EMPLOYMENT TRIBUNALS

Claimant: Ms W Gidman

Respondent: National Institute for Health and Care Excellence

HELD AT: Manchester **ON:** 5 to 12 March 2018
12 April 2018 (In Chambers)
23 & 24 August 2018
(In Chambers)

BEFORE: Employment Judge Holmes
Mrs A Jarvis
Mr W Haydock

REPRESENTATION:

Claimant: In person
Respondent: Mr B Williams of Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1.The respondent did not directly or indirectly discriminate against the claimant on the grounds of either of her disabilities.

2.The respondent did not discriminate against the claimant because of something arising in consequence of either of her disabilities.

3.The respondent did not fail to make reasonable adjustments for the claimant.

4. The respondent did not harass the claimant in relation to her disabilities.

5.The respondent did not victimise the claimant.

6. The claimant's claims are dismissed.

REASONS

1. By a claim form presented on 18 May 2017, the claimant brings claims of disability discrimination against the respondent, her former employer. The claims

were discussed at a preliminary hearing on 11 July 2017, and the issues identified in the Annex to the Tribunal's Orders made that day , and sent to the parties on 18 July 2017.

2. The claimant withdrew claims for "other payments", and her claims were identified in the Annex to the Tribunal's orders.

3. The respondent did not concede disability in respect of either conditions that the claimant suffers from, IBS, and a wrist condition. Further, knowledge, and the date of knowledge was also in issue.

4. The claimant gave evidence, but called no witnesses. She had made two witness statements, the first , relating to her alleged disabilities (the "impact statement") was undated, but appears to have been served on 30 July 2017 (it is at pages 53 to 61 of the bundle) , and a second , undated, full witness statement, which she confirmed was true at the final hearing.

5. For the respondent Jasdeep Hayre, and Melinda Goodall gave live evidence. There was a bundle of documents . Additionally a supplementary bundle was produced, and references to pages in that bundle will be by the use of "SBxxx". In total over 1400 pages of documents have been included in the bundles before the Tribunal. Additionally, the respondent adduced witness statements from Sarah Cumbers and Judith Richardson, but they were not called.

6. The parties made, by agreement, written submissions, which were considered in Chambers on 12 April 2018. Thereafter the judgment was drafted, but not completed in August 2018. This reserved judgment is now promulgated, with apologies for further delays initially occasioned by pressure of judicial business, and the absence of the Employment Judge on other judicial assignments, and due to family illness. Whilst the parties did enquire about the judgment in November 2018, when the Employment Judge did bespeak the file, and prepared to finalise the judgment, it was then overlooked. It was only upon the claimant further contacting the Tribunal again in May 2019 that it was appreciated that it had not been promulgated in December 2018. Thereafter an IT issue resulted in part of the draft not being saved, and requiring to be reconstituted. The Employment Judge apologises for this, and thanks the parties for their considerable patience.

7. Having heard and read the evidence , and considered the submissions of both parties, the Tribunal finds the following facts:

7.1 The claimant is graduate with a degree in Pharmacy, a Diploma in Clinical and Health Services Pharmacy, a PhD in Pharmacy Practice/Health Economics, a Postgraduate Certificate in Teacher and Learning in Higher Education, and an MSc in Health Economics and Health Policy. She has previously been employed as a locum community pharmacist, a clinical pharmacist, a research fellow, a senior lecturer, and a research methodology fellow.

7.2 In October 2015 she applied for a post with the respondent, which is the body responsible for ensuring standards of clinical practice and approval of procedures , treatments and medicines in the NHS. The role that the claimant

successfully applied for, and to which she was initially appointed was that of Technical Analyst , in the Observational Data Unit ("ODU", based at the respondent's premises at City Tower, Piccadilly Plaza, Manchester.

7.3 This was a band 7 post, on a fixed term contract expiring on 31 March 2017. The claimant was provided with a Statement of Main Terms and Conditions of her employment (pages 62 to 70 of the Bundle).

7.4 Prior to her appointment , the claimant completed a pre-employment health screening questionnaire . O H Assist wrote to her prospective employer on 9 September 2015 stating that the claimant had indicated that she had no disabilities or health concerns that affected her ability to perform her role, and that as such she was fit for the duties of the proposed role with no adjustments to her workplace (page 174 of the bundle).

7.5 The claimant had since mid - 2015 suffered from irritable bowel syndrome, although she did not consider this to be likely to affect her work when she completed the pre – employment health questionnaire. She had only recently been given that diagnosis , having been referred by her GP to a Consultant in July 2015. She underwent a colonoscopy in August 2015, and the diagnosis of mild irritable bowel syndrome ("IBS") was provided to her by a letter to her GP of 7 September 2015 (page SB10). At that time her condition was described as "mild" irritable bowel syndrome, and her main complaint was that she experienced urgency and frequency when on long runs, she being a keen runner who had entered the London marathon.

7.6 The claimant has had a ganglion on the top of her right wrist for a number of years. Although it was unsightly, it caused her few problems. Another one grew during 2015, and the claimant arranged to see her GP, and a hand surgeon in July 2015, but as it then shrank in size , she cancelled this consultation.

7.7 At the time she commenced employment with the respondent, her ganglions were not causing her any problems.

7.8 The claimant was assigned to the ODU team , and was initially managed by Nina Lathia, Senior Technical Advisor. Ms Lathia was based in London, as were two other senior staff members.The claimant's initial placement as a Technical Analyst in the ODU involved her in joining a project that had been running for two years. The claimant considered that this project was not well conceived , or being managed well by Nina Lathia for reasons which are set out in some length in her witness statements , but are not relevant to the claims that she makes.

7.9 By December 2015 a ganglion on the claimant's right wrist was causing her some problems, so she arranged a consultation with a hand surgeon for 15 December 2015. She informed Nina Lathia of this consultation by email of 14 December 2015 (page 175 of the bundle).

7.10 A note of this consultation with Professor Vivien Lees appears at page 578 of the bundle. She records how the claimant had noticed that a second ganglion

had grown in size over few months, the claimant having initially noticed this after a gym class. The claimant commented that this got in the way when she was doing weights in the gym. It was a nuisance to her when she wore her watch, and she was experiencing aching pain.

7.11 The notes record how treatment options were discussed, and the possibility, put at 30% that the ganglions would resolve entirely, but, if removed by surgery , they may equally return, there being a 30% chance of this occurring.

7.12 The claimant was advised to consider these options, and return to see the Consultant in the New Year. The claimant has a degree of claustrophobia, and therefore did not think she could tolerate an MRI scan which was suggested, but neither did she have plain radiography.

7.13 During November 2015 the claimant was working in the Manchester office alongside Geoffrey Ellison. She continued to be managed remotely by Nina Lathia. The claimant's relationship with Nina Lathia was not a good one, and matters came to a head on 25 November 2015 , which resulted in the claimant writing to HR to complain about Nina Lathia's conduct in a meeting. That led to an offer of mediation between the claimant and Nina Lathia, but this never took place.

7.14 Instead, matters escalated, with a number of issues being raised by Nina Lathia, and perhaps others, which resulted in a formal investigation being carried out by Jennifer Prescott , Associate Director for Planning and Operations. The claimant was notified of that investigation by email of 8 December 2015 (pages 768 to 770 of the bundle). The claimant regarded this as bullying by Nina Lathia, who she considered was using Geoffrey Ellison to spy upon her, and to gather evidence to use in an attempt to have the claimant disciplined.

7.15 For her part, the claimant was of the view that Nina Lathia lacked the competence to conduct an economic evaluation to determine the cost effectiveness of certain treatments that were being considered in order to inform NHS funding decisions. In general she had a low opinion of the project, its methodology, and the competence of those responsible for delivering it.

7.16 The investigation was carried out between December 2015 and February 2016. The claimant responded to it initially by an email to Jennifer Prescott (page 771 of the bundle) on 29 December 2015, in which she pointed out the difficulties of being managed by Nina Lathia, who was at that time about to start maternity leave , and was in Canada. She sought further details of the allegations, and complained of the pressure that she was being put under by the situation. She made no mention of her IBS in this email, but did say how she felt she had been treated very badly, and was seeking alternative employment.

7.17 Nina Lathia started maternity leave in January 2016, and never returned thereafter to manage the claimant. The claimant "acted up" as Nina Lathia's replacement whilst she was on leave. The claimant considered that the ODU department was understaffed during this period, and found the situation

stressful. Whilst the claimant has said in her evidence that she raised this with the respondent, the document she refers to (page 1130 of the bundle) relates to the period prior to January 2016 (it was sent on 10 December 2015, see page 1121) and it makes no mention of IBS.

7.18 The claimant had two periods of sickness absence in December 2015. On each occasion a Return to Work Form was completed, one of 23 December 2015, and another on 29 December 2015 (pages 620 to 621 of the bundle). The former relates solely to a cold, the latter does refer to a cold, and gastrointestinal problems, for which home remedies for a cold and diarrhoea had been taken. There is no mention of IBS at that stage. The claimant sent an email in relation to one of these absences on 24 December 2015 to Hannah Patrick (page 176 of the bundle) , stating she had had a gastric upset in the night, saying that she thought she was quite run down, as she had been under significant pressure. She had also applied for another post.

7.19 The investigation led to a disciplinary hearing being held on 25 January 2018. The claimant had sought advance and representation from her union, and was supported at the hearing by Nick Staples of UNISON.

7.20 On 1 February 2016 the claimant was notified of the outcome of the disciplinary hearing (pages 836 to 839 of the bundle). No formal action was taken, and in respect of the allegations it was found there was “no case to answer”, but a number of recommendations were made. The findings were that the claimant had displayed insensitive behaviours , had showed poor judgment and limited self – awareness. She was urged to exhibit more professional and sensitive communication with her colleagues. There was recognition of the fractured relationship with Nina Lathia, and a recommendation that they work together to rectify their professional relationship. The same was said about the claimant’s relationship with Geoffrey Ellison.

7.21 During this period Hannah Patrick was the claimant’s manager. The claimant was off work sick for two days from 4 February to 8 February 2016. On her return on Monday 8 February 2016 she completed a Return to Work Form (page 623 of the bundle) in which the reason for absence was stated to be gastrointestinal. The notes record that such symptoms are “probably IBS flare – up”, and how the claimant had followed the advice she had been given at the time she underwent a colonoscopy. In terms of suggested support, the comment was made by the claimant : “introduce flexible working arrangements to allow me to work from home if affected by flare – up.”

7.22 The claimant completed a flexible working application form, on 8 February 2016 (pages 178 and 179 of the bundle) in which she asked for ad hoc working from home. She did not explain the reason for the request (nor was she required to), and Hannah Patrick signed the form indicating that this was acceptable. In furtherance of this suggestion, the claimant completed a homeworking self – assessment form (pages 734 to 737 of the bundle) on 23 February 2016.

7.23 The claimant was then absent again for two days on 25 February 2016, and on her Return to Work Form (page 625 of the bundle) whilst the box for gastrointestinal problems had been crossed, the narrative below refers to flu/chest infection, for which the claimant attended her GP and was given antibiotics.

7.24 In May 2016 the respondent had a vacancy for a Band 8a Technical Analyst in the Centre for Health Technology Evaluation (CHTE) . This came about because the incumbent Dr Anwar Jilani was being seconded from that post to a hospital position for a period of 12 months from 11 April 2016. Authorisation had therefore been given to recruit a replacement for that period, and the post was advertised in May 2016 (see pages 80B to 80J of the bundle). The claimant was interviewed, and was successful. She was offered the post by letter of 27 May 2016 on a fixed term contract until 30 April 2017 (page 71 of the bundle). She was in touch with Linda Landells, the Associate Director in Technology Appraisal by email at the end of May 2016 to discuss her start date. Monday 6 June 2016 was suggested, but at that time there would be no permanent line manager in post. The claimant confirmed that she had no problem with that, and 6 June 2016 was agreed as her start date (see pages 181 to 182 of the bundle).

7.25 Linda Landells initially managed the claimant, then Jasdeep Hayre ,on or about 5 July 2016 was appointed Technical Adviser (Band 8b) within Technical Appraisals, and became the claimant's line manager. Melinda Goodall, an Associate Director in Technology Appraisals was the line manager above the claimant's line manager, effectively her "grandparent" in management terms. At this time , until February 2017, she was living in Belgium, and working from there. She accordingly did not have a great deal of direct contact with the claimant.

7.26 The claimant had made Linda Landells aware that she wanted a permanent position, and that she wanted flexible working. She confirmed to the claimant on 5 July 2016 that she had spoken to Jasdeep Hayre about these and other matters that the claimant had raised with her.

7.27 A statement of main terms and conditions of employment was duly issued to the claimant (pages 72 to 80 of the bundle), which provided, amongst other matters, for a 12 week probationary period, a fixed term , and a commencement date of 6 June 2016.The claimant signed this document and dated it 13 July 2016.

7.28 Neither the claimant nor Jasdeep Hayre were informed of the reasons for her appointment being for a fixed term.

7.29 On 5 July 2016 the claimant sent an email to Kelly Cuthbertson in HR (page 183 of the bundle) in which she sought her assistance in sorting out her probationary period and application for flexible working. The position was that the respondent would not consider flexible working requests from its employees until they had completed their probationary period. The claimant accordingly submitted a further form requesting flexible working (pages 184 to 185 of the bundle) with this email.

7.30 In the email she said this:

"If you recall my flexible working request was expedited last time as I have a long commute from Warrington. During peak hours this can take up to 2 hours each way. Consequently I set off from home before 7 to beat the traffic and find parking.

I am generally super healthy , but periodically have severe IBS. I had a colonoscopy and other investigations relating to this last year. There aren't really many effective treatment options.. and although it doesn't generally cause me any issues it can strike unpredictably. For example, I had to withdraw from a half marathon race in April with severe gastric distress and lots of bleeding. It can be a particular problem in the night which can prevent me sleeping – at times when I am affected this doesn't combine well with consecutive 6 am starts. I can support this with medical evidence if necessary.

Is there any way I can apply to have flexible working arrangements re-instituted before the end of my probation please ?"

7.31 The attached form is in identical terms to that which the claimant had previously submitted, and does not mention her IBS.

7.32 The flexible working application was discussed and taken further with Jasdeep Hayre. The claimant and he met on 19 July 2016 to discuss this application. She provided him with a draft by email of 18 July 2016 , and he replied the following day (page 188 of the bundle). In relation to her request he said that it seemed sensible, and asked if she wanted to have a trial period. He attached a revised draft request that he had drafted (pages 189 to 191 of the bundle). In it he suggested compressed hours, to allow the claimant not to work alternate Fridays, and home working. On the second page he had put as the reasons for the request the following:

"This arrangement is requested because I have a long commute to work from home, in terms of time. I also have a number of other commitments including being a member of my running club committee and a Unison work place co-ordinator. I am also fund raising for Spinal Research and am training for the London marathon next year (both of which are time consuming).

I have worked from home part of the week for the last 15 years and have found it increases my productivity particularly when I am focussing on writing technical documents. My role requires periods of intense concentration and this can be challenging in the open plan setting in the Manchester office."

7.33 The claimant agreed with the draft, and must have signed it, as Jasdeep Hayre then progressed her application. It was considered at a Programme Management Meeting , and Melinda Goodall, Associate Director in Technology Appraisals fed back to Jasdeep Hayre the response, which was that whilst the other aspects of the application were acceptable, compressed working was not, at that time. Jasdeep Hayre therefore reported this back to

the claimant, who agreed to remove the request for compressed hours from the application (see pages 194 to 196 of the bundle) , which was then granted (see pages 192 to 193 of the bundle) on 27 July 2016 by letter sent with a covering email (pages 197 to 198 of the bundle). The flexible working arrangement therefore was then for two days working at home, usually Tuesdays and Fridays, and ad hoc working from home, for up to 7.5 hours per week. The actual hours to be worked each week were to be agreed with Jasdeep Hayre.

7.34 Around this time, on 25 July 2016 , the claimant was absent from work by reason of an IBS flare up. On her return on 26 July 2016 she completed a return to work form , recording this as the reason for her absence, and writing in the "suggested support" section:

"Flexible working re-instituted following job move as flare-ups often happen at night – disturbing sleep and making 5 day week sequential early morning starts problematic fro [sic] *long commute. I have already raised this with HR and line management My previous flexible working arrangement was approved on this basis."*

7.35 By email of 26 July 2016 (page 192 of the bundle) Jasdeep Hayre agreed her request to work from home, and he asked the claimant to add recurring Outlook calendar appointments ad her working from home status. He did so because she was working flexibly, and from home, and he wanted to be clear what hours she was working , and where. He did the same in respect of Helen Powell, a Band 7 Technical Analyst , whom he also managed, as she worked from home. She was required to state that she was working from home on her Outlook calendar. She did not, however, work compressed hours, as the claimant subsequently did. As the claimant worked these non – standard hours , Jasdeep Hayre did then require her to note these hours, so that colleagues were aware of her working hours.

7.36 The respondent operated a "hot desk" practice in the Manchester office where the claimant worked. Staff were not allocated a specific desk, there were a number of desks for them to use, and choice was on a "first come, first served" basis. The claimant was often in work early, because of her commute, and had her choice of desks. At no point did she raise the issue of hot desking with her manager, Jasdeep Hayre, or anyone else.

7.37 The claimant and Jasdeep Hayre worked together during the summer of 2016 with no apparent incidents, and he was aware of her ambition to secure a permanent post. In August 2016 preparations were made for the claimant's 12 week review. That review was delayed, but the reason for this, as Jasdeep Hayre explained in an email to the claimant of 1 September 2016 (page 223 of the bundle) was that the claimant had not had a line manager for the first month of her employment in Technology Appraisals , and he did not want her appraisal to include the first month when she was not given much support. The claimant had believed that he delay was due to negative feedback from some colleagues, but Jasdeep Hayre explained that this was not the case.

7.38 The claimant completed her probationary period on or about 26 September 2016. An appraisal meeting was held that day (see pages 256 to 258 of the bundle) , and a further document reviewing the claimant's performance signed (printed) by Jasdeep Hayre dated, possibly erroneously, 2 September 2016 , with comments from the claimant , dated 27 October 2017, appears at pages 254 to 255 of the bundle. Jasdeep Hayre's comments are largely positive, though he does mention the need for the claimant to reflect upon her verbal and email communication style, and the feedback from colleagues about this. The claimant stated that she had learned a lot, and thanked, amongst others, Jasdeep Hayre for his advice, feedback, support and mentoring. This process was completed in October, after Jasdeep Hayre had, on 30 September 2016, sent an amended copy of the documents to the claimant for her comments (see page 227 of the bundle). With that email he also sent a further draft flexible working application form, for the claimant to continue to pursue her request for compressed hours.

7.39 Securing a permanent post or extension was an objective identified in the review meeting in September, and Jasdeep Hayre sent her details of some vacancies for permanent band 7 and band 8a positions on 28 September 2016 (pages 225 and 226 of the bundle).

7.40 The claimant applied for two posts in autumn 2016, both in Technology Appraisal. She was interviewed for one in November 2016, and the other in December 2016. In the applications for each post (pages 678 and 683) the claimant answered the question "do you consider yourself to have a disability" in the negative.

7.41 On 24 November 2016 Jasdeep Hayre applied to Donna Barnes, the Assistant Project Manager for CHTE for training to be provided to the claimant on 22 to 24 March 2017 (pages 296 to 298 of the bundle). The claimant was aware of this, and completed part of the application form.

7.42 Donna Barnes replied on 25 November 2016 to Jasdeep Hayre questioning whether this training could wait until the next financial year, as the budget was tight, and only urgent applications were being granted. He did not reply immediately.

7.43 In relation to the first application for a permanent post, the claimant was interviewed, but was unsuccessful. She was informed of this on 25 November 2016. She considered that she was better qualified than the four members of the panel who interviewed her, and that the test and the questions were flawed. Whilst the claimant in para. 109 of her witness statement suggests that she had some difficulty in completing the written part of the test on her laptop due to hand being painful, she has made no similar allegation previously, in the extensive evidence she gave to the grievance and the grievance appeal, and the Tribunal rejects this. The feedback she received was that she spoke too quickly for her answers to be understood. She scored 93 out of a possible 165.

7.44 She was invited to discuss feedback from the interview. She was told by the chair , Nwamaka Umeweni , that she had found it difficult to understand the

claimant's answers. The panel had, in fact, determined that the claimant was unappointable. The claimant, however, was not , at the time, told of this. From the evidence given by Nwamaka Umeweni , the scores and notes subsequently presented in the course of the claimant's grievance (pages 490 to 493 , and 566 to 568 of the bundle) , this was the view of the panel. The claimant however received different verbal feedback from a member of the panel , Martin Burke, who had said she was one of 13 appointable candidates.

7.45 Further, and unbeknownst to the claimant at the time, the person to cover whose secondment the claimant was recruited, was due to return in March 2017.

7.46 The claimant raised her lack of success with Melinda Goodall and Meindert Boysen in an email of 25 November 2016 (page 270 of the bundle). The latter asked Helen Knight , Associate Director, to investigate the matter.

7.47 Around this time, precisely when is unclear, but prior to 8 December 2016, Jasdeep Hayre verbally warned the claimant that her contract would come to an end in March 2017. It is common ground that this was in early December 2016, but precisely when he so informed the claimant is unclear, but it was before 8 December 2016. Up until this time Jasdeep Hayre had been encouraging the claimant to apply for permanent posts, allocating work into 2017, and encouraging her to book annual leave for 2017. Neither he nor the claimant were up until then aware that the claimant's post was in fact filling in for a member of staff who was about to return. Jasdeep Hayre had not been in post at the time of the secondment which led to creation of the vacancy that the claimant's appointment covered, having only been appointed to his managerial role after the claimant was recruited into the post.

7.48 Jasdeep Hayre from the time that he gave the claimant this news, noticed a change in her attitude towards him. He considered that she was not giving 100% to the role.

7.49 At 9.26 on 8 December 2016 the claimant sent an email to Jasdeep Hayre and Melinda Goodall, flagging up that the last day of her contract was 12 March 2017, and that she would therefore not be available to complete activities on a new project to which she had been assigned. She suggested that it may need to be reallocated (page 276 of the bundle).

7.50 Later the same day, 8 December 2016, the claimant met , for the first time, Melinda Goodall. There was a discussion about the claimant's unsuccessful application, and the application for which she was awaiting an interview. As Melinda Goodall was on the interviewing panel, she could not discuss it further.

7.51 The claimant contends that Melinda Goodall told her that she was not recruited because she was on a temporary contract, but Melinda Goodall denies that. She did , however, say that there was a need to make staff cuts due to a reduction in funding and this would lead to many of these staff members applying for other jobs, and this was factually correct. Whether

Melinda Goodall said in terms that this was the reason the claimant was unsuccessful, or the claimant simply made that assumption once impending redundancies affecting permanent staff were mentioned seems to us not greatly to matter, the fact is that the claimant believed that this was the likely reason she had not been successful. She therefore raised this with her union representatives, Trudie Willingham and Nick Staples, by email of 8 December 2016 (page 260 of the bundle) . In that email she explained how she had sought feedback, and how she had heard that she was not the only person in that position, i.e she was not the only person on a short term contract not to secure a post. She asked if there was anything she could do, as it seemed very unfair when she had been recruited to the same job 6 months previously.

7.52 Nick Staples relied later the same day (page 278 of the bundle), to the effect that the respondent was within its rights, and could only be challenged if process had not been followed, or there was discrimination. After a short reply the claimant then sent an email (page 279 of the bundle) the following day to Nick Staples and Trudie Willingham, in which she suggested that the process was discriminating against short term contract workers, who were also union members. She urged the union to investigate this "underhand" process, on behalf of all union members, not just those with a permanent contract.

7.53 On 8 December 2016 Jasdeep Hayre sent an email to Helen Knight, Associate Director Technology Appraisal , having been informed that she was investigating the claimant's non – appointment to the permanent role (page 630 of the bundle). He expressed concern at the situation, and flagged up the fact that her employment was due to end in March 2017. He was concerned that topics would become unallocated in the period of her notice, and the morale issues that he thought were likely to start with the disappointment of not being valued by the recruitment panel. He went on to make some general observations about this process, and the perversity of recruiting and training up analysts on short term contracts, and then letting them go. He made other general observations about the matrix management system as a whole (not dissimilar to criticisms that the claimant has voiced) , and asked what options there may be. He assumed that the claimant would leave in March, and would be winding down until then.

7.54 Jasdeep Hayre replied to the claimant's email of 8 December 2016 on 13 December 2016 (page 287 of the bundle) , saying that it was very important that she did not unallocate anything that day, and that they needed to properly plan for the next three months.

7.55 The claimant replied (page 287 of the bundle) saying this:

"In terms of planning it [sc. "is"] probably worth flagging up that I have been having increasing difficulties with my wrist. I have an appointment with a hand surgeon on the 10th of January. I saw her last year and the only potential way to resolve the issue is quite complex surgery. I was keen to avoid it but things have deteriorated. I need to have an MRI to determine the benefits and risks involved – so I am not certain how this will progress.

I am also on annual leave in the later part of January – so I guess surgery could be in February depending on the urgency and her waiting list."

7.56 On 12 December 2016 the claimant was written to by Rebecca Goor, and offered an interview for a post of Technical Adviser (pages 288 to 290 of the bundle).

7.57 Jasdeep Hayre replied by email of 13 December 2016 (page 286 of the bundle) referring the claimant to the sickness absence policy, and informing her that if her wrist might be a problem for the work she did an occupational health assessment could be arranged, and how she could access the necessary information online.

7.58 On 14 December 2016 the claimant sent a further email to Jasdeep Hayre (page 286 of the bundle) saying this:

"You have probably seen the large complex multiple ganglion which is most visible on my wrist – it presses on nerves and this is progressively causing problems with pain and hand function. Usually the advice with ganglions is to leave them alone unless they are causing the problems outlined – then it is surgery."

7.59 The claimant went on to refer to the date and time of her appointment, and how she would probably be referred for an MRI scan. She explained how she had not followed this up last time as the symptoms were not so bad. She went on to say:

"It can be a bit of a problem with keyboard work – but it comes and goes so difficult to assess."

7.60 Between 14 and 16 December 2016 the claimant and Jadeep Hayre exchanged Lync messages (pages 291 to 292 of the bundle) . The claimant expressed her frustration at her recent lack of success in her application for a permanent post. She expressed her belief that the system did not work, that an existing Technical Analyst would get the permanent post, and that personal preferences would be justified. Jasdeep Hayre explained his own experiences. The claimant expressed her view that , given her experience and qualifications, earning less than project managers without a degree , staying in Travelodges, using broken toilets and getting £10 for meals in London , something was very wrong. Jasdeep Hayre agreed, saying that having been in a professional role for 6 years he thought it was unacceptable to stay in Travelodges and use broken toilets.

7.61 The claimant also made a comment about not having time to do certain work, referring to an "excess of other work" , which prompted Jasdeep Hayre to say he was unsure what excess work she had, as her schedule was the same as all other analysts.

7.62 On 14 December 2017 Helen Knight held a meeting with the claimant and Nwamaka Umeweni , who had been the lead recruiter on the selection panel for the first post that the claimant was interviewed for. She sought feedback

from Nwamaka Umeweni for the claimant, but the claimant voiced her unwillingness to receive this, and criticised the recruitment process. She suggested that the process was biased against fixed – term employees, and repeated her contention that Melinda Goodall had told her that the respondent was prioritising permanent employees. Helen Knight's account of her investigation and this meeting, dated 11 January 2017, is at pages 329 to 330 of the bundle.

7.63 On 19 December 2016 Jasdeep Hayre sent the claimant an email , enclosing the email from Donna Barnes about the training budget referred to above, and asking her, given the constraints of the training budget , and the limited time left on her contract in the new financial year, if she could let him know if she wanted to proceed with her training request (page of the bundle). Whilst there appears to be no email or other communication cancelling the training, the claimant did not undergo it.

7.64 The claimant replied the following day , 20 December 2016 (page 295 of the bundle) saying that it was up to him whether to arrange this, and telling him of her interview the following day. He replied wishing her luck.

7.65 The claimant was interviewed for the Technical Adviser role on 21 December 2016. Melinda Goodall chaired the interview panel, with Jo Holden and Rosie Lovett. The process involved a written test, and competency – based interview questions. The notes of the interview, and the interviewers' comments are at pages 401 to 416 , the tests for the role are at pages 418 to 423, and further interview notes and feedback comments are at pages 432 to 437 of the bundle.

7.66 The claimant was unsuccessful in this application. Melinda Goodall and the panel felt that she answered one question in particular , as to how she would deal with an an employee who was not working their contracted hours, in a less than appropriate manner, as she said that she would keep them under covert surveillance. Upon further probing, the panel considered that the claimant's response demonstrated a lack of understanding and insight into the skills needed by a manager. She was scored 25% of the available marks on this question. There were other aspects of her interview which did not, in the view of the panel, demonstrate that she had the necessary skills and qualities required for a Band 8b Technical Adviser. The panel's notes and scores are at pages 401 to 406 and 473 of the bundle. Whilst the claimant scored highly on some questions, she was only average on others.

7.67 The claimant was informed on 23 December 2016 that she had not been successful, and was verbally given feedback by Melinda Goodall. The claimant did not accept the feedback , and argued against what she was being told. Melinda Goodall reported this to Kelly Cuthbertson and Nicky Evans in HR by an email of 23 December 2016 (pages 300 and 301 of the bundle). Melinda Goodall found the claimant's responses to the feedback negative and threatening, and that she had made claims that Melinda Goodall had spoken to her about the likelihood of fixed term contract staff being appointed to permanent roles, which she disputed she had said. She flagged up these issues, and how they would need to be followed up in the New Year.

7.68 The claimant was absent from work 28 to 30 December 2016 with a sore throat and a virus.

7.69 The claimant sought further feedback from the application process in January 2017 , requesting written feedback and sight of the notes . She first chased up Melinda Goodall on 3 January 2017 and did so again on 10 January 2017 (page 325 of the bundle). Melinda Goodall replied that day, apologised, saying that she did not want to disturb the claimant whilst she was on sick leave, and stating that verbal feedback was all that was required under the relevant policy, and this had been provided to the claimant on 23 December 2016.

7.70 The claimant then raised the matter with Meindert Boysen , the Programme Director (page 323 of the bundle) by an email on 11 January 2017. The claimant was informed by Lorna Squires of HR , to whom she had also written, on 11 January 2017 that she could make a subject access request for this information (page 327 of the bundle). The claimant also sought clarification of any policy or HR directive that only employees on permanent contracts would be offered roles because jobs were under threat of redundancy. In her email of 11 January 2017 Lorna Squires said that when changes were ongoing staff who had been formally advised that they were at risk of redundancy received preferential treatment at interview.

7.71 On 3 January 2017 the claimant sent two emails to Jasdeep Hayre (pages 302 and 303 of the bundle) referring to her ganglions and how they were increasingly problematic and painful. In the first she said that she was not sure if the volume of keyboard work was the underlying issue, particularly working with a mouse distorted the alignment of her wrist. She said that this seemed to have been much more of a problem recently , as her job involved hours of keyboard work, much of it powerpoint, with a mouse. In the second, she informed him that she had an appointment with a hand surgeon on 10 January. She said the underlying issue may be when she used a mouse and the rotation and movements involved in manipulating graphs and information from other documents for slides. She referred to the complexity of the procedures required, and how she was undergoing pre-operative tests.

7.72 The claimant was off work from 4 to 10 January 2017 because of her wrist. She rang the “sick line” to report her absence. Shana Butterworth of HR sent Jasdeep Hayre an email on 4 January 2017 to inform him of this, and to advise him to discuss an OH referral with the claimant (page 634 of the bundle). When the claimant did not log in the following day Jasdeep Hayre sent an email to HR asking whether the claimant had said how long she was going to be off work . The reply was to the effect that she had not, and he was advised to contact her on her mobile or other contact number if he had one. There was reference to the claimant having a work station assessment, and then a possible referral to OH (page 633 of the bundle).

7.73 Jasdeep Hayre tried to ring the claimant, but his call went to voicemail. She then tried to call him back, but she too got only a message. This prompted her on 9 January 2017 to email him (page 305 to 306 of the bundle), in which she

thanked him for his call, and explained how she had tried to return his call. She explained how she was not using a mouse or keyboard at the time as it was very uncomfortable, and said she would update Jasdeep Hayre after she had seen the surgeon the following day.

7.74 Jasdeep Hayre sent an email to the claimant, asking her to call him, as it would be easier to have a chat. The claimant replied that she would call the following day. She remarked how it was not long until her annual leave , so she was only missing a couple more days of work (page 305 of the bundle).

7.75 Later that day the claimant asked, in a further email, about any further formal processes that needed to be completed, and said she was very happy to talk to OH (page 307 of the bundle). These email exchanges on 9 January 2017 were sent from and to the claimant's private email account.

7.76 By email at 17.52 that day (page 308 of the bundle) the claimant was advised by Jasdeep Hayre of the steps she needed to take in relation to her sickness absences, the need to ring in each , unless there was a likely return to work date, and how the sickness absences would interrelate with leave. This was on HR advice, as the claimant was due to start a period of annual leave on 12 12 January 2017, and HR had advised how this would need to be dealt with in terms of whether the claimant was still unfit for work at that time. The possibility of a work station assessment , a referral to Occupational Health, and how a return to work meeting would be arranged were all discussed. He proposed that they have a chat the following day.

7.77 Jasdeep Hayre sought further HR advice on 9 January 2017, and his email and the response are at page 632 of the bundle.

7.78 The claimant and Jasdeep Hayre did not in fact speak on 10 January 2017, and continued to communicate via email. At some point (though it is not clear from the bundle when and how) a return to work meeting was proposed by Jasdeep Hayre. This prompted the claimant to email Jasdeep Hayre on 10 January 2017 (page 310 of the bundle) to ask why it was being held, as she believed it was relatively unusual for such a meeting to be scheduled after only five (it is presumed the claimant meant, although a $ sign is what she wrote) days absence. Jasdeep Hayre replied (page 309 of the bundle) explaining that this was a step outlined in the policy, an extract of which he enclosed. He said it would be useful to find out what steps the claimant thought were needed for her return to work , to try to plan for future absences, to discuss her work needs during her annual leave, and any planned leave after her operation.

7.79 The claimant and Jasdeep Hayre met on 11 January 2017. Early that day there was an email exchange about when they should meet, as the claimant had a telephone interview arranged at 10.00 a.m. This email exchange, originating from the claimant, was from and to her private email account.

7.80 No notes were taken of this meeting, but at 15.32 that day Jasdeep Hayre sent the claimant an email (page 332 of the bundle) in which he set out an outline of what had been discussed, and asked the claimant if she was happy

for him to send this to HR for their records. The claimant did not respond in terms to that email, but did send a further email at 16.03 that day to Jasdeep Hayre (page 312 of the bundle) enclosing the workplace assessment she had completed, but making no mention of his prior email.

7.81 Jasdeep Hayre's email summarising the return to work meeting records their discussion about her wrist hurting all the time, and how a workplace assessment would be carried out by Paul Hynes, as it then, in fact was. They then discussed the claimant's future appointments on 30 and 31 January, and her possible surgery on 7 February 2017. The effects of the surgery, possible return to work dates, and her requirements upon returning to work were all discussed. He outlined the need for better communication, and gave the claimant his contact numbers. As confirmed in the email, in this meeting Jasdeep Hayre also told the claimant that she would need to complete an "other absence" form for her appointment on 30 January 2017, and any other subsequent time off, and a sick note after surgery.

7.82 The claimant alleges that in this meeting Jasdeep Hayre told her that if she complained about the outcome of her interview of 21 December 2017 it would ruin her reputation , and stop her getting a job at NICE or other employment in the future. She also contends that he told her not to discuss the circumstances of her contract and recruitment decisions with other staff who were also on short term contracts.

7.83 Jasdeep Hayre does not agree that he made such comments, though he does accept that her lack of success in her applications was discussed in the meeting. He did encourage her to think about the reasons she may have been unsuccessful, rather than make accusations against the selection panel. He did say that it appeared that the claimant was getting away with things, by which he meant that she was seeking to unallocated work in the run up to her finish date. This had been a view expressed to him by HR, wo had wanted things "tightened up".

7.84 The work station assessment was carried out on 11 January 2017 , and was supplied to Jasdeep Hayre that day (pages 312 to 321 of the bundle). In it it was recorded that since doing more mouse - related work the claimant's ganglions had grown, and she was in constant pain. Recommendations were made for a wrist rest and the supply of a vertical mouse, which was done that day. No mention was made of any other issues with the claimant's work station , or any desk that she used.

7.85 On 30 and 31 January 2017 the claimant attended appointments in connection with her wrist condition. The claimant was scheduled for surgery on her wrist on 7 February 2017. Her absences on those dates were covered by an Other Absence Request Form (page 346 of the bundle) , and was paid absence. On 3 February 2017 she was absent for an interview. This absence too was covered by Other Absence Request Form (page 345 of the bundle) and was unpaid.

7.86 On 31 January 2017 Jasdeep Hayre sent the claimant an email (page 340 of the bundle) saying that he had been informed by HR that he needed to notify

her formally about the end of her contract in person and in writing before 6 February 2017. He had therefore had added a meeting for them at 2.30 p.m in the Manchester office. The claimant replied on 1 February 2017 saying that she needed to work from home the following day, and to attend an interview on Friday. She said that she thought the HR needed to attend this meeting.

7.87 On 1 February 2017 the claimant sent an email to Lorna Squires in HR, replying to hers of 11 January 2017 , referred to above. In it she said this:

"Thanks for your reply. I am not sure this answers my specific question relating to Melinda's statement – have I been unsuccessful in recent applications because I am on a temporary contract ? That is what Melinda directly told me."

7.88 She went on to refer to people being recruited into TA without an interview, whilst her contract was not being extended, effectively a dismissal, and how she would be raising questions about this. She ended the email with:

"I also feel I am being treated differently to permanent staff in other respects – which I will also raise."

7.89 On 1 February 2017 Jasdeep Hayre and the claimant met. Whilst neither the claimant nor Jadeep Hayre in their witness statements depose to this meeting, shortly after it , at 12.45, Jasdeep Hayre sent an email (pages 344A to 344C of the bundle) to Kelly Cuthbertson in HR setting out what the claimant had said in the meeting. Firstly, she had queried the fact some unsuccessful interviewees for the Technical Adviser role had been offered a Technical Analyst role without such roles being advertised. She had raised a query about attending an external assessment centre, but had used up her leave entitlement , so this would be unpaid. She had raised the issue that permanent employees were granted paid leave for such appointments, and wanted to be treated the same as permanent employees.

7.90 In what he described as a "few notes from the meeting", Jasdeep also referred to the claimant making reference to what could be used in an employment tribunal claim, the need for further HR involvement , and how if he contacted her on sick leave this would be regarded as harassment. They had not agreed upon the terms of any contact.

7.91 He went on the record this (page 344B of the bundle) :

"Wendy has made it clear that she believed NICE are discriminating against someone with a disability (wrist – injury), and also in favour of permanent employees, and not employees who are on fixed – term. She said that NICE did not address her concerns about her wrist via a work station assessment early enough."

7.92 He went on the report how the claimant had been led her to believe she would be made permanent. Reference was also made to Melinda Goodall's alleged comment that the respondent was not hiring people with fixed – term contracts, which she said was illegal. She said she should be treated the

same way as permanent staff members and questioned why she could not be put on "gardening leave". Other matters were discussed relating to the impending appointments and time off work for the surgery.

7.93 Kelly Cuthbertson replied (her comments being in red) giving Jasdeep Hayre advice on the specific issues raised. In relation to the suggestion that contact during the claimant's sick leave would be harassment, her advice was that this was not harassment, it was perfectly reasonable for a manager to keep in touch with an absent employee, and was in accordance with the sickness policy.

7.94 After their meeting , at 18.39 on 1 February 2017, Jasdeep Hayre sent an email (pages 343 and 344 of the bundle) to the claimant, referring to their discussion, and answering a point she had raised about leave to attend interviews for new posts. He confirmed that she had no remaining annual leave for the year. He asked her more questions about her absence for surgery, and asked her for her preferred method of communication when she was on sick leave. Her pointed out that the policy was clear that they should maintain contact during the sickness absence period.

7.95 The claimant replied to Jasdeep Hayre by email at 08.11 on 2 February 2017 enclosing an absence form (page 343 of the bundle). She also made the point that she was aware that staff on permanent contracts were being given support and training to find new posts. She asked if HR could confirm why she was being treated differently to permanent staff? She gave more information about the operation, and her likely recovery period. She ended this email by saying this:

"I feel that Jasdeep contacting me at home when I am on sickness absence by phone inappropriate. He can contact me by letter if necessary – so that an accurate record of all contact is maintained."

7.96 On 2 February 2017 the claimant also forwarded to Jasdeep Hayre a letter from her surgeon, Professor Vivien Lees confirming that date for her surgery as 7 February 2017, and that her recovery would take approximately 6 weeks, during which time she would only be able to undertake one – handed duties. Jasdeep Hayre forward this documentation onto HR (pages 347 to 350 of the bundle).

7.97 On 2 February 2017 the claimant also emailed HR herself, enclosing an email from Jasdeep Hayre to her of 11 November 2016 in which he referred to her allocations, and that she had not yet booked annual leave for 2017, which he encouraged her to do (page 351 of the bundle). In her email to HR the claimant said that this supported her assertion that Jasdeep Hayre had always told her that her contract would be extended beyond the end of April. She went on to say that at no point had anyone told her that she was back filling for anyone who would be returning.

7.98 By email at 15.22 on 2 February 2017 Jasdeep Hayre informed the claimant of the advice he had been given by HR, and the arrangements for her absences (page 342 of the bundle). He approved her absences for 30 and 31

January 2017, and went on to discuss her forthcoming operation. He advised the claimant of the requirement for her responsibility for providing documentation and sick notes to cover her absences from work. He said that failure to provide this may result in sick pay being withheld. He referred to the respondent's policy which he attached for her information.

7.99 He informed her of the intention to involve OH for guidance and advice, and arrangements for her return to work. For this purpose he would need to remain in touch with her during her absence. He said that he assumed that her btinternet account was an acceptable method of communication. The claimant did not respond to that email.

7.100 Whereas it was Jasdeep Hayre's intention to have a face to face meeting to give the claimant notice of termination, this did not occur, they spoke on the phone on 2 February 2017.

7.101 On 3 February 2017 Jasdeep Hayre then sent an email to the claimant confirming the end of her fixed term contract (the email is at page 353, and the enclosed letter is at pages 81 and 82 of the bundle). Whilst the letter makes reference to a meeting the day before, neither the claimant nor Jasdeep Hayre in their evidence referred to any such meeting, and it seems likely that there was no meeting on 2 February , but there was one on 1 February as noted above. That email was sent to the claimant's personal email address.

7.102 The claimant by email of 3 February 2017 (page 353 of the bundle) asked Jasdeep Hayre to desist from using her personal email address in relation to work matters. He did not thereafter do so.

7.103 On 6 February 2017 the claimant attended a pre-screening hospital appointment. She completed a further absence form . The claimant underwent the surgery on her wrist on 7 February 2017.

7.104 The claimant remained off work after her surgery, her absence being covered by a fit note from 13 February 2017 for 6 weeks (pages 360 and 361 of the bundle).

7.105 Lorna Scoular (formerly Squires) sent an email to the claimant on 8 March 2017 (page 355 of the bundle) , a belated response to an email from the claimant of 2 March 2017 . She addressed the claimant's points, and sought more specifics. She specifically confirmed that the substantive post holder for the role that she had been covering was returning , and would be continuing the work she had been doing. She pointed out that the claimant's contract would run into the following financial year, and that she would be required to work that period.

7.106 The claimant responded by an email to Lorna Scoular on 8 March 2017 (pages 354 to 355 of the bundle) in which she complained that she had been treated differently from other employees in that her training was cancelled, when the decision was made to terminate her contract. She went on to highlight how permanent employees were permitted to attend interviews in

work time, but she had been required to use her leave. She complained that she had not been told that she was backfilling a post, and that Melinda Goodall and Jasdeep Hayre had led her to believe that there would be a permanent position for her.

7.107 She ended that email with these words:

"I think it could be relevant that I was alerted to my dismissal after I informed my line manager that I needed to take time off for surgery as I have significant damage to joints in my right hand. This is a matter I shall be discussing with Unison.

If a documented explanation for my dismissal is not provided I can only assume that my dismissal is unexplained by any plausible reason.I will explore that with Unison. "

7.108 On 9 March 2017 in an email to Kelly Cuthbertson and Lorna Scoular , formerly Squires , (page 364 of the bundle) she advised them that she had been speaking with her union, and that the scores from her recruitment for Technical Advisor were being sought. She reiterated a number of points, including the alleged comment by Melinda Goodall, and ended this email with:

"This will allow me to complete the necessary grievance and other paperwork to formally pursue my claim for disability discrimination with Unison support within the timeframe."

7.109 On 21 March 2017 the claimant sent an email to HR (page 379 of the bundle) informing them that she had seen her hand surgeon and had been referred to a physiotherapist. Her hand was still too sore for her to be able to return to the work. She mentioned that she was aware that a fit note from her GP was preferred, and said that she would get one as soon as she could, after her current note expired.

7.110 On 22 March 2017 the claimant submitted a formal grievance (pages 380 to 387 of the bundle) to Lorna Scoular. In her covering email she said that she was looking for alternative employment, and , as her grievance related to Jasdeep Hayre and Melinda Goodall, she would be seeking references from Meindert Boysen. She asked for her interview scores for the TA post in May 2016, and for the interview she had in July/August 2016.

7.111 Lorna Scoular acknowledged her grievance, and asked Sarah Cumbers , Associate Director for Guidance Transformation, to deal with it.

7.112 The claimant's grievance is a 7 page, 58 paragraph document. It sets out a narrative of the claimant's employment with the respondent from its commencement to date. In the opening paragraph she referred to her diagnosis with IBS in summer 2015, and how she was unsure when she started her employment whether it would affect her in the workplace. She also made reference to her ganglion on her right wrist, and how she had consulted a hand surgeon in December 215. She explained how she had been given flexible working in 2015 on the basis of IBS flare ups whilst working in the

ODU. She went on to mention how her work as a TA was stressful in July 2016, and this led to IBS flare ups. She had sought a reinstatement of her flexible working arrangement, which had been approved.

7.113 The claimant also made reference to the amount of keyboard work she was carrying out , and how using a mouse caused her pain. She went on to say that, as she had no manager at that time, she did not mention this.

7.114 There were frequent references in this document to Jasdeep Hayre being an inexperienced manager, and to assurances the claimant had received from him, and others, that her fixed term contract would be extended.

7.115 Whilst her ganglion had got worse during 2016, she had not approached Jasdeep Hayre about it, due to his inexperience, his prior awareness as she considered, of her IBS, and her desire to secure a permanent contract.

7.116 The claimant went on to go through her applications for permanent posts. She expressed her incredulity at not being appointed, and considered that the reasons she was given for her lack of success were “implausible”. She repeated her allegation that Melinda Goodall had told her that permanent staff would be given preferential treatment.

7.117 She went on to suggest her performance in the written part of the test may have hampered because it been hard to complete it within the timeframe because of her wrist, but she had not raised that in her informal complaint after this exercise.

7.118 She continued by referring to her further application for a TA role, and how she felt she was more suitable for that role, as she had a breadth of technical management experience.

7.119 She suggested that at this time, December 2016 , she and Jasdeep Hayre were working under pressure, and how this caused her “extreme” problems with her hand, which led to her informing Jasdeep Hayre of this.

7.120 She went on to mention Jasdeep Hayre’s enquiry about training , and how this was then “cancelled”. She was then of the view that the outcome of the interview for the TA role was a foregone conclusion. She detailed her subsequent discussion with Melinda Goodall and how she had not given satisfactory responses, considering her explanation to be bizarre and implausible. She had raised the issue with Unison, and had been told off the record that the recruitment processes at NICE were flawed and unfair, but the branch was too weak to challenge this.

7.121 She went through her notification to Jasdeep Hayre of her wrist operation, and the absences connected with it. She contended that his handling of her return to work meeting was heavy handed and inappropriate, and complained of his contacting her by phone or email whilst she was off work.

7.122 She went through the history of her absence, and the meeting she had with Jasdeep Hayre to terminate her contract. She said she had not been told that there was someone returning to the post that she had been filling.

7.123 She set out her attempts to obtain details of the successful candidates for permanent posts, and of how she had been scored in her interviews. She disputed that there had in fact been preference given to permanent staff, and thought it unlikely that the successful candidates would have performed as well as she did.

7.124 Having received redacted scores for the TA role interviews held on 21 December 2016 , she believed that her scores were biased and could not be justified. She made particular reference to a slide correction test and to the low score she was given for her response to a question as to how she would deal with a member of staff as a manager, saying this score was preposterous and unjustifiable. She set out what she saw as her qualifications for the Adviser role, and how Melinda Goodall and HR had been evasive in providing her with feedback.

7.125 At par. 53 of this document she said this:

"To my knowledge no one else in TA has had their fixed term contract terminated in this way. I have been treated differently to a hypothetical comparable person without a disability (for the sake of an application to an industrial tribunal)."

7.126 She then went on to contrast her treatment with that of Marcela Haasove, who had also been on a fixed term contract, but secured a permanent role.

7.127 At paras. 55 to 58 she said this:

"55. I believe that NICE intended to extend my contract until the end of November 2016 - at s–me stage after this the decision was reversed and the recruitment activities were unfairly skewed against me. It seems to me this coincided with my hand difficulties (see point 30). NICE/Melinda Goodall was already aware that I had IBS and this affected my work patterns (see point 9).

56. I consider that disability discrimination is a likely explanation for recruitment decisions and the subsequent termination of my fixed term contract.

57. Specifically I believe that I have been directly discriminated against on the basis of disability.

58. I would like NICE to re-examine and justify the interview scoring recruitment decisions and my dismissal."

7.128 Sarah Cumbers investigated the claimant's grievance. She wrote to the claimant on 12 April 2017 (pages 442 to 443 of the bundle) summarising the 6 points from the claimant's grievance that she had identified as the key areas

that should be the focus of their discussion in the meeting to which the claimant was invited.

7.129 Sarah Cumbers interviewed Kelly Cutherbertson, Melinda Goodall, and Jasdeep Hayre for the purposes of the claimant's grievance (her notes are at pages 445 to 448 and 458 to 461 of the bundle). She also interviewed Lorna Scoular (notes at pages 494 to 495 of the bundle), and Ahmed Elsada (pages 496 to 498).

7.130 The claimant attended a grievance meeting with Sarah Cumbers on 19 April 2017. The notes are at pages 449 to 452 of the bundle , with the claimant's annotations at pages 453 to 457.

7.131 On 29 April 2017 the claimant sent an email to Sarah Cumbers (page 481 of the bundle) in which she pointed out that the respondent was externally advertising "her" job at NICE, and enclosed a copy of the Jobs – by – Email alert that she had seen. She described this as "unbelievable".

7.132 Jasdeep Hayre had not alerted the claimant to this vacancy. His reasons for this were not clear. There is no evidence that he was involved in the decision to recruit to this post in April 20178, which was taken by Jen Prescott, or that he was aware, and if so when, that the respondent hade decided to recruit to this post at this time.

7.133 On 30 April 2017 the claimant's employment with the respondent ended as her fixed term contract expired that day.

7.134 The claimant , although aware of the vacancy being advertised in this way , did not apply for it, as she had by that time applied for and secured another, better paid, post.

7.135 Consequently Sarah Cumbers investigated this issue. She contacted Jennifer Prescott , CHTE Associate Director for Planning, operations and topic selection to ascertain why this latest role had been advertised externally, and not offered first to internal applicants (page 486 of the bundle). She replied, in a verbal discussion, which was followed up by an email on 18 May 2017 (page 485 of the bundle) , summarising the discussion, which Jennifer Prescott confirmed in a reply on 22 May 2017.

7.136 In essence, Jennifer Prescott explained how the vacancy had arisen, and how it had not been advertised internally as her understanding was that in the November 2016 recruitment round the pool of suitable candidates had been exhausted, and hence the position had not been advertised internally.

7.137 In an email exchange between Jen Prescott and Sarah Cumbers on 10 May to 18 May 2017 (pages 485 to 487of the bundle) Jen Prescott gave details of how the vacancy in question came to be advertised on 29 April 2017. The vacancy potentially arose in October 2016 , on the secondment of Ahmed Elsada (the email contains a typo referring to October 2017) , but that the decision was not made immediately to recruit. Following movements within the team, however, the decision was taken in April 2017 to advertise for two

posts, a vacant band 8a, and a band 7, both on fixed term contracts. The position had been advertised in line with the availability of staff to complete the recruitment.

7.138 Further, Sarah Cumbers, being aware that the claimant had challenged the contention that she had been found to be unsuitable in the outcome of the November 2016 Technical Analyst interviews, decided to make further investigations into this process.

7.139 Accordingly on 18 May 2017 she interviewed Nwamaka Umeweni who had chaired the claimant's interview on 20 November 2016. She had obtained the interview scores for all the candidates that the panel had seen over three days in November 2016. The notes of Sarah Cumbers' interview are at pages 490 to 493 of the bundle.

7.140 In this interview Nwamaka Umeweni explained how the claimant had performed, and expressed her surprise that she had not done better. She explained in some detail why the panel had not appointed her, and , whilst she was not asked to say this at the time, it was the panel's view that she was unappointable based upon her performance in the interview. She also mentioned the difficulties she encountered in giving the claimant feedback, how she would not listen, was rude, and critical of the questions that had been set.

7.141 On 18 May 2017 the claimant submitted this claim to the Tribunal. In it she raised, for the first time, and not included in her grievance, at para. 12 of her "Background and Details of Claim" attached to her ET1, an allegation that inadequate female toilet provision was a PCP which indirectly discriminated against her as a person with a disability as this affected her ability to attend work.

7.142 As a result of this Lorna Scoular made enquiries of Michelle Rowlands as to whether there had been any issues raised about the toilet provision at the office where the claimant worked. She replied by email of 24 May 2017 (pages 488 to 498 of the bundle). She stated that she was aware that there were on occasions queues in the ladies near MR5 , but she had never seen any near the Bollin meeting room. There had been reports of broken seats, which were replaced in January 2017. There was a refurbishment project underway. She enclosed a table of works carried out from January 2016 to March 2017.

7.143 She ended her email with details of the toilet provision, there being 3 for use by persons with disabilities. Only one of those had been out of use for more than one day and that was in March 2017.

7.144 Sarah Cumbers completed her report in May 2017. It is at pages 499 to 513 of the bundle. The report is 15 pages long, with 29 Appendices (and not all included in the bundle as such as they would duplicate much of what is contained elsewhere).

7.145 In overall terms the outcome of the grievance was that the claimant's grievances were not upheld. In particular, no disability related complaints were upheld. It was , however, accepted that the claimant had not been told at the outset of her appointment of the reason why the post was a fixed term post, and that this was something which should be done in future. Recommendations were also made about the feedback process, and interview record handling and storage issues were also addressed.

7.146 An outcome letter dated 9 June 2017 , enclosing a copy of the report , was prepared by Meindert Boysen (pages 519 to 520 of the bundle), but it was not, for various reasons, received by the claimant until later in June 2017.

7.147 The claimant appealed the grievance outcome by letter of 29 June 2017 (pages 542 to 555 of the bundle). This is a 14 page extensive document, in which the claimant challenged the outcomes of her grievance.

7.148 Judith Richardson , Deputy Director and Programme Director for Quality and Leadership , was appointed as the appeal officer . The claimant was informed of this by email of 12 July 2017 (page 556 of the bundle). The claimant was invited to attend a grievance appeal meeting on 16 August 2017 (page 665 of the bundle) . She replied that she was not available, and, as she no longer worked for the respondent, she would probably not attend the meeting. She was sent a further email on 9 August 2017 , in which she was offered a further date for a meeting on 5 September 2017, and told that if she did not attend the appeal would be determined on written representations, and she was invited to submit any that she wished to rely upon.

7.149 The claimant did not attend the meeting on 5 September 2017, nor did she send any further representations. Judith Richardson accordingly determined the appeal on the written information that she had.

7.150 The grievance appeal was not upheld, and Judith Richardson's letter dated 31 August 2017 setting out her reasons is at pages 558 to 562 of the bundle.

7.151 Whereas in her grievance the claimant had identified two named individuals who had been recruited on fixed term contracts as comparators, and had been successful in securing permanent posts (pages 386 and 387 of the bundle) , in her claim (page 19 of the bundle, and confirmed in the List of Issues agreed at the preliminary hearing , page 46 of the bundle) she relied upon one actual comparator, Helen Powell , for the purposes of her direct discrimination claims relating to non – renewal of her fixed term contract , and the requirement to write down her hours from July 2016 until her employment ended.

7.152 Helen Powell was recruited on a 13 month fixed term contract from 5 May 2015 to cover a period of maternity leave. It had been scheduled to end in June 2016, but was extended until 30 September 2016 to allow her to complete a piece of work that was time limited. The authority to extend her fixed term appointment until 30 September 2016 is at page 725 of the bundle.

7.153 Thereafter Helen Powell applied for another Band 7 Technical Analyst role, to which she was appointed, on another fixed term contract until 31 December 2017 (her offer letter is at page 724 of the bundle, and the authority to recruit at page 725). She then applied for a permanent Band 7 role to which she was appointed on 14 August 2017. Notification of this change appears at page 728a of the bundle.

8. Those, then are the relevant facts as found by the Tribunal. The Tribunal has not , it will be appreciated , made any findings, or indeed rehearsed in its findings of fact much of the evidence that the claimant has included in her witness statements, and backed up by the inclusion of documents in the bundle which relate to what she saw (and may well have been) significant flaws in the structure , methodology , staffing levels and quality of personnel in the respondent organisation. Paragraphs 69 to 87 of her (non – impact) witness statement, for example , set out her criticisms of how the respondent carried out its tasks. The Tribunal has not done so because it cannot see the relevance of these matters to her claims. Whilst they are relied upon , to some extent, it is appreciated, to suggest that the claimant found this working environment stressful, this is not a personal injury claim, although the claimant's language and many of her complaints are more appropriate to one. The Tribunal is not concerned with the causation of any alleged stress (that not being, in any event, one of the disabilities relied upon) , or even, save in the context of PCPs and reasonable adjustments , whether the alleged working conditions caused any flareups of either the IBS or symptoms from the ganglions. For these reasons, much of the claimant's evidence has been irrelevant to her claims, and as not been considered. One shining fact, however, emerges, which is that the claimant , from a very early stage in her employment with the respondent, had a very low opinion of it as an organisation, and clearly did not enjoy working there.

9. The Tribunal did not hear live evidence from Sarah Cumbers and Judith Richardson, who heard the grievance and grievance appeal respectively. Their evidence, with respect, adds little, as , as is often the case in such claims, it amounts to little more than a "dress – rehearsal" of the claims before the Tribunal. Their conclusions, however properly arrived at cannot be a basis for ours, and the only relevance that the grievance and the appeal have, as ever, is to provide material upon which the parties and their witnesses can be questioned in terms of the consistency, reliability and the accuracy of the evidence they give to the Tribunal, as both sides in fact utilised this material. That said, Sarah Cumbers' investigation did produce some highly pertinent documentation , relating in particular to the unsuccessful applications that the claimant made for the two posts in 2016. Whilst the claimant has questioned the validity and authenticity of this material, the Tribunal has no basis whatsoever not to accept it as genuine.

The Submissions.

10. The parties made written submissions. Mr Williams made his first, and the claimant then submitted hers. These are extensive documents, which are on the Tribunal file, and it would be disproportionate to include them, or attempt to summarise them in this judgment. The claimant's run to 19 pages, and is a thorough document, despite her lack of legal qualifications or representation. It contains some allegations (made also in her witness statement) as to the conduct of the proceedings by the respondent's representatives, but these are not germane to the

Tribunal's task of determining liability. The claimant attacks the credibility of Jasdeep Hayre and Melinda Goodall, whilst commending her own. Mr Williams, not surprisingly , had done the opposite. In terms of credibility, whilst the Tribunal accepts that the respondent's two witnesses were not perfect historians, and had rather sloppily allowed their witness statements to state that they had witnessed the claimant first hand in more than one meeting, when they had only seen her in one , and probably no more, this did not in the Tribunal's view seriously undermine the basis veracity of their evidence on key issues. It was certainly more compelling that the claimant's repeated tendency to extrapolate from a document or a comment a meaning that it did not, on closer scrutiny , bear.

The Law.

11. The relevant statutory provisions are set out at Annex A to this judgment. The claimant has made claims of various types of discrimination in relation to some of the allegations, contending, as she is entitled to , that they amount to one or more of the proscribed types of conduct. We therefore will examine each of the alleged acts or omissions complained of, and then determine, in the light of the facts we have found above, whether any of the claimant's claims are made out, and whether, where the burden of proof falls on the respondent, the respondent has made out any non – discriminatory explanations, justification in any s.15 claims, lack of knowledge in claims where it is required, or any other relevant defences in claims which require the respondent to do so.

12. We also have considered the judgment of HHJ Richardson in ***Carranza v General Dynamics IRLR [2015]*** in relation to the interrelation of s.15 and s.21 claims, where he said this:

"In many cases the two forms of prohibited conduct are closely related: an employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct. But not every case involves a breach of the duty to make reasonable adjustments, and dismissal for poor attendance can be quite difficult to analyse in that way. Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play or whether the case is best considered and analysed under the new, robust, s.15."

13. Further, we note the words of Elias LJ in ***Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216*** (at [27]): *"…it is in practice hard to envisage circumstances where an employer who is held to have committed indirect disability discrimination will not also be committing discrimination arising out of disability, at least where the employer has, or ought to have, knowledge that the disabled employee is disabled".*

We consider that the converse is also true, in that where an employer does not commit one type of disability discrimination, it will be rare that it commits another.

Discussion and Findings.

Disability.

14. The starting point has to be the claimant's disabilities, and it is important from the outset to bear in mind that there two relevant disabilities in play. The first is her IBS, the second her wrist condition. Whilst both are conceded to constitute possible disabilities, there is an issue as to when either condition met the definition of disability , and, further , when , if at all,the respondent knew, or ought reasonably to have known that it did.

1.The wrist condition and ganglions.

a)When , if at all, did this condition amount to a disability?

15. The claimant's case is that this condition became a disability from December 2015. Her impact statement , at para. 8 suggests some activities which this condition impeded. She says that she had difficulty in flexing her right hand in some directions. She struggled , she said, to remove full pots and pans from the cooker, or to pour water from a full kettle with her right hand. She had difficulty in fastening her sports bra strap, or zipping up the back of dresses.

16. These she relies upon as evidence of the effect of this condition upon her day to day activities. The Tribunal has difficulty in accepting that this condition, at that time, December 2015 did have the requisite effect upon those types of activities. Firstly, and very importantly, Professor Lees' note of the consultation on 15 December 2015 (page 578 of the bundle) does not record these problems. The only issues that she records the claimant relating are problems with weights when in the gym, the nuisance of her watch on that wrist, and some aching pain with the wrist. The first point is that lifting weights in a gym is not a day to day activity. It is of some significance , the Tribunal considers, that the claimant , according to the evidence from Professor Lees, first noticed this condition was becoming a problem in the context of her gym exercises. There was no mention to the Consultant of any of the more domestic issues that she refers to para. 8 of her impact statement, nor of any difficulties being caused at work.

17. That no further treatment or intervention was then sought until January 2017 rather emphasises how little an issue this condition actually was for the claimant. Indeed, in her evidence she only really begins to refer to problems at work from June 2016, when the amount of keyboard work that she had to carry out was increased.

18. The claimant's case is that she was then required to work for protracted periods at a keyboard, which caused her pain from the effect of the ganglions. Whilst this is denied, assuming it to be correct, protracted (indeed, on the claimant's very case, unreasonably so) keyboard use , with, as the claimant puts it , having to coordinate fine movements on a small laptop keyboard, it is not a day to day activity. Many persons without the claimant's condition may also find that they suffered pain in the wrists or other joints if they carried out protracted keyboard work, without adequate breaks. The claimant in para. 12 of her impact statement suggests that she still had difficulty with lifting and dressing, and had to use her left hand or both hands to lift heavy household objects. Her oral evidence was that her wrist ached at the end of the day, and she agreed she did not raise this as an issue, go home early, or take any time off as a result of this condition.

19. This evidence, therefore, does not support a conclusion that by June 2016 the condition could be considered to meet the criteria for disability. The Tribunal does not accept the claimant's contentions in her submissions (para. 19) that she had a severe and painful wrist injury at all material times. She seeks to take this condition back to December 2015 as a disability, but the evidence, particularly the medical evidence, does not support such a conclusion.

20. Clearly, by December 2016, however, she was in sufficient pain and discomfort to seek further medical advice, which led to the surgery in February 2017. Whilst causation is irrelevant to whether a person does or does not have a disability, by January 2017, when her work was assessed , she was complaining of constant pain in her right wrist. Whilst the effect upon her day to day activities up until late 2016 may have been slight, they were then more than trivial, and the fact that she was then in constant pain by January 2017 suggests that whilst she could carry out such activities, she could only do so in pain, and therefore, "with difficulty". This , the Tribunal considers , does satisfy the definition of disability from that time , in this regard.

21. Mr Williams challenges in his submissions (paras. 37 to 42) whether the claimant can establish sufficient long term effect, in that he submits that there was no evidence that the condition (in terms of having the requisite effect) had lasted or was likely to last for 12 months or more. He cites the medical evidence that if the ganglions were removed, there was a 70% chance that they would not return. He went on to submit that the effect of the operation was something of a red herring.

22. With all due respect to Mr Williams, we consider that he misses an important point. By the provisions of para. 5 of Part 1 of Schedule 1 of the Equality Act 2010 the Tribunal is to ignore the effects of treatment. As at January 2017, these ganglions , left untreated were likely to amount to a condition with the requisite effect upon the claimant's day to day activities which , whilst it had not lasted for 12 months at the point, without treatment, it was likely to do so.

23. We therefore find that the claimant's wrist condition did amount to a disability from January 2017.

b)When , if at all, did the respondent have actual or constructive knowledge of this disability?

24. It is established that in order to establish knowledge on the part of an employer of a relevant disability, a claimant has to show that the employer know not only of the condition, but that it satisfied all the elements of the definition of disability (see ***Joanne Lamb v The Garrard Academy UKEAT/0042/18/RN*** below). That therefore requires knowledge of the effect upon day to day activities, and of the likely duration of the condition, and its effects.

25. Whilst the claimant has sought to impute this knowledge to the respondent from December 2015, when she first saw a hand surgeon, the Tribunal does not accept that this in itself was anywhere near sufficient to impart the necessary knowledge of disability on the respondent. In any event, the Tribunal does not accept that she had a disability in this regard at that time, so the issue does not arise.

26. The Tribunal also does not accept that the claimant's email to Jasdeep Hayre of 13 December 2016 is sufficient to impress the necessary knowledge of disability upon him, or anyone else in the respondent organisation. Rather, it is not until the workplace assessment of 11 January 2017, and the claimant's provision of the medical evidence from her surgeon, that we consider the respondent had the necessary knowledge, or it should be imputed it to the respondent on a constructive basis, in that a referral to OH would have elicited the details of her condition , its effects, and likely duration. It is thus from this date only that the Tribunal considers that the respondent had knowledge of this disability.

2)The irritable bowel syndrome condition.

a)When , if at all, did this condition amount to a disability?

27. We now turn to the other condition relied upon, that of IBS, to use its abbreviation. There is unchallenged evidence that the claimant was diagnosed with this condition from mid 2015, and equally that she did not disclose this condition as a disability when completing her pre – employment health screening.

28. In terms of the effect of this condition , Mr Williams submits that the claimant has not shown sufficient adverse effect upon her day to day activities. He cites the low level of IBS related absences, and the absence of evidence that she was compelled to work from home, or arriving late or leaving early or any other evidence of the effect of this condition upon her working life.

29. It has to be observed that the claimant's assertions in her impact statement that her IBS was much more debilitating after she started working at NICE , and that at some points it totally ruined her life, with, on occasions , her symptoms preventing her from leaving the house, are remarkably absent from her extensive grievance and appeal, or in any documentation during her employment provided to the Tribunal. Given the emphasis she places upon it, and how it was exacerbated by the stressful working conditions of which she has made extensive complaint, this is surprising, and the Tribunal is driven to the reluctant but inevitable conclusion that there has been a considerable degree of exaggeration of the effects of this condition by the claimant.

30. That said, there is clear evidence that the claimant has suffered flare ups, often at night, and these affect her sleep. This was (in part, the Tribunal accepts) one of the reasons she sought flexible working. Further, the Tribunal accepts , the condition did affect her continence, with the need for urgent toileting on occasion. These are , in themselves, more than trivial effects upon day to day activities, and the Tribunal does accept, on a balance of probabilities, that this condition satisfies the definition of disability, has done probably since mid 2015, and did so certainly by February 2016.

b)When , if at all, did the respondent have actual or constructive knowledge of this disability?

31. Whilst the claimant contends in para. 32 of her impact statement that she made her managers aware of the impact her IBS had on her in the workplace from December 2015, there is no evidence of this. The claimant had not disclosed this

condition to her employers on induction, and whilst her sickness absence on 24 December 2015 was recorded on her return to work form as being by reason of cold/flu symptoms and gastrointestinal problems, there is no reference to IBS. Her email of 24 December 2015 refers simply to having had a gastric upset in the night, and how she was quite run down. There is nothing to support any contention that the claimant at that point informed her manager (Hannah Patrick) that she had IBS, or any other form of long term condition.

32. Rather the first mention is made in a return to work form in respect of an absence on 4 February 2016, where there was reference to her gastrointestinal symptoms being "probably IBS flare -up." Mr Williams concedes that at this point the respondent ought properly to have understood that the claimant was suffering the occasional flare up of IBS, but he submits that this is not to be equated with knowledge of disability. He points out that the claimant at no point goes on to explain the impact her condition was having upon her. He points again to the lack of any evidence of any other effects upon her, such as not being able to come to work, arriving late or leaving early.

33. With respect, that submission ignores the fact that the claimant made a flexible working request in her return to work form, on this occasion (page 623 of the bundle) asking to be allowed to work from home if affected by a flare -up, which was granted. The respondent carried out no more enquiries, and did not seek any medical evidence from the claimant, or obtain its own.

34. This arrangement ceased when the claimant moved post, and she therefore, following another day of sickness absence following an IBS flare -up, sought re-institution of the previous arrangement. Jasdeep Hayre , and Melinda Goodall, were aware of the claimant's IBS, and the former, to some limited extent, was aware of some of its effects in that he was aware that the claimant had asked for the ability to work from home, on this occasion, specifically because of IBS flare ups, which disturbed her sleep. As a person working in the health sector, Jasdeep Hayre had, he agreed, a general knowledge of IBs, and hence would know of its long term nature. He now knew of its effects upon the claimant , particularly in relation to disturbance of sleep. It is right, as the claimant accepts, that she did not discuss her IBS with him directly, but he saw her application, and helped her with it. He knew she had IBS, and that it affected her sleep, hence the need for working from home to avoid a long commute. The Tribunal considers that this is sufficient to fix him with the requisite knowledge of disability from, certainly, July 2016. That he may have forgotten about it does not, in the Tribunal's view, matter. One cannot "unknow" something, though such a factor may be highly relevant in approaching "the reason why" issue.

35. The position of Melinda Goodall, however, the Tribunal considers is different. Firstly, her involvement with the claimant was far more limited. Secondly, as the application came to her, the claimant's reasons for her request (page 190 of the bundle) make no reference to her IBS, or any other health issues.

36. The claimant's submissions in relation to the extent of Melinda Goodall's knowledge of her IBS condition amount to little more than a contention that "it is reasonable to suppose" that Jasdeep Hayre discussed this with her. She focussed a lot upon the stressful nature of her work, which she links to IBS flare-ups, from which

she appears to extrapolate a conclusion that Jasdeep Hayre and Melinda Goodall knew of her IBS condition, and that it was a disability.

37. The Tribunal does not act upon supposition, particularly where there is a challenge on the evidence. The Tribunal finds that Jasdeep Hayre did not discuss the claimant's IBS with Melinda Goodall, and that whilst she probably had an awareness of it, that awareness fell well short of an awareness that it was a disability.

The claims and their determination.

38. Having made those findings upon disability, and knowledge, the Tribunal will now consider the consequences of these findings upon the claims.

The direct discrimination claims.

39. The claimant contends that the following are instances of direct disability discrimination, to put them in chronological order.

a) The requirement to write down her hours of work in her diary in a period from around the end of July 2016 until the end of her employment on 30 April 2017. The claimant relies on an actual comparator, Helen Powell, and, in the alternative, on a hypothetical comparator.

b) Failure to promote her to the post of Technical Analyst in December 2016 (the claimant being advised she was not successful on 23 December 2016). The claimant relies on a hypothetical comparator.

c) Non-renewal of her fixed term contract on 3 February 2017. The claimant relies on an actual comparator, Helen Powell, and, in the alternative, on a hypothetical comparator.

In order to succeed in such claims (other than as perceived disability claims which the claimant does not make) at the material times the claimant must have been a person with a disability. It is therefore necessary to consider , in respect of each disability when the claimant is to be so regarded, and in relation to which disability.

40. Claim (a) relates to the claimant's IBS condition, as the Tribunal understands it. In terms of when that was to be considered a disability, the Tribunal's findings above do conclude that this condition was a disability from its diagnosis and that Jasdeep Hayre had the requisite knowledge of effects and likely duration by July 2016.

41. The claimant's case on direct discrimination requires an actual , or in the alternative, a hypothetical comparator. The claimant deals with this claim at para. 193 of her witness statement. She states that she had not been required to do this by her previous manager, Linda Landells. That may well be so, but under Linda Landells the claimant was not working flexibly and from home until February 2016. The claimant states that she was unaware of any other person working at NICE who was required to do this, but that is far from compelling evidence that no one else actually was. The nature of the respondent's working arrangements was that many

persons worked remotely, and the degree to which fellow employees discussed their arrangements was probably not high. The claimant has been unable to produce evidence of anyone working with similar arrangements who was not subject to this requirement, she has merely asserted that she was unaware of any such person. Jasdeep Hayre's evidence, which the claimant is not in a position to contradict, and which the Tribunal has no reason not to accept , was that he in fact did something similar in the case of Helen Powell (the claimant's chosen comparator for claim (c)). She is an actual comparator, and the Tribunal has no reason to believe that any other non – disabled hypothetical comparator working to the same arrangements as the claimant would not have been required to do the same. The sole question then is whether, in making these requirements of the claimant, which he admits he did, he treated her less favourably than he did her chosen comparator, Helen Powell, or any hypothetical comparator, because of her disability.

42. We are quite satisfied that he did not do so. We accept that his reasons for doing so were entirely unrelated to the claimant's disability. His reasons for doing so were twofold. Initially it was to ensure that colleagues would know when she was working at home, a requirement he also made of Helen Powell when she was working at home for on – disability related reasons. Further, when the claimant was working compressed hours, he made a further requirement so that it would be clear to all when her working hours were. At this point Helen Powell ceases to be a comparator, as she did not work compressed hours. The Tribunal is quite satisfied that the same requirement would have been made of a non – disabled person working compressed hours, and hence this direct discrimination claim fails.

43. Turning to claim (b), as a direct disability discrimination claim, the decision not to appoint the claimant was, we appreciate, taken by a panel, of which Melinda Goodall was the chair, with Jo Holden and Rosie Lovett as the other members. This interview was on 21 December 2016. The claimant had, she points out, informed Jasdeep Hayre on 14 December 2016 , that she was due to see a hand surgeon in the New Year about her ganglions. Her email at page 286 of the bundle refers to this condition as "causing problems with pain and hand function". She told him of her previous appointment, and how she did not follow it up as the symptoms were not so bad, and ended that email by saying "it can be a bit of a problem with keyboard work – but it comes and goes so difficult to assess". The Tribunal does not consider that this gave Jasdeep Hayre the requisite knowledge of disability at that time. It merely "flagged up" a potential problem, and a need for surgery, surgery which may well, have removed the problem.

44. That , however, is not the issue, as the Tribunal, for this alleged act of direct discrimination is not concerned with the knowledge and motivation of Jasdeep Hayre but of Melinda Goodall, and the rest of her panel. It will be necessary, therefore to examine whether she, or indeed, any of them, had the necessary knowledge of either of the claimant's disabilities. The claimant relies upon the timing of her interview in relation to her emails to Jasdeep Hayre of 13 and 14 December 2016. In her witness statement she puts it this way, at para. 145:

*"As NICE completely deny that recruitment decisions were influenced by the upcoming redundancy program the most likely explanation for **this** unfair recruitment decision is that NICE, and Melinda Goodall specifically, were aware of both of my*

disabilities and that I would need to take significant time off work in the future for surgery."

45. It is thus suggested that Melinda Goodall had the requisite knowledge of not just ne, but of both disabilities. At that time the only condition that had recently been mentioned was the wrist condition. It was for that the claimant was possibly going to need surgery, and hence, time off work. Pausing there, it is worth observing that as at 14 December 2016, all the claimant had said to Jasdeep Hayre was that she was seeing a surgeon in the New Year, and that surgery could be required, but she described it also as "the last resort". Further, she had said that she was "not sure how this will progress". She guessed the surgery could be in February, but she said nothing at that time about the length of time she might be off work. That is information that she received, and then communicated later , after she had seen the surgeon on 10 January 2017. Thus in terms of what Jasdeep Hayre knew, it was no more than was in the emails from the claimant, and neither he, nor therefore , and more importantly, Melinda Goodall knew that the claimant would actually have the surgery, or , if she did, how long she was likely to be off work.

46. Again, this focusses on what Jasdeep Hayre knew, it is not evidence of what Melinda Goodall knew. She clearly (and the claimant does not allege this) cannot have known any more than Jasdeep Hayre knew, and probably knew much less. In terms of the evidence of her knowledge at this time, it is of note that none of the claimant's emails of 13 and 14 December 2016 were copied to her, and there is no evidence of Jasdeep Hayre discussing the claimant's potential need for time off work for surgery with Melinda Goodall.

47. In relation to the IBS, if we focus upon what Melinda Goodall saw, as opposed to what Jasdeep Hayre may have seen, the flexible working request that she saw would have been the first one submitted at pages 189 to 191 of the bundle, drafted by Jasdeep Hayre for the claimant, and then the revised application at pages 194 to 196. Neither of those make any reference to the claimant's IBS. Thus, there is no documentary evidence to support any suggestion that Melinda Goodall was on actual notice of the claimant's IBS condition, still less of its effects. Melinda Goodall did, however, in her evidence , concede some awareness of the claimant having IBS.

48. It is well established the alleged discriminator has to know of the disability. It is the motivation (conscious or subconscious) that operates on the mind of the decision – maker that must be examined, and only that. This was affirmed by Underhill LJ in ***CLFIS (UK) Ltd v Reynolds [2015] IRLR 562***, at para. 36 of the judgment:

"I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfied the definition of discrimination. That means that the individual who did the act complained of must himself have been motivated by the protected characteristic."

Further, the requisite knowledge has to be of all the elements of the definition, as stated by Simler, P in ***Joanne Lamb v The Garrard Academy UKEAT/0042/18/RN*** at para. 15 of her judgment , where she said:

"15. Knowledge of disability, whether actual or constructive, must be knowledge of the following three matters:

(i) the impairment (whether mental or physical);

(ii) that it is of sufficient long – standing or likely to last 12 months at least;

(iii) that it sufficiently interfered with the individual's normal day to day activities to amount to a disability."

49. The Tribunal does not consider that Melinda Goodall had anything like the requisite knowledge of either of the claimant's disabilities at the time that the interview for the Technical Adviser post was held on 21 December 2016. There is no evidence at all that even if she did, the other two members of the interviewing panel did, and there is nothing that the claimant has advanced which could support such a conclusion. The claimant in her submissions contends that it is "reasonable to suppose that" Jasdeep Hayre spoke to Melinda Goodall about the claimant's forthcoming wrist surgery, and that she must have told the rest of the panel. There is no evidence of this, and the claimant is simply asking the Tribunal to speculate that this was so.

50. Thus, Melinda Goodall and the interviewing panel lacked the necessary knowledge of either of the claimant's disabilities to be influenced by either of them, and that disposes of this direct discrimination claim.

51. For completeness, however, even if the Tribunal is wrong, and there was such knowledge, the Tribunal would be quite satisfied that the claimant's disabilities were nothing to do with the decision not to appoint her. The reasons have been given, and the claimant disagrees with them. She is entitled to do so. She thinks they are poor, and , as previously, with her first interview, she has questioned the competency of those who were interviewing her. She has made wideranging criticisms of the whole recruitment process in her evidence, describing it as flawed, wasteful of public money and lacking transparency. It may well be, but that does not make it discriminatory. Indeed, in para. 145 of her statement the Tribunal detects a flavour of what the claimant's real complaint probably was, and perhaps should have been to this Tribunal. As she raised with her union, and in her discussions with Helen Knight, and other documentation, the claimant suspected , and claims that she had actually been told, that the respondent, faced with the need to make redundancies amongst its permanent staff , was favouring them in the recruitment process, to the detriment of fixed – term contract workers. The respondent denies this, but if it were true, it would, of course be another, plausible , but non – disability related , explanation for the claimant's lack of success. Para. 145 of the claimant's witness statement rather reads as if the claimant seeks to hoist the respondent by its own petard, so to speak, saying , in effect, "well, if you won't admit you discriminated against me on the grounds of my fixed – term status, it must have been for another reason that I can rely upon to found these claims".

52. Further, there is evidence that the claimant had previously been found to be unsuitable for appointment to an earlier post. The claimant disagrees with that panel's assessment as well, but it clearly pre-dates the notification of potential wrist

surgery, so cannot have been tainted by any knowledge of that alleged disability. The claimant found it difficult to accept the outcomes of two application processes, in which she considered she was well qualified, and should have been given the role, especially as she was already carrying it out. She found the findings of both panels literally unbelievable She has therefore, the Tribunal considers, perhaps understandably, cast around for some other explanation for her lack of success, and has alighted upon her disabilities. As she herself has said, however, there are plenty of other explanations, even if her own performance is not one of them, in the lack of qualifications, understanding, or competence on the part of the panel members, who in her eyes were not up to the task with which they were entrusted .That too may be so, but it is another , non – discriminatory , explanation for her treatment.

53. In relation to the IBS, it is of note that, other than in the context of the claimant's request for flexible working in 2016, there is no other documented reference to that condition until her grievance in March 2017, a year later. There is not a single email or other document passing between the claimant, or indeed, Melinda Goodall or anyone else in which any reference was made to this condition , or any problems that the claimant was experiencing at work because of it. This is relevant not only to whether, and if so when, the condition is to be regarded as a disability, but also to the issue of knowledge. It is to be remembered that knowledge in this context means not merely knowledge that a person has the relevant condition, but also that it amounted to a disability.

54. The claimant herself appears to recognise this, as in para. 184 of her witness statement she says that her managers at NICE had a very poor understanding of the nature of disability, and in particular less visible disabilities such as IBS. The claimant refers to absences for IBS in 2015 to 2016 (para.23 of her witness statement) and cites pages 620 to 628 of the bundle in support of a contention that the respondent knew that this condition was a disability. The Tribunal notes however that the last of these was on 25 July 2016. There is no recorded instance of any further IBS related absence after that date.

55. The Tribunal also finds it of note that in the claimant's grievance of 22 March 2017, which is a comprehensive and thorough account of her employment history, h her IBS is hardly mentioned, at para. 55 she stated:

"55. I believe that NICE intended to extend my contract until the end of November 2016 – at some stage this decision was reversed and the recruitment activities were unfairly skewed against me. It seems all this coincided with my hand difficulties (see point 30). NICE/Melinda Goodall was already aware that I had IBS and this affected my work patterns (see point 9)."

56. Prior to that , in her email to Lorna Scoular of 8 March 2017 (page 354 of the 5undle) the claimant tells her that she thought "it could be relevant" that she was alerted to her dismissal after she had informed her line manager that she needed time off for surgery.

57. A number of points arise. The first is that the claimant attributes the change in the respondent's intentions to her as being triggered by her "hand difficulties", which, going back to her point 30, she said arose in December 2016. Her wrist condition, however, cannot have been a factor in her lack of success in her first application,

which was in November 2016, and she was notified of the outcome on 25 November 2016. She did not notify Jasdeep Hayre of her growing wrist problems until 13 December 2016. Those difficulties cannot therefore have been known about by the interviewing panel for the post in November 2016.

58. A further point to take from the claimant's grievance is that , whilst her IBS is mentioned, it is very much secondary to her wrist condition, and she very clearly cites that condition as being the trigger for her treatment by the respondent. Thirdly, whilst the IBS is mentioned, no complaint is made at all of any issues (aside from the need for flexible working, which is not expressed as any form of complaint) arising from it, such as inadequate toilet provision, or any other of the complaints that the claimant now brings as part of these claims.

59. Finally, the Tribunal addresses the claim that the claimant was treated less favourably than Helen Powell, who is not disabled, but whose contract was extended. The respondent has explained how her contract was initially extended , but was still a fixed term contract, and how she then successfully applied for a permanent post. Thus the reason she got a permanent post was that she successfully applied for one. She was not treated any more favourably that the claimant was.

60. For all these reasons the Tribunal is quite satisfied that the claimant's disabilities played no part whatsoever in the decisions made in relation to her applications for permanent roles, and these direct discrimination claims are accordingly all dismissed.

The discrimination arising from disability claims.

61. It is convenient to consider these claims at this juncture , as they are similar to the claims of direct discrimination that the claimant has made. The issues are:

Was the claimant treated unfavourably because of something arising in consequence of her disability?

If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Did the respondent know or could they reasonably be expected to know that the claimant had the disability?

62. The claimant relies on the following matters as detrimental and unfavourable treatment, (in chronological order) :

The requirement to write down her hours of work in her diary in a period from around the end of July 2016 until the end of her employment on 30 April 2017.

Failure to promote the claimant to the post of Technical Analyst in December 2016 (the claimant being advised she was not successful on 23 December 2016).

The claimant's manager, Jasdeep Hayre, contacting her on her mobile or by personal email while on sick leave in the period 4-11 January 2017.

Non-renewal of the claimant's fixed term contract on 3 February 2017.

63. The first issue to be addressed in each of these claims therefore is whether the claimant was treated unfavourably because of something connected with one of her disabilities. That requires in each instance an analysis of what the unfavourable treatment was , and how, if at it was connected to either of her disabilities.

64. The first of these relates to Jasdeep Hayre's requirement that the claimant note down her hours of work. Was that unfavourable treatment ? Is it not necessary that it be less favourable treatment, so no comparator is needed, but can it be said to be unfavourable treatment? There is no statutory definition of unfavourable. A dictionary definition is of expressing or showing lack of approval or support. It is synonymous with adverse, hostile, critical, bad and harsh. The Tribunal considers that this has to be considered objectively – treatment is not unfavourable just because the sufferer perceives as being. There is no evidence that this was a particularly onerous task, or that the claimant failed to do it, and was taken to task about it. She never made any complaint about having to do it until this claim. On the basic premise that the law should not concern itself with trivialities, the Tribunal cannot see that this was, on any view unfavourable treatment. It may have been a minor inconvenience. Indeed, it would potentially be to the claimant's benefit, as by this means she would not be subjected to phone calls and emails demanding responses from her during hours when she was not working. It may have amounted to less favourable treatment for the purposes of direct discrimination, but it has to be viewed on its own merits, not as comparable treatment. The claim fails on that basis alone.

65. If, however, it was unfavourable treatment, was it because of something arising in consequence of the claimant's disability, in this case her IBS, as that was the only one at that time To the extent that her request for homeworking , and to work compressed hours, did arise , at least in part, from her IBS condition, and that requirement would be satisfied.

66. That would then lead to the Tribunal having to consider whether such treatment could be justified as a proportionate means of achieving a legitimate aim. In the Tribunal's view it manifestly could be. Jasdeep Hayre required this information to ensure when the claimant was working, and when she was not. He needed it , in particular , so that colleagues would know what were her working hours, and what were not, for the purpose, for example, of arranging meetings or telephone conferences. That is a legitimate aim, and the minimal requirement to log working hours on Outlook or similar, is clearly a proportionate means of achieving it.

67. Turning to the next claim, that of the failure to appoint the claimant to the post of Technical Analyst in December 2016, that clearly is unfavourable treatment. The next question, however, is how is that said to be because of something arising from either (if one takes the wrist condition as a relevant disability by that time) of the claimant's disabilities? Again, this is not a direct discrimination claim, the treatment has to be linked to "something arising from" a disability.

68. The Tribunal cannot see any basis upon which it could find that the claimant's failure to be appointed to this role had anything to do with either disability, or

anything that arose as a consequence of either of them . She does not say that she underperformed in the interview because of any effects of either disability, rather the opposite, she considered she had given the best interview of her life.

69. The claimant seeks to suggest that the reason she was not successful was the knowledge that Melinda Goodall had about her impending surgery , and potential absence as a result. She suggests that this influenced her, and she influenced the panel, not to appoint her. The Tribunal cannot accept this. Melinda Goodall denied this was the case, and, other than the claimant contending that it is reasonable to suppose that she did this, the claimant has no basis (other than her inability or unwillingness to understand how she possibly could not have been appointed) upon which the Tribunal could making any such finding. In essence this is a re-casting of one of the direct discrimination claims. This claim similarly fails.

70. The next claim chronologically is that of Jasdeep Hayre, contacting her on her mobile or by personal email while on sick leave in the period 4-11 January 2017. Again the first issue is whether this is unfavourable treatment. This overlaps with one of the harassment claims below , which is framed in the same terms.

71. To the extent that this was something that the claimant did complain about, it may be thought unfavourable conduct. That said, she has not explained why she found it so irksome. She was, after all, having a one day operation on her wrist. There is no evidence or suggestion that she was , prior to her operation, so vulnerable and unwell that she could not receive telephone calls or mails. The contemporaneous email exchanges at this time show no complaint at this type of contact, and the claimant rang Jasdeep Hayre back. At no stage , prior to 11 January 2017 did the claimant indicate that she was being unfavourably treated by this form of communication. Indeed, the email exchanges between her and Jasdeep Hayre at this time were on her private email account. The first time that she asked that he did not ring her whilst she was on sickness absence was in her email of 2 February 2017 (page 343 of the bundle) , and the first time she told him not to use her personal email address was 3 February 2017 (page 353 of the bundle). The claimant makes no claims that Jasdeep Hayre did so after she asked him not to. Most crucially, there is no allegation that he contacted her inappropriately after her operation on 7 February 2017, during her recovery period.

72. The Tribunal finds that this cannot be regarded as unfavourable treatment, though it would be because of something arising from her (wrist) disability, so this claim fails at that point. Again, however, were it to be unfavourable treatment, and satisfy the requirements of s.15, we would find that the respondent can justify it as a proportionate means of achieving the legitimate aim of maintaining contact with an employee on sick leave.

73. The final claim under this section is that of non-renewal of the claimant's fixed term contract on 3 February 2017. There is no doubt that this is unfavourable treatment. The next question therefore is whether this was "because of something arising as a consequence" of either of the claimant's disabilities. The Tribunal cannot see how it was. It was for a number of reasons. The first, and primary reason, was that the substantive post holder was returning from a secondment. The second is that the claimant failed to secure a permanent post after two applications. In

essence this too is a re-casting of one of the direct discrimination claims. This claim similarly fails.

74. The claimant contends that the reason she was not appointed to the TA post in December 2016 was because the respondent , in this instance Melinda Goodall, and her panel, were aware that she was going to have an operation, and would need time off. Assuming that were to be established (which the Tribunal finds it has not), that in itself would not be sufficient to ground liability under s.15 if the respondent shows that it, in the person of this panel, did not know , and could not reasonably be expected to have known, that the relevant condition leading to the potential absence was a disability. That is something the respondent would be able to establish, and would have defence under s.15(2) in any event.

75. The Tribunal rejects any suggestion that her failure to succeed in these applications was in any way connected to either of her disabilities, and this s.15 claim fails.

The failure to make reasonable adjustments claims.

76. Having identified the claimant's actual disabilities, and the dates from which they can be so considered, the Tribunal can now also address these claims. The issues are :

Did a provision, criterion or practice (PCP) of the respondent's put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

The PCPs relied upon are:

Hot desking;

Failure to adequately plan workforce support and train staff; and

Failure to provide adequate female toilet facilities.

Could the respondent reasonably be expected to know that the claimant had a disability and was likely to be placed at the disadvantage?

If so, did the respondent fail to take such steps as it would have been reasonable to take to avoid that disadvantage?

77. In relation to the first PCP, the claimant relies on the wrist condition. She argues that she was put at a substantial disadvantage by this PCP because she needed her work station to be set up by a trained assessor in a particular way to accommodate her wrist condition i.e. her desk had to be a specific height and screens in a particular position to ensure her hand placement with a vertical mouse was correct. The reasonable adjustment sought was to have a set workstation which had been set up by a trained assessor. The claimant says the policy of hot desking applied throughout her employment.

78. In relation to the second PCP, the claimant relies on the condition of IBS. She argues that she was put at a substantial disadvantage because stress exacerbated her IBS. She says that the respondent failed to plan to ensure there were sufficient people in post and failed to train her when she was appointed to a new role in June 2016 because there was no one in post for her to shadow. She says that, from October 2015 there should have been 5 people in her team and were only 4. This later reduced to 2. There were workforce shortages in the new role the claimant moved to in June 2016, including being without a manager for a month. These workforce shortages and failure to train the clamant put her under extreme stress, exacerbating her IBS. The claimant says that reasonable adjustments would have been to provide adequate staff and training to reduce stress. The claimant says that this PCP applied throughout her employment.

79. In relation to the third PCP, the claimant relies on the condition of IBS. The claimant says that there was scant toilet provision because the respondent had expanded the number of people working in the building by the practice of hot desking and the condition deteriorated, with, often, only half the toilets being in a usable condition, resulting in long queues to use the facilities. The claimant argues that she was put at a substantial disadvantage because she could not wait in long queues to use the toilet and, therefore, was more likely to need to work from home if experiencing difficulties but was not allowed to do so during probation. The claimant's use of home working she says led to her manager being very vigilant about her working hours and making her record her working hours in her diary which others did not need to do (the respondent being able to check working hours by means of the electronic log in system). The claimant says this PCP applied throughout her employment.

Discussion and findings of the PCPs.

80. Turning to the PCPs, the first issue is whether they are made out. The first, "hot desking" is not disputed, in that it was a clearly a practice. The question then is whether it was one that put the claimant as a substantial (i.e more than trivial) disadvantage in comparison to persons who did not share her disabilities ? This PCP is relied upon in connection with her wrist condition.

81. The evidence that hot desking as such put the claimant at a disadvantage is lacking. Whilst she puts the PCP as her work station not being set up by a trained assessor in a particular way to accommodate her wrist condition i.e. her desk had to be a specific height and screens in a particular position to ensure her hand placement with a vertical mouse was correct, when the respondent carried out that workstation assessment in January 2017, the only adjustment found to be necessary was the provision of a vertical mouse. This adjustment, therefore was not linked to hot desking as such , but to the provision of a particular piece of equipment, to be used by the claimant wherever she worked. In her submissions the claimant refers to the obligations upon an employer to reduce the risks associated with working with computers, workstations and display screen , and to provide adequate health and safety training arising under the Health and safety (Display Screen Equipment) Regulations 1992 , as amended. The respondent may well have been in breach of those Regulations, but that is not the issue in these claims, which relate simply to whether the respondent failed to make reasonable adjustments. These Regulations have no bearing upon this issue. She seems to contend that had the respondent

done so it may have made a dramatic difference to her wrist condition. That too may be so, but it is not the issue. The issue is firstly ,whether, and secondly, when the claimant had the relevant disability, in this instance related to her wrist. The Tribunal has found that as at January 2017 she did, but as soon as that was known of, or within a reasonable time thereof, the respondent then made the necessary reasonable adjustment of providing a vertical mouse.

82. The second alleged PCP is a very broad one, that of failure to adequately plan workforce support and train staff. It has to be observed that this is a very strange PCP, in that it amounts to an allegation of understaffing, and/or lack of training. That is claimed to have led to stressful working conditions, which put the claimant, as a person with the disability of IBS, at a particular disadvantage as stress causes flare – ups of IBS.

83. The Tribunal has had to consider whether is capable of amounting to a PCP at all. Whilst the categories of PCP are very broad, and the authorities make it clear that Tribunals should take a purposive and practical approach, the Tribunal cannot see that this alleged PCP is capable of amounting to a PCP at all. Firstly, whilst the claimant may feel that the respondent was understaffed , it may not have been. There was evidence of considerable recruitment going on, and it may well be that there were sufficient staff employed. The claimant may feel that there were specific instances of understaffing, or of the right staff not being employed in the right roles, or not being sufficiently competent in the disciplines required, but she had adduced no evidence at all that this is something that was a policy, or the result of any decision taken by the respondent. Whilst deliberate action is not a prerequisite for something to amount to a PCP, the Tribunal considers that the mere alleged fact of understaffing, or inadequate training, cannot, of itself amount to any PCP unless there is evidence that this was the result of some decision or policy by the respondent. Even then, the Tribunal would question whether it amounted to a PCP. Further, whilst the claimant alleges inadequate training, because, the Tribunal supposes, some of the workforce were not up to the tasks that they were employed to do, how does one know this was a training issue? What if they had been trained, but just would not perform? It may be a recruitment issue, it may be (as the claimant suggests) a failure to devise appropriate methodology, regardless of who was employed to carry it out.

84. In effect the claimant seems to be saying that the PCP was not having enough staff who were competent to carry out the right tasks with the result that she was put at the disadvantage of the risk of stress at work, she as a disabled person, being at greater risk of , for example, IBS flare ups. In those circumstances, presumably, the reasonable adjustment would have been “to employ and train sufficient number of competent personnel so as to ensure that no employees were put under stress as a result of their working environment”.

85. It must be a feature both of PCPs and , more importantly, reasonable adjustments, that they are capable of identification with some precision. How is an employer to know in these circumstances when it has made the reasonable adjustment? These matters cannot be viewed simply by result – cause and effect , i.e once there is no workplace stress, the employer has achieved that adjustment.

86. In short, the PCP contended for is too vague, imprecise and ill – formulated to amount to a PCP at all, and no reasonable adjustments are required to negate or obviate its effects. Indeed, it seems to the Tribunal , if it has any place at all, to fit potentially within an obligation to provide a safe system of work, under health and safety legislation, or the common law duty of care, and to be far more applicable , if at all, to the law of personal injury than disability discrimination. Claims based on this PCP accordingly fail.

87. Turning to the third PCP, the inadequate toilet provision, the claimant contends that this did put her at a disadvantage, but the respondent disputes this. The claimant clearly preferred a certain desk, which was closer to the toilets. There is, however, no evidence in her statements of any specific instance where this lack of proximity, or lack of functioning toilets ,coincided with any flare up of her IBS which necessitated immediate and easy access to the toilet. Whilst she suggests in para. 34 of her impact statement, that she sometimes had to use the toilet 20 times a day, or was taken "short" in meetings, almost soiling herself in attempts to find a working toilet, she never made any comment about such instances in any email, or even in her grievance. The only evidence of the effects of her IBS condition upon the claimant is in relation to her flexible working request, where the effects upon her sleep were indeed notified. These other workplace – related matters , however, were first mentioned in her claim form in May 2017. The Tribunal considers that this is another instance of exaggeration on the part of the claimant.

88. In any event, even if the claimant could demonstrate that such a PCP had the necessary disadvantageous effect upon her, the respondent will escape liability under the provisions of para. 20 of Schedule 8 to the Equality Act 2010 unless it can be shown that the respondent knew , or could reasonably be expected to have known, not only of the disability , which the Tribunal has found it did, but also that the disabled person was likely to be placed at the relevant disadvantage by reason of that disability. The Tribunal considers that even if the claimant was being put at this disadvantage, neither Jasdeep Hayre nor anyone else knew, or could reasonably have been expected to have known that this was the case. This is particularly so given the claimant's total lack of complaint , or even comment , about this alleged disadvantage during her employment, including her grievance. Whilst the claimant has adduced evidence of the stressful working conditions, and has suggested in her impact statement that her IBS condition became much more debilitating, and "ruled her life" , preventing her from leaving home, there is not one documented instance, nor does the claimant mention in her evidence, of the claimant bringing this to the attention of the respondent. The Tribunal notes, but does not accept, the contention in para. 43 of the claimant's impact statement that she discussed her IBS problems with "all her managers". Whilst she clearly did in relation to her flexible working requests, by mid July 2016 these were in place , and there were no recorded absences due to IBS , or any other issues raised in connection with that condition prior to early 2017.

89. It is noted that the claimant has suggested that Jasdeep Hayre "discussed" the toilet provision with her, in an Lync stream (page 292 of the bundle) , but on analysis this is no more than a passing reference to using broken toilets, amongst other gripes that both were making about the hotel provision and meal allowances. There is evidence of the toilets needing repair or replacement, but this is far from an acknowledgement of any particular difficulties that the claimant was experiencing

because of her IBS. This is, unfortunately, another example of the claimant seizing onto a piece of evidence , and seeking to extrapolate from it a construction which it does not in fact bear.

90. Thus, even if the claimant were to establish that her IBS and the inadequate toilet provision did put her at a particular disadvantage, the Tribunal accepts that the respondent did not know, and could not reasonably have been expected to know that this was the case, and no liability to make reasonable adjustments arises in these circumstances. This claim fails.

The indirect discrimination claims.

91. It is convenient to consider these claims at this juncture , as they rely upon the same facts as are relied upon for the reasonable adjustments claims. The issues have been identified as:

Did the respondent subject the claimant to a detriment?

Did the respondent apply to the claimant and others without the disability a PCP? The claimant relies on the same PCPs as for the complaints of failure to make reasonable adjustments.

Did that PCP put persons with whom the claimant shared the characteristic of disability at a particular disadvantage when compared with persons without that characteristic.

Did the PCP put the claimant at that disadvantage?

Can the respondent show the PCP to be a proportionate means of achieving a legitimate aim?

92. As the PCPs contended for in these claims are the same as those in the reasonable adjustments claims, the Tribunal having found that they have not been established, and the requisite ensuing disadvantage for the claimant similarly being not proven, these claims too must fail.

The harassment claims.

93. We turn now to these claims, where the issues have been identified as:

Did the respondent engage in unwanted conduct?

If so, was it related to the protected characteristic of disability?

If so, did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

94. The claimant relies on the following matters as harassment, in chronological order:

a) The requirement to write down her hours of work in her diary in a period from around the end of July 2016 until the end of her employment on 30 April 2017.

b) Jasdeep Hayre, contacting her on her mobile or by personal email while on sick leave in the period 4-11 January 2017.

c) Jasdeep Hayre telling the claimant in her return to work interview on 11 January 2017 that if she complained about the outcome of the interview for Technical Analyst that it would ruin her reputation and stop her getting a job with the respondent in future.

d) Mr Hayre emailing the claimant on 11 January 2017 after the return to work meeting, stipulating conditions for the claimant's absence including how she should be in contact with the respondent.

e) Mr Hayre refusing, in a conversation in early February, to accept a note from the hospital about the claimant's likely recovery time from surgery on her hand on 7 February 2017 and insisting the claimant got a fit note from her GP.

f) Mr Hayre and his manager, Melinda Goodall, requiring the claimant in the period 3 January to 7 February 2017 to fill in forms for her absence for various tests required before surgery – MRI scan, X rays, MRSA testing, when the claimant had never been required to do this before and this was not required of others.

95.In order to amount to harassment under s.26, the conduct must be unwanted, and have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Whilst the claimant has suggested that Jasdeep Hayre's conduct towards her was deliberate, and that he therefore had the purpose of creating the proscribed environment for her, we do not so find. Therefore such claims can only succeed if the conduct was likely to have that effect. Further, the conduct must "relate to" a disability, and , further must be considered in the light if s.26(4) which provides:

(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.

96. Turning to the claims above, in relation to (a), we do not find that the conduct in requiring the claimant to record her hours at this time (which was July 2016) was related to the claimant's disability, if such it was at the time, of IBS, still less the ganglions. It related to her working from home, and flexibly, which may in part have been related to her IBS but the same requirement would have been made whatever the reason for her home – working. Further, we do not consider even if unwanted by the claimant such conduct could begin to amount to any violation of her dignity, or creating an environment of the type proscribed by s.26. The words in the section are

strong ones, and amount to more than inconvenience or irritation. It is hard to see how the claimant suffered anything more than inconvenience or irritation at being required to meet these requirements. There can be no element of humiliation- she was not publicly instructed to do this , or belittled her in the eyes of her colleagues, and she made no complaint about this at all until her grievance in March 2017. Finally, even if she did personally perceive this conduct as having the proscribed effect, the Tribunal cannot hold that it was reasonable for it to do so. This harassment claim fails.

97. Turning to (b), Jasdeep Hayre contacting her by phone and email whilst she was off sick in January 2017 , to the extent the wrist condition may by that time have amounted to a disability , the Tribunal would accept that this conduct would be related to that disability, but the Tribunal would not find that it amounted to harassment. Firstly, at the time (though clearly the claimant then did request that Jasdeep Hayre not contact her this way) the claimant made no such complaint, and did not, in the Tribunal's view, herself perceive this as harassment. Her emails at this time in which she thanks Jasdeep Hayre for calling her, and tries to speak to him, are inconsistent with any other finding. If that were wrong, we would again find that it would not, under s.26(4) be reasonable for the conduct to have that effect. This harassment claim too fails.

98. It is to be noted that the claimant's claims in relation to this form of harassment – contact during sickness absence – is only pleaded or relied upon in relation to the period in January 2017. The claimant makes no such claim in relation to the period of her sickness absence following her operation. She had, it is noted, suggested in the meeting on 1 February 2017 with Jasdeep Hayre that she would regard such contact as harassment, but she has not made any such claim. For completeness, the Tribunal would not find any such claim well founded. Conduct cannot be made harassment merely because the recipient says they will regard it as such, it must be reasonable to so regard it. There is no evidence whatsoever that the claimant was, post surgery , going to be in such a fragile physical or mental state that a telephone call or email from her employer would be injurious to her health. Clearly an unreasonable level of contact, or any form of pressure to return to work , may constitute such conduct, but the claimant had given no evidence of this.

99. In relation to (c) , Jasdeep Hayre denies saying this, but accepts he said something. Taking the claimant's case at its highest, however, and assuming that he did use the words that the claimant contends for, where, the Tribunal asks, is there any relationship to either of the claimant's disabilities ? Nothing he said referred to them, and the claimant does not suggest that she had said to him anything about her failure to get the Technical Adviser role being in any way shape or form related to either of her disabilities. Whilst she has suggested that she mentioned this, the Tribunal does not accept that. Telling someone not to press a complaint because it may harm their future career does not become conduct which relates to a person's disability just because the person to whom it was addressed is disabled. Interestingly, the claimant also alleges that he told her not to discuss such issues with other members of staff who may be on short – term contracts. That is <u>not</u> however relied upon as an allegation of harassment under s.26. It perhaps illuminates, as do many other features of the claimant's case, how what the claimant wanted to complain about, and tried to, but has not brought as claims, is fixed – term contract worker discrimination. This harassment claim falls at the first hurdle.

100. In relation to (d), this conduct, if the claimant's wrist condition was by January 2017 a disability, would be conduct which was related to it. The question then is whether the stipulations that Jasdeep Hayre made did have the necessary proscribed effect upon the claimant, and if so, whether they reasonably could be found to have done so. Again, there is no suggestion of any type of public humiliation, or other potentially degrading effect of these requirements. The claimant may again have found them inconvenient or irritating, but that is a long way from creating an intimidating, hostile, degrading , humiliating or offensive environment. Further, even if the claimant so perceived them, under s.26(4) we would not consider it reasonable to do so, especially when, as the evidence shows they were merely procedures that the respondent operated , and which HR advised Jasdeep Hayre to follow.

101. In relation to (e) , the refusal of Jasdeep Hayre to accept a note from the hospital about the claimant's likely recovery time from surgery on her hand on 7 February 2017 and insisting the claimant got a fit note from her GP, this was on advice from HR, and in accordance with policy. Again, the claimant did not complain about this at the time, and it cannot reasonably be regarded as creating the proscribed environment.

102. In relation to (f) Mr Hayre and his manager, Melinda Goodall, requiring the claimant in the period 3 January to 7 February 2017 to fill in forms for her absence for various tests required before surgery – MRI scan, X rays, MRSA testing, when the claimant had never been required to do this before and this was not required of others, this too cannot reasonably be regarded as harassment. Rather like the preceding allegations, this was no more than procedural requirement than HR had advised. As this is not a direct discrimination claim, whether anyone else had been asked to do this is not strictly relevant. The fact that the claimant had previously been required to do this not is neither here nor there, she had never previously been off work for 6 weeks following surgery.

103. Whilst this would relate to her disability, whether it was unwanted conduct with the effect of creating the requisite environment for the claimant, the Tribunal seriously doubts. Again, these were hardly onerous requirements. The absence forms were one page documents, which the claimant in fact filled in and returned quickly. She never questioned at the time why she should be having to do this. Whilst the claimant may have perceived this as having the effect of creating the proscribed environment, (although her lack of complaint rather undermines this), the Tribunal is quite satisfied that it would not be reasonable for the conduct to have that effect. This claim too fails.

The victimisation claims.

104. In relation to the victimisation claims, in the issues formulated for the preliminary hearing (page 47 of the bundle), the claimant relies upon allegations made in her return to work meeting with Mr Hayre on 11 January 2017 as the protected act. Her case was to be that she told him that she considered him contacting her on her mobile and by personal email during her sick leave to be harassment , that she could have a claim of disability discrimination , and that she told him that she thought there had been disability discrimination in the failure to

appoint her to the post of Technical Analyst in December 2016. The claimant's evidence, however, does not support the finding of any protected act taking place in this meeting on 11 January 2017. Paragraphs 146 to 153 of her witness statement deal with these matters. Para. 153 is the only place where she mentions telling Jasdeep Hayre that she considered that she was being subjected to disability discrimination. This is a vague paragraph , and is unclear as to when she allegedly did so. It comes after her account of the meeting. There is no other mention , prior to the claim being issued, in any other documents that the claimant has allegedly made such a claim to Jasdeep Hayre in the meeting of 11 January 2017. She did not respond to his email setting out his record of the meeting on 11 January 2017. Her next email to him after it simply enclosed the completed work station assessment. At no point did she then dispute his account, and seek to refer to any alleged threats or her raising of disability related harassment, or, indeed, disability at all.

105. The claimant also states in her witness statement (para. 203) that the statement in Helen Knight's report upon her informal investigation to the effect that the claimant would "take further action" shows that her employers were under the impression she would make a formal complaint of disability discrimination. That is not, with respect to the claimant, correct. In Helen Knight's extensive note of her investigation and what the claimant told her at pages 329 to 331of the bundle there is no mention whatsoever of either of the claimant's two medical conditions, and no hint of any potential complaint of disability discrimination. The claimant cannot make this quantum leap from this evidence to support the contention she makes in her witness statement. Indeed, the tenor of what the claimant was complaining of at that time was fixed term worker discrimination.

106. This , i.e the alleged mention of disability discrimination 11 January 2017 to Jasdeep Hayre, is the only protected act that the claimant has expressly relied upon, and if it is not made out, if there is no protected act, there can be no victimisation, so these claims , advanced on this basis, must fail.

107. The Tribunal notes, however, that there is evidence , in Jasdeep's Hayre's email to HR of 1 February 2017 , in which he gives an account of the meeting he held that day with the claimant, at page 344B of the bundle, that the claimant had made it clear that she believed the respondent was discriminating against her as someone with a disability (her wrist injury) , as well as in favour of permanent employees. That is, the Tribunal finds a further potentially protected act, and indeed, that it was such an act. Further, in her email of 9 March 2017 to HR (page 364 of the bundle) the claimant clearly signals an intention to pursue a disability discrimination claim. That too must be a protected act.

108. It is therefore possible that any treatment thereafter, if it amounts to a detriment, may amount to victimisation, if that treatment was "because" of any protected act. If there was any protected act, the burden of proving that the treatment was because of it not lies upon the respondent. The acts of victimisation relied upon by the claimant are:

Non-renewal of her fixed term contract on 3 February 2017.

Mr Hayre not alerting her to a post of Technical Analyst in around April 2017 when he had, before the protected act, informed her of other posts and suggested she apply for them.

Failing to appoint the claimant to the post of Technical Analyst in around April 2017 without interview (the claimant will says that others were often slotted in without interview if they were already doing the role and the claimant was doing that role).

109. Taking the date of the first protected act as 1 February 2017, it is clear that the first of these acts of unfavourable detriment cannot have been "because of" her protected act because, whilst the formal letter of termination was dated 3 February 2017, the decision not to renew her fixed term contract was made well before then. It was made in or about December, and was clearly about to be actioned , as the email traffic shows , by 31 January 2017. This cannot, therefore succeed as a victimisation claim.

110. Turning to the remaining two allegations of victimisation, these are both in April 2017, and hence do post - date the protected acts. The allegation is that Jasdeep Hayre was responsible for at least the first of these acts of victimisation. In relation to the first of these, not "alerting" the claimant to the post , he said that he could not remember if he was aware of this post at the time. The evidence in the email chain in Sarah Cumbers' investigation, and para. 33 of her witness statement, however, is that the post in question had actually arisen in October 2016, when a decision was taken not to fill the post immediately, but then , due to further changes, the decision was taken in April 2017 to advertise this, and, indeed, another band 7, post. There is no evidence that Jasdeep Hayre was involved in this decision, or even aware of it.

111. Mr Williams makes a further point in his submissions, that the claimant, having said in evidence that she had already secured a better paid job, and did not apply for the post for that reason. This he says means there can be no detriment , and this claim must fail.

112. The Tribunal takes the first point, which is that there is no evidence that the failure of Jasdeep Hayre to alert the claimant to this post was deliberate, which is, and must be, her case. The Tribunal cannot reach that conclusion. He may not even have been aware that it was being advertised at all. There is no evidence that he was involved in , or even informed of, the decision to recruit to it at that time. There can therefore be no evidence that he made a deliberate decision not to alert her to the vacancy. This claim fails on that basis.

113. In relation to Mr Williams' submission that this cannot, given that the claimant had by then secured another better paid post, amount to a detriment , whilst he has not cited it, he may have in mind the case of ***Keane v Investigo UKEAT/0389/09*** in which the EAT upheld an Employment Tribunal's finding that a claimant whose application for a job was rejected suffered no detriment when he had no genuine interest in the job, and would not have accepted it if it had been offered to him. That may be so, on the facts of that case, but the Tribunal would be hesitant to accept such a contention on the facts of this case. The Tribunal can see how, before her employment ended, and she was still an internal candidate, not being alerted to a post with the respondent could be seen as a detriment. Whilst we also appreciate

that by then the claimant had such a low opinion of the respondent as an organisation , which may well have led to her not wanting to remain in its employ, those are considerations which would probably be more relevant to remedy. Be that as it may, we are in any event, not persuaded that Jasdeep Hayre's failure to notify the claimant of this vacancy was deliberate, still less that it was in any way shape or form influenced by any protected act she had done.

114. Turning to the final alleged act of victimisation, the failure to appoint the claimant to this post without interview, "slotting her in", as it were, this is not an allegation specifically levelled at Jasdeep Hayre, but the respondent in general. The prime reason, however, that the claimant was not "slotted in", firstly, is that no one would be. There is no evidence that any of the respondent's employees were so treated. All had to go through an application process. Further, another issue was that she was not considered appointable in her applications in 2016, so was not in the pool of appointable candidates when this post came up in April 2017. The Tribunal accepts that explanation, and that the fact this post was advertised externally, without the claimant being "slotted into it", or being given any preferential treatment as an internal candidate , had nothing whatsoever to do with her protected acts , and these claims too fail.

Time limits.

115. Whilst the Tribunal has considered the claims on their merits, there is a further issue, and an important one, which arises , in particular , in relation to the reasonable adjustment claims, and indeed those of indirect discrimination which are based upon the same PCPs, but also affects all claims which pre-date 21 December 2016. In relation to both the hot – desking, and the issue of toilet provision, the first time that these are raised is in the claim form presented on 18 May 2017. They are not mentioned in the claimant's grievance. As by the time of the claim form the claimant had ceased to be employed, and hardly been in work since January 2017 , more than 3 months before the presentation of the claims, they must be out of time. The claimant approached ACAS for early conciliation on 20 March 2017 ("Date A") . Her certificate was granted ("Date B") on 20 April 2017. She presented her claims on 18 May 2017.

116. That means that for any act giving rise to any claim, for such a claim arising from it to be in time , the act would have to have been committed on or after 21 December 2016. Whilst that would include her interview for the TA post, which was that day, any other claims which pre – date that date are out of time. This has not been addressed (other than in paras. 109 to 111 of Mr Williams' submissions, in the context of the claim relating to non – renewal of the claimant's fixed term contract) in the parties' submissions, but is a matter which goes to the Tribunal's jurisdiction, and cannot therefore be ignored. It was included in the List of Issues at para. 31 (page 48 of the bundle). Further, the Tribunal in its questions to the claimant expressly asked her to address the time limit issues, and referred her to page 48 of the bundle. She was invited to put forward any basis for the just and equitable extension, and said that it was not apparent until December 2016 that disability discrimination was the subtext of the respondent's actions against her.

117. Whilst the claimant has not put specific dates on instances of her being disadvantaged by either hot desking, or inadequate toilet provision, the implication of

her evidence was that this all pre-dates 21 December 2016. She was on leave in January and then on absences related to her wrist condition, so was hardly in work at all in January. Further, she worked from home a lot. Thus these particular claims, and any other pre – 21 December 20916, are out of time.

118. The Tribunal has considered whether these alleged failures/acts of indirect discrimination could be argued to be part of a course of "conduct extending over a period of time" so as to entitle the Tribunal to determine that the claims are in time.

119. Dealing with the first PCP, that of hot desking, the claimant's case is that she was put at a substantial disadvantage by this PCP because she needed her work station to be set up by a trained assessor in a particular way to accommodate her wrist condition i.e. her desk had to be a specific height and screens in a particular position to ensure her hand placement with a vertical mouse was correct. The reasonable adjustment sought was to have a set workstation which had been set up by a trained assessor. The claimant says the policy of hot desking applied throughout her employment. That may be so, but the cause of action is the failure to make the reasonable adjustment, and that was made by the provision of a workstation assessment and the provision on a vertical mouse on 11 January 2017.

120. In relation to the second PCP (third in the list) of toilet provision, the claimant is vague as to when there was a shortage , i.e when there were breakages or other problems which put toilets out of action. Again , the cause of action is the failure to make reasonable adjustments, not the existence of the PCP.

121. The Tribunal would accordingly not find that these claims could be found to be in time by virtue of the operation of s.123(3) of the Equality Act 2010 as conduct extending over a period of time. The claimant accordingly would need the Tribunal to grant her an extension of time on the basis that it would be just and equitable to do so. In deciding whether to do so, the Tribunal applies the principles of whether it would be just and equitable to extend the time for presentation of these claims. In deciding whether to exercise our discretion , we take into account the guidance upon how we should approach this task set out in ***British Coal Corporation v. Keeble [1997] IRLR 336*** , In the event that either the existing claims as presented, are out of time, the Tribunal has to consider whether to extend time under Para. 3(3) of Schedule 3 above, on the basis that it would be just and equitable to do so. This discretion, of course, is the same as conferred by several other discrimination statutes, and caselaw has evolved as to how a Tribunal should approach the exercise of its discretion. One of the leading cases is ***Robertson v. Bexley Community Centre t/a Leisure Link 2003 [IRLR] 434*** ,a judgment of the Court of Appeal. Of particular note is the judgment of Auld L J, who made it clear that there was no presumption of extension, but rather the converse was the case, extension was the exception, not the rule, and an out of time claimant had to convince a Tribunal why an extension should be granted.In terms of the principles upon which a Tribunal should approach the exercise of the discretion, the EAT in ***Chohan v. Derby Law Centre [2004] IRLR 685*** endorsed the approach taken in ***British Coal Corporation v. Keeble*** to the effect that Tribunals should consider the factors listed in s.33 of the Limitation Act 1980 , which applies to the exercise of discretion to extend time in personal injury claims before the civil courts. Those factors are:

The length of and reasons for the delay;

The extent to which the cogency of the evidence is likely to be affected by the delay;

The extent to which the party sued had co-operated with any requests for information;

The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action;and

The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

122. Those factors, whilst useful, must not, however, be regarded as a checklist, or exhaustive. In ***London Borough of Southwark v. Afolabi [2003] ICR 800*** the Court of Appeal held that the s.33 factors were of utility, but that as long as no significant factor was left out of consideration, a failure to follow the express provisions of s.33 would not be a error of law. In that case, delay of 9 years was, exceptionally, not fatal to the application to extend time.

123. The claimant has failed to advance good reasons for the Tribunal doing so. She is an articulate, intelligent and able woman quite capable of raising ,as she did , a detailed and exhaustive grievance. She was a member of, and workplace co-ordinator for, a trade union. That she was aware of time limits is demonstrated in her emails to HR of 9 March 2017 (page 364 of the bundle) and 14 March 2017 (page 366 of the bundle). In the latter she expressly refers to the intention to submit her ET1 by 23 March 2017. By email of 22 March 2017 (page 372 of the bundle) the claimant stated that she was submitting her grievance that day, and would be finalising her ET1 for submission that day, or the day after. Whilst the claimant invoked the ACAS early conciliation process on 20 March 2017, her claim was not submitted until 18 May 2017.

124. The fact she did not raise these particular matters before her employment ended, or even in the grievance she did raise, has prejudiced the respondent's ability to investigate these matters. They are out of time , and the Tribunal would not extend time for their presentation. If, however, the Tribunal were wrong on this, the Tribunal would not, in any event find that the claims succeed on their merits, as set out above.

Conclusion.

125. Paragraphs 91 to 93 of the claimant's witness statement are illuminating. She refers therein to having come from academia (where she had achieved considerable success) into the respondent organisation at a relatively low entry level for her qualifications and level of experience. She felt that her qualifications, experience and professionalism "far exceeded" that of more senior staff. She hoped, nay expected, she would secure promotion to a more senior role, and would then be able to improve the organisation, as she clearly considered it required. That we consider, explains a lot about why this was a relationship which was unlikely to flourish. The claimant's frustrations with her employer, and her colleagues' frustrations with her were always likely to surface, and doom this relationship to failure. Had the claimant been more able to bite her tongue, observe , and seek to progress through the

organisation without , as it were , ruffling feathers, she may have been able to have stayed on and achieve her long term objective. As found in the first investigation, however, there were clearly difficulties in managing relationships, particularly with persons she considered her inferiors, which was most of the respondent's staff, including senior management. That is not to be unduly critical of the claimant, she may well have been right about much of what she found to be deficient in the organisation. That does not entitle her, however, through the mechanism of discrimination claims, to seek compensation for what, in essence, could be regarded as a bad career choice. More importantly, all this assists the Tribunal in its prime task, particularly in cases of direct discrimination and victimisation, of establishing "the reason why" the claimant was treated as she was. As will be abundantly clear from this judgment we are quite satisfied that the reasons, be they good bad or indifferent, why the claimant was treated in the way she was were nothing to do with her disabilities. Whilst the claimant received, we accept, from time to time, mixed – messages, and there were , as Sarah Cumbers found in her grievance investigation, improvements that were required in the respondent's communications , there was, we are satisfied, whatever the deficiencies in the respondent as an organisation, no disability discrimination and these claims fail..

Employment Judge Holmes

Dated: 8 July 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 July 2019

FOR THE TRIBUNAL OFFICE

ANNEXE A

The relevant statutory provisions – The Equality Act 2010

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

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

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

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

20 Duty to make adjustments

(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's 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.

(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 a 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.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) – (13) N/a

21 Failure to comply with duty

(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 purpose 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.

26 Harassment

(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.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) [N/a]

(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.

27 Victimisation

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

Schedule 8

Limitations on the Duty

20. Lack of knowledge of disability, etc

(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—

> *(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;*
>
> *(b) [in any case referred to in Part 2 of this Schedule], 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.*