. The Claimant complained that Ms Allinson had been involved throughout the whole grievance process since she attended the appeal hearing, in addition to having carried out the grievance itself. We are satisfied that there was no such breach of process in Ms Allinson being involved since we accept that she was not the decision maker in the appeal.

59. The Claimant went off sick from 26 June 2017 until 22 July 2017. This was an initial planned sickness absence of 5 days, but she was not able to return at this point as she felt unwell. She was certified as being unfit for work between these dates. She then went on annual leave immediately prior to her return to work on 8 August 2017.

60. On her return to work, the Claimant had been allocated a new line manager, Mr Tempest. There was a telephone call on 11 August 2017 at which there was a joint agreement between Mr Tempest and the Claimant to meet face to face on 15 August, late in the morning to avoid travelling during rush hour.

61. We accept the Claimant's evidence that Mr Tempest did request to meet the Claimant in person and this meeting was not carried out by skype, but accept that the Claimant agreed to this. The Claimant's evidence was that Mr Tempest refused a skype meeting but Mr Tempest refuted this. We unanimously accepted Mr Tempest's evidence that he did not refuse to hold

the meeting on 15 August 2017 by skype but rather that it was mutually agreed that the meeting would be face to face.

62. We are satisfied that the time of the meeting had been adjusted for the Claimant and accept the Respondent's evidence that it was important that this initial meeting between the Claimant and her new manager was carried out face to face.

63. The Claimant's aunt had unfortunately died on 13 August 2017 and the Claimant's evidence was that she felt bereaved at the time of her return to work meeting and that Mr Tempest was aware of this.

64. During the meeting on 15 August 2017, the Claimant was told to only travel to Buckingham Palace Road when necessary and to check with him if she was unsure. Also, during this meeting, Mr Tempest raised performance concerns with the Claimant as can be seen from Mr Tempest's note [page 356] which referred to "*performance concerns which included report drafting, publication and meeting KPI, inspection evidence and handover of work*."

65. Mr Tempest considered that the terms merited starting an informal capability management process with the Claimant as was clear from the email sent to the Claimant by Mr Tempest on the same day [page 358]. In this email, he confirmed that, "*since joining CQC, you have conducted 25 inspections, of which 18 were published by other inspectors and 11 reports were written by other inspectors*".

66. The email also made clear that the Claimant had not appropriately recorded evidence, which resulted in a warning notice appeal being upheld. It also highlighted that she had failed to hand over her work appropriately before taking the planned sick leave and that she had failed to contact a service provider to cancel an inspection that was due to take place on 15 August, despite being back at work from 8 August 2017. We were satisfied that the Claimant recognised that she had failed to do this as she had called to apologise to the practice concerned.

67. We were satisfied that, in light of the concerns that Mr Tempest had regarding the Claimant's performance, it was reasonable for the Respondent to begin an informal performance management of the Claimant. His email of 15 August confirmed the objectives, which had been put in place for the Claimant.

68. We accept that the Claimant had no prior warning that the meeting of 15 August would be anything but a return to work meeting.

69. An action plan was drawn up by Mr Tempest dated 15 August 2017 [pages 367-372], which was signed by the Claimant on 24 August 2017. This included the objectives, which had been set out in the email following the meeting.

70. Mr Tempest set up regular weekly review meetings with the Claimant; these were all conducted by skype so that the Claimant did not have to travel into Central London. A record of these, together with the Claimant's comments appeared at pages 373-379 and 468-475. The record clearly shows how the Claimant improved in certain areas with recognition from Mr Tempest that the Claimant had been able to meet a number of actions he had set out for her. However, it still showed that there were areas that required improvement. It is acknowledged that, whilst her first three inspections had been published within the 50 day publishing KPI, the subsequent three would not meet this deadline. Also the Claimant had failed to reduce her open enquiries as she had been tasked to do.

71. Mr Tempest carried out a stress and wellbeing assessment for the Claimant on 21 August 2017 by telephone [pages 360-366]. This confirmed that "*JM is pacing herself as she returns to work and manages her breaks and pain levels. Jackie feels currently free from bullying and harassment…Jackie's pain levels have decreased since her most recent procedure to address her back pain.*"

72. Mr Tempest organised for the Claimant to have an updated OH report in order to finalise a TAP as recommended by the grievance appeal outcome. This was therefore requested at the end of August 2017 [pages 384-389].

73. The Claimant was required to travel into Central London for a regional development week in September 2017. Whilst this was stated to be a 'training week', only the first 3 days were mandatory. These were the only days that the Claimant was required to travel into Central London between 15 August 2017 and 8 January 2018.

74. The mandatory training was to cover the new CQC methodology including new tools for inspectors and, therefore, attendance on the training was compulsory. The regional development/training week included face to face group work with specialist clinical advisers, together with speeches and presentations. All staff were instructed not to go on inspections during the 5 day learning week. Other than the 3 compulsory training days, the remaining days were 1 day for administrative purposes and 1 day for team building.

75. The Claimant suggested attending the training by skype but Ms Golden's evidence was that, if one person dialled in they would find it isolating and difficult to contribute, which we accept.

76. The Claimant's initial evidence was that she had to attend in person for the whole 5 days. However, she accepted, in cross-examination, that this was not the case. In any event, she was not expected to attend for the whole 5 days.

77. During review meetings on 31 August and 15 September 2017, Mr Tempest discussed the learning week with the Claimant and this was confirmed in an email dated 15 September [page 391]. This stated that a plan had been put in place for the Claimant to attend the 3 compulsory days but not the administration day. Mr Tempest said that he would like her to join them for the team building day on the Friday, even if only for part of the day, and we accept that this would be difficult to do remotely. It was agreed that the Claimant and Mr Tempest would speak at the end of each day to make sure that a plan was in place for the next day. We are satisfied that this was carried out as evidenced by the notes of the discussions at page 470. The Claimant was allowed to take taxis to and from the station to the hotel in which the training was being carried out.

78. The Claimant was able to attend for the 3 days compulsory training but felt unable to attend the final 2 days and this was agreed by Mr Tempest.

79. The Claimant gave evidence that other inspectors were facilitated to attend on intermittent days. Whilst we accept that there was some flexibility concerning the two additional days, we accept the evidence from Mr Tempest and Ms Golden that inspectors were required to attend the 3 days' mandatory training.

80. Mr Tempest continued to review the Claimant's performance informally and sent an updated action plan on 29 September 2017 [page 393]. This email confirmed, "*I know you are careful about managing your back pain but please don't take any risks and let me know if I ask you to do anything you think will exacerbate the problem*".

81. The Claimant dialled into a management review meeting on 3 October 2017 concerning an inspection she was due to lead later that month. Ms Golden was on this call, along with other people. At the end of the call, Ms Golden asked the Claimant to stay on the telephone. Ms Golden's evidence was that she wanted to suggest that they meet for a coffee as the grievance outcome had suggested mediation, which the Claimant had not yet arranged. We accept that the Claimant had no notice that Ms Golden was going to do this.

82. The Claimant declined Ms Golden's suggestion of a coffee, stating that she was not coming in to the London office, to which Ms Golden replied that she would have to come in at some stage. We do not accept the Claimant's assertion that Ms Golden said, "*You will come in whether you like it or not*". We consider that the Claimant may have misinterpreted this.

83. The Claimant gave evidence that Ms Golden started to discuss her grievance complaint. She contended that Ms Golden, went on to say, "*your grievance was not upheld by an impartial panel…your grievance was against me, which I take personally*". The Claimant later admitted in re-examination that Ms Golden had said "*which I take seriously*". We considered that this had a very different meaning from the original wording in the Claimant's statement. The impression the alternative wording gives moves from being threatening to being more neutral. We found this to be a significant change in the Claimant's recollection, which went to her credibility.

84. The Respondent provided a typed note prepared by Ms Golden of this conversation [pages 395(c) and (d)], which did not form part of the agreed bundle at the start of the hearing. However, we are happy to accept that this note was prepared at the time since it was sent to HR by an email on 4 October 2017 [page 395A]. We also accepted Ms Golden's evidence that she had forgotten that she had made it.

85. The Claimant gave evidence that Ms Golden said "*you will come in whether you like it or not*". We accept that Ms Golden said "*you will have to come in at some point*" and can understand that the Claimant might have remembered it differently, but we do not accept the Claimant's recollection as the true version.

86. We appreciate that the Claimant was upset on the call, which she was not expecting to take place and that this may have been the reason for her failure to remember it accurately. We do not accept that Ms Golden said that she was 'shocked' to hear of the Claimant's condition, nor that Ms Golden said "*you are not doing well are you*".

87. Ms Golden did speak to the Claimant about the misleading impression she had given her line managers in calling a guided injection into her back, back surgery, since, in Ms Golden's view "surgery" implied a longer period of time to recuperate and this procedure was not surgery. Ms Golden asked the Claimant to explain more fully to her managers any procedure she was undergoing in order that appropriate support could be offered.

88. The Claimant accused Ms Golden of not believing she had a problem with her back. The panel accepts that Ms Golden believed the Claimant to have a back condition, but asked her to be clear about the nature of her treatment. Whilst this did not appear in the note of conversation submitted to HR after the call by Ms Golden, we are satisfied that this took place.

89. Following the call, Ms Golden spoke to Mr Tempest to ensure that the Claimant's concerns that reasonable adjustments were not being implemented and that a TAP was not in place was followed up. Mr Tempest was waiting an OH report but had regular review meetings to ensure that the Claimant was being supported.

90. The Claimant had a meeting with Mr Tempest on 5 October 2017, which was originally to be held in person. However, it was ultimately held by skype. A stress and wellbeing assessment was carried out during this meeting. The Claimant confirmed that she was in more pain as the effects of the injection had lessened since August 2017 and that she struggled with commuting into London [page 405]. It was therefore agreed that the TAP would be completed and updated once the OH report had been obtained and that she could continue to use taxis from and to train stations when she did have to travel. The assessment also stated, "*JM to avoid travelling to the London office where possible*".

91. During this skype meeting, the Claimant queried the reasons for the informal capability procedure being followed. As a result, Mr Tempest sent an email to the Claimant on 9 October [page 421], which attached his earlier email confirming the reasons for informally monitoring her performance which had been sent on 15 August 2017. The TAP was initially drawn up by the Claimant and sent to Mr Tempest on 20 October 2017 [page 412 A-G]. We understand this to have been a working document, which could be updated as required. In the document, the Claimant outlined what adjustments she considered were needed. There was an updated version at pages 441-445 which confirmed adjustments which had been put in place for the Claimant, the following had been agreed:

    a. an assessment would be undertaken before the Claimant was required to travel into London;

    b. there was flexibility on start times for training and conferences, to avoid rush hour travel and this would be assessed on a case by case

basis and, if it was necessary to travel into Central London, this would be planned with Mr Tempest in advance; and

c. team meetings and one to ones to be held by skype.

92. A further OH report was obtained on 26 October [pages 438-440]. This recommended that consideration be given to using alternative means for meetings and training to avoid all prolonged travel requirements for the Claimant. We consider this to have already been in place.

93. On 31 October 2017, Mr Tempest emailed the Claimant concerning her performance and management arrangements [pages 453-454]. This email explained the rationale for Mr Tempest putting the Claimant onto an informal capability plan. The Claimant was asked to confirm by Mr Tempest's return from holiday (21 November) that she understood and accepted his reasons and would agree to resuming the action plan, failing which he would consider what formal action would be appropriate. No reply was received until 8 January 2018 (see below).

94. Mr Tempest had a call with the Claimant on 24 November 2017 [page 472]. The Claimant was still suffering with anaemia and there was a discussion about the impact of carrying out inspections on her energy levels and reports. Mr Tempest regularly updated his notes of the meetings with the Claimant as can be seen from pages 468-475.

95. The Claimant went off sick with anaemia from 27 November to 12 December 2017.

96. On 8 December 2017 a meeting was held between Mr Tempest, Ms Golding and Ms Georgiou to consider the Claimant's sickness and performance concerns. It was decided in this meeting that a formal capability process should be followed [page 473]. Mr Tempest felt that it was not easy to separate the Claimant's ability/capability from her health and, therefore, was advised that this could be identified as a physical health issue, such that she could be redeployed.

97. A return to work interview was carried out by telephone on 12 December. During this call, the Claimant confirmed that she did not require any additional adjustments or changes to her TAP, which was recorded in an email sent to the Claimant by Mr Tempest on the same day [page 452A].

98. On 8 January 2018, the Claimant replied to Mr Tempest's email of 31 October 2017. She stated that she understood his reasons but did not agree with them.

However, it went on to say that she was "*completely in agreement with the objectives which are also my job description*…".

99. On 10 January 2018 Mr Tempest emailed the Claimant a revised TAP [pages 455-461]. The email stated: (a) the 10 day target for submitting a draft report for review was in place for all London inspectors and formed part of an informal capability action plan. He did, however, ask that she should let him know any additional reasonable adjustments for report writing should she think of any, (b) the day after an inspection, "…*please do continue to take posture breaks to best manage the day after an inspection and manage your workload (as far as possible) so that you do not have to travel or be on your feet too much on those days…if you are experiencing the symptoms that mean you are not well enough to be at work, you have to let me know and follow the sickness absence procedure*". Whilst there was no reference to making up time in the email, the TAP did state that, if the Claimant was at work, she must work a full day.

100. The TAP itself highlighted a number of adjustments which had been agreed between Mr Tempest and the Claimant. A number of the adjustments sought by the Claimant had been agreed or had been confirmed as being already in place [pages 458-459]. These included continuing to hold meetings by skype where this was possible, holding one to one meetings nearer to her home, taking 2 x 20 minute posture breaks and discussing travel options for inspections and considering options like the use of taxis. The Claimant sought 2 further adjustments, one of which was partially agreed. She sought a rest period on the day after inspections and it was agreed that she could take posture breaks at her discretion on the day after an inspection, although not a rest day. Should the Claimant require longer time than breaks on a day following an inspection, this would need to be covered by either sickness absence or time off in lieu. The other adjustment that the Claimant sought was flexibility in the initial timeframe in which to submit her draft inspection report to her manager. She requested 11 days instead of 10. This was not agreed as this KPI was used throughout the directorate and so Mr Tempest confirmed that, if the Claimant took 11 days on occasion, they would not automatically be thought of as a performance issue in any event.

101. On 11 January 2018, there was a further skype meeting between Mr Tempest and the Claimant to discuss her physical health [page 474]. Mr Tempest told her that they could discuss options including redeployment on the same pay

grade to a role which did not require site visits and long days on her feet. He considered that the pain she suffered was contributing to her inability to produce reports on time, although the Claimant refuted this. The Claimant confirmed that there were no new reasonable adjustments that could be made to help her.

102. Whilst Mr Tempest confirmed in cross-examination that he had said to the Claimant "*you are always in pain*", we do not accept that he said "*you* want *to be treated differently to other inspectors so you cannot do your job*" or "*look at your TAP you're always asking for extra days to do your reports which shows you cannot do your job and then asking for rest time after an inspection day and with your posture dates it is up to you to make up that time at the end of the day*". This did not appear to be consistent with the supportive way in which Mr Tempest treated the Claimant and we accept his evidence in this regard.

103. Mr Tempest drafted an email on 31 January, which he sent to Ms Golden and others to gain their thoughts. This draft email was then sent to the Claimant on 7 February 2018 [page 501]. This confirmed the concerns over the timeliness of the Claimant's report writing and that the reasons given were not valid reasons for the extent of the delays. We considered that the evidence provided by the Respondent showed that most of the Claimant's reports were considerably delayed. The email went on to say that the Claimant was to be separately invited to a stage 1 formal capability hearing. It did, however, acknowledge that the Claimant had worked hard to meet most of the action plan points.

104. An invitation letter was then sent to the Claimant on 7 February 2018 [pages 505-506] for her to attend a stage 1 formal capability hearing. The hearing took place on 21 February 2018 [minutes for which appear at pages 508-511].

105. The formal meeting had been convened since the Claimant's average time to publication was 76.5 working days, which was significantly higher than the average for the other inspectors in Mr Tempest's team and across the directorate.

106. During the formal capability meeting, the Claimant made clear that she wanted to take time off in lieu following an inspection and complained about having to make up the 20 minute posture breaks. She was informed that the Respondent would review this. The Claimant did, however, confirm that she was not struggling to write reports due to her back problem but due to the complexity of the inspections she was carrying out. It was, therefore, agreed

that the Claimant would revise her TAP with Mr Tempest following the meeting. A further referral to OH was also agreed to ensure that all necessary adjustments were in place.

107. The Claimant went off sick from 22 February 2018 to 9 April 2018. An updated OH report was received on 23 April 2018 [pages 520-521]. A further review meeting then took place on 15 May 2018 [page 522-523] to discuss the Claimant's capability, the OH report and the amended TAP. The formal capability procedure was then stopped so that consideration could be given as to whether the further adjustments were effective.

Submissions

108. We are grateful to both parties for their detailed written submissions that were supplemented orally. Where relevant, we will refer to them below.

The Law

Section 15 EqA discrimination arising from disability.

109. The Claimant claimed that she had been treated unfavourably because of something arising as a consequence of a disability. The protection is laid out in Section 15 EqA which states:

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

110. No comparator is required for this assessment. In order for this to apply, the employer must have treated the Claimant unfavourably. As the EHRC Employment Code ("the Code") explains at paragraph 5.6 it is sufficient to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability. There must, therefore, be a link between the unfavourable treatment and the Claimant's disability.

111. The Code states, "*often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a*

disabled person, they may still treat that person unfavourably" [paragraph 5.7 of the Code].

112. The employer may seek to rely upon an objective justification for the unfavourable treatment where it was a proportionate means of achieving a legitimate aim.

Section 20 EqA Duty to make adjustments

a. Where this act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 on the applicable schedule apply; and for those purposes, a person on who the duty is imposed is referred to as A.

b. The duty comprises the following three requirements:

c. The first requirement where a provision, criteria or practice (PCP) of A's puts a disabled person at a substantial disadvantage in relation to a relative matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21 EqA, failure to comply with duty:

   i. A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

   ii. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

   iii. A provision of an applicable schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of sub-section (2); the failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise. There is no onus on the disabled person to suggest what adjustments should be made, although it is good practice for employers to ask.

113. The tribunal must identify the PCP applied by or on behalf of any employer; B the identity of non-disabled comparators where appropriate; C the nature and extent of the substantial disadvantage suffered by the Claimant.

114. This is an objective test. There is no need to show group disadvantage. Substantial disadvantage is more than minor or trivial, although this was noted to be a low threshold to overcome.

115. The tribunal had regards to paragraph 6.16 of the Code relating to the use of comparators in cases concerning an alleged failure to make reasonable adjustments "the purpose of the comparison with people who are not disabled is to establish whether it is because disability at a particular provision, criteria, practice…disadvantages the disabled person in question. Accordingly - and unlike direct or indirect discrimination - under the duty to make adjustments, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as a disabled persons".

116. To be subject to a duty to make these adjustments, the employer must know or reasonably be expected to know, that the employee has a disability and is likely to be placed at the disadvantage referred to in the legislation [paragraph 20 of schedule 8 to the EqA].

117. Wilcox v Birmingham CAB Services Limited, UKEAT/0293/10 provides that the employer is under no duty to make reasonable adjustments unless it knows (actively or constructively) both:

    a. that the employee in question is disabled; and
    b. that the employee is likely to be placed at a substantial disadvantage because of that disability.

118. The Code at paragraph 6.33 gives examples of adjustments that might be reasonable for an employer to make. The adjustments may include "*altering the disabled worker's hours of work or training*". The Code gives an example of "*an employer allows a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue, arising from his disability. It can also include permitting part time working or different working hours to avoid the need to travel in the rush hour if this creates a problem relating to an impairment*".

119. The test of whether an adjustment is reasonable is an objective one to be determined by the tribunal. The Code lists a number of facts that might be taken into account in deciding what are reasonable steps for an employer to take, these being:

    a. the extent to which the steps would have prevented the substantial disadvantage;
    b. the extent to which the adjustment was practicable;
    c. the financial and other costs of making the adjustment and the extent to which the step would have disrupted the employer's activities;

d. the financial and other resources available to the employer;
e. the nature of the employer's activities and the size of the undertaking.

Harassment section 26 EqA

120. Section 26 EqA provides "A person (A) harasses another (B) if -

a. A engages in unwanted conduct related to a relevant protective characteristic; and
b. The conduct has the purpose or effect of -
    i. Violating B's dignity, or
    ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

In deciding whether conduct shall be regarded as having the effect referred to above, section 24(4) EqA states that the following must be taken into account:

"(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

121. We reminded ourselves that there is no need for comparative for harassment claims and that a one-off incident can amount to harassment. There is also no need for a claimant to have made clear to the perpetrator that the conduct is unwarranted. The test of conduct "related to" a protected characteristic is wider than the test for direct discrimination which requires treatment "because of" a protected characteristic.

122. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 the EAT observed that "harassment" as now defined focuses on three elements. Firstly there is the question of unwanted conduct, secondly the tribunal should consider whether the conduct has the purpose or effect of either violating the Claimant's dignity or creating an adverse environment for him or her. Thirdly, was the conduct on prohibited grounds. The EAT observed in that case that the motivation for the harassment was not always relevant.

123. For the purposes of the EqA, anything done by an employee in the course of their employment is treated as having also have been done by the employer by virtue of Section 109(1) EqA.

Victimisation - Section 27 EqA

124. Section 27 EqA provides:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because:

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act -

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not expressed) that A or another person has contravened this Act.

125. Victimisation need not be consciously motivated. In Nagaragan v London Regional Transport & Others [1999] IRLR 572, the House of Lords upheld the tribunal's decision confirming it had been entitled to find in the circumstances of that case, that the interviewer's decision (in rejecting Mr Nagaragan's application for roles) had been affected by Mr Nagaragan's previous proceedings, regardless of whether the interviewers consciously took the protected act into account.

126. Victimisation occurs when the claimant is subjected to a detriment because the claimant has done a protected act or the respondent believes that she has done or may do the protected act. Therefore, there is no need to consider a comparator.

127. The tribunal had to consider whether the Claimant's grievances and complaints to Ms Golden on 3 October 2017 amounted to protected acts and then, whether the Claimant was subjected to detriments in which the contents of those grievances/conversation played any significant part in the decision to subject her to those detriments.

128. We noted that detriments can take many different forms. It could simply be general hostility. It may be dismissal or some other detriment. Failures to act may constitute unfavourable treatment. It is, however, not enough for the employee to say that he or she has suffered a disadvantage. We note an unjustified sense of grievance is not a detriment.

Burden of proof and discrimination claims

129. The tribunal had regard to the burden of proof and discrimination claims. This lies with the Claimant. However, if there are facts from which a tribunal could

decide in the absence of another explanation that the employer contravened the provision of the EqA, the tribunal must hold that the contravention occurred (section 136(2) EqA).

130. In considering the reverse burden of proof as it relates to a duty to make reasonable adjustments, we had specific regard to Project Management Institute v Latif [2007] IRLR 579. "*The Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could have been made*"

Conclusions

131. In considering all of the allegations of discrimination, we have looked at the individual allegations in detail. However, we have borne in mind, at all times, that we must have regard to the totality of the evidence. In considering all of the allegations we have had regard to all of the evidence before us and its cumulative effect.

132. In relation to the jurisdictional point concerning whether any of the complaints were out of time, we are satisfied that we should consider all of the complaints contained within the claim form. This was due to the fact that we considered that there were allegations of conduct extending over a period, which was to be treated as done at the end of that period in accordance with Section 123(3)(a) EqA. We, therefore, considered all of the claims within time.

133. We accept that the Claimant had been invited to attend a return to work meeting on 15 August 2017 at which, without prior warning, the Claimant was informed by Mr Tempest that he was going to informally manage her performance. However, we do not accept that this, in itself, constituted unfavourable treatment of the Claimant.

134. We also accept that, informally managing someone's performance can be unfavourable treatment, even where it is done to try and support the employee concerned, with a view to enabling them to improve, which we believed to be the case in this instance.

135. Even though we found this to be unfavourable treatment, we did not, however, accept that this was because of something arising from the Claimant's

disability. We do not consider that the informal capability procedure was linked to the Claimant's disability related absences and/or her back condition.

136. The Claimant gave evidence that her ability to concentrate may be affected when in pain, but there was no evidence at the point prior to 15 August, that the Claimant had been so affected. It was clear that the Respondent had performance issues with the Claimant since the commencement of her employment. The issues with her performance related to her failure to record inspection evidence properly on the computer system, her report drafting, publication and meeting KPIs together with the failure to properly hand over work. Therefore, we are satisfied that, whilst the informal capability procedure did amount to unfavourable treatment, we do not consider that this was something arising out of the Claimant's disability.

137. Even if it were, we consider that the Respondent's reasons for informally managing the Claimant were legitimate and proportionate. These were set out at paragraph 11 above. The Claimant accepted that they were legitimate, something with which we agree, but reserved her position on whether they were a proportionate means of achieving those legitimate aims. We are satisfied that they were, since we considered that the Respondent was entitled to manage its inspectors to ensure that their inspections and reports were completed within a reasonable time scale, were of an acceptable standard and had properly recorded evidence against them. We did not consider that there was a less discriminatory way in which to do so, other than managing the claimant through the informal capability procedure.

138. We do not accept that the Respondent commenced informal capability management before the Respondent had carried out the OH processes. Whilst we accept that a formal TAP had not been agreed at this time, we consider that reasonable adjustments had already been put in place in respect of the Claimant. Therefore, we do not consider that she was treated unfavourably by virtue of the OH and TAP processes not being finalised.

139. We also do not accept that the Claimant was treated unfavourably by virtue of the conversation with Ms Golden on 3 October 2017. We accept that Ms Golden did query the way in which the Claimant had described the procedure she was undergoing. However, we do not consider this constituted treating her unfavourably in light of our findings of what was said during that conversation. We understood the Respondent's wish for the Claimant to be

clear about the procedures she was undergoing to avoid misunderstandings between her managers and the Claimant.

140. We are not satisfied that Mr Tempest set objectives which did not take into account the Claimant's back condition such that she was more likely to fail, as the Claimant suggests.

141. We accept that the Claimant was subject to a requirement to produce an initial inspection report for review by her manager within a 10 day period, although we find that all London inspectors were obliged to comply with such an objective and this was not specifically targeted to the Claimant. We do not accept that the objectives set by Mr Tempest amounted to unfavourable treatment. Further, these were not because of something arising in consequence of the Claimant's disability.

142. We accept that Mr Tempest refused to make adjustments at the meeting on 11 January 2018 held by Skype. Although Mr Tempest refused to allow the Claimant a rest day the day following an inspection, he agreed that the Claimant could take whatever posture breaks she required on that day, at her discretion. Also, Mr Tempest refused the Claimant's request to amend the initial submission of reports within 11 days (rather than 10 days).

143. We were satisfied that this could amount to unfavourable treatment of the Claimant, but we considered that the Respondent had shown that these objectives were a proportionate means of achieving a legitimate aim. It was necessary for the reports to be published within 50 days in order to comply with the statutory requirement to publish reports in a timely fashion to protect the public. We consider that the adjustments required may have affected the Respondent's ability to work towards this key date, and considered that there was no less discriminatory way to ensure that this was done.

144. We further do not accept the Claimant's assertion that Mr Tempest made unfavourable remarks to the Claimant in the meeting on 11 January 2018. We consider that Mr Tempest was extremely supportive of the Claimant both in respect of the work that she was doing in order to get it to the required standard, but also in respect of the making of adjustments for her in order for her to be able to carry out her job.

145. Finally, we accept that Mr Tempest emailed the Claimant on 7 February to inform her that he had decided to progress the capability management process to a formal stage 1 of the policy. Again, as for the informal process, we consider a move to formal capability management is less favourable treatment.

However, in light of our findings, we do not consider that this treatment was due to the Claimant's disability related sickness absences from work and/or the symptoms relating to her back condition.

146. However, even if that were to be the case, we again consider that the Respondent had shown that the treatment was a proportionate means of achieving a legitimate aim. We accept that it is necessary for the Respondent to ensure that its inspectors provide their reports in a reasonable timescale so that its operational targets such as KPIs are consistently met.

147. We, therefore, consider that the Claimant's claims for discrimination arising from disability fail and are dismissed.

148. Turning to the Claimant's claims for failure to make reasonable adjustments.

149. We do not accept that Mr Tempest required the Claimant to attend a one to one meeting in person in London HQ on 5 October 2017. This was ultimately held by skype and we failed to understand the basis for this claim.

150. We accept that the Claimant was requested to attend three days of a learning week in September 2017. We accept this to have been a PCP consistently applied to all inspectors in that region.

151. As the Claimant was allowed to use taxis to assist her in getting to and from the station for this learning week, we were not satisfied that the requirement to attend three days of the five day learning week placed the Claimant at a substantial disadvantage as compared to non-disabled persons.

152. However, even if it had placed her at a substantial disadvantage, we do not accept that it would have been reasonable to have held the training sessions by skype. Ms Golden's evidence was clear that this could have isolated the Claimant and we accept that some of the training provided and the type of sessions held at the training week would have been difficult to effect by skype. We also consider that obtaining handover information from colleagues who attended would not have been appropriate since she would not have attended the training, which was mandatory for the role she was performing and, therefore, would have adversely affected her ability to do her job. We therefore did not consider that the adjustments would have ameliorated the substantial disadvantage the Claimant asserts she suffered as a result of the requirement to attend 3 days of training in London. There was cogent evidence that it was crucial to attend the training in face to face sessions in order to carry out the role, which we accept and therefore do not find these to be reasonable adjustments.

153. We do not accept that the Respondent allocated the Claimant a greater case load and more cases which required enforcement action. As reflected above, it was impossible for the Respondent to know which practices would require enforcement action prior to their first inspection. We further accepted the evidence that the Claimant's workload had been decreased during the informal capability process to assist her in improving her performance.

154. We accept that a PCP was applied to the Claimant relating to the 10 day KPI timeframe in which draft reports had to be sent to her line manager. We are satisfied that this was applied consistently across the whole of the London team. We did not consider that this would place the Claimant at a substantial disadvantage as compared to non-disabled persons. She had previously suggested submitting the first draft within 11 days, and had been told that should she do so, on occasion, this would not be viewed as a performance issue. We did not accept the Claimant's evidence that adjusting this to a 20 day target was a reasonable adjustment, since we believed that this would have inevitably led to the inspection reports not being published within the 50 day KPI, which we considered was appropriate in the circumstances.

155. The Respondent did require the Claimant to pay back the time she needed to take during the working day as posture breaks, usually two 20 minute breaks, by working additional time at the end of each working day, but we are not satisfied that this was ever enforced. The Respondent had subsequently agreed that she did not have to make up the time from these breaks, but we accept that she had to initially do so. We do not consider that this would have put the Claimant at a substantial disadvantage as compared to non-disabled persons. The evidence was that the Claimant required posture breaks but she did not state that she could not work for additional time at the end of the working day in order to make that time up. Therefore, we do not accept that the Claimant was put at a substantial disadvantage in order to trigger the requirement to make reasonable adjustments.

156. We do not accept that the Respondent had a PCP, which required the Claimant to work a full working day on days following an inspection visit. The Claimant was allowed to take time as and when required following an inspection day. Whilst we accept that the Respondent did want the Claimant to take sick leave for longer periods in which she was unable to work on the day following an inspection visit, she was entitled to take whatever breaks she needed.

Therefore, we do not accept that they have failed to make reasonable adjustments in this regard.

157. Turning to the harassment claims, these relate solely to alleged statements made by Ms Golden during the conversation on 3 October 2017. We did not find that Ms Golden had stated to the Claimant "*you will come in whether you like it or not*". We have made findings concerning what was said during this conversation as set out above.

158. We found that Ms Golden had stated something like, "*as you know your grievance was not upheld by an impartial panel, and your grievance was* against *me and I take that very seriously*". Whilst we accept that Ms Golden may have said that she took grievances very seriously, we do not consider that this was related to the Claimant's disability. This was a statement of fact concerning the grievance outcome.

159. Nor do we consider that this statement had the purpose, or indeed the effect, as identified in section 26(1)(b) of the EqA.

160. We note that Ms Golden did state that the guided injections did not amount to back surgery, but we agree with this, since a lay person would not consider this amounted to back surgery. Again, we did not consider that this statement had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We consider this conversation was a discussion concerning how the Claimant should explain any procedures that she was to have to her managers in the future.

161. Therefore, we dismiss the complaints of harassment.

162. In relation to the victimisation complaints, we accept the Claimant's grievances dated 10 March and 19 July 2017 were protected acts, since they clearly raised allegations that the Respondent had contravened the EqA. We also accept that Claimant's complaint to Ms Golden on 3 October 2017 about the failure to make appropriate adjustments was also a protected act.

163. However, we do not accept that the Claimant was subjected to a detriment by virtue of doing these protected acts, as alleged or at all. The Claimant relies upon the matters stated to her by Ms Golden during the conversation on 3 October 2017 as detriments following on from her protected acts. However, we did not find that the Claimant had been told that she would have to come in to London 'whether she likes it or not'. Nor did we consider that Ms Golden had confronted the Claimant in an aggressive way about her grievances. Therefore, we do not consider that the Claimant had been victimised.

164. As a result of the above, we dismiss all of the claims against the Respondent in their entirety.

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Employment Judge Welch

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Date 13 March 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21 March 2019

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FOR EMPLOYMENT TRIBUNALS