EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs Susan Boyers	**AND**	**Department of Work and Pensions**

JUDGMENT OF THE TRIBUNAL

Heard at: North Shields **On: 10-13 December 2018**
Submissions: 1 February 2019
Deliberations: 15 February 2019

Before: Employment Judge A M Buchanan
Non Legal Members: Mr S Carter and Mr R Dobson

Appearances

For the Claimant: Mr Gerard Boyers
For the Respondent: Mr A Tinnion of Counsel

JUDGMENT

It is the unanimous Judgment of the Tribunal that:
1. The claim of discrimination by failure to make reasonable adjustments fails and is dismissed.
2. The claim of disability related harassment fails and is dismissed.
3. The claim of discrimination arising from disability is well-founded and the claimant is entitled to a remedy
4. Any claim advanced for indirect disability discrimination is dismissed on withdrawal by the claimant.
5. The claim of unfair dismissal for the purposes of sections 94/98 of the Employment Rights Act 1996 is well-founded and the claimant is entitled to a remedy.
6. The claim of unauthorised deduction from wages is not well-founded and is dismissed.
7. A Remedy Hearing will take place at the Employment Tribunal sitting at North Shields on Wednesday 5 June 2019 at 10:00am.

REASONS

Preliminary matters

1.1 The claimant instituted proceedings on 8 May 2018 supported by an early conciliation certificate on which Day A was shown as 13 March 2018 and Day B as 10 April 2018. A response was filed on 17 July 2018 in which the respondent denied all liability to the claimant.

1.2 At a private preliminary hearing before Employment Judge Shepherd on 24 July 2018 the various claims advanced and the issues arising for determination were defined and case management orders were made. Under the heading "*disability"* an issue was defined as: *"Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following conditions – severe anxiety and depression, chronic migraines and post-traumatic stress disorder"?*

1.3 The claimant filed further and better particulars of her claims and a schedule of loss on 21 and 28 August 2018. On 11 October 2018 the respondent filed an amended response and a counter schedule of loss.

1.4 The matter came before this Tribunal as set out above. Reasonable adjustments were made to the conduct of the hearing to accommodate the disability of the claimant. Regular breaks were taken throughout the hearing in particular during the time the claimant was giving evidence. The claimant was allowed to enter the Tribunal room first and make herself comfortable before the respondent and its witnesses entered.

1.5 There was insufficient time to receive submissions from the parties at the end of the hearing on 13 December 2018 and orders were made for written submissions to be prepared and exchanged.

1.6 The parties attended before the Tribunal on 1 February 2019 in order to make oral submissions and the Tribunal then reserved its judgment.

1.7 The Tribunal met in Chambers on 15 February 2019 to complete its deliberations and this Judgment is issued with full reasons in order to comply with Rule 62 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

1.8 The claimant referred in her evidence to allegations of bullying by a colleague in the period up to July 2014. No formal complaint was ever made by the claimant in respect of those allegations and the alleged perpetrator of those actions was never investigated or made aware of the allegations. In the circumstances the Tribunal considers it appropriate not to refer to that individual by name in this Judgment and the person will be referred to as "X".

The claims

2 The claimant advances the following claims to the Tribunal:-

2.1 A claim of disability discrimination by an alleged failure to make reasonable adjustments relying on the provisions of sections 6, 20/21, 39 and Schedule 8 of the Equality Act ("the 2010 Act").

2.2 A claim of harassment related to disability discrimination relying on the provisions of sections 6, 26 and 40 of the 2010 Act.

2.3 A claim of discrimination arising from disability relying on the provisions of sections 6, 15 and 39(2)(c) of 2010 Act.

2.4 A claim of ordinary unfair dismissal relying on the provisions of sections 94/98 of the Employment Rights Act 1996 ("the 1996 Act").

2.5 A claim of unauthorised deduction from wages relying on the provisions of Part II of the 1996 Act.

3 The Issues

The issues in the various claims advanced to the Tribunal are:

Disability

1. Did the claimant suffer with a condition or conditions which constituted a disability within section 6 of the 2010 Act? It is **noted** the claimant alleged two conditions namely migraines and anxiety/PTSD.
2. Was the claimant disabled at all times relevant to her claims?
3. Did the respondent have or ought the respondent to have had actual or constructive knowledge of the claimant's disability/disabilities at the relevant time?

Claims in respect of which it is accepted there are no time issues

Discrimination arising from disability: section 15 of the 2010 Act

4. Did the claimant suffer from anxiety/PTSD at/prior to her dismissal? (This issue was not agreed between the parties and is dealt with in our conclusions.)
5. If she did, was is a legal disability within section 6 of the 2010 Act?
6. Did the respondent have actual or constructive knowledge that the claimant had this disability at/prior to her dismissal?
7. Was the claimant treated unfavourably by the respondent when she was dismissed on 10 January 2018. It is **noted** that the respondent accepts the dismissal was unfavourable treatment
8. What was the "something" arising from the disability of anxiety/PTSD? (This issue was not agreed between the parties.)
9. Was her absence from work the "something"?
10. Was the claimant dismissed because of her absence?
11. Can the respondent show it was acting in a proportionate way to achieve a legitimate aim when moving to dismiss the claimant?

Unfair dismissal claim: sections 94/98 of the 1996 Act

12. Was the respondent's reason/principal reason for dismissing the claimant related to capability?
13. If it was, was that reason a sufficient reason for the respondent to dismiss the claimant in the circumstances? In particular:
13.1 Did the respondent follow a fair capability/dismissal procedure before dismissing the claimant on capability grounds?
13.2. At the time of her dismissal was there evidence as to whether and, if so, when the claimant might be fit to return to work to perform the substantive duties of the post?
13.3 Was the claimant's dismissal within or outwith the range of reasonable responses open to the respondent at the time?
14. If the dismissal was unfair how great a chance was there that the claimant would have been fairly dismissed had a fair capability/dismissal procedure been followed – the question arising from the decision in **Polkey -v- A E Dayton Services Limited [1988] ICR 148**?

Unlawful deductions from wages claim: sections 13 -27 of the 1996 Act

15. Were deductions made the claimant's wages in January and February 2018 pursuant to section 13 of the 1996 Act?

16. Was the deduction required or authorised to be made by virtue of a statutory provision or a relevant provision of the claimant's contract?

17. Does the evidence show that the full amount of these deductions is justified as an overpayment of wages?

18. Are these deductions excepted in full for the purposes of section 14 of the 1996 Act as a deduction in the form of the reimbursement by the claimant (not respondent as the list of issues prepared by the parties stated) following an overpayment of wages?

19. Does the deduction match the amount specified in the letter to the claimant?

20. Did the respondent fail to explain this deduction to the claimant, clearly or at all?

Claims in which the respondent asserted jurisdictional time issues

Time Issues

21. Were the complaints identified below presented within three months of the specific act/omission complained of?

22. If not, were the acts part of a continuing act, the last of which occurred within three months of the presentation of the claim form (subject to the effect of the early conciliation extension of time provisions)?

23. If not, has the claimant established that it is just and equitable for the Tribunal to extend time to allow the claimant to pursue the complaint?

Failure to make reasonable adjustments

It is noted that the claims of failure to make reasonable adjustments were based on the asserted disability of anxiety save where stated otherwise.

24. Did the following events occur and if so when:
24.1 requirement imposed by the respondent requiring the claimant to continue working in the same team, at same desk, in the same building as X
24.2 removal of the claimant's ability to work at Eston in October 2017?
24.3 prohibition on employees taking toilet breaks longer than three minutes/restrictions on employees taking screen or comfort breaks?
24.4 prohibition on employees taking toilet breaks close to lunchtime/restrictions on employees taking screen or comfort breaks?
24.5 absence policy including trigger points at which absence would lead to disciplinary action?
It is noted that the claims in respect of PCPs 24.3 - 24.5 inclusive were advanced on the basis of the asserted disability of migraines.
25. If they occurred, did they constitute a provision criterion or practice ("PCP")?
26. If they did, where those PCPs applied to the claimant and if so when?
27. If applied to the claimant, what substantial disadvantage does the claimant allege the PCP put her to in comparison to nondisabled employees?
28. Did the PCP put the claimant to that disadvantage?
29. If it did, where the following measures which the respondent could reasonably have taken which would have had the effect of avoiding the claimant being put at that disadvantage? (The Tribunal has slightly recast this issue in order to make sense of it).
29.1 in respect of the first PCP moving the claimant to a different desk away from X
29.2 in respect of the second PCP offering the claimant further locations or options prior to dismissal. The claimant asserted two additional adjustments namely engaging in performance management to enable the claimant to continue to work at Eston and allowing for reduced productivity by the claimant.
29.3 in respect of the third and fourth PCPs allowing the claimant to take regular short breaks
29.4 in respect of the fifth PCP allowing increased absences for the claimant and/or allowing for reduced productivity by the claimant.
30. If yes, did the respondent take those steps?
31. If not, was it reasonable for the respondent not take those steps
32. The claimant originally asserted a third PCP namely a requirement imposed by the respondent that the claimant returned to work at Middlesbrough up to the date of dismissal in January 2018 with a suggested adjustment of offering the claimant further locations or options are to dismissal.

Harassment: section 26 of the 2010 Act

33. Did the following events occur:
33.1 Did Gary McDonald shout *"Don't ask her anything we never know what medication she's on*" in May 2016?
33.2 Did GM say to Robert Heslop on an unspecified date "*Don't bother asking her, she doesn't know what day it is"?*

33.3 Did GM say "*Those doors are locked so that people like you can't jump out"* in July 2016?
33.4 Did GM in late 2016 hand the claimant his glasses and laugh off an approaching migraine
33.5 Did GM shout "*Don't panic Captain Mainwaring*" in 2016
33.6 Did GM say to the claimant "*I wouldn't let anyone get me in that state*" and *"I'm a trained killer you know"* in 2016?
33.7 Did GM imitate the claimant in January 2017 by slurring his speech, tilting his head to his shoulders, putting his tongue out of his mouth and rolling his eyes?
33.8 Did Dawn Rogers ("DR") ask Rachel Gallagher in August 2017 whether she was aware of the claimant's personality?
33.9 Did DR fail to investigate a number of points and did she believe the respondent's witnesses over the claimant without justification and contrary to the evidence and did she reach conclusions contrary to the evidence?
33.10 Was the appeal against the grievance findings tainted in the same manner as set out in 3.27 above?
33.11 Was the claimant subjected to a barrage of calls from Rachel Young ("RY") on 23 /24 October/November 2017 even after the claimant had made RY aware that she in hospital undergoing tests for a suspected heart attack?
34. Were those events related to the disabilities of the claimant? Which disability?
35. Were the events intended to violate the claimant's dignity or to create for her an intimidating hostile offensive humiliating or degrading environment?
36. If not, was that the effect of the events?

4. **Witnesses**

In the course of the hearing, the Tribunal heard from the following witnesses:

Claimant

4.1 The claimant gave evidence and called no other witnesses.

Respondent

4.2 For the respondent evidence was heard from:

4.2.1 Gary McDonald ("GM") Line Manager of the claimant from December 2015 - December 2016

4.2.2 Denise Brough ("DB") Dismissing Officer August 2017/January 2018

4.2.3 Amanda Crandon ("AC") Line Manager of the claimant from December 2016 onwards

4.2.4 Dawn Rogers ("DR") Grievance Manager

4.2.5 Antony Sayer ("AS")– Grievance Appeal Manager

5. **Documents**

We had an agreed bundle comprising two lever arch files before us running to some 927 pages. Some pages were added during the hearing. Any reference to a page number in this Judgment is a reference to the corresponding page in the agreed trial bundle.

Findings of Fact

6. Having considered all the evidence both oral and documentary placed before us and in particular the way the oral evidence was given, we make the following findings of fact on the balance of probabilities:

6.1 The claimant was born on 13 April 1968 and commenced work for the respondent as a customer telephony agent/administrative officer on 19 September 2005. Initially the claimant was employed on a fixed term basis.

6.2 The claimant was appointed to a permanent role with the respondent on 15 September 2006. Her place of work was James Cook House Middlesbrough (page 157). Her contract of employment entitled her to 6 months full pay and then six months half pay if absent from work due to illness: this was limited to collective absences in a four-year period (page 160). The claimant worked full-time Monday – Friday usually including one late shift each week.

6.3 In October 2007 the claimant received a call at work from her father to say that her mother had been taken seriously ill. The claimant asked to leave work and claims there was a delay in this being authorised and when the claimant reached the hospital her mother was in a coma and sadly died. The claimant has harboured feelings of discontent about this matter since that time. We did not hear from any witnesses for the respondent about this matter and we make no finding as to whether there was a delay in the claimant being allowed to leave or, if there was, who was responsible for it.

6.4 In 2009 (page 167) the claimant wrote to her Centre Manager about an issue with her team leader which she described as a "*terrible situation".* In the course of that message she made the manager aware that she was on tablets for depression. This message related to a misunderstanding the claimant had had with her then team leader Alison Smith whom the claimant alleges took exception to the claimant seeking advice from another team leader. The claimant alleges her team leader took her into a meeting room and blocked her way out of it until she had signed a letter withdrawing her complaint. The claimant refused to sign the letter but claims to have been traumatised by the event. We heard no evidence from the respondent on this matter and, given the age of this allegation and the fact that the claimant has clearly dwelt on it over and over again since it occurred, we make no findings of fact about whether the incident occurred in the way the claimant asserts. However, we do find that there was an incident and that it was the "*terrible situation"* to which the claimant referred at page 167. The claimant asserts she received no help to resolve the matter and it remained unresolved. The claimant generally has a poor opinion of those people who have managed her over the years and considers as she set out at paragraph 50 of her witness statement that "*management were more*

interested in covering their own backs and boosting their own interests rather than supporting us which I thought was supposed to be the role of a team leader".

6.5 In the period of her employment relevant to the issues before us, the line managers of the claimant were Steven Conlin ("SC") 2014 - March 2015, Lewis Barker ("LB") March – December 2015, Gary McDonald December 2015 – November 2016 and Amanda Crandon November 2016 until Summer 2017. The work trial at Eston which is referred to below was overseen by Linda Gibson.

6.6 On 3 December 2013 (page 174) the claimant was referred to ATOS Healthcare in relation to migraines from which she suffered. The claimant advised that she had suffered from migraines for the past four years twice or three times per month and usually lasting for about two days. It was opined that the claimant would qualify as a disabled person for the purposes of the 2010 Act because of this impairment and it was suggested reasonable adjustments to consider would be a degree of increased absence or reduced productivity. On 4 December 2013 the claimant met with her line manager (page 179) to discuss the report and the claimant confirmed the migraines were not at that time impacting on her sickness absences and that if she felt an attack coming on, it was agreed steps could be taken to move her off line. The claimant declined a desk assessment.

6.7 On 17 and 18 March 2014 the claimant had conversations with her line manager in which she indicated that she was having problems with migraines but had not told her line manager earlier. The claimant said she had used some days of annual leave when she felt an attack coming on in order not to have a sickness absence recorded. She was asked why that was so given that adjustments would be made. The claimant was offered a change of desk but declined.

6.8 At around this same time the claimant had issues with a work colleague ("X") whom she considered was bullying and harassing her. At first, she did not report this to her managers but wrote about it privately to others outside work (page 177). It appears the difficulties had begun around the end of 2013 and arose from a "night out" the claimant attended with her work colleagues when her drink was spiked which she attributed to the actions of X. In a note (page 176) the claimant described X as "*like a sociopath out to destroy me with daily constant verbal abuse, spreading lies and rumour in front of me….".* We find that the claimant genuinely perceived difficulties with X and that she perceived X made unkind and cruel remarks to and about her. The claimant worried that hitmen from work were outside or had broken into her house because X had made a remark that a team leader SC had offered her the use of "*hitmen – no questions asked".* By January 2014 the claimant had decided she wanted to move desks in order to be away from X who sat close to her. SC told the claimant that she was being melodramatic and hypersensitive and that all that the team (including X) were doing was having a laugh and that the claimant was doing great and her call statistics were spot on and that their team (led by SC) was the best.

6.9 At the claimant's request a further OH referral was made and resulted in a report dated 25 March 2014 (page 184). That report went into more detail about the migraines from which the claimant suffered and stated that the claimant could carry out her role but would require additional breaks away from the screen to reduce

excess eye strain. A desk assessment was again recommended and a possible increase in trigger points in the sickness absence policy. It was opined that the trigger for a migraine in the workplace was intensive computer work. It was opined that the migraines amounted to a disability under the 2010 Act.

6.10 On 1 April 2014 the claimant spoke to SC and told him how bad the conduct of X was and that she was still afraid of being killed and wanted a desk move. SC asked the claimant to put it in writing which she did. On 3 April 2014 the claimant met SC and reported "*the worst abuse …and the most terrible mistreatment"* she had ever experienced from a work colleague and she asked her manager to help her end "*the misery caused by this menacing woman"* (page 186). The claimant reported she was living in a permanent state of terror and was afraid what the woman was capable of next if she found out she had reported the matter. The claimant stated she suffered from depression, countless sleepless nights and panic attacks. She concluded her written report: "*Therefore I am happy for now to just move desk/teams and just tell people it is on account of my migraines….this is my preferred outcome for now as is (sic) the option that will cause me the least further stress ".* In a subsequent email to her line manager (page 188) the claimant said she had realised the increase in frequency of the migraine attacks could be the stress of the bullying and that she had been treated for depression, stress and panic attacks as a result of the bullying.

6.11 The claimant reported in an email to a friend (page 192) that her line manager described what the claimant had written as the "*worst thing he has ever read"* and told the claimant to make a formal complaint of bullying but the claimant was not willing to do so and confirmed that position in writing on 3 April 2014 (page 194) to her line manager. In the course of that letter the claimant wrote: "*I cannot be forced to make a complaint and am not prepared to do it and hope you will support my decision. A lot has changed since I told you 2 days ago and I feel stronger now….".* In a later email to herself on 13 April 2014 (page 197) the claimant considered herself trapped between the devil and the deep blue sea in relation to the question of a formal complaint. The claimant wrote: "*My team leader told me last week he agrees not to go formal with my complaint but if I get upset about it again he will have no choice. I can see his predicament……".*

6.12 The claimant felt that she had no real choice. She did not want a formal investigation because of her fear of the consequences from X but that was the only way she could secure a desk move. The claimant feared for the loss of her job and felt trapped in a situation. SC told her that even reporting it would not guarantee a desk move.

6.13 The desks of the claimant and X remained very close to each other in the workplace at this time but for other reasons X was moved to a different desk around this time which pleased the claimant. The claimant and X remained working on the same team but now at a distance from one another. By 19 July 2014 (page 216) the claimant reported in her diary that she was pleased she had been moved away from X. The claimant recorded referring to SC: *"He said he thought everything had been sorted with that and I said it had – but that doesn't stop me from being happy that she isn't there any more and I don't have to speak to her..".(*page 216).

6.14 On 1 September 2014 the claimant reported to her line manager that she had a migraine at work and that her work rate would be slow (page 219). She repeated a similar message on 3 September 2014 (page 221).

6.15 The claimant was seen again by OH on 16 March 2015 (page 225) in relation to migraines. The resulting report recommended a continuing supportive and understanding approach particularly in the period up to April 2015 when she was to have botox treatment and in which lead up period she was not to take any other medication. The recommendation was that she take 1-2 minute breaks from screen work every 30 minutes and that trigger points for absence be increased for the following 3-6 months. On 17 March 2015 Ceri Hughes (temporary team leader) saw the claimant and agreed the claimant could take breaks "*as needed to ensure she has a natural break away from the screen. I have also asked Susan to communicate with me as she has been and I will assist whenever I can".* (page 229).

6.16 In March 2015 the claimant moved to the team of Lewis Barker. The claimant made LB aware of her difficulties with X and we find that she did ask for a move to a different floor but was told that was not possible and that she should not let it get to her.

6.17 In August 2015 letters were sent to all staff including the claimant about breaks and the 15 minute tea/coffee break was not to be taken in the period 11.30am – 2.20pm when people were taking their lunch break. On 25 August 2015 the claimant was asked by email why she had taken a break between 11:32 and 11:46 on 17 August 2015 over the lunch period (page 231). No action was taken in respect of this break.

6.18 In December 2015, the claimant moved to the team of GM. GM had been a sergeant major in the army and the claimant considered that he treated his team as he might have treated new recruit soldiers. GM occasionally walked up the office shouting "*quick march".*

6.19 In March 2016 the claimant wrote in a diary that she felt unsupported by her manager GM in respect of issues around her call times (page 236). On 28 April 2016 GM sent the claimant information about stress in the workplace and on 4 May 2016 the claimant raised a request for help with stress at work and her union encouraged her to keep pressing the point. The claimant made GM aware of her difficulties with X and he arranged to position her desk so the claimant could not see X.

6.20 We find that on one occasion in 2016 GM did say to the claimant "*I am a trained killer you know".* We find that there was resistance from GM to the claimant's request for a stress reduction plan ("SRP") and he told her that to have such a plan she would have to have gone through occupational health and that a stress reduction plan ("SRP") could not just be requested for no reason.

6.21 On 12 May 2016 the claimant visited her GP because she was upset that X had been moved closer to her. The claimant continued to ask GM from time to time for a desk move or a team move but was told that it was not possible.

6.22 In July 2016 when GM was away on holiday, the claimant became extremely upset in the workplace and had what GM subsequently described as a "*meltdown*". The claimant gave only little evidence of this matter but attributed the incident to seeing a colleague achieve a desk move at her first request. The claimant broke down in the workplace and sobbed to such an extent that Elizabeth Stewart, another manager with no responsibility for the claimant at that time, intervened and arranged an immediate move for the claimant to the third floor of the building. As it happened the team of GM was due to move to that floor in August/September 2016 and so the claimant was able to work there until the rest of the team moved there a few weeks later.

6.23 In September 2016 the claimant asked for a change to a week of late finishes and GM supported that request on 8 September 2016 (page 242A). On 12 September 2016 the claimant repeated her request for a SRP and a desk assessment linked to her migraines. Discussion took place about a change of desk for the claimant and a move was suggested on 13 September 2016 (page 245). On 16 September 2016 Katrina Boland wrote to GM asking on behalf of the claimant for a SRP and an OH referral on the matter. On 17 September 2016 GM wrote to the claimant to say he had requested time be made available for the SRP to be completed.

6.24 The claimant completed a SRP and identified the harassment from X in 2014 and the failure to move her desk and the fact that she saw others moved for very minor reasons made her feel like a second-class citizen. The claimant recorded that on 6 September 2016 she had been admitted to hospital with chest pains but it was not thought she had had a heart attack and put the attack down to stress. The claimant ended her report: "*My chest pain is still there and I feel sure I am going to suddenly die of a heart attack"* (page 252). A meeting took place on 22 September 2016 to discuss the SRP and the conversation mainly dealt with the perceived bullying and harassment of the claimant by X and the claimant commented that she felt the only way out was to get another job. She was not being bullied at that time but she stated that the past actions were still affecting her. When it became clear to GM that the claimant was in fact complaining about the actions of X, he concluded that a SRP was not appropriate and referred the claimant to her union representative to consider the bullying and harassment complaint against X rather than pursuing the SRP. The claimant did not pursue any such complaint because she accepted she was not being bullied at that time and GM heard nothing further about the matter. As a manager GM felt that he could not just approach X with an informal allegation of bullying because that is a very serious allegation. GM made arrangements for the claimant to be moved further away from the desk of X after the meeting in September 2016.

6.25 We have considered the evidence of the claimant and GM in respect of the alleged remarks of GM to the claimant which form the basis of the claims of harassment advanced. We have assessed that evidence and in the main we accept the claimant's evidence as to the remarks made to her by GM during the time of his line management of the claimant. The denials from GM were not convincing even when we take account of the long delay that there has been in advancing these allegations. The remarks alleged by the claimant were of such specificity that we conclude it is very unlikely that she has made up such remarks and in the main we

accept the remarks attributed by the claimant to GM. We deal with our particular findings on these matters in our conclusions but our rationale for preferring the evidence of the claimant on this matter is as set out above. We accept the evidence of the claimant that GM was prone to making remarks which were not "politically correct" and that he had a robust disregard of the political correctness. We accept that the claimant had panic attacks at her desk on a not infrequent basis and that on one of those occasions GM said "*don't panic Captain Mainwaring".* On another occasion we accept that when the claimant made GM aware that she was anxious and upset because X was sitting nearby, GM said words to that effect that he would not let anyone get him into that state.

6.26 On 4 October 2016 the claimant had a severe migraine and called the sickness line to advise about her illness. The claimant received a call from GM in which he forcefully told her that she had not followed the correct reporting procedure.

6.27 At her mid-year review in November 2016 the claimant was awarded a box 3 which was the lowest possible grade and was advised by GM how to improve the position by the year end: in the event at the year- end she secured a box 2 marking. The claimant spoke to another manager David Tomblin about this mark who promised to speak to GM about. The claimant perceived GM did not speak to her after that as he was upset that she had raised the matter with another manager. As a result, the claimant felt she could not appeal the box marking. In January 2017 the claimant moved to the team of Amanda Crandon.

6.28 At a 1:1 discussion on 13 January 2017 with AC, the claimant recorded that she was looking forward to sitting in a darker area to help her migraines and to further hospital treatment to help her migraines and that sitting on a different floor to X had made a positive difference for the claimant. (page 268). At a discussion with AC on 3 February 2017, the claimant said she felt better since sitting in the dark but would like to request a SRP and a desk assessment and that she liked her new team and was happy not having to sit within the vicinity of the people who bullied and harassed her (page 277). It was noted by her line manager *"we also discussed a stress risk assessment but we have agreed that this is not really necessary as the issues she has are not really related to this*" (page 278). At the same time the claimant recorded her upset at the way GM had spoken to her on 2 February 2017. The claimant reported that GM had publicly mocked her speech impediment. The claimant referred to the bullying by X in 2014 and said she did not feel able to challenge GM about his behaviour particularly as he was making a decision about her box marking. The note (page 281) ends "*I am not happy that it is acceptable for a manager to make fun of someone when he is deciding what happens to me at the end of the year and he knows by suffering from stress as it is".* AC did nothing about this having not witnessed anything for herself.

6.29 On 13 February 2017 the claimant took a call from a customer who said he was suicidal. The call took some time to deal with and the claimant called for and received the assistance of a manager Rachel Gallagher ("RG") to bring the call to a satisfactory conclusion. The claimant sent an email to AC that same day complaining about the way RG had spoken to her. The claimant was shaking at the end of the call and records that she felt "*at rock bottom".* She broke down at her desk and wept. The claimant was seen by the command manager Peter Graves who asked if the claimant

was alright and she said that she was not. The claimant contacted her GP surgery and asked to leave the workplace to take the call. This was allowed and the claimant went to a coffee shop to wait for the call and there broke down in tears.

6.30 On the same day the claimant received a fit note showing her unfit for work by reason of "*work stress"* for 28 days. The claimant did not return to work after that until her dismissal in January 2018 save for a period of work trial in Eston in September/October 2017.

6.31 The claimant had a call from AC on 15 February 2017 when she declined an OH referral and in her note (page 305) recording that conversation the claimant recorded that the respondent was trying to grind her down to go back to work "*brainwash me into what I want or tip me over the edge so that I die and they won't have the problem of me anymore".* The claimant confirmed in her diary on 22 February 2017 that she did not want an OH referral. The calls received from AC and Tom Hunter upset the claimant and she told them she did not want to discuss matters (page 309). The claimant was invited to a meeting on 15 March 2018 when she had been absent for 28 days but it was agreed the meeting should not take place and that contact should be by email. The claimant mentioned in a call to Tom Hunter on 13 March 2017 that she planned to submit a grievance.

6.32 While away from work in February/March 2017 the health of the claimant was poor. We accept that she had frequent panic attacks and was tearful for much of the time.

6.33 AC recognised the claimant's case as complex and sought advice from HR on how to handle the matter. Telephone contact continued but the claimant was unwilling to engage with her managers. At the request of the claimant telephone contact ceased and contact continued via email. AC was seriously concerned for the claimant's welfare and felt upset that the claimant would not speak to her by telephone. On 24 March 2017 AC wrote to the claimant (page 333) and recorded the attempts to engage with the claimant and concluded that she had decided to refer the case to Denise Brough "*who will decide whether your sickness absence level can continue to be supported at this time which if not could lead to dismissal"* (page 334).

6.34 In March 2017 the claimant submitted a six page grievance letter (pages 327-332) in relation to *"how bullying stress and illness has been handled by the department".* The complaint was sent to the Counter Fraud and Investigation Unit but they refused to deal with it and passed it back to line management to deal with in accordance with the grievance policy.

6.35 The claimant wrote to DB on 31 March 2017 explaining her position and expressing her willingness to provide information needed but preferably by email. On 3 April 2017 DB was advised that any decision-making process should be put on hold while the grievance was investigated.

6.36 On 3 April 2017 Caroline Bell Grievance Manager wrote to the claimant and asked her to complete a formal grievance form within 5 days (page 345). In the event that step was not insisted on and the grievance letter was allowed to stand as the formal complaint. After a period of delay when the managers of the respondent were

seeking advice on how to proceed, Dawn Rogers (DR) of the Eston Job Centre was appointed to investigate the grievance and the claimant was so advised on 27 April 2017 (page 381).

6.37 The claimant was invited to a meeting with DR on 5 June 2017 but at the claimant's request this was changed to 12 June 2017. DR was accompanied by a note taker and the claimant was accompanied by her son. The meeting was on neutral ground at the Acklam Business Centre. The claimant confirmed that her complaint was directed at her management and how her issues had been handled and not the individual who had allegedly bullied and harassed her in 2014.The meeting was minuted (pages 410 - 416). The claimant indicated that she could not return to the building she had previously worked in. The claimant recounted the grievance and the bullying she had received at the hands of X. She complained that her manager SC had said nothing could be done unless she made a formal complaint. The claimant stated she had not felt strong enough to deal with a formal process. The claimant complained that others were given desk moves and she was not. She asserted that the conduct of X had destroyed her and she felt it difficult even to walk past X. The claimant indicated she could not return to work anywhere in the service centre and that the managers had not helped her when they could see how much she suffered. The claimant stated she could see herself returning to work if it was somewhere else.

6.38 Arising from that meeting with DR, the claimant agreed to an OH referral and that was put in place by AC.

6.39 DR met with SC on 23 June 2017.The meeting was minuted (pages 439-441). A meeting with LB took place on 30 June 2017 and was minuted (pages 451-453) .LB confirmed that in his time as line manager the claimant did not sit near to X. A meeting with GM took place on 5 July 2017 and was minuted (pages 456-461). A meeting with AC took place on 7 July 2017 and was minuted (pages 462-465). A meeting with RG took place on 1 August 2017 and was minuted (pages 494 – 495).

6.40 On 28 June 2017 AC wrote to the claimant to say a work trial was available for her at Fraud in Eston and asked her to be in touch. The claimant replied positively but was concerned about the travel distance.

6.41 In his meeting GM confirmed that he was aware the claimant did not get on with X but he was not aware when taking over as her line manager that a SRP was required. He was aware that the claimant did not wish to have contact with X and he suggested alternative toilet and breakout facilities to the claimant to avoid any possible contact with X. In July 2016 he recounted that the claimant had what he described as a "*meltdown"* because X had moved closer to where the claimant sat and AC (in fact Elizabeth Campbell was referred to) had stepped in and moved the claimant so that she would not need to be near to where X was then sitting.

6.42 In her meeting AC stated the claimant came into her team in November 2016. She had held a meeting with the claimant in January 2017 at which the claimant had "*ranted"* about X but the claimant declined to pursue a bullying and harassment complaint about X. AC confirmed that claimant had never mentioned to her that she felt suicidal at any time. In the summer of 2016 it was Elizabeth Campbell (then

Stewart) who had dealt with the claimant and moved her to another floor. AC had perceived the claimant as anxious and requiring more support than others but had not observed any suicidal traits (page 463). The claimant had not mentioned any worsening of her migraines, increased stress or made any request for a stress reduction plan.

6.43 In her meeting RG had said she was told someone on another floor needed help with a call on 13 February 2017 and had gone upstairs immediately and had assisted the claimant.

6.44 Throughout her absence the claimant submitted fit notes which recorded the reason for absence as "*work stress".* In an email to AC on 20 July 2017 (page 472) the claimant referred to her conditions as "*work-related stress, depression and anxiety".*

6.45 The claimant agreed to an OH referral in June 2017 but would not then release the subsequent report on the basis that it was not an accurate reflection of the discussion which had taken place. The first report from OH (pages 529-531) was not received by the claimant and was not released to the respondent. The claimant objected to that referral because the telephone connection between herself and the OH adviser was poor and a further referral was made which resulted in a full report (pages 662-666) which was sent to the claimant but was rejected by her on the basis it did not give an accurate reflection of the telephone discussion which had taken place. We deal with the report further at 6.51 below.

6.46 On 10 August 2018 DR issued a letter confirming that the claimant's grievance was not upheld. The claimant was told of her right to appeal. The report (pages 502-507) detailed the investigation which had taken place and noted the claimant wished to return to work but not at James Cook House Middlesbrough or Daryl House Stockton. It was noted that the grievance policy of the respondent stated matters should be investigated within 30 days of occurrence but in this case the investigator had agreed to investigate the allegation that line managers had exacerbated the claimant's absence from work. The conclusion was that none of the five managers interviewed had failed in their duty of care to the claimant. A clear rationale for each decision was set out in the report. The central conclusion reads:
"My investigation showed that they all made reasonable efforts to ensure that Ms Boyers was content and that she was comfortable with the location of her desk and that the lighting was in line with the advice from occupational health to support her ongoing migraines. There is no evidence to believe she was suicidal or suffering from work related stress. I cannot find any evidence that Ms Boyers was prevented from requesting a stress reduction plan or a further referral to occupational health referral" (sic). It was noted the claimant had agreed on 12 June 2017 to an OH referral and a SRP and wished to return to work at a different location and that information had, with the claimant's permission, been passed to her line manager to progress. We are satisfied that the investigation of the claimant's grievance by DR was robust and the outcome amounted to a reasonable conclusion.

6.47 On 20 August 2017 the claimant appealed the grievance outcome (page 513-517). The grounds of appeal were various. It was said that the investigation had not looked into several matters raised by the claimant in respect of her ability to take

days off sick, a delay in her being allowed to visit her mother in hospital when she had received word she was dying which meant the claimant had arrived too late at the hospital, warnings about being negative about the DWP and being trapped in a room with a manager and ordered to lie. The second matter raised dealt with the failure to investigate the manner in which RG had spoken to the claimant on 13 February 2017. Thirdly, the delay in moving her desk between January and July 2014 had not been investigated and the failure of GM to hold monthly 1:1 meetings with the claimant. There was reference to the claimant's "*personality"* in the grievance report which the claimant stated she found deeply offensive and inappropriate as her personality was not relevant and did not excuse the bullying or the way she had been treated. For the first time reference to a comment allegedly made by GM is referred to: "*we can't have the balcony doors open on the third floor, they're locked so that people like you can't jump out".* It was asserted that at her meeting with DR on 12 June 2017 the claimant had brought a "*stack of evidentiary documents including the complaints to my managers and logs of the time*" but that DR had declined to look at it. The grounds of appeal concluded that DR had not fully completed the investigation, did not consider documentary evidence, did not validate the comments of line managers and the report was "*incomplete and partly inaccurate".*

6.48 The claimant advised Elizabeth Stewart that she would return to work on 29 August 2018. There was some reluctance in line managers to have this trial undertaken. Linda Gibson ("LG") wrote to Sue Freary on 23 August 2017 in these terms:
"It seems we still have a work trial on the table at Eston. I need to be clear that we do not have to do this. If Ms Boyers turns it down and I know she's already querying the travel, this is the only offer on the table. Can you call her to discuss as I asked Denise Brought (sic) to proceed with the dm action now her complaint has been investigated. I currently see no reason why she can't come back to work" (page 520).

6.49 On 23 August 2017 DB invited the claimant to a sickness absence meeting ("SAM") on 31 August 2017.The claimant replied explaining the grievance outcome was being appealed and that a work trial was to begin shortly. DB agreed to defer the SAM (page 524).

6.50 In an email from LG to DB a measure of frustration was expressed at the failure of the claimant to commit to the work trial and the difficulties with an OH referral. The email ends "*work trial is on offer and this is the only one on offer as we aren't required to move her. She queried the travel as its to Eston"* (page 526).

6.51 The claimant had an OH referral on 30 August 2017. The referral was requested by AC and it included migraines as well the stress. The claimant did not allow the report to be released to the respondent who therefore did not see it until these proceedings were commenced. The claimant refused to release the report because she considered it to be false and misleading and was not a full and accurate reflection of her then current mental health situation. The report indicated that "*the depression appears to be in remission with some low level anxiety probably due to the timing of this call and a natural response to a meeting tomorrow with a return to work plan being imminent"* (page 529). The author of the report opined that the claimant's condition was likely to amount to a disability and the measures to consider

were a stress risk assessment and a phased return to work with supportive management.

6.52 On 30 August 2017 the claimant confirmed her willingness to return to work at Eston in an email to AC. Linda Gibson put steps in place and confirmed that for the trial, line management would remain at Middlesbrough. The claimant made it plain to the respondent at this time she could not consider a return to work at either Middlesbrough or Stockton because she did not feel strong enough to face the colleagues, managers or faces which had caused her mental health problems. The claimant made it known that she had not received the latest OH report and was chasing it up.

6.53 Antony Sayer ("AS") was appointed to deal with the grievance appeal. He agreed to meet with the claimant at Eston on 15 September 2017.

6.54 It was agreed that the work trial at Eston would begin on 11 September 2017. The claimant was seen by AC on that day (page 550). It was noted that the phased return hours of work for the first 4 weeks were agreed. The claimant was not taking any medication except for migraine medication and that the counselling she had been undergoing had ceased. There was a conflict as to whether the trial began on 11 September or 18 September 2017. On balance we prefer the claimant's evidence that the trial began on 11 September 2017 and that the date on the document appearing at page 610 prepared by AC is incorrect.

6.55 A meeting took place between the claimant and AS on 15 September 2017 and was minuted (pages 551 – 556). The claimant stated she was terrified of the people who had bullied and harassed her when working at Middlesbrough but her complaint was about the way she had been treated by the managers. The claimant stated she could not return to work at Middlesbrough or Stockton or work under managers who had insulted her and commented on her personality. The claimant gave her version of events from 2014 when X had been moved on 2 July 2014 but remained on the claimant's team until 9 February 2015. The claimant was told to send in any further documents such as emails on which she wished to rely.

6.56 On 18 September 2017 the claimant sent her first pieces of additional evidence to AS (pages 560-609). The claimant described the diary notes which she sent in as "*deeply personal".* She recorded that she could not take what had happened in 2014 from X any further because of her religious faith (page 597). The claimant recounted her visit to hospital on 6 September 2016 and how she had gone into work after being released arriving by 9:36am. The claimant sent more information on 29 September 2017(page 629) and AS replied that same day stating he would need to take time to review matters.

6.57 The claimant met AC at Eston on 11 September 2017 (page 610) and agreed the hours of a phased return over four weeks. A further meeting took place on 12 September 2017 between the claimant and AC and Gayle Nixon who was to supervise the claimant during the trial. The duties of the trial were discussed and the claimant was introduced to the team and it was agreed the claimant would be contacted each Friday of the trial by Sue Freary ("SF") from the Middlesbrough office

to discuss how the trial was going (page 610). In the event this contact did not take place.

6.58 On 22 September 2017 the claimant sent an email to SF (page 619) confirming things at Eston were going "*okay"* and that she had explained to her manager all that she had gone through at work and her manager had been very patient with her. On 26 September 2017 SF noted that the work trial should be extended by two weeks to 20 October 2017 to compensate for difficulty with IT access in the first two weeks of the trial. On 26 September 2017 the claimant asked to drop back her hours from 6 hours to 5 hours. The claimant recorded in her diary (page 622) that she felt "*shaky tired high anxiety and under pressure to make sure the work trial a success even though I'm struggling to concentrate on anything with my anxiety – caused entirely by what I have been through at the service centre. I feel as if they are putting their business needs above my medical needs. This pressure caused me to retract my request – not wanting to rock the boat with my new team leader as I expect she makes the decision whether or not Fraud at Eston will keep me or not. May speak with union for advice, my TL Amanda is away"* (page 622). In fact the claimant worked 5 hours per day in weeks commencing 11 and 18 September and 6 hours per day in weeks commencing 25 September and 1 October 2017.The claimant asked to remain on 6 hours and not move to full time hours by email dated 26 September 2017. On 28 September 2017 Gayle Nixon told the claimant by email that the work she had done that day was all correct (page 628).

6.59 On 4 October 2017 the claimant wrote to AC to say she had finally received her OH report from 30 August 2017 but had rejected it on the basis it was false and misleading and not an accurate reflection of her current mental health situation. At the same time managers were considering if the work trail could be extended but that was agreed and the claimant was so advised on 6 October 2017.The claimant asked to stay on 6 hours due to "*high levels of depression and anxiety due to what happened at James Cook House."* (page 654). On 10 October 2017 Karen Oldrid at Eston wrote to Alan Dunn commenting that Gayle Nixon was coaching the claimant and reporting back to the claimant's line manager and continued: "*Susan's performance is not good and she is unable to do the LS Admin role….Are you able to provide your assurance that Susan will be returning back to her original office after this period as I do not have the resource to manage her at Eston"* (page 658).

6.60 By 18 October 2018 the managers had determined the work trial had not been a success and Linda Gibson wrote to SF advising that she would need to see the claimant to tell her she had not met the standard and must return to Middlesbrough (page 669). On 19 October 2017 the claimant wrote to SF to say she had tried working 7 hours per day but could not manage it and would revert to 6 hours per day.

6.61 On 19 October 2018 (page 673) Karen Oldrid wrote to Andrea Thompson expressing some irritation that she was expected to complete paper work to evidence the claimant's lack of progress with the job trial. A work trial agreement form was completed retrospectively (paged 675 – 688) which had annexed to it details of the claimant's progress or lack of it over the weeks of the trial. None of these reports were ever discussed with or shown to the claimant.

6.62 On 20 October 2017 Andrea Thompson sent an email to Linda Gibson explaining that the work trial had been carried out informally and that there were no documented 1:1 meetings with the claimant but there was a comprehensive list of work given and errors made and she continued: "*I am sure there is enough detailed information in the documents attached to explain why the Admin role in FES NEE is not suitable for Sue. She actually advised her mentor that she could not concentrate due to her medical issues and this is detailed in the attached documents"* (page 690).

6.63 On 20 October 2017 SF sent an email to the claimant at around 2.30pm to say the work trail had ended and that she was to return to James Cook House on Monday 23 October 2017 which the claimant recorded was not a possibility for her (page 698). On that same day Linda Gibson wrote to SF asking: "*Please advise where we are at with the timeliness of getting her out of the fraud team" (page 700).* In the same message Linda Gibson thanked Andrea Thompson for the information which she had sent to her in respect of the claimant's performance on the job trial and said: "*thank you the evidence should I'm hoping be enough. It's very difficult to refute thank you. As this is (sic) only just come through and I understand why we may not be able to get to her until Monday".* The message was sent at 13: 39.

6.64 On Monday 23 October 2017 the claimant reported ill with anxiety and depression and obtained a fit note saying she was unfit for work due to "*work stress"* for 28 days until 20 November 2017 (page 704).On 24 October 2017 the claimant wrote to Rachel Young to the effect that she was at hospital after a huge panic attack and that she could not face going into work at all and she concluded: "*I need to be left alone to start my recovery again and yet again I need to ask to be contacted by email rather than phone, as I find talking about this too stressful and I'm really concerned about my health"* (page 707).

6.65 AC made various attempts to contact the claimant on 23 October 2017 by text message and telephone. Once the claimant had made AC aware that she required contact by email that request was observed.

6.66 On 26 October 2017 the claimant sent a message to AS advising him that the work trial had ended and that it was "*completely unacceptable. After years of abuse and neglect from the department, my one opportunity to get back on track and work on my recovery has been taken away. Please add this to my formal complaint" (p*age 712). The claimant wrote in similar terms to SF (page 713).

6.67 On 6 November 2017 AC wrote to the claimant (page 720). The steps taken during the claimant's absence from February 2017 were set out and she advised the claimant that she had decided to refer her case to the decision maker who would decide whether the claimant should be dismissed or demoted or whether the absence could continue to be supported. A report was prepared by AC for Denise Brough (pages 722/23) and she recommended that the claimant be dismissed on the basis she had been given adequate guidance support and time to improve her attendance but had not shown any reasonable prospect of achieving the required level of attendance within a reasonable timescale. The report was accompanied by a large number of papers showing contact with the claimant in the period of absence which began in February 2017 (pages 710-74).

6.68 On 12 November 2017 the claimant asked for more time to send evidence to AS and this was agreed by him. On 15 November 2017 the claimant sent to AS a full history of GP appointments dealing with stress, depression and anxiety caused by the problems at work.

6.69 On 29 November 2017 DB wrote to the claimant inviting her to a meeting on 12 December 2017 to discuss her absence and warning she was considering dismissal or demotion or a further support of the absence (page 783a-b).

6.70 On 11 December 2017 the claimant wrote an email to DB saying she was not well enough to attend the meeting and asking for any questions to be emailed to her. The claimant made DB that her mental health had deteriorated significantly since leaving Eston.

6.71 DB replied asking the claimant to say if she required input from a Trade Union representative and asking six questions:
1 Were there any reasonable adjustments the respondent could put in place to help facilitate her return to work?
2 Was the claimant taking any medication at present and if so what for?
3 Who did the claimant see about her illness namely a GP or hospital consultant?
4 Why had the claimant refused to release the recent OH report and could she divulge any details from the report the claimant had seen?
5 Had a SRP been put in place for the claimant with her line manager and if not, what was the reason?
6 What actions was the claimant currently taking to try and improve her mental health?

6.72 The claimant replied on 19 December 2017 786 reminding DB that there was an ongoing serious grievance against the respondent and that she should not make a decision whilst that process was ongoing. The threat of dismissal was causing the claimant more stress and had made her suicidal. Her illness was considered to be a disability. There had been irreparable damage to her health. The claimant wrote: *"as a result of many years of bullying and harassment at work and the subsequent lack of support and abuse from management, I have been suffering from severe stress, depression, anxiety, worsening migraines and suicidal…. The DWP has had many opportunities to intervene provide the support I asked for and help me escape the abuse. Instead they have abandoned me, rejected my pleas for help, taken away my opportunities to move forward and cause more stress by covering up what happened and threatening me with my job. This has caused irreparable harm to my health".* In response to the six questions the claimant responded:

1 The move to Eston had been a reasonable adjustment and the claimant wished to know why it had been withdrawn.
2 The claimant was taking Rizatriptan for migraines for over 7 years and mirtazapine for anxiety and depression since November 2017.
3 The claimant saw her GP regularly and the James Cook Hospital pain clinic every few months in relation to her migraines. She was presently undergoing counselling not for the first time.
4 The OH report was inaccurate and misleading and she continued "*If you require an accurate report on my health, I would prefer to obtain this via my GP".*

5 There was no SRP in place. One had been requested when she began at Eston on 12 September 2018 but had not been put in place.
6 The claimant tried to minimise her stress by taking her medication and undergoing counselling and getting out of bed and being dressed and leaving the house "*as often as I am able".*

6.73 On 7 January 2018 the claimant wrote to AS (page 791) saying she had not had time to put together the documents she had mentioned in November 2017 but pointing out specific inaccuracies in the grievance investigation.

6.74 On 5 January 2018 DB took advice from Civil Service HR casework. It was stressed that the decision was for DR to take but she was advised to ensure the trial period was sufficient enough time for the claimant to meet the required standard and that reasonable adjustments were in place and the advice continued: "*it would also be reasonable to confirm if alternative roles and adjustments were offered following the end of the work trial to support the member of staff back to work"* (page 801).

6.75 DB took a decision to dismiss the claimant but also that she should receive 100% compensation under the Principal Civil Service Pension Scheme ("PCSPS"). The rationale for her decision was set out in writing (page 811-814). DB could not foresee a return to work in the near future. The claimant was unable to communicate save by email and that too meant there would not be a return to work in a reasonable timescale. It was noted that the claimant's complaint of bullying and harassment had not been upheld following an independent investigation and it was not appropriate to await a decision on the appeal. The claimant was to be paid in lieu of working her notice. DB concluded that the claimant was not complying with the respondent's internal absence management processes and was insisting on contact by email. She concluded that the claimant had refused to cooperate with the 0H process and had been obstructive in some of the efforts made by her managers to help her back to work. The trial at Eston had not succeeded and the claimant refused to work in Middlesbrough or Stockton and DB concluded she had no alternative but to terminate her employment. DB did not explore options for the claimant to work elsewhere and was not aware of any restriction on the claimant's ability to travel. She considered she had no alternative but to dismiss. She did not see it as her role to look for other work locations as the management had been reasonable in looking at three offices. She saw her role was not looking at the claimant's performance but at her attendance. The role at Eston was a basic administration role and simpler than the one the claimant carried out. It was not for DB to determine whether the trial had been a proper or reasonable one. DB knew the claimant was disabled and had no medical evidence before her. She did not think she needed to contact the claimant's GP and it was not standard practice to do so. A stress risk assessment could not be carried out until the claimant returned to work. She understood the claimant could not travel further than Eston. She had not gone into the detail of the work trial.

6.76 The decision was confirmed in writing to the claimant by letter dated 9 January 2018 (page 819-820A). A right of appeal was offered. The letter to the claimant referred to the claimant having anxiety/depression and migraines. No appeal was lodged by the claimant.

6.77 On 12 January 2018 AS wrote to the claimant to say he proposed to re-interview one of the claimant's line managers but he would complete the appeal when he had done so. The claimant asked to see the notes of any re-interview. The manager to be re-interviewed was GM and this took place on 7 February 2018 and was minuted (pages 829-831).

6.78 On 23 January 2018 a letter was sent to the claimant advising that there had been an overpayment of salary to her in the amount of £1787.17p.

6.79 On 1 March 2018 AS wrote to the claimant and advised that he did not uphold her appeal against the grievance outcome. AS stated he was satisfied that the crux of the complaint was the underlying breakdown of the claimant's relationship with X and the way the various line managers dealt with that situation in terms of support offered. AS completed a lengthy rationale for his decision which was not sent to the claimant (pages 842-847). It was noted that X had never been the subject of a formal complaint from the claimant and the matters were then out of time. AS had considered the additional information supplied by the claimant but he saw nothing to alter his view that the grievance outcome was one which DR could reasonably have made. He considered the actions of each of the five line-managers of the claimant over the relevant period of 4/5 years. All the points raised in the grievance appeal letter were addressed and decided against the claimant.

6.80 A rationale for the overpayment of salary to the claimant was provided by a payroll officer on 18 June 2018 and a full explanation provided in writing (page 877A). The overpayment of salary occurred because there was a failure to take account of the claimant's sickness absence from 23 October 2017 until 10 January 2018 which is a total of 80 days. The claimant should have moved to half salary on 24 October 2017 and this resulted in an overpayment of salary in October 2017 of £204.25 and of £791.46 in both November and December 2017. This resulted in an overpayment of £1781.17p.

6.81.1 The attendance policy of the respondent (pages 114-152) includes as a key aim the making reasonable adjustments if an employee has a disability. The trigger point for action is said to be four spells of absence in a 12-month rolling period regardless of length of absence. Absences related to a disability are not counted as spells of absence. If an employee is absent for a continuous period of four weeks or more the manager must work to develop a back to work plan which can be shared with the GP of the employee (page 117). The policy includes the rights and responsibilities of the employee which include keeping in touch with managers during any absence. Formal action under the policy is only considered if an employee is absent for eight working days in a 12-month rolling period or has four spells of absence in that period. An employee who is disabled may wish to complete a workplace adjustment passport and this may lead to increased trigger points and action will not be taken unless those increased triggers are breached. If an employee is absent because of a mental health condition, a referral to 0H can take place on the first day of absence. Warnings can be given, including a final written warning after which the manager must consider referring the case to a decision maker to consider dismissal or demotion.

6.81.2 In the case of continuous absence, formal attendance review meetings are to take place and after 28 days a review meeting should take place to discuss a return to work. The circumstances mean a return to work is possible then the policy requires monthly reviews and after three months a manager must arrange a case conference with an OH adviser to discuss how to manage the absence at which an HR expert may be present. After six months of absence, a senior civil service member must be engaged to ensure the employee is given the help and support needed to return to work. The policy is lengthy and complex. If an employee is unlikely to return to satisfactory attendance, then referral to a decision maker to consider dismissal can take place. If so, the manager must ensure that the procedure has been correctly followed and must not refer a case if they wish to consider advice from an HR expert if the case is complex and dismissal is not an option if there is an outstanding 0H report. A decision maker when considering a case must ensure the procedure has been correctly followed and if not, return it to the manager. The meeting considering dismissal must be face-to-face and not by telephone or video and the decision maker must consider whether there is a reasonable expectation of improved and sustained attendance, whether there are mitigating circumstances such as personal work problems and whether reasonable steps have been taken to understand the effects of the illness. Dismissal is not an option if there is an outstanding occupational health report. If a dismissal with compensation is decided on, then a note of the reasons must be set out.

6.82 The GP records of the claimant (pages 766 – 770) showed an acute situational disturbance on 4 February 2014 and mixed anxiety and depressive disorder on 5 February 2014. On 12 May 2016 there is an entry in respect of stress at work and diazepam was prescribed. On 13 February 2017 the claimant reported "*feeling anxious"* and was prescribed sertraline. On 6 March 2017 a further entry records *"mixed anxiety and depressive disorder"* and again on 30 March 2017. On 7 April 2017 there is an entry in respect of depressed mood and feeling anxious but the claimant was feeling better by 14 June 2017. On 29 June 2017 there is an entry for mixed anxiety and depressive disorder. A diagnosis of work stress is made in early September 2017. On 22 September 2017 the notes mention that the claimant is not really depressed. A further diagnosis of work stress is given on 23 October 2017 and the diagnosis of depression is given on 25 October 2017 and citalopram is prescribed

6.83 The claimant was referred to the Middlesbrough mental health services in July 2018. The claimant reported long-standing anxiety and depression throughout her adult life which had been managed by her GP. The report on that day (page 881) noted the claimant presented as very anxious and it was felt the claimant was presenting with symptoms of PTSD and would benefit from trauma work around the bullying at work. A change in medication was recommended.

6.84 In a detailed report from the claimant's GP (page 890 – 893) of 17 July 2008, it was noted the claimant first reported low mood and stress in February 2014. The report records the claimant being admitted to hospital on 24 October 2017 with chest pains and the doctors being so concerned about her that she was referred to a liaison psychiatrist. The claimant was prescribed 10mg of citalopram daily at the time. This was changed to mirtazapine in December 2017 and later increased to 30mg daily. The claimant was referred to the mental health services in February 2018 and has had fit notes for anxiety and depression since that time. The report concludes:

"there have certainly been dips in her mental health associated with periods of uncertainty around the job especially in late 2017 before the employment was terminated in January 2018. Susan feels that this affects her activities of daily living and as such could be considered a disability".

6.85 The claimant has suffered from migraines for approximately 10 years and they occur around 16 days each month and range in length from three hours to 4 days. Symptoms include violent headache, nausea, shivering, sensitivity to light, aching limbs, visual disturbance and vomiting. The claimant generally travels no more than two hours from home as that is the warning period before a migraine starts. Prescribed medication makes the claimant drowsy. All the line managers of the claimant in the period relevant to this matter were aware of this condition. Linda Gibson of the respondent who is a higher-grade manager also knew of the condition.

6.86 The claimant has suffered episodes of mild depression and anxiety since her early 20s. In 2014 the condition in relation to anxiety became much worse. The issues the claimant perceived in the workplace with X caused significant anxiety and the perceived lack of support from her managers also has increased anxiety. Anxiety has caused the claimant to be hypervigilant, to suffer panic attacks, paranoia, disassociation and at times it has taken over her life and she has had suicidal tendencies. In 2018 it was suggested that the claimant suffered from post-traumatic stress disorder. The claimant suffers panic attacks on a regular basis. Her sleep is affected and she suffers what she describes as "*horrific nightmares".* The claimant fears seeing anyone from the work place in Middlesbrough and avoids certain areas of the town. The claimant has had episodes of breaking down in tears in public and has suicidal thoughts regularly but has no intention of acting on them. The claimant has stopped attending her church and has lost friends as a result of the impairment.

Submissions

7. We received detailed written submissions from the representatives of both parties. These were supplemented by oral submissions and all are briefly summarised.

Claimant

7.1 The Tribunal is asked to find that the claimant was suffering from a disability of anxiety from 2014 onwards. Evidence of that condition comes from medical notes, an occupational health assessment of August 2017, the claimant's GP records and the claimant's oral evidence. The function of the Tribunal is to enquire into the underlying facts which amounted to the disability and the effects of it not on the condition itself – **Urso -v- DWP UK EAT/0045/16.** It is shown that the claimant did suffer from PTSD at all times during the four years 2014 – 2018 and there is no evidence to suggest that that condition only developed after dismissal.

7.2 In her oral evidence DB confirmed that the claimant's health issues were not in doubt at the time of dismissal and she accepted the claimant was disabled.

7.3 The respondent had the appropriate and necessary knowledge from 2014 onwards. References were made to the documents in the bundle to support that submission.

7.4 The respondent has failed to show that the dismissal was fair. No consideration was given to the claimant's disability from the end of the work trial until the date of dismissal. No further medical evidence was sought and there was no investigation into the claimant's renewed absence or consideration of any further alternative location or role. No explanation was given to the claimant why the Eston work trial was terminated and both the line manager of the claimant and the decision maker testified that it was not their place to do anything further to support the claimant. The size and administrative resources of the respondent are large and it did not act reasonably. The withdrawal of the role at Eston was not carried out reasonably. The claimant was not given proper support during the trial at Eston. It was unreasonable to expect the claimant to return to Middlesbrough when it had clearly been established she was unable to work at that office. The decision maker did not follow the advice of the Civil Service HR case work in respect of ensuring sufficient time had been allowed for the work trial or the consideration of further adjustments.

7.5 The respondent did not follow its own disciplinary policy. It did not engage or notify a senior civil servant as required by the policy (page 124). In addition, there was no occupational health case conference. There was no occupational health assessment requested after the work trial had ended which was a separate period of absence. There was a failure to consider ill health retirement. There was a failure properly to consider and investigate the claimant's grievance originally and at appeal and accordingly it was unreasonable to dismiss the claimant. It is denied that the claimant contributed in any way to her dismissal. The claimant did not appeal the dismissal for a number of reasons namely that the grievance appeal was still ongoing, she had little faith in the respondent's processes, the claimant had had no explanation as to why the work trial at Eston had been terminated, she was only given ten working days to appeal which was an unreasonable period given her mental health. In addition, the occupational health referrals of 18th August 2017 and 30th August 2017 are inaccurate and thus the claimant withheld her consent for them to be released.

7.6 In respect of the section 15 of the 2010 Act claim, the claimant was dismissed because of her absence which arose in consequence of her anxiety disability. Dismissal was clearly because of the claimant's absence. The claimant's ability to work at an alternative location can be conclusively shown by the fact that she attended every day at the office in Eston during the work trial. The respondent did not consider moving the claimant to any other office. The dismissal did not constitute the furtherance of any legitimate aim.

7.7 The complaint of unauthorised deduction of wages is not withdrawn. The payslips do not explain the purpose of the deductions which were made. The respondent failed to produce any witnesses that would have been able to answer matters in respect of this complaint.

7.8 The claim of failure to make reasonable adjustments based on migraine relates to an accepted disability but it would have reasonable for the respondent to have allowed the claimant to take screen or comfort breaks as needed at any time, increase the claimant's trigger points for absence and disregard any spells of

absence related to this disability as required by the respondent's attendance policy. The asserted PCPs were all applied to the claimant.

7.9 The failure to make reasonable adjustments claim based on anxiety relies on several PCPs. The first related to a limiting of the absence that any employee could take from work before facing disciplinary action. Secondly a PCP that employees must sit at preassigned desks in preassigned teams and buildings. Thirdly by refusing to complete a stress risk assessment, occupational health referral and desk assessment when requested by the claimant, fourthly terminating the work trial at Eston and ordering the claimant to return to Middlesbrough without following any performance management or disciplinary procedures and finally a PCP to dismiss the claimant without seeking alternative roles or locations.

7.10 The claims of harassment should be considered as part of a continuing act but if not time should be extended on a just and equitable basis. There was a clear culture or regime in this case of harassment.

7.11 Reference was made to various authorities as follows:
Urso -v- DWP UKEAT0045/16
Carrabyne -v- DWP Liverpool Employment Tribunal 2016
Fareham College Corporation -v- Walters UKEAT/0396/08
The Environment Agency -v- Rowan UKEAT/0060/2007
Cast -v- Croydon College 1998 Court of Appeal
City of York Council -v- Grosset UKEAT/0015/16
Finnigan -v- Chief Constable of Northumbria Police Court of Appeal 2013
Owusu -v- London Fire and Civil Defence Authority UKEAT/334/1993
The Commissioner of Police of the Metropolis -v- Hendricks UKEAT/614/2001
Sutherland -v- Hatton Court of Appeal 2002

Respondent

7.12 A detailed appendix A set out a chronology and appendix B the relevant law. It is conceded that the claimant suffered from migraines which constituted a disability at all material times. The claimant is put to strict proof of the alleged disabilities of anxiety and Post Traumatic Stress Disorder.

7.13 The reason for dismissal related to the capability of the claimant and is clearly proved on the balance of probabilities.

7.14 The respondent followed a fair procedure before moving to dismiss the claimant. Without criticising the claimant , it is clear that she made numerous decisions in 2017 which contributed to her dismissal or made her dismissal more likely including refusals to attend OH assessments, refusal to permit disclosure of an OH report to the respondent, refusal to discuss causes of her stress with her employer, insisting that keeping in touch be by e-mail only, refusing to speak to the respondent on the telephone, refusing to permit home visits and not appealing against the dismissal. It is clear that the decision to dismiss the claimant was within the band of a reasonable response and in particular it is clear that the claimant had developed an overwhelming irrational aversion/antipathy to all her former work colleagues and line managers and there was no scenario in which the claimant could continue to work

alongside any of them. There is nothing to suggest that the decision would have been any different if the respondent had waited any longer. In any event it is clear that at the hearing the claimant still remained unfit for work. If the decision is unfair on procedural grounds then there is a 100% chance that the claimant would have been fairly dismissed had a correct procedure been followed. If it is an unfair dismissal the claimant culpably contributed to that dismissal by refusing to release OH advice and refusing to work in Stockton.

7.15 In relation to section 15 of the 2010 Act claim PTSD is a clinically recognised medical condition and is not the same as anxiety or stress no matter how great but there is no evidence that the claimant suffered from PTSD during the period of her employment: the claim is specifically tied to the impairment of PTSD. The respondent did not know and had no reason to know or suspect that the claimant might have PTSD prior to her dismissal: in any event the claimant's dismissal served legitimate aims of protecting scarce public funds and resources, reducing the strain on other employees of the respondent and achieving a healthy workforce to meet reasonable business needs. The dismissal was a proportionate means of achieving those aims because by the time of dismissal the claimant had been away from work for nearly a year with no prospect of a return and no adjustments could have been made at the point of dismissal which would have enabled that return.

7.16 The unlawful deduction of wages claim must be dismissed because none of the facts which underlie it were put to any of the respondent's witnesses.

7.17 The claim for reasonable adjustments has not been presented within three months of the occurrence of the act/omission complained of and in several cases the complaints are years after the event. In relation to those matters, the claimant has failed to discharge the burden which lies on her to show that it is just and equitable to extend time and what evidence there is suggests that it is not just and equitable to extend time because the claimant had the benefit of union advice and knew as far back as January 2015 of her right to pursue legal claims. There was no continuing act.

7.18 Certain of the alleged PCPs constitute one off events involving the claimant only and do not amount to PCPs. Where the alleged PCP can amount to a PCP, it is denied that the respondent applied them to the claimant. If it did, then there is no evidence of substantial disadvantage to the claimant. In any event there were no further reasonable adjustments open to the respondent which would have had the effect of enabling the claimant to return to work. It would not have been reasonable to extend the work trial at Eston any further. In any event no duty arose in the period February 2017 to January 2018 because no adjustment which the respondent could have made would have enabled the claimant to return to work.

7.19 The claims of harassment are all out of time and it is not just and equitable to extend time. The claims should be rejected on the evidence. The one matter accepted by Mr McDonald is not harassment on the grounds of disability or at all. There was nothing unreasonable or harassing about the question of DR to Rachel Gallagher enquiring about the claimant's personality. In final written submissions, the claimant seeks to amend or put forward a case which was not advanced at the hearing particularly in respect of the section 15 claim and the disability relied on and

different PCPs and advancing further non-pleaded allegations of harassment. The correct time limit for a claim of reasonable adjustments is to consider that the time limit begins on the expiry of a period in which the employer might reasonably been expected to make the adjustment – **Abertawe Bro Morgannwg University Health Board – v – Morgan 2018 EWCA CIV.640**

8. The Law

The meaning of Disability within section 6 of the 2010 Act

8.1 The Tribunal reminded itself of the meaning of disability and in particular Section 6 of the 2010 Act which provides:

(1) A person (P) has a disability if--
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability--
(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) --
(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

8.2 We have also referred to Schedule I to the 2010 Act and in particular the following paragraph 2:

2. Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

8.3 The Tribunal has reminded itself of the decision in **Goodwin –v- The Patent Office 1999 ICR 302 EAT** and the guidance in that decision to the effect that in answering the question whether a person is disabled for the purposes of what is now section 6 of the 2010 Act, a Tribunal should consider the evidence by reference to four questions namely:
1. did the claimant have a mental and/or physical impairment?
2. did the impairment adversely affect the claimant's ability to carry out normal day to day activities?
3. was the adverse effect substantial?
4. was the adverse effect long term?
We note that the four questions should be posed sequentially and not cumulatively. We note it is for us to assess such medical and other evidence as we have before us and then to conclude for ourselves whether the claimant was a disabled person at the relevant time.

8.4 The Tribunal reminded itself that the meaning of the word "*likely"* referred to at paragraph 8.2 above is "*could well happen*" as determined by Lady Hale in **SCA Packaging Limited –v- Boyle 2009 ICR 1056**.

8.5 We have reminded ourselves of the decision in **College of Ripon and York St John -v- Hobbs 2002 185** and note there is no statutory definition of "impairment" and that the 2010 Act contemplates that an impairment can be something that results from an illness as opposed to itself being the illness. It can thus be cause or effect. We have noted also the decision in **Urso -v- DWP UKEAT/0045/2016** and the necessity for an employer to consider the symptoms and effect of an employee's disability and that there may be cases where the specific cause of the disability is not known or has not been identified at the material time. What is important is that the employer considers the symptoms and effect of the impairment. We note that stress and anxiety can occur and then be separated by periods of stress free good mental health but that is no barrier to establishing that anxiety or stress is a disability provided a claimant can show that the impairment has a substantial adverse long-term effect on the ability to carry out normal day-to-day activities.

Failure to make Reasonable Adjustment Claim: sections 20/21 of the 2010 Act

8.6 The Tribunal has reminded itself of the relevant provisions of section 20 and 21 and Schedule 8 of the 2010 Act which read:

Section 20:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant 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.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid".

Section 21

(1) A failure to comply with the first second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue of subsection (2): a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

8.7 The Tribunal has had regard to the relevant provisions of Schedule 8 of the 2010 Act and in particular paragraph 20 which reads:
" (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know...
(b)….that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

8.8 The Tribunal reminded itself of the authority of **The Environment Agency v Rowan [2008] IRLR20** and the words of Judge Serota QC, namely:

"*An Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the 1995 Act by failure to comply with section 4A duty must identify –*

(a) the provision, criterion or practice applied by or on behalf of an employer;

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

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

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

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable

to prevent the provision, criterion or practice or feature placing the disabled person concerned at a substantial disadvantage".

The Tribunal notes this guidance was delivered in the context of the 1995 Act but considers it equally applicable to the provisions of the 2010 Act.

8.9 The Tribunal has reminded itself of the guidance in respect of the burden of proof in claims relating to an alleged breach of the duty to make reasonable adjustments in the decision in **Project Management Institute -v- Latif 2007 IRLR 579** where Elias P states:

"It seems to us that by the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative……that is why the burden is reversed once a potentially reasonable adjustment has been identified…..the key point…is that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made……we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

8.10 We have reminded ourselves of the guidance from Elias LJ in the Court of Appeal in the decision in **Griffiths –v- Secretary of State for Work and Pensions 2015 EWCA Civ 1265.**

In this context I would observe that it is unfortunate that absence policies often use the language of warnings and sanctions which makes them sound disciplinary in nature. This suggests that the employee has in some sense been culpable. That is manifestly not the situation here, and will generally not be the case, at least where the absence is genuine, as no doubt it usually will be. But an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision. As I mention below, the fact that some of the absence is disability-related is still highly relevant to the question whether disciplinary action is appropriate.

As to the second proposed adjustment, the reasoning of the majority is in my opinion more opaque. But I think implicit in its analysis is the belief that there is no obvious period by which the consideration point should be extended. If the worry and stress of being at risk of dismissal is to be eliminated altogether, then all disability-related illness must be excluded. But if that step is not taken - and no-one was suggesting that it should be - then in a case like this when lengthy further periods of absence are anticipated, the period by which the consideration point should be extended becomes arbitrary. As the majority point out in paragraph 49 when drawing an analogy with the O'Hanlon case, in so far as the alleged disadvantage is with the stress and anxiety caused to a particular disabled employee, it would be invidious to assess the appropriate extension period by such subjective criteria.

Also, where the future absences are likely to be long, a relatively short extension of the consideration point is of limited, if any, value. It will not in practice remove the disadvantage if the absences remain

over 20 days. No doubt there will be cases where it will be clear that a disabled employee is likely to be subject to limited and only occasional absences. In such a situation, it may be possible to extend the consideration point, as the Policy envisages, in a principled and rational way and it may be unreasonable not to do so. But in my view the majority has taken the view that this is not appropriate in a case of this nature. In my judgment, the majority was entitled to reach that conclusion.

8.11 We note that where a position is reached when there is nothing an employer can reasonably do to alleviate a disadvantage then the duty to make adjustments falls away: this will be the case where the position is irretrievable and this may be the position reached during a period of extended ill health. This may be the case also where the employer has caused the employee's predicament where, even in that situation, there is no unlimited obligation to accommodate the employee's needs. If an adjustment proposed will not in fact procure a return to work then it will not be a reasonable adjustment. We note also that the EAT in **Lincolnshire Police –v- Weaver 2008 AER 291** made it clear that a Tribunal must take account of the wider implications of any proposed adjustment and this may include operational objectives such as the impact on other workers, safety and operational efficiency. The purpose of an adjustment in the employment context is to return the employee to work.

Discrimination arising from disability – section 15 of the 2010 Act.

8.12 The Tribunal has reminded itself of the provisions of **section 15 of the 2010 Act** which read:

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arises in consequences of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Sub-Section (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

8.13 We remind ourselves that in considering a claim pursuant to section 15 of the 2010 Act, we need to consider what breach of section 39 of the 2010 Act is established, whether there was unfavourable treatment of the claimant, whether there is something arising in consequence of the disability and finally whether the unfavourable treatment was because of the something arising from the disability.

8.14 We have reminded ourselves of the guidance of Simler J in **Pnaiser –v- NHS England 2016 IRLR 170** in respect of the proper approach to adopt in cases involving section 15 of the 2010 Act:

"From these authorities, the proper approach can be summarised as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference

between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

8.15 We have reminded ourselves that in considering so called justification, that we must consider an objective balance between the discriminatory effect of the PCP engaged and the reasonable needs of the party who applies it. We have noted the words of Pill LJ in **Hardys and Hanson -v- Lax 2005.** This was a decision of the Court of Appeal taken in the context of a claim of indirect discrimination but this test was applied to claims advanced under section 15 of the 2010 Act by the EAT in **Hensman –v- Ministry of Defence UKEAT/0067/14/DM**.

Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.

8.16 We have referred to the decision of HH Judge Clark in **H M Land Registry –v- Houghton and others UKEAT/0149/14/BA** to which we were referred by the claimant. We have noted the guidance given in that decision on the question of Justification:

As to justification, it is common ground between Counsel that at paragraph 26 this Employment Tribunal correctly directed themselves as to the classic test propounded by Balcombe LJ in Hampson v DES [1989] ICR 179 at 191E: "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. .....Ultimately, the balancing exercise, once properly identified, is a matter for the Employment Tribunal absent any irrelevant factors being taken into account or relevant factors disregarded.

Harassment related to disability: section 26 of the 2010 Act

8.17 The relevant provisions of section 26 of the 2010 Act provided:

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are--. disability;

8.18 In relation to what is required to establish a case of discrimination by harassment the Tribunal has reminded itself of the guidance given by Underhill J in **Richmond Pharmacology Limited –v- Dhaliwal 2009 IRLR 336** and in particular that the Tribunal should focus on three elements namely:

(a) unwanted conduct
(b) having the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him and
(c) being related to the claimant's race.

Burden of Proof and other relevant provisions of the 2010 Act.

8.19 The Tribunal has reminded itself of the relevant provisions of **section 136 of the 2010** Act which read:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An employment tribunal……."

8.20 The Tribunal has reminded itself of the relevant provisions of **section 39 of the 2010 Act** and in particular:

(2) An employer (A) must not discriminate against an employee of A's (B)-
…
(c) by dismissing B
(d) by subjecting B to any other detriment……

(5) A duty to make reasonable adjustments applies to an employer…
(7) In subsections (2)(c)… the reference to dismissing B includes a reference to the termination of B's employment-…
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

8.21 We have reminded ourselves of the provisions of section 123 of the 2010 Act in respect of the time limit for the advancement of a claim. We have noted the decision in **Abertawe** (above) and that section 123(4) of the 2010 Act indicates that the period in which the employer might reasonably have been expected to comply with the duty should in principle be assessed from the claimant's point of view having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time. In addition, we note that section 123 gives Tribunal the widest possible discretion to consider an extension of time but factors which are almost always relevant include the length and reason for the delay and whether the delay has prejudiced the respondent.

Ordinary Unfair Dismissal Claim – Section 98 Employment Rights Act 1996 (the 1996 Act)

8.22 The Tribunal has reminded itself of the provisions of section 98 of the 1996 Act which read:

"*98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –*

(a) the reason (or if more than one the principal reason) for the dismissal, and

(b) that it is either a reason falling in subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) The reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed to do;

(b) relates to the conduct of the employee …

(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case".

8.23 The Tribunal has reminded itself of the decision of **British Home Stores Limited v Burchell [1978] IRLR379** and notes that it is for the respondent to establish that it had a genuine belief in the lack of capability of the claimant at the time of the dismissal and that that belief was based upon reasonable grounds and that dismissal followed a reasonable investigation and a reasonable procedure.

8.24 We have reminded ourselves of the authority of **Spencer-v-Paragon Wallpapers Limited 1976 IRLR 373** and the words of Phillips J:

"What is required will vary very much indeed according to the circumstances of the case. Usually what is needed is a discussion of the position between the employer and the employee. Obviously what must be avoided is dismissal out of hand. There should be a discussion so that the situation can be weighed up, bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover his health…..Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and if so, how much longer?..".

8.25 We have reminded ourselves of the authority of **McAdie –v- Royal Bank of Scotland 2007 EWCA Civ 806** and the words of Wall LJ who expressly approved the decision of the EAT in that case which came before him on appeal. The Court of Appeal expressly approved the words of Underhill J in the EAT:

*"In **Betty** Morison P appeared to say that the fact that the employer had been responsible for the incapacity which was the reason for a dismissal should as a matter of principle be ignored in deciding whether it was reasonable to dismiss for that reason. But Bell J in **Edwards** and Judge Reid QC in **Frewin** expressed the view that, if that was what Morison P meant, it over-stated the position. We agree. It seems to us that there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to "go the extra mile" in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable. (We need not consider the further example, suggested by Bell J in **Edwards**, of a case where the employer, or someone for whose acts he is responsible, has maliciously injured the claimant, since there is no suggestion that those are the facts here. But we should say that we find some difficulty with the implication that in such a case there could never be a fair dismissal.) However, we accept, as did Bell J and Judge Reid, that much of what Morison P said in **Betty** was important and plainly correct. Thus it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him for ever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work. Employees who have been injured as a result of a breach of duty by their employers are entitled to compensation in the ordinary courts, which in an appropriate case will include compensation for lost earnings and lost earning capacity: tribunals must resist the temptation of being led by sympathy for the employee into including*

granting by way of compensation for unfair dismissal what is in truth an award of compensation for injury. We also agree with Morison P in sounding a note of caution about how often it will be necessary or appropriate for a tribunal to undertake an enquiry into the employer's responsibility for the original illness or accident, at least where that is genuinely in issue: its concern will be with the reasonableness of the employer's conduct on the basis of what he reasonably knew or believed at the time of dismissal, and for that purpose a definitive decision on culpability or causation may be unnecessary".

8.26 We note that a dismissal which cannot be justified does not automatically fail the reasonableness test in section 98(4) of the 1996 Act. There may be a dismissal which is unfair, usually for procedural reasons, but which is nonetheless justified under section 15 of the 2010 Act. We note that the decision to dismiss under the 1996 Act on the ground of mental ill-health should be taken in the light of medical advice and is a particularly delicate and sensitive matter and should perhaps be handled with greater tolerance and support. Consideration should be given to the true medical position and considerations of speaking to the employee and alternative employment are equally as important as when there is a dismissal for a physical illness.

8.27 We have reminded ourselves of the provisions of Section 123 of the 1996 Act and we have reminded ourselves of the decision of **Polkey –v – A E Dayton Service Limited 1988 ICR142**. We note that the Polkey principle applies not only to cases where there is a clear procedural unfairness but what used to be called a substantive unfairness also. However, whilst a Tribunal may well be able to speculate as to what would have happened had a mere procedural lapse or omission taken place, it becomes more difficult and therefore less likely that the Tribunal can do so if what went wrong was more fundamental and went to the heart of the process followed by the respondent. We have noted the guidance given by Elias J in **Software 2000 Limited –v- Andrews 2007 ICR825/EAT.** We recognise that this guidance is outdated so far as reference to section 98A(2) is concerned but otherwise holds good.

Conclusions and Discussion

9. We approach our conclusions by dealing with the various claims advanced and issues arising in the following order:

9.1 The question of the disabled status of the claimant in respect of the asserted disability of anxiety/PTSD.

9.2 The question of whether and, if so, when the respondent had knowledge of that disability.

9.3 The claims in respect of alleged failures to make reasonable adjustments.

9.4 The claims in respect of harassment related to disability.

9.5 The claim in respect of discrimination arising from disability.

9.6 The claim in respect of ordinary unfair dismissal.

9.7 The claim of unauthorised deduction from wages.

10. We remind ourselves what this case is not about. We observe that much of the evidence of the claimant related to alleged failures by the respondent to observe its duty of care towards her. A constant theme of the complaints by the claimant related to alleged failures by the various line managers and their managers to fulfil their duty of care towards her over the period from 2014 onwards. We have no jurisdiction over such matters and we were told that no such proceedings are ongoing in the civil courts. Our jurisdiction is limited to questions of disability discrimination, unfair dismissal and unauthorised deduction from wages only.

11. The question of disability

11.1 We note that it was accepted by the respondent that the claimant was a disabled person at all material times relevant to this claim by reason of the impairment of migraines. The respondent had three OH reports specifically on this condition to which we refer paragraphs 6.6, 6.9 and 6.15 above. The respondent had full knowledge of this impairment throughout all times material to the matters arising in these claims.

11.2 In respect of the asserted impairments of anxiety/PTSD we approach our conclusions by considering the questions set out in **Goodwin** (above). We remind ourselves again that our duty is to look carefully at the symptoms and effect of an impairment. We are satisfied that the claimant suffered at all times material to these claims from a mental impairment which caused her to suffer from anxiety. We see evidence of that impairment as early as October 2007 and the events to which we refer at paragraph 6.3 above. The claimant's anxiety manifested itself at that time by her feeling that she needed specific permission to leave work in the circumstances of her mother's sudden illness and would not leave without the permission of her managers. We see further evidence of anxiety in the events of 2009 referred to at paragraph 6.4 above and then, more acutely, in respect of her work colleague X which began around the end of 2013 and continued at all times after that until at least the time of the claimant's dismissal. We note that the level of the claimant's anxiety caused her to fear that hitmen were outside her home or had broken into her home and she feared what X may do to her both inside the workplace and outside it. As set out at paragraph 6.10 above, by April 2014 the claimant had anxiety about being killed and described matters in such a way that her line manager recorded that it was the worst thing he had ever read as set out at paragraph 6.11 above. Evidence of the impairment continues after that and is shown by the frequent references about X made by the claimant in the workplace to her line managers and importantly is shown by the events in July 2016, referred to at paragraph 6.22 above, when the impairment surfaced to such an extent that a manager with no responsibility for the claimant was forced to intervene and move the claimant to a different desk on a different floor by reason of the anxiety which then manifested itself. Further evidence comes in February 2017 with the claimant taking a call from a suicidal customer and the effect that had on her as evidenced in paragraph 6.29 above. The anxiety evidenced by the claimant in respect of her asserted inability to return to work at either Middlesbrough or Stockton is further evidence of this impairment and continued to the point of dismissal and after it. In addition to all this we have the medical records of the claimant which contain references to anxiety from 4 February 2014 onwards. We conclude that the mental

health impairment giving rise to anxiety was present at least from February 2014 onwards and therefore at all times material to the claims before us.

11.3 We have considered whether that impairment adversely affected the claimant's ability to carry out normal day-to-day activities. We answer this and all other questions by reference to the times material to the claims of disability discrimination and not as at the date of the hearing. We have considered which of such activities (if any) were affected. We are satisfied that the impairment which we identify had and has an effect on the claimant's ability to sleep. We accept the claimant's evidence that this has been the case since 2014 and that she has suffered nightmares on a frequent basis and wakes up paralysed with fear. This is an adverse effect. We are satisfied that the impairment has an effect on the claimant's ability to go about her daily life in the town in which she lives for fear of meeting people from work and in particular that she avoids the vicinity of the offices where she worked in Middlesbrough and, even whilst still in employment, avoided areas of the town where she thought it likely that she might encounter X and other people with whom she worked and, in particular, her managers. We accept that the impairment has had the effect of the claimant breaking down in public on numerous occasions. We accept that the impairment has had the effect of causing the claimant to evince symptoms of paranoia and obsession to the extent that she has lost many of her friends who have tired of her constant references to her difficulties. We accept the claimant has suffered from panic attacks during which she entertains suicidal thoughts. We conclude that the mental impairment has had an effect on the claimant's normal daily activities of sleeping, shopping, socialising, engaging with her friends and family members and generally being able to live a normal existence.

11.4 We have considered whether the effect on those activities was substantial. We note that in this context substantial means something more than minor or trivial. We accept the evidence of the claimant that her sleep became frequently and considerably disturbed at least from 2016 onwards. That is a substantial adverse effect. We accept that the claimant's ability to visit the areas of the town where she lives was substantially adversely affected. We accept that the claimant's ability to go about her daily activities was substantially adversely affected by her tendency to have panic attacks. We accept that the claimant's ability to socialise with her family and friends was substantially adversely affected by her obsession with her difficulties which arise from the impairment of anxiety. We conclude that there was a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities at least from 2016 onwards.

11.5 We turn to the final question namely was the adverse effect on normal day-to-day activities long term? This is generally the most difficult question to determine in respect of the definition of disability. We remind ourselves again of the provisions of paragraph 2 of schedule 1 to the 2010 Act. The evidence of the claimant on this aspect of the definition was not particularly detailed nor do the medical reports and notes which we had before us assist greatly. We have to consider if and when the adverse effects became substantial and when they had lasted for at least 12 months or were likely to last for at least 12 months. The first real evidence we have of a date when the adverse effects became substantial is the event in the workplace in July 2016 when the claimant suffered what was described as a "meltdown" which was so severe that a manager with no responsibility for the

claimant was forced to intervene and arrange an immediate move of the claimant from where she was working at to a desk on a different floor of the building – albeit to an area where her team were due within the next few weeks to move. After that there is the evidence of the effect on the claimant of dealing with a suicidal customer in February 2017 and her being absent from work from that point onwards until she was able to take up the work trial in September 2017. We conclude that the adverse effects which we have identified became substantial in July 2016 and continued through thereafter until dismissal and beyond. We cannot say that at July 2016 the substantial adverse effects were likely to recur for there is no medical or other evidence before us to that effect. However, we are satisfied that substantial adverse effects occurred from July 2016 and by July 2017 such substantial adverse effects had continued for 12 months and indeed continued thereafter until the end of the period material to this claim and after that.

11.6 We are supported in this conclusion by the contents of the OH report from August 2017 which concludes that the impairment from which the claimant suffered at that time was likely to amount to a disability under the 2010 Act and measures to deal with that impairment were recommended. We remind ourselves that the respondent did not see this report at any time before these proceedings were instituted.

11.7 Accordingly, we conclude that from the end of July 2017, the claimant became disabled for the purposes of section 6 of the 2010 Act by reason of a mental impairment which manifested itself in a mixed anxiety and depressive disorder and she remained disabled by reason of that impairment until the point of her dismissal and beyond. We remind ourselves that the claimant was a disabled person from at least 2014 onwards by reason of the impairment of migraines.

11.8 The first and only reference in the claimant's medical notes to PTSD arises in a report obtained months after the claimant's dismissal to which we refer at paragraph 6.83 above. That report, which dates from July 2018, speaks of a feeling that the claimant was presenting with symptoms of PTSD but that "feeling" is a long way from amounting to such a diagnosis. In any event, that report dates from some six months after the claimant was dismissed which is the final act complained of in this litigation. Accordingly, we conclude that the claimant was not disabled by reason of the impairment of PTSD at any time material to this litigation. We reach no conclusion as to whether the claimant suffers from that condition now or has done so at any time previously. The medical evidence before us did not persuade us that the mental impairment which we accept amounted to a disability was properly categorised as PTSD.

11.9 With the finding in place set out at paragraph 11.6 above, we move on to consider the important question of if and when the respondent acquired knowledge of the impairment of anxiety and, for the purposes of the claim of failure to make reasonable adjustments, of the effects of that impairment.

12. The knowledge of the respondent

12.1 We have considered if the respondent had knowledge of the disability of anxiety from the end of July 2017 or if not, whether the respondent could

reasonably have been expected to know of that disability either at that time or at any material time after that.

12.2 In the three-year period from 2014 leading up to July 2017, there were many matters which occurred in the workplace from which the anxiety impairment of the claimant were apparent and lead us to conclude that, by November 2017, the respondent could reasonably have been expected to know that the claimant was disabled by reason of the mental impairment of anxiety.

12.3 All the various line managers of the claimant from 2014 onwards described her from time to time as anxious and timid. This is particularly apparent from the interviews conducted with the line managers at the time of the claimant's grievance investigation in June, July and August 2017, SC described the claimant as melodramatic and hypersensitive in January 2014 (paragraph 6.8), the claimant told SC that she had been treated for depression, stress and panic attacks in April 2014 (paragraph 6.10), the claimant raised issues about stress in the workplace with GM in May 2016 (paragraph 6.19), the claimant suffered an extreme anxiety attack in the workplace in July 2016 necessitating her move to another floor (paragraph 6.22), the respondent knew of the claimant's admission to hospital in September 2016 with chest pains which were attributed to stress (paragraph 6.24), the respondent knew of the claimant's continued obsession with the behaviour towards her of X as it was referred to again in a meeting with AC in February 2017 (paragraph 6.28) and the claimant's extreme reaction to the suicidal caller incident on 13 February 2017 (paragraph 6.29).

12.4 After the claimant became ill and was away from work from February 2017, there were several factors which were indicative of the impairment and which were known to the respondent. The claimant's refusal to engage with OH in February 2017 (paragraph 6.31) was potentially indicative of a mental impairment, the fact that AC recognised the claimant's case as a complex one in March 2017 (paragraph 6.33), the contents of the claimant's grievance of March 2017 which at section 5 (page 318) referred to "*long term stress and anxiety"* and in the summary at page 322 refers to the condition as a permanent disability, the fact that the claimant herself in an email to AC on 20 July 2017 referred to her condition as "*work-related stress, depression and anxiety"* (paragraph 6.44), the fact that the claimant indicated to DR in a meeting on 12 June 2017 (paragraph 6.37) and that she was unable to consider a return to work at Middlesbrough or Stockton which on the face of it was irrational but a matter which no-one from the respondent thought to challenge or investigate. In addition, the claimant's unwillingness to release OH reports from August 2017 which again no-one from the respondent challenged or investigated, the medical information provided by the claimant to AS for the grievance appeal which contained her GP records which clearly detailed her anxiety disorder, the report prepared by AC for DB in November 2017 which clearly recorded at page 806 that the claimant was suffering from stress alongside anxiety and depression (paragraph 6.67) and the claimant's own statement in answer to question posed by DB in December 2017 (paragraph 6.72) that she was suffering from "*severe stress, depression, anxiety, worsening migraines and suicidal..".*

12.5 We note that in cross examination DB accepted that when she moved to dismiss the claimant, she knew that the claimant was disabled although her evidence was vague as to the reason for that disability. DB attributed the disability

to conditions of work related stress, migraines and diabetes. We note that the reference to diabetes was incorrect.

12.6 When AC commissioned the OH report which resulted in the report of August 2017 she included stress as a matter to be investigated and in cross examination she accepted that she became aware of the mental health issues of the claimant as early as February 2017 when the claimant went away ill after the suicidal caller incident. When the claimant failed the work trial at Eston, AC stated in cross examination that she was shocked as she was of the opinion that the role was "*well within her capabilities".* Neither AC nor anyone else from the respondent investigated why it was that the claimant did not succeed in what should have been a work trial well within her capabilities and, had they done so, we conclude that evidence of the mental disability related to anxiety would have been clearly apparent.

12.7 When we take all these factors together, we conclude that the respondent ought to have known by the time DB began once again to seriously consider the claimant's absences in November 2017 that the claimant was disabled by reason of the impairment which we have identified as a disability from July 2017 onwards. We conclude that there were numerous factors and signposts which would have led the respondent to have that knowledge had someone taken the trouble to assess the history of this matter and properly consider the full history of this matter and all the matters of which the respondent was aware. The difficulty for the respondent in this matter is that no one took charge of this complex case and tried to assess the accumulated evidence which by November 2017 was available and which pointed in our judgment to clear evidence of disability by that time.

12.8 Accordingly we conclude that by November 2017 the respondent ought to have been aware of the anxiety of the claimant which we conclude had by July 2017 amounted to a disability under the provisions of the 2010 Act.

The claim of failure to make reasonable adjustments

13. We deal with the various claims of failure to make reasonable adjustments in turn. We comment that there are serious time issues in respect of several of these claims and in addition some of the matters raised by the claimant in submissions had not featured in any of the lengthy pleadings in this case and no application to amend was made in respect of them. In addition, several of these claims seek to shoehorn into the detailed provisions in respect of the law on reasonable adjustments set out above, claims which are nothing of the sort and which should have been advanced, if at all, as claims of discrimination arising from disability or direct discrimination or indeed claims of breach of statutory duty in a different forum. At the outset of the hearing we were presented with a list of issues for our determination. No application was made to amend that list of issues. We limit ourselves in dealing with the claims advanced to the matters set out in those lists of issues. Where the issues for our determination were not agreed, we deal so far as necessary with the matters raised in both lists.

13.1 Requirement imposed by the respondent to require the claimant to work in the same team, at the same desk and in the same building as X

13.1.1 This claim relies on the disability of anxiety which we have concluded did not become a disability until July 2017 and which the respondent did not have knowledge of until November 2017. This allegation has no relevance to the claimant's admitted disability of migraines. Whilst we note the claimant's assertion at paragraph 6.10 that her migraines could have become more frequent because of the stress caused by the bullying of X, we had no medical evidence to show that was the case and we do not accept that it was. No specific case was advanced that the claimant's migraines were increased because of this asserted PCP.

13.1.2 The respondent organised its workforce into teams and it so happened that the claimant and X were in the same team from at least 2013 onwards until sometime in 2016. At first there was no difficulty in the arrangement but by late 2013/early 2014 the claimant perceived difficulties with X and raised the matter with her managers. We note that by July 2014 the claimant reported that her desk was now at a distance from that of X and that remained the position at all times thereafter. Accordingly, as from July 2014 we do not accept that there was a PCP imposed of the claimant and X working at the same desk as the asserted PCP stipulates.

13.1.3 The duty to make reasonable adjustments in respect of the disability of anxiety did not arise until November 2017 and by that time the claimant was absent from work. There was no suggestion that, if she returned to work at Middlesbrough, she would be working at the same desk as X. Indeed, the claimant herself ruled out any suggestion of a return to work at Middlesbrough where X possibly still worked at the time. We had no evidence placed before us that by November 2017 X still worked for the respondent in Middlesbrough.

13.1.4 We conclude that the asserted PCP was not applied to the claimant at any time during which the respondent could conceivably have been under a duty to make reasonable adjustments in respect of the disability of anxiety which we conclude arose only from November 2017 onwards. This allegation of failure to make reasonable adjustments fails and is dismissed.

13.2 Removal of claimant's ability to work at Eston in October 2017

13.2.1 We do not accept that this amounted to a PCP applied by the respondent. The respondent did not apply this PCP to its workforce and it is not possible to identify any substantial disadvantage to the claimant in respect of this alleged PCP in comparison to others to whom this PCP was applied.

13.2.2 The ending of the work trial at Eston in October 2017 was a decision taken by the claimant's line managers on their assessment of the performance of the claimant during that trial. It was a decision taken which related to the claimant and to the claimant alone. It is not a PCP capable of reasonable adjustment.

13.2.3 The work trial is clearly a centrally important matter to what followed after the trial was ended and features prominently in our conclusion in respect of the claim

advanced under section 15 of the 2010 Act. However, we conclude it is not a matter which is properly advanced under sections 20/21 of the 2010 Act.

13.2.4 The claimant advanced the claim relying on the disability of anxiety. The duty of the respondent to make adjustments in respect of this disability did not arise until November 2017 which in any event was some weeks after the work trial ended. Thus at the time the PCP is said to have been applied, there was no duty on the respondent to make adjustments. This allegation fails and is dismissed.

13.3 Prohibition on employees taking toilet breaks longer than three minutes and prohibition on employees taking toilet breaks close to lunchtime

13.3.1 This allegation is based on the admitted disability of migraines.

13.3.2 The confused evidence in relation to these two alleged PCP was linked and we take these two matters together.

13.3.3 There was no agreement between the parties as to the issues we were to determine on these matters. The respondent saw the alleged PCPs to be a prohibition first on toilet breaks longer than 3 minutes and secondly close to lunchtime. The claimant asserted the PCPs pleaded were first, restrictions on taking screen or comfort breaks generally and secondly, a prohibition on taking screen or comfort breaks close to lunchtime.

13.3.3 The evidence from the claimant in relation to these two matters came under the heading "*Lewis Barker's team"* and related to events in 2015. We accept that during 2015 the respondent applied a policy in respect of breaks and in particular that the 15-minute tea/coffee break was not to be taken in the period from 11:30am until 2:20pm (paragraph 6.17). That is the only evidence we accept of any PCP being applied by the respondent in respect of the time when breaks of any nature could be taken and we note that that PCP does not feature in either list of issues. We do not accept that the PCPs asserted by the claimant in relation to the length of a toilet break or the time at which a toilet break could be taken were applied by the respondent. The evidence on those matters was vague to say the least. It is inconceivable that the respondent would seek to restrict the ability of any employee to visit the toilet as and when required.

13.3.4 In relation to screen breaks, we accept that the respondent applied a policy in respect of the 15 minute tea/coffee break. We are satisfied that such PCP would have placed claimant at a substantial disadvantage in the workplace by reason of her disability of migraines in comparison to employees not suffering from that disability. The claimant could not predict when migraines would occur and could not prevent migraines occurring in the period from 11:30am until 2:20pm and thus substantial disadvantage – in the sense of something more than minor or trivial - could have occurred.

13.3.5 The reasonable adjustment contended for by the claimant in relation to this matter was to be allowed to take regular short screen breaks. We do not accept that the respondent refused to allow the claimant to take screen breaks as and when required when she was suffering from a migraine. We had no evidence before us that being prevented from taking the 15 minute tea/coffee break during

the period from 11:30am until 2:20pm caused the claimant to suffer a migraine and thus we do not accept that it would have been a reasonable adjustment to have exempted the claimant from this policy generally. However, we accept that it would have been a reasonable adjustment to have allowed the claimant to take a break during the prohibited period if she was suffering from a migraine as recommended in the three OH reports to which we have referred above.

13.3.6 We are satisfied that if the claimant was suffering from a migraine and needed to take screen breaks at any time, as recommended by the OH reports to which we refer at paragraphs 6.6, 6.9 and 6.15 above, that such breaks were allowed. We are not satisfied on the evidence before us that there was any failure to make this adjustment on the part of the respondent or any of its managers. There was a suggestion by the claimant that she held off from requesting breaks during the prohibited time, even when she needed one, because of her condition of anxiety. That may or may not be so, but in 2015 that impairment did not amount, on our findings, to a disability and no duty to make adjustments arose by reason of that impairment. In respect of the impairment of migraines we find no failure to make the reasonable adjustment contended for by the claimant. We note that we had no evidence that action of any kind was ever taken against the claimant by reason of the number of absences from work or breaks away from work taken by her for any reason and certainly not because of the necessity for a break by reason of the impairment of migraines. We conclude that when OH reports in respect of this impairment were received by the respondent in 2014 and 2015, the respondent considered the contents with the claimant carefully and offered all reasonable adjustments. We note in particular the note made by Ceri Hughes (paragraph 6.15 above) from which we infer that breaks were allowed for the claimant as and when required without difficulty. We had no meaningful evidence about this matter in respect of any period after the end of 2015.

13.3.7 Even if that is wrong and there was a failure on the part of the claimant's line managers in 2015 to make adjustments, then a claim in respect of such matters should have been advanced at the latest by the end of March 2016. In cross examination, the claimant accepted that there was no ongoing complaint in relation to these matters from 2017 onwards: the submission of Mr Boyers on this point at paragraph 71(c) of his written submissions to the effect that this alleged failure to adjust applied to the claimant until her dismissal is rejected. In this matter the claimant entered into early conciliation with the respondent on 13 March 2018 which would mean that any alleged matter which occurred before 14 December 2017 was out of time. This allegation, arising as it does from events in 2015, is therefore considerably out of time. We deal with the question of extension of time below.

13.3.8 For those reasons this claim of failure to make reasonable adjustments fails and is dismissed.

13.4 Absence policy including trigger points at which absence could lead to disciplinary action

13.4.1 This allegation relies on the two asserted disabilities of migraines and anxiety individually and collectively.

13.4.2 The attendance policy of the respondent (pages 114 – 152) was applied by the respondent to the claimant and amounted to a PCP. The claimant was disabled throughout the period from 2014 onwards by reason of migraines and latterly by reason of anxiety also and this policy was applied to her by the respondent throughout that period.

13.4.3 As a disabled person we accept that the claimant was subjected to a substantial disadvantage in the application of this PCP given that as a disabled person she was more likely to be absent and thus subject to the provisions of the attendance policy. The terms of the policy (paragraph 6.81) had as a trigger point for action four spells of absence in a 12-month rolling period regardless of length of absence.

13.4.4 The 3 0H reports received by the respondent in 2014/2015 all referred to an increase in the trigger points and allowing for reduced productivity being reasonable adjustments in the case of claimant because of the condition of migraines.

13.4.5 We are not satisfied on the evidence presented to us that the respondent failed in any way to make these adjustments for the claimant. There is no evidence that the claimant was ever subjected to any disciplinary action under the terms of the attendance policy by reason of any short-term absences from work or by reason of the number of breaks taken by her or by reason of her productivity. Allowances were made for the claimant because of the impairment of migraines from which she suffered throughout. When the attendance policy was invoked against the claimant in 2017, it was by reason of a single period of absence, wholly unrelated to migraines, and had nothing to do with trigger points being breached or productivity being inadequate.

13.4.6 In closing submissions, Mr Boyers referred correctly to the duty to make adjustment being an anticipatory duty and pointed to the respondent's failure when receiving OH advice in 2014/2015 to agree increased trigger points and reduced productivity targets with the claimant at that time. If that had been a reasonable adjustment to make as opposed to what was done (which was simply to take no action against the claimant), then it is clear that the time limit to bring action in respect of that failure expired some years before these proceedings were instituted. We accept the submission of Mr Tinnion that this was not an ongoing breach until dismissal but rather one caught by the time limit provisions as explained in **Abertawe Bro Morgannwg University Health Board -v- Morgan** (above). Any claim in relation to this matter is therefore out of time and we deal with any question of extension of time below.

13.4.7 In respect of the disability of anxiety, we have concluded that this impairment only became a disability in July 2017 and the respondent did not acquire the knowledge of it until November 2017. By that time, the claimant had been away from work since February 2017 – except for the trial period at Eston – and was being managed under the attendance policy because of that lengthy period of absence and not by reason of breach of trigger points or poor productivity. The reasonable adjustments contended for by the claimant in this matter namely allowing for increased absences and/or reduced productivity would not have removed the substantial disadvantage suffered by the claimant by reason of the disability of anxiety which led to her single and prolonged absence from work in

February 2017. We accept the submission of Mr Tinnion that the absence policy of the respondent was suspended for a long period of time whilst arrangements were made for the work trial at Eston and an indefinite suspension of the attendance policy to allow the claimant to recover would not have been a reasonable adjustment - indeed it was not suggested by the claimant that it would.

13.4.8 For those reasons the allegations of failure to make reasonable adjustments in respect of the attendance policy fail and are dismissed.

Other allegations of failure to make reasonable adjustments

13.5.1 In his closing submissions, Mr Boyers referred to 3 further allegations which were not included in the pleadings and which did not feature in the list of issues. These were first that the respondent had applied a PCP of refusing to complete a SRP, an 0H referral and a desk assessment when requested by the claimant, secondly that the manner in which the Eston work trial was terminated and the claimant required to return to Middlesbrough was itself a PCP and thirdly that the respondent applied a PCP by moving to dismiss the claimant without seeking alternative roles or locations.

13.5.2 For the respondent, Mr Tinnion submitted that these matters should not be considered given that they had not been pleaded or included in the list of issues and given that there had been no application to amend. We agree with that submission and will not consider these matters further. In any event, the matters were all specific decisions taken by the respondent in respect of the claimant and in our judgment did not amount to PCPs falling within sections 20/21 of the 2010 Act. The matters raised in fact relate to the questions of proportionality and reasonableness of the process which led to the dismissal of the claimant which is principally what this case is all about and we will give consideration to those matters in the claims of discrimination arising from disability and of unfair dismissal below.

13.5.3 The claimant's list of issues included an allegation of a failure to make an adjustment because of a requirement imposed by the respondent that the claimant return to work at Middlesbrough up to dismissal in January 2018. This allegation was recognised not to be a PCP but a decision relating to the claimant alone and it was not pursued as a discrete claim of failure to make reasonable adjustments.

13.6 In relation to the question of whether it would be just and equitable to extend time to allow any of these allegations to be considered remedy, we note this matter does not directly arise given our findings above but we make brief findings on the matter in case any such conclusion above should be wrong. The allegations of failure to make reasonable adjustments were all advanced many months out of time. We accept that time would run from the date when the respondent might reasonably have been expected to comply with its duty. We must assess this from the claimant's point of view having regard to facts known by her or which should reasonably have been known by her at the relevant time. These allegations date from 2015. The claimant had the benefit of union advice at and after that time and there is no reason why on the face of it she could not have brought a timely claim. The delay is a very long one and the respondent has been prejudiced in that it was not able to call Lewis Barker to give evidence - and it was that witness who was

central to most of these claims. Had it been necessary for us to consider an extension of time, we would have concluded that it was not just and equitable to extend time in the circumstances of this case. Time limits are there for a reason: the claimant could have brought a timely claim and the balance of prejudice lies on the side of the respondent.

The claims of harassment related to disability

14. We deal with the various claims of harassment related to disability in turn. We remind ourselves that section 26 of the 2010 Act makes harassment unlawful if it relates to a protected characteristic in this case disability: there is no need for it to relate to a disability of the claimant's as such.

14.1 We have considered the allegation that GM shouted to colleagues in or around May 2016 about the claimant *"Don't ask her anything, we never know what medication she is on".*

14.2 We accept that GM made these remarks to the claimant in or around May 2016. We did not find credible the evidence of GM that he "*would not"* make remarks of this nature because he did not know the actual medication being taken by the claimant. On the other hand, the claimant was clear that this remark was made.

14.3 We accept that the words were unwanted by the claimant. We do not accept that GM intended to violate the claimant's dignity or to create for her the prohibited environment by his use of those words. We have considered whether the effect of those words was to violate the claimant's dignity or to create for her the prohibited environment. We have concluded that in May 2016 the claimant was not disabled by reason of the anxiety state from which she suffered but she was disabled by reason of migraines. We find that GM knew the claimant was disabled by reason of migraines and took medication although we accept that he had no specific knowledge of the actual medication taken by the claimant. We conclude that the claimant perceived those words of GM created for her the prohibited environment and violated her dignity and that it was reasonable for those words to have that effect. Even though the words of GM do not refer to a specific disability, the words related to medication and GM knew the claimant took medication for the condition of migraines which he knew amounted to a disability. We conclude that the words used by GM on this occasion were words of harassment related to disability.

14.4 We note that these words were spoken by GM in May 2016 and that for a timely claim to be advanced in respect of them, early conciliation should have begun by August 2016. In fact, that process did not begin until some nineteen months later in March 2018. Therefore, this claim is out of time. We deal with the question of extension of time below.

14.5 We have considered the allegation that in 2016 GM stated to a colleague about the claimant "*Don't bother asking her, she doesn't know what day it is".* In her witness statement at paragraph 122, the claimant placed this remark as being said between April and October 2016 and stated it was a remark making fun of her anxiety: the words themselves are not inherently words of harassment related to disability. Unlike the remark at 14.1 which relates to medication and could refer to

the disability of migraines, even on the claimant's evidence, this remark refers to the impairment related to anxiety and we have concluded that in 2016 this did not amount to a disability. Accordingly, the remark could not relate to a disability of the claimant and we conclude the words were not act of harassment. If we should be wrong in this conclusion, then we note again that this remark was made some 17 months before the claimant entered into early conciliation and is therefore out of time.

14.6 We have considered the allegation that in July 2016 when the claimant asked GM if the balcony doors on the third floor could be opened for ventilation, GM replied "*those doors are locked so that people like you can't jump out".*

14.7 The context in which this remark was allegedly made and the less than convincing denial by GM in cross examination of the use of these words and the fact that this allegation was raised by the claimant in her grievance appeal (paragraph 6.47) persuade us that these words were spoken by GM in July 2016. We conclude that the words are not inherently discriminatory. We conclude that this remark was not related to the disability of migraines but instead alluded to the claimant's anxiety from which, in her witness statement at paragraph 123, she attributed her suicidal feelings. We have concluded that in July 2016 the claimant was not disabled by reason of that impairment and thus this remark cannot relate to disability as required by section 26 of the 2010 Act.

14.8 If we should be wrong in this conclusion, then we note again that this remark was made some 17 months before the claimant entered into early conciliation and is therefore out of time.

14.9 All that said, this remark and the remark to which we refer at 14.5 above were made by GM in the workplace to a person whom he line-managed and in the presence of others. They are remarks which should have no place at all in the modern workplace and especially so from a line manager. They are both remarks which could easily amount to actionable harassment and the respondent could be said to be fortunate that they are not so in the circumstances of this matter.

14.10 We have considered the allegation that in late 2016, when the claimant told GM she needed to go home because of a migraine attack, GM laughed it off and handed to the claimant his glasses.

14.11 If this event had occurred it would indeed have been shocking conduct by a line manager in the civil service – or indeed elsewhere. We are not persuaded that this event occurred as the claimant describes. The claimant could not put a date to this event and in cross examination, GM could not recall this matter at all and clearly stated that if the claimant had expressed difficulties arising from a migraine attack, then he would have suggested a desk assessment. On balance, we prefer the evidence of GM on this matter and we do not accept that the words alleged were used or that GM offered the claimant the use of his glasses. We infer that during a migraine attack, it is quite likely that the pain from which the claimant suffered caused her to misunderstand or misinterpret what was said to her by GM or done by him. This allegation of harassment fails.

14.12 We have considered the allegation that during 2016 when the claimant was suffering from a panic attack, GM said loudly "*Don't panic Captain Mainwaring"* thereby likening the claimant to a character known to be prone to panic in a television programme about the Home Guard with which, as a former member of the armed forces, GM was very familiar. We were not persuaded by the denials of GM in relation to this matter to the effect that he had no recollection of the matter at all and that it was "*not something I would say".* Having seen GM give evidence before us and having concluded that certain of the remarks attributed to him were indeed said by him (albeit not amounting to actionable harassment), we conclude that this is very much what GM would say. The claimant was clear the words had been spoken and we accept that they were. The words used are not inherently words of harassment related to disability.

14.13 The claimant attributed this remark as being related to the mental impairment of anxiety. Patently it could not be said to relate to the impairment of migraines. Once again, we note our conclusion that that impairment did not amount to a disability in 2016 and thus the remark made by GM did not relate to disability.

14.14 If we should be wrong in this conclusion, then we note again that this remark was made some 17 months before the claimant entered into early conciliation and is therefore out of time.

14.15 We have considered the allegation that in 2016 GM said to the claimant in relation to X "*I would not let anyone get me into that state"* and *"I'm a trained killer you know".*

14.16 GM accepted that the first remark was made by him but did not accept that the second remark was made by him. Having considered the evidence from the claimant and from GM we conclude that both remarks were made to the claimant by GM during 2016 whilst he was her line manager. GM accepted in cross examination that, whilst in the army, he had been trained in the use of firearms and we infer that the second remark was a remark used by GM in the workplace.

14.17 Neither remark relates inherently to disability and the claimant attributed the remarks as being related to her impairment of anxiety. We have concluded that in 2016 the claimant was not disabled by reason of that impairment and thus the remarks do not amount to harassment related to disability. If that conclusion should be wrong, then we conclude from the evidence of GM that he did not intend the admitted remark to violate the claimant's dignity or to create the prohibited environment for her. We accept that that remark was made in the course of a conversation during which he was seeking to support the claimant in dealing with the perceived behaviour of X and, having assessed all the circumstances and having considered whether it was reasonable for the admitted remark to have amounted to harassment, we conclude that it was not reasonable for the admitted remark to have had that effect. We reach by inference the same conclusion in respect of the second unadmitted remark.

14.18 If either or both of those conclusions should be wrong, then we note the remarks were made some 17 months before the claimant entered into early conciliation with the respondent and thus any claim based on either remark would have been considerably out of time by reference to section 123 of the 2010 Act.

14.19 We have considered the allegation that in January 2017 when speaking to the claimant, GM tilted his head to his shoulder, hung out his tongue from his mouth, rolled his eyes and spoke in slurred speech. At paragraph 127 of her witness statement, the claimant clearly refers to her disability of migraines in relation to this allegation.

14.20 This would have been very serious conduct on the part of GM if it had happened as the claimant describes. GM in cross examination stated forcefully that he did not do it and accepted that it would have been humiliating for the claimant if he had done it. GM made the point that he would have had no reason to speak in slurred speech as the claimant does not have a speech impediment. We do not accept that this event occurred. As was the case in respect of the matter dealt with above at 14.11, we infer that during a migraine attack, it is quite likely that the pain from which the claimant suffered caused her to misunderstand or misinterpret what was being said to her by GM or done by him. This allegation of harassment fails.

14.21 We have considered the allegation that on 1 August 2017 DR asked RG if she was aware of the claimant's personality. This matter was accepted by DR and it did occur. We can deal with this matter briefly as we accept the submission made by Mr Tinnion in relation to it. DR was investigating a grievance raised by the claimant and it is clear that, in respect of the allegations being investigated, the personality of the claimant was a material factor to take into account. The claimant presented to DR as anxious, nervous, timid, shy and non-assertive and it was right that those matters be factored into the investigation of her grievance. There is no evidence whatever that DR intended that question to be an act of harassment related to disability and we conclude that the question cannot reasonably have had such an effect. This allegation of harassment fails and is dismissed.

14.22 If that conclusion should be wrong, then we note that this question was asked some five months before the claimant entered into early conciliation with the respondent and is out of time.

14.23 We have considered the allegation that R Young ("RY") subjected the claimant to a barrage of phone calls and text messages on 24 October (not November) 2017. We can deal with this matter briefly. It is clear that there was correspondence exchanged between the claimant and RY on 23 October 2017 which was the first working day after the end of the work trial at Eston. On 24 October 2017 the claimant made RY (and AC) aware that she was in hospital after a huge panic attack (paragraphs 6.64 and 6.65 above) and asked to be left alone to recover. We find that once RY was satisfied that the claimant was safe then the correspondence ceased. We accept the submission of Mr Tinnion on this matter to the effect that the respondent had a duty of care towards the claimant as an employee and was entitled to contact the claimant in furtherance of that duty whilst she remained an employee. We do not accept that it was the intention of RY in contacting the claimant to harass her in respect of either disability from which she then suffered nor could that contact reasonably have been considered to have had such an effect. This claim of harassment fails and is dismissed.

14.24 In the course of final submissions, Mr Boyers raised allegations of harassment for the first time which had not been pleaded and which did not feature in the list of issues before this Tribunal. These allegations were that the

investigation of DR into the grievance of the claimant was self-serving and an act of harassment, that the investigation of AS at the appeal stage of the grievance was self-serving and an act of harassment, that the referral of the claimant to DB by AC for consideration of dismissal was an act of harassment, that the dismissal of the claimant by DB was an act of harassment and that eight actions of Linda Gibson in relation to the work trial at Eston were acts of harassment. No application was made to amend the pleadings for these matters to be considered as acts of harassment. In the absence of any such application, we conclude that those issues are not before us and will not be considered further by us as allegations of harassment. However, we note that such matters form part of our assessment of the proportionality of the actions of the respondent in relation to the claim advanced under section 15 of the 2010 Act.

14.25 We have decided that one act of harassment is made out but should not be considered for remedy because it has been advanced out of time. We have also decided that several other matters do not amount to acts of harassment but, even if they did, should not be considered for remedy as they have been advanced out of time.

14.26 We have considered the submissions made by Mr Boyers in respect of time limits. Given that we have concluded there was only one act of harassment then there is no question of there being a continuing course of conduct in this matter by GM. We do not accept that any other manager of the respondent had committed acts of harassment in the way which Mr Boyers urged on us. We do not accept that there was a culture or regime of discrimination towards the claimant in this matter.

14.27 We have considered whether it is just and equitable to extend time to enable the one act of harassment to be considered for remedy. We have considered the matters relied on by Mr Boyers as set out at paragraph 92 of his written submissions as reasons to extend time. We take account of the timidity of the claimant and her willingness to back down in the face of challenge by her line managers. We note the claimant's assertion that she did not have the requisite knowledge to advance a claim of harassment before she received support from her family and others in 2017. We note the claimant's state of health and her disabilities. Against that we have considered the submissions of Mr Tinnion for the respondent. The delay in this matter is a very long delay and in that period, we are satisfied that the claimant did have the benefit of union advice and representation. Having considered all relevant factors, we conclude, principally by reason of the length of the delay, that it would not be just and equitable for time to be extended to enable the one act of harassment to be considered for remedy. We would reach the same conclusion in respect of any other act of GM during his line management of the claimant during 2016 should our conclusion in respect of any other alleged act of harassment be in error.

14.28 Accordingly all claims of harassment fail for different reasons and are dismissed.

The claim of discrimination arising from disability: section 15 of the 2010 Act.

15. We deal with the claim of discrimination arising from disability in respect of the dismissal of the claimant.

15.1 The first matter to address in relation to this claim is the identity of the disability on which the claimant relies in order to advance the claim. For the claimant, Mr Boyers asserted that the impairment relied on was that described as anxiety/PTSD. It was accepted that at paragraph 22 of the further and better particulars (page 73) the disability referred to in respect of this claim was stated to be PTSD but it was submitted that the pleading had to be read as a whole and, when it was, it was clear that the impairment relied on was anxiety which became subsequently diagnosed as PTSD. For the respondent, Mr Tinnion submitted that the section 15 claim, which related only to the dismissal of the claimant, was explicitly tied to the impairment of PTSD and to no other disability. There was not on the face of the pleading anything to suggest that there had been a typographical error in referring only to PTSD and that by seeking now to rely on the impairment of anxiety the claimant was changing the goalposts. It was submitted that PTSD was a recognised medical condition and not the same as mere anxiety or stress - no matter how great.

15.2 We have considered this matter in detail. We conclude that it is right that the pleadings be considered as a whole and in particular that paragraphs 10-17 of the further and better particulars of claim (pages 71-72) make it clear that the impairment on which the claimant relies to support the claim of discrimination arising from disability is a disability which is described as anxiety/PTSD. We accept that paragraph 22 refers only to PTSD but paragraph 22 cannot be read in isolation from what precedes it. When that is done, it is clear that the claimant is relying on the impairment described as anxiety/PTSD. If the pleadings in this matter had referred throughout to PTSD and to no other impairment, then the submission of the respondent would have been persuasive but the pleadings are not so limited. It is clear that the issue is as the claimant described it in her list of issues namely that the impairment relied on in respect of this claim was the mental impairment described as anxiety/PTSD. Furthermore, we note that paragraph 22 of the further and better particulars is an assertion of the cause of the claimant's absence from work and does not specifically tie the section 15 claim to the impairment of PTSD as the respondent asserted.

15.3 We have considered again the authorities to which we refer at paragraph 8.5 above and note that we must concentrate not so much on the label applied to an impairment but rather to the symptoms and the effect of the impairment. We have carried out this exercise and have concluded that the claimant suffered from a mental impairment which at the time of her dismissal had amounted to a disability from July 2017 onwards. That impairment caused the claimant to be anxious and whether or not by the point of dismissal that impairment had reached the level of PTSD (or ever did) is not material. We conclude that it is clear from the pleadings that it is the mental impairment resulting in anxiety which the claimant relies on to support the section 15 claim in respect of her dismissal and we reject the submission that the claimant is changing the goalposts. The case the respondent had to meet in respect of the disability relied on to support this particular claim was clear from the pleadings as a whole.

15.4 We do not accept that the respondent has been disadvantaged. The same impairment was relied on in respect of certain of the claims of failure to make

reasonable adjustments and harassment and was fully addressed by the respondent in its pleadings and in its defence to these claims generally.

15.5 We conclude that in dismissing the claimant on 10 January 2018 the respondent through DB treated the claimant unfavourably – this point was rightly conceded by the respondent, although understandably, in respect of these proceedings only.

15.6 We have considered what was the "*something"* arising from the disability and whether the claimant was dismissed by the respondent because of that "*something".*

15.7 We conclude that the reason the claimant became absent from work in February 2017 was because of the mental impairment of anxiety and that clearly remained the reason for her absence up until the beginning of the work trial in September 2017 and after it ended from October 2017 onwards. By July 2017 we conclude that that impairment amounted to a disability. The claimant's absence from work was clearly the "*something"* which arose from her disability from July 2017 onwards.

15.8 We have considered if the claimant was dismissed because of the absence which arose from the disability. For the respondent, Mr Tinnion submitted that the claimant was not dismissed because of her historic absence record but rather because there was no evidence before DB of when the claimant might be medically fit in the future to return to work. We do not agree with that submission. We do not agree that the absence from work can be separated from the question of whether, and if so when, the claimant could return to work following that absence. We conclude that for the purposes of the exercise required to be undertaken under section 15 of the 2010 Act, as explained in **Pnaiser** (above), that the absence of the claimant from work was at least a significant influence (in the sense of more than trivial) in the mind of DB when moving to dismiss the claimant. The reason the claimant could not indicate a return to work date in January 2018 was because of the disability from which she suffered which in turn had caused her to be absent from work in the first place. Accordingly, we conclude the claimant was dismissed because of something arising from her disability.

15.9 We move on to consider whether in moving to dismiss the claimant, the respondent was pursuing one or more so called legitimate aims. We note that it was submitted by Mr Tinnion that the aims the respondent was pursuing were two-fold: first protecting scare public funds/resources and secondly reducing the strain on other employees of the respondent caused by the claimant's absence. It was said that the respondent had expended huge resources of time in managing the claimant during her illness and that the claimant's absence impacted on her colleagues who were required to cover her duties whilst still providing an adequate service to the customers of the respondent.

15.10 We accept that the two aims advanced were legitimate aims in the context of the business of the respondent and its duties towards its employees and its customers.

15.11 We turn therefore to the question of whether the respondent acted in a proportionate way in pursuance of those aims in moving to dismiss the claimant when it did.

15.12 We have noted the authorities referred to by Mr Tinnion in respect of this question as referred to in the Appendix B annexed to written submissions. We note that we must afford a substantial degree of respect to the judgment of the respondent's decision maker and that we are to use our common sense and knowledge as an industrial jury to ask whether the dismissal was proportionate. Having carried out that exercise, we conclude that it was not proportionate for the respondent to have moved to dismiss the claimant when it did for the following reasons:

15.12.1 When she dismissed the claimant, DB had no up to date medical evidence before her. We accept that the claimant had refused an OH referral in the early days of her absence in February 2017 and when she had undertaken two assessments in August 2017, she had refused to release the resulting report (as she was entitled to do) but the fact remains that the respondent moved to dismiss an employee with over 12 years' service on grounds of capability without any current medical evidence before it. When asked by the Tribunal whether she had considered asking the claimant to agree to provide a report from her GP (whom the claimant confirmed on 19 December 2017 she was seeing regularly) DB replied that it was not usual to go to the GP of an employee and that the standard procedures to be followed did not allow for that step to be taken. That approach showed no appreciation that the claimant was a disabled person and no thought was given at all to the possibility that the reason the claimant was failing to co-operate (as DB perceived her to be) could be a symptom of the disability which was the cause of the absence in the first place.

15.12.2 The absence of the claimant was managed at first by her line managers and then the claimant submitted a grievance against her then current line manager and her predecessors. That should have alerted the respondent to a need to have the management of the claimant's absence removed from her line manager and the responsibility given to someone who could view matters objectively. It is clear to us that the grievance submitted by the claimant in March 2017 upset AC and her line managers and others with whom she worked and the measure of that upset and frustration was clear from the message to which we refer at 6.48 above. We conclude and infer that the claimant was perceived as a nuisance by management of the respondent and a time-consuming problem who needed to be dealt with. No thought, let alone understanding, was given to the fact that the claimant might be disabled by reason of the severe anxiety which she evinced. In moving to dismiss DB had no appreciation of these matters herself and failed to take them into account.

15.12.3 We find evidence of the grudging approach of the respondent in the way the work trial was carried out at Eston. It is illuminating to note that this opportunity was identified as a result of the conspicuously fair and thorough grievance investigation carried out by DR and not as a result of the actions of the claimant's own managers. The work trial was then put in place with AC nominally still managing the claimant from Middlesbrough whilst the trial was carried out but she

herself accepted in evidence to us that she had no previous experience of a work trial and did not know how one was to be carried out.

15.12.4 There were several aspects of the work trial at Eston which were not carried out reasonably. The claimant was promised weekly feedback sessions on her performance during the trial but none were provided. There were difficulties with the IT equipment provided to the claimant at the outset which necessitated an extension of the trial itself. The training provided to the claimant was limited with the person assigned to train the claimant being absent for some weeks of the trial. The trial was withdrawn in circumstances which were bound to upset the claimant: it was withdrawn without notice or explanation or discussion with the claimant or any right of review or appeal. The claimant was making her way home on the last day of the trial when she received word that the trial was deemed to have been a failure and she was to return to work at Middlesbrough. It was surprising that the claimant had been deemed unsuccessful as AC herself commented that the role should have been well within the capabilities of the claimant given that it was a purely administrative role with less responsibility than that carried by the claimant in her usual telephony role. The paperwork in respect of the trial was not completed contemporaneously, as it should have been, but was completed after the event and in the hope that there was sufficient evidence to show that the trial had been unsuccessful. The trial having been deemed unsuccessful, no attempt was made by any manager to consider if other trials were potentially available and if so, where. After the trial ended the claimant had little contact from her managers and the only substantive contact was a letter from AC advising that the case was being referred to DB for a decision.

15.12.5 DB recognised the claimant's case as a complex one and contacted Civil Service HR casework on 5 January 2018 and received advice to the effect that she should ensure the work trial had been carried out for a sufficient period of time with any appropriate adjustments to ensure the claimant was supported. She was also advised to check if alternative roles and adjustments had been offered following the end of the trial at Eston to assist the claimant back to work. DB did not see it as her role to check on the reasonableness or otherwise of the work trial arrangements or whether it had been reasonably carried out. She candidly accepted that she left those matters to the line managers and did not see it as her role to consider the question of the reasonableness of the Eston work trial or if there were other trials available. In failing to take those steps, we conclude that DB did not act proportionately to the aims being followed in moving to dismiss the claimant when she did.

15.12.6 We note and accept that after the trial ended the claimant refused to engage face to face with DB which meant the matter became more challenging for DB to deal with but that failed to alert DB to the possibility that such action may be a symptom of a disability affecting the claimant. No further request was made of the claimant to attend an OH referral and no request was made for release of GP records or a report from the GP even when the claimant expressed her willingness for that step to be taken in her reply on 19 December 2017 (paragraph 6.72 above). No consideration was given by DB to the question of whether the claimant was a disabled person and, if so, by reason of what impairment(s).

15.12.7 DB was right to conclude that this was a complex case. Such cases require to be handled carefully and this case was not so handled. The managers of the claimant saw their role as waiting for the grievance outcome and then moving to the work trial and, with that deemed a failure, referring the matter to DB as a decision maker with a view to the claimant being dismissed. DB saw her role as simply considering the papers referred to her and considering whether the claimant could offer a return to work date. No one person took an overview of the whole case and properly considered all aspects of it including the complex medical impairments of the claimant and whether one or more of them amounted to a disability. No person dealing with this matter had any appreciation that the claimant was disabled by reason of anxiety by the time DB came to move to a decision in November 2017 onwards. That failure to place anyone in charge of overseeing the whole case led DB to act without a full understanding of the case and without any or any proper consideration of whether the claimant could be helped back to work. No consideration was given to the fact that the claimant had managed to return to work for six weeks at Eston after a very lengthy absence which was in itself a sign of progress and a sign that a return to work was possible.

15.12.8 The attendance policy of the respondent requires case conferences to be carried out after an absence lasting more than three months and after six months of absence, a senior civil servant member must be engaged to ensure the employee is given the help and support needed to return to work. These steps were not taken in this case and again this is evidence that no one had overall control of the case. The matter effectively fell between the line managers and DB who each thought the other had taken or would take steps which were necessary but, in the event, those steps were taken by no one. The attendance policy of the respondent (paragraph 6.81) specifically requires all mitigating circumstances to be considered and whether reasonable steps had been taken to understand the effects of any illness suffered by the claimant. These steps were not taken by DB or by anyone else in the process which led to the claimant's dismissal.

15.12.9 The decision making process of DB was placed on hold by her when the claimant raised a grievance and that grievance was investigated by DC. The claimant appealed the outcome of that decision but DB did not consider it necessary to await the outcome of the appeal before moving on with her decision making process. That decision is on the face of it illogical but was not explained by DB: that gives us further grounds for our inference that the claimant was deemed to be a nuisance and that a decision needed to be taken to remove her from the business. When she moved to make a decision, DB did not consider any outcome other than dismissal and, with the information which was before her, that could be said to be understandable but we conclude that had the matter been carried out properly and in accordance with procedures laid down, more relevant information might have been available to DB which might have led to a different outcome.

15.12.10 In reaching our decision in this matter, we do not overlook that the claimant placed difficulties in the path of the respondent. The claimant would not engage face to face with her managers for a considerable period of her lengthy absence, the claimant would not initially agree to see OH and then, when she did, she refused to release the resulting reports and by the time of her dismissal the

claimant had been absent from work for approaching 12 months – if the period of the work trial did not break the period.

15.12.11 We have assessed all the above factors. We conclude that in dismissing the claimant in January 2018, the respondent did not act proportionately to the aims it was seeking to achieve. There was more that could proportionately and reasonably have been done to assist the claimant back to work particularly by building on the positive aspects of the work trial at Eston rather than concentrating on the negative aspects of that trial. Whether or not any such further action would have yielded results is a very different question and is one for consideration at the remedy stage of this claim and not the liability stage.

15.12 For those reason we conclude that in moving to dismiss the claimant when she did DB was not acting proportionately in relation to the aims being pursued. Accordingly, the claim of discrimination arising from disability in respect of the dismissal of the claimant is well-founded and the claimant is entitled to a remedy.

The claim of ordinary unfair dismissal

16. We turn to deal with the claim of ordinary unfair dismissal.

16.1 We conclude that the respondent has proved the reason for the dismissal of the claimant as being related to her capability and thus falling within the potentially fair reasons for dismissal set out in section 98(2) of the 1996 Act. We note the claimant did not seek to argue that the respondent had failed to establish the reason for the dismissal.

16.2 We turn to the question of whether the respondent acted reasonably in treating that reason as sufficient to dismiss the claimant. We remind ourselves that in answering the question posed by section 98(4) of the 1996 Act, we must not substitute our own views but consider matters objectively from the view point of the hypothetical reasonable employer. The matter we now consider raises different questions to the process followed when deciding whether the respondent acted proportionately in moving to dismiss the claimant in respect of the claim advanced under section 15 of the 2010 Act. The question posed by section 98(4) of the 1996 Act brings into sharp focus the size and administrative resources of the respondent (which are vast) and we must consider the question in accordance with equity and the substantial merits of the case.

16.3 We remind ourselves that a reasonable employer will generally consider the question of the length of an absence from work, whether a return to work is likely and if so when, whether the employee could return to other lighter or different duties either temporarily or permanently and will ensure there has been consultation with the employee facing dismissal by reason of the absence of capability. We must consider whether the respondent could be expected to wait any longer for the claimant to return to work. We have reminded ourselves of the decision in **McAdie** (above) which deals with cases, such as this, where it is said by the claimant that the absence from work was caused by the respondent. In this case the respondent does not accept that it has any responsibility for the circumstances which led to the absence of the claimant from work in February 2017 or the renewed absence after the work trial in October 2017 and we make no

decision whatever as to the causation of the illness of the claimant. As we have stated above, if the claimant asserts she has been injured by reason of a breach of duty by the respondent, we have no jurisdiction over such matters. However, where there is an issue as to whether or not the illness was caused in the workplace, it might be necessary for the respondent to "*go the extra mile"* before reasonably moving to dismiss.

16.4 We note that the respondent dismissed the claimant at a time when the most recent medical evidence before it was OH reports dating from 2014/2015. This was a complex case and one which raised issues of the claimant was a disabled person pursuant to section 6 of the 2010 Act. Whatever else DB knew or did not know, she did know (or should have known) that the claimant was disabled by reason of the migraines from which she suffered as the OH reports made clear. We conclude that no reasonable employer would move to dismiss the claimant in the circumstances of this case without seeking a report from the GP of the claimant (as she offered) as to the reason for the absence and the possibility of a return to work. Any reasonable employer would seek to inform itself of the medical reasons for the absence of the employee and this DB refused to do in the circumstances of this case. We conclude that that step was all the more reasonable bearing in mind that the claimant had returned to work successfully (in terms of attendance) for six weeks in September/October 2017 and that would lead any reasonable employer to investigate further the possibility of a return to work at any reasonable location and the reason why the claimant ruled out a return to work at Middlesbrough or Stockton. This is particularly so given the size and administrative resources of the respondent.

16.5 The attendance policy of the respondent laid down steps to be taken when dealing with the long-term absence of an employee such as the claimant. For entirely understandable reasons, the policy requires a case conference to be held by line managers with an OH adviser at which an HR expert could be present after an absence of more than three months. That step was not taken by the respondent in this case. This step fell to be taken in May 2017 when the claimant was still saying she was unwilling to see OH but very shortly after that, through the grievance process, the claimant indicated a willingness to engage with OH and any reasonable employer knowing that would put in place that case conference at that stage in accordance with its own policy. By August/September 2017 the claimant had been absent for six months and the policy then required the involvement of a senior civil service member to ensure the claimant had all necessary help and support needed to effect a return to work. That step was not taken. At that time the work trial was about to begin but when that work trial ended unsuccessfully, then any reasonable employer would revisit its own policy and take that required step at that stage. Before moving to dismiss, DB had a duty under the policy to consider if the policy had been correctly followed and, if not, to refer it back to the line managers. This step was omitted by DB who did not consider whether the terms of the policy had been correctly followed at all. These are not the actions of a reasonable employer.

16.6 We conclude that the consultation with the claimant by DB in the period between November 2017 and January 2018 was not reasonable. Whilst appreciating and noting the difficulties caused by reason of the claimant's refusal to

meet face to face, the correspondence between the claimant and DB was limited to one exchange and the replies given by the claimant in December 2017 raised at least two matters which no reasonable employer would fail to investigate. First was the offer of a GP report and the second was the question raised by the claimant about the withdrawal of the work trial at Eston which would have altered any reasonable employer to look into the circumstances of that trial and the reason for its withdrawal. DB failed to take either of those steps and is so doing acted as no reasonable employer would have acted.

16.7 The evidence before DB suggested that the claimant was ill and yet no consideration was given to whether the claimant's illness, related as it was to anxiety, could amount to a disability. DB concluded that the claimant was deliberately not complying with internal absence management procedures by insisting on contact by email and was being deliberately obstructive. We conclude that no reasonable employer would reach that conclusion without having medical evidence before it to support that conclusion or without having taken further steps to acquire such evidence. The duty on the respondent in that regard was clearly not without limit but we conclude in the circumstances of this case that the respondent acted as no reasonable employer would have acted by dismissing when it did without taking further steps to try to inform itself of the true medical position of the claimant. Furthermore, in taking advice from Civil Service HR Casework in January 2018 and then not following that advice, the respondent acted as no reasonable employer would have acted.

16.8 In reaching the decision to dismiss the claimant and award 100% compensation under the PCSPS, DB did not give any serious thought to any alternative to dismissal but went ahead in a preordained way to dismiss the claimant without fully informing herself of the matters which any reasonable employer would have informed itself of and would have taken into account.

16.9 For those reasons, the claim of unfair dismissal is well-founded and the claimant is entitled to a remedy.

The claim of unauthorised deduction from wages

17. We deal with the claim of unauthorised deduction from wages.

17.1 This matter was not put to the witnesses for the respondent to the extent that counsel for the respondent submitted the claim had been withdrawn. It was not specifically withdrawn and so we address the matter.

17.2 We were taken to no documents in relation to this claim. In the claim form (page 17) at paragraph 16 the claimant refers only to a deduction of £1787 and in her witness statement at paragraphs 210-214 the claimant did not give further information about alleged deductions and so we limit ourselves to a consideration of the deduction to which the respondent refers in the latter at page 877A.

17.3 We note the provisions of the claimant's contract of employment as set out at paragraph 6.2 above and we note the rationale for the deduction made from the final salary payment to the claimant set out at paragraph 6.80 above. We accept that the claimant was absent from work from 14 February 2017 and did not return to

work after that until the date of her dismissal save for the period of the work trial at Eston. The rationale set out at paragraph 6.80 provides for the claimant to have received six months full pay in the six-month period from February 2017 which would last until the time the work trial began at Eston in September 2017 which lasted until 20 October 2017.

17.4 We accept that the claimant should in accordance with the terms of her contract have reduced to half pay from 23 October 2017 and that due to an administrative error that reduction was not actioned until the point the claimant was dismissed. We do not accept that the claimant became entitled to a further period of six months full sick pay by reason of her return to work at Eston for the period of the trial. The contract of employment of the claimant does not so provide.

17.5 We accept the rationale and calculation set out by the respondent at page 877A and we heard nothing from the claimant to persuade us that the recovery of the sum of £1787.17p was anything other than the recovery of an overpayment of salary to which she was not entitled and thus the recovery was authorised pursuant to section 14(1)(a) of the 1996 Act.

17.6 Accordingly we conclude that in deducting the amount of £1787.17 from the final salary payment to the claimant, the respondent made an authorised deduction. The claim of unauthorised deduction of wages therefore fails and is dismissed.

Final Comments

18.1 The pleadings had at one time made reference to a claim of indirect disability discrimination. However, it was clarified during the hearing that the claimant advanced no such claim. Accordingly, any claim of indirect disability discrimination is dismissed on withdrawal by the claimant.

18.2 There was reference in the list of issues to a claim by the claimant for personal injury. The Tribunal has no jurisdiction to consider claims for personal injury as such and any such claim, as with any claim for breach of statutory duty, must be advanced in the civil courts. However, the Tribunal does have power in awarding compensation for an act of discrimination to consider an award for personal injury if such injury has been caused by the act of discrimination. In this case the claimant made a great many allegations of discrimination which have not succeeded. The single act of discrimination which succeeds is the act of dismissal. The claimant will have to consider carefully whether any claim for personal injury arises out of that single act of discrimination and, if so, call evidence on that point or make any appropriate submissions at the remedy hearing. Equally if the claimant seeks to assert that she was made ill by her dismissal and that she has not obtained alternative work now because of that illness, the claimant may call whatever evidence she considers appropriate at the remedy hearing.

18.3 A successful claim of discrimination will generally give rise to a claim for injury to feelings. This is a matter which the Tribunal will consider at the remedy hearing but again in the context of the single act of discrimination which is proved in this matter.

18.4 If a pension loss arises to the claimant because of the dismissal and if that loss is likely to be a complex one, then the parties may apply for further case management orders.

18.4 For the respondent, it was submitted that the claimant contributed to her dismissal by refusing to release the 0H report from August 2017 and by refusing to work in Stockton. These are matters which the Tribunal will consider further at the remedy hearing and the parties may make or adduce such further evidence on these matters as they think fit.

18.5 The Tribunal will also consider at the remedy hearing any argument in relation to a reduction in compensation by reason of the failure of the claimant to appeal against the decision to dismiss her.

18.6 The Tribunal has concluded that the dismissal of the claimant was an act of discrimination arising from disability and was also unfair under the 1996 Act. The central question which arises from our conclusions in respect of both these claims is whether, and if so when, a fair and non-discriminatory dismissal could and would have taken place. In this regard the Tribunal has reached no conclusion but it notes that during the unsuccessful work trial in Eston, the claimant was already raising issues about the distance of travel from home to work and had not managed to work her full contractual hours during any period of the trial. The Tribunal will consider whether a further alternative role would have been available for the claimant and, if so, where and when and will consider the likelihood of such a position being successfully filled by the claimant and for how long.

18.7 In assessing any compensation due to the claimant, the Tribunal will need to have regard to the sums received by the claimant from the respondent under the PCSPS.

18.8 The Tribunal has set a date for the remedy hearing in the hope that this matter can be concluded on that day. If the parties consider that any case management orders are required for the remedy hearing or that further time is required, application can be made to the Tribunal in the usual way with any agreed orders or alternatively a short telephone private preliminary hearing may be requested.

EMPLOYMENT JUDGE A M BUCHANAN
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 3 May 2019