Case Number: 1601692/2014

EMPLOYMENT TRIBUNALS

Claimant:	**Mr T B Caulcutt**	
Respondent:	**Department for Work and Pensions**	
Heard at:	**Llangefni**	**On: 11th to 14th January 2016**
	Wrexham	**On: 11th January 2017**
Before:	**Employment Judge Howden-Evans** **Mr L J Boulton** **Mrs A M McCall**	

Representation:

Claimant:	Mr Doughty (Representative)
Respondent:	Mr Tinkler (Counsel)

RESERVED JUDGMENT

The unanimous reserved judgment of the Employment Tribunal is as follows:

1. The respondent subjected the claimant to disability discrimination by failing to comply with its duty to make reasonable adjustments (Sections 20, 21(2), 25(2)(d), 39(2)(c) and 39(5) of the Equality Act 2010).

2. Contrary to s39(2) Equality Act 2010 the respondent has treated the claimant unfavourably because of something arising in consequence of his disability (s15 Equality Act 2010).

3. The respondent unlawfully victimised the claimant within the meaning of s27 Equality Act 2010 because he had carried out protected acts as defined therein.

4. The claimant's claim that he has been harassed because of his disability (per s26 Equality Act 2010) is not well founded and is dismissed.

REASONS

Introduction

1. The claimant, Mr Caulcutt, has been continuously employed by the respondent, the Department of Work and Pensions ("DWP") for over 35 years. He commenced work with DWP on 22nd June 1981 as a clerical assistant. In 1996 Mr Caulcutt became a finance officer and in 2013 when the amount of finance work diminished, Mr Caulcutt became an administrative officer/ assistant work coach. Mr Caulcutt worked in the DWP's Caernarfon office until 1st September 2014 when he moved to the DWP's Llangefni office before being transferred to the DWP's Bangor Processing Centre on 29th September 2014.

2. By reason of his chronic asthma and severe eczema, Mr Caulcutt has been registered disabled for all his working life; he praises the DWP for the reasonable adjustments and flexible working arrangements that supported him for the first 30 years of his employment and also enabled him to care for his disabled daughter.

3. Since 2013, there have been changes to Mr Caulcutt's role and working environment and Mr Caulcutt has been required to attend group training. Mr Caulcutt's ill health meant he exceeded his Disabled Employee's Trigger Point (ie number of days' absence) under the DWP's Attendance Policy and on 1st April 2014 he was given a first written warning in relation to the level of his absence.

4. On 3rd April 2014 Mr Caulcutt was given a "Box Mark 3" ("Must Improve") assessment of his performance during the period 1st April 2013 to 31st March 2014. In each of the previous 15 years he had received a Box Mark 2 ("Achieved") assessment of his performance.

5. Essentially, the claim before this tribunal is in respect of the first written warning and the Box Mark 3 assessment and the adjustments that were /

were not made for Mr Caulcutt in relation to these. In addition, Mr Caulcutt asserts that his email of 8th September 2014 or alternatively his expressed intention to lodge an employment tribunal claim amounted to protected acts under S27(2) Equality Act 2010 and that Bev Lovatt's emails of 8th and 9th September 2014 subjected Mr Caulcutt to a detriment. In the alternative, Mr Caulcutt claims that Bev Lovatt's emails and/or Eiddwen Borland's comments on 29th September 2014 amounted to harassment.

6. By an ET1 claim form presented on 13th October 2014 (following a period of ACAS early conciliation between 21st August 2014 and 26th September 2014) Mr Caulcutt complained of disability discrimination, namely:

   6.1. that he has been subjected to a detriment because of something arising in consequence of his disabilities, contrary to s39(2)d and s15 Equality Act 2010 ("the Section 15 claims");
   6.2. that he has been unlawfully harassed, contrary to s40(1)a and s26 Equality Act 2010 ("the Harassment claims");
   6.3. that DWP have failed to comply with their duty under s20(3) Equality Act 2010 to make reasonable adjustments contrary to s21(2) Equality Act 2010 ("the Failure to Make Reasonable Adjustments claims").

7. On 16th November 2014, Employment Judge S Davies allowed Mr Caulcutt to amend his claim to include a claim for victimisation contrary to s27 Equality Act 2010 and a further allegation of harassment based upon the emails sent by Bev Lovatt on 8th and 9th September 2014.

8. At the Preliminary Hearing on 7th September 2015, Regional Employment Judge Clarke, granted permission for Mr Caulcutt to amend his claim to include an allegation that the rejection of his appeal against the Box 3 marking was a further act of discrimination to be added to the s15 claims and to the failure to make reasonable adjustments claims.

9. Mr Caulcutt is seeking compensation for disability discrimination, for injury to feelings, financial loss and aggravated damages.

10. The DWP accepts that Mr Caulcutt has a disability, as defined by s6 Equality Act 2010 and accepts that it was aware of the claimant's disability at all material times. All other aspects of the claim are contested.

The Issues

11. To ensure parties were clear as to the issues to be determined in this case, during the hearing the employment judge prepared a written list of issues which was circulated to the parties for comment. By the time of closing submissions, the final List of Issues was agreed as follows:

Discrimination arising from disability (s15 Equality Act 2010)

1. Did the claimant receive unfavourable treatment from the respondent or from any employee of the respondent?

   In particular, did any of the following amount to unfavourable treatment:

   1.1. the first written warning on 1st April 2014;
   1.2. turning down the appeal against this warning on 7th May 2014;
   1.3. the Box 3 marking on 6th May 2014;
   1.4. turning down the appeal against this Box 3 marking on 3rd October 2014; and / or
   1.5. Eiddwen Borland's "comfort zone" remark in the claimant's half year report?

2. If there was unfavourable treatment, was this "because of" something arising in consequence of the claimant's disability?

   2.1. What was the something arising in consequence of the claimant's disability?
   2.2. Was this unfavourable treatment because of this something?

3. If so, was this treatment a proportionate means of achieving a legitimate aim?

   3.1. Was this treatment the application of policies in order to manage attendance?
      3.1.1. Is this a legitimate aim?
   3.2. Was this treatment the application of policies in order to manage performance?
      3.2.1. Is this a legitimate aim?

   3.3. If so, was this a proportionate means of achieving this aim?

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

4. Has the respondent applied any of the following alleged provisions criteria or practices ("PCP") to the claimant and to others not sharing his disability:

    4.1. any PCP of requiring employees to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions?
    4.2. any PCP of requiring employees to maintain a certain level of work in order not to be subject to the risk of disciplinary sanctions?

5. If the respondent has applied any of the PCPs referred to in paragraph 4 (above) has this placed an interested disabled person (the claimant) at a substantial disadvantage in comparison with non-disabled persons?

6. If so, did the respondent breach the duty to make reasonable adjustments?

    6.1. Were there reasonable adjustments that could have been made?
    6.2. If so, would this adjustment have avoided the disadvantage?

7. If so, did the respondent know or was it reasonable to expect the respondent to know of the claimant's disability and that the claimant was likely to be placed at a substantial disadvantage by the PCP?

Harassment (s26 Equality Act 2010)

8. Has the respondent or one of its employees engaged in unwanted conduct related to disability? In particular does any of the following amount to unwanted conduct related to disability:

    8.1. Eiddwen Borland's "comfort zone" remark;
    8.2. Bev Lovatt's email of 8th September 2014; or
    8.3. Bev Lovatt's email of 9th September 2014.

9. Did this conduct have the purpose of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant?

10. Did this conduct have the effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant?

11. If it had "the effect" referred to in 10 (above) was it reasonable for this conduct to have that effect, taking into account the claimant's perception and all the circumstances of the case?

12. If unwanted conduct was undertaken by an employee of the respondent, was this done “in the course of that employee’s employment”?

13. If yes, did the respondent take all reasonable steps to prevent this employee from doing that act or doing anything of that description?

Victimisation (s27 Equality Act 2010)

14. Did the claimant’s email of 8th September 2014 amount to a “protected act”?

15. Did the claimant express the intention of lodging an employment tribunal claim and was this a protected act?

16. If yes, did the respondent subject the claimant to a detriment? In particular do Bev Lovatt’s emails of 8th and 9th September 2014 subject the claimant to a detriment?

17. If yes, was this because the claimant had sent the 8th September 2014 email or expressed an intention of lodging an employment tribunal claim?

Time limits

18. Are any of these claims time-barred?

    18.1. Is there a continuing act of discrimination extending over a period of time, or a series of distinct acts?

    18.2. If any claim has not been presented within time, is it just and equitable for the time limit to be extended?

<u>The Hearing</u>

12. Throughout these proceedings, Mr Caulcutt has been represented by Mr Doughty, a retired trade union representative; DWP have been represented by Mr O’Reilly, solicitor, and at the hearing by Mr Tinkler, counsel.

13. The case had been listed with a time estimate of 4 days and was heard between 11th and 14th January 2016 at Llangefni County Court. The tribunal had the benefit of an agreed chronology and an agreed bundle of 467 pages. Detailed witness statements had been prepared for each of the 7 witnesses. Mr Doughty had also prepared a detailed written opening submission, which assisted Mr Tinkler and the tribunal in understanding the claimant’s case.

14. At the outset, the tribunal read the bundle of documents and witness statements, before proceeding to hear evidence. All witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: the tribunal had already read each witness's statement in full, so there was opportunity for supplemental questions before questions from the other side, questions from the tribunal and any re-examination. Mindful of Mr Caulcutt's health and the health of other witnesses, the tribunal ensured there were regular comfort breaks and that each witness felt able to stop at any time they needed to take a rest.

15. During the hearing, we heard evidence from:

    15.1. Barrie Caulcutt, the claimant;

    15.2. Peter Doughty, the claimant's trade union representative who had also worked at DWP prior to his retirement;

    15.3. Cheryl Jones, the claimant's line manager until September 2013;

    15.4. Leanne Lewis, the claimant's line manager between September 2013 and June 2014, who issued the First Written Warning and gave the Box 3 assessment;

    15.5. Eiddwen Borland, manager of the Caernarfon office and the claimant's line manager between June 2014 and September 2014;

    15.6. Bev Lovatt, Operation Manager, who considered the claimant's grievance in relation to the Box 3 assessment; and

    15.7. Alan Shenton, Work Services Manager, who heard the claimant's appeal in relation to the first written warning.

16. Unfortunately despite the best endeavours of parties, witnesses and representatives, whilst we were able to finish hearing evidence during the 4 days allocated to the case, there was insufficient time for closing submissions. By agreement, the tribunal ordered exchange of written closing submissions.

17. Whilst preparing Mr Caulcutt's closing submissions, Mr Doughty identified further possible claims under s15, s20 and s21 Equality Act 2010. He applied for permission to amend the claim; this application was opposed by the DWP. Having considered the written application and response, the employment judge ordered that the claimant provide further information about the amendment being sought and the respondent provide further information about any difficulty in addressing these claims. The application was listed to

be heard by the tribunal on 29th April 2016, with witnesses to attend in case they were required to give further evidence. Unfortunately witnesses were not able to attend on this date, so the hearing was re-listed for 28th September 2016. Unfortunately the employment judge was unwell and admitted to hospital in September 2016, so the hearing was re-listed for 11th January 2017. The employment judge apologises to the parties and witnesses for the additional stress that this delay has caused.

18. At the hearing on 11th January 2017, the tribunal listened to submissions from Mr Doughty and Mr Tinkler as to the claimant's application to amend the claim. The tribunal rose to consider this application in detail. Having considered the submissions and authorities such as *Selkent Bus Company Ltd v Moore* 1996 ICR 836, the tribunal carefully considered the interests of justice and the hardship that would be caused to either party by allowing / refusing the amendment. It concluded that the amendment sought was so wide it would entirely change the case and would necessitate recalling all the witnesses and new witnesses. The employment tribunal gave an oral decision with full reasons confirming that it was not granting permission to amend the claim to add further new claims of disability discrimination.

19. By consent, the tribunal then proceeded to consider closing submissions. Parties had already prepared and exchanged written closing submissions; at the hearing on 11th January 2017, both Mr Doughty and Mr Tinkler were able to orally present any final closing submissions. The tribunal reserved its judgment, but were able to have a chambers discussion on 11th January 2017.

<u>Findings of Fact</u>

Background

20. Mr Caulcutt has suffered with chronic asthma and severe eczema for all his life. His health had such a profound impact on his ability to attend school that he spent many of his teenage years living in a residential school for children with disabilities.

21. On 22 June 1981, at the age of 19, Mr Caulcutt started work with DWP as a clerical assistant, based in their Caernarfon office. Between 1981 and 2013 (ie for 32 years), he worked in a "back of house" role which meant he had no face-to-face contact with members of the public; he was based in the finance office, which was only shared with 1 or 2 colleagues. Happily this meant his asthma and eczema were well-managed and his attendance record was good. He had opportunities for promotion but chose not to pursue these as he was concerned about the impact different roles might have on his health.

22. In 1996 he was promoted to the role of finance officer and continued to work without contact with the public.

23. The tribunal notes, from a 2001 memo that the DWP had made reasonable adjustments to its Attendance Policy for Mr Caulcutt and had agreed that an additional 20 days' absence for asthma or eczema would be considered reasonable, meaning that reasonable sickness absence for Mr Caulcutt would be up to 28 days in any 12 month period. Mr Caulcutt considered this to be fair; he was very happy with the reasonable adjustments and with his flexible working arrangements which helped him to care for his daughter who has a severe learning disability.

24. By 2006, as Mr Caulcutt had such a good attendance record, by agreement, his disability related absence allowance had been reduced to 15 days, which meant reasonable sickness absence for Mr Caulcutt would be up to 23 days in any 12 month period. In fact, in 2010, 2011 and 2012, Mr Caulcutt only lost 4 working days through ill health each year, of which 2 days were disability related. His line manager, Cheryl Jones, noted his attendance record was "exemplary".

25. The DWP has "People Performance Procedures" under which Mr Caulcutt would have a Mid Year Review and a End of Year Review, at which point his performance would be assessed as being either Box 1, Box 2 or Box 3:

    - Box 1 means an employee has **exceeded** their expected outcomes and behaviour standards; there is an expectation that 20-25% of staff would achieve this rating.
    - Box 2 means an employee has **achieved** their expected outcomes and behaviour standards; there is an expectation that 65% of staff would achieve this rating.
    - Box 3 means an employee **must improve,** ie their outcomes and/or behaviours have not achieved a satisfactory standard; there is an expectation that 10% of staff would receive this rating.

26. Prior to his 2014 assessment, Mr Caulcutt had received Box 2 "Achieved" ratings for 15 consecutive years. There is a financial bonus attached to the award of a Box 1 or Box 2 rating. Conversely, if an employee repeatedly received a Box 3 rating, this would lead to disciplinary action.

Spring 2013: Proposed Changes to Mr Caulcutt's role / location

27. In 2013, changes in finance administration meant Mr Caulcutt's workload was reducing, leading his managers to consider alternative work for Mr Caulcutt. Mr Caulcutt was concerned that this might mean working in a public area, which he felt would have an impact on his health. In email exchanges in early 2013, Mr Doughty (Mr Caulcutt's trade union representative) and Cheryl

Jones (his line manager), proposed undertaking a stress risk assessment and referral to Occupational Health.

28. On 19th February 2013, Bev Lovatt (the Operations Manager for the area) and Eiddwen Borland (the Manager of the Caernarfon office) discussed "doing away with the finance room" in front of Mr Caulcutt. Given the claimant had worked in this separate room for 32 years, this was very insensitive and in fact led to Mr Caulcutt being off work with work related stress, asthma and severe eczema for 5 weeks.

29. Mr Doughty emailed Bev Lovatt and Eiddwen Borland on 20th February 2013 and pointed out their discussion was inappropriate and detrimental to Mr Caulcutt's health. Mr Doughty explained *"stress can aggravate [Mr Caulcutt]'s medical impairments…"*

30. On 7th March 2013, Mr Caulcutt's GP wrote to the DWP explaining Mr Caulcutt *"has suffered with stress and anxiety primarily due to concerns for his future job role and which is unfortunately having an impact on his other health conditions. He suffers with chronic asthma and severe eczema … his asthma is severe at times and occasionally requires treatment with steroids and antibiotics. With regard to his eczema he has to apply daily emollients and unfortunately also has thinning of the skin…He does find the eczema particularly troublesome and feels that it does impact quite significantly on his physical and mental wellbeing. He has had a back of house job for a number of years which has not had any confrontational content and this has had a positive impact on his health. I would be very grateful if it would be possible to take these factors into consideration with regard to his future employment."*

31. On 18th March 2013, whilst still on sick leave, together with his union representative (Mr Doughty), Mr Caulcutt attended a meeting with Cheryl Jones and Eiddwen Borland to discuss his return to work. During this meeting it was made clear to Mr Caulcutt that he was expected to move into the main section and be seated with his team, albeit this could be a non-customer facing role and Mr Caulcutt could have access to a room to apply cream in private. Mr Caulcutt explained that his concern about working with the public related to being prone to chest infections. He enquired about the possibility of being a Nominated Officer (a non-customer facing role) and was advised that DWP would look into this for him and would also look into a referral to the DWP's Reasonable Adjustments Support Team ("RAST").

32. On 18th March 2013, Ms Borland sought advice from the DWP's Complex Case Advisory Service ("CCAS"). Janine, HR Consultant commented it did not make sense that Mr Caulcutt could use the canteen in work yet needed a private room to work in.

33. On 20th March 2013, Mr Caulcutt was referred to occupational health.

34. On 23rd March 2013, Mr Caulcutt was invited to attend a formal attendance review meeting. His line manager, Cheryl Jones had phoned him ahead of sending this letter and made arrangements for him to initially return to work in the finance room as an interim measure. Ms Jones also devised a "fit for work" plan with Mr Caulcutt to support him to return to work.

The April 2013 Occupational Health Report

35. The Atos Healthcare occupational health report of 4th April 2013 concluded *"Working in a private secure room alone is Mr Caulcutt's perception that this will enable him to manage his conditions effectively. However from a medical point of view his conditions do not stop him from working in a communal room."* The tribunal notes that Atos did not seek access to medical records and did not see the GP's letter of 7th March 2013; Janet Watson, Occupational Health Adviser appears to have based this report solely on the referral form, Mr Caulcutt's absence record and a 20 minute conversation on 4th April 2013 with Mr Caulcutt.

The Move out of the Finance Room

36. Whilst Mr Caulcutt and Mr Doughty were concerned that Atos did not have a full briefing, they accepted that Atos's advice supported Mr Caulcutt being moved into the main room. Cheryl Jones arranged a stress risk assessment for Mr Caulcutt. Mr Doughty suggested that whilst considering the stress risk assessment, they should also consider reasonable adjustments for the planned move to fully address Mr Caulcutt's medical concerns. Ms Jones arranged for Ms Borland to attend the stress risk assessment as she had authority to agree reasonable adjustments.

37. By 1st April 2013, Mr Caulcutt had returned to work. Whilst Mr Caulcutt's absence (26 days) had exceeded his consideration point (23 days) under the DWP Attendance Policy, on 12th April 2013, his line manager Cheryl Jones decided formal action was not necessary.

38. On 18th April 2013, Mr Caulcutt and Mr Doughty met Ms Borland and Ms Jones, to consider Mr Caulcutt's new role and adjustments that could be made to make the transition into the main office easier. Important points that were raised during this meeting were:

    38.1. It was agreed Mr Caulcutt would have a covered bin, access to a clean room that he could lock for privacy and an additional 15 minute break in the morning and in the afternoon to apply cream.
    38.2. Mr Caulcutt noted that his eczema and asthma had deteriorated recently; he now needed to attend asthma clinic and had been referred back to the hospital to see his dermatologist.

38.3. Mr Doughty was concerned about targets and was told there were no individual targets, only office targets.

38.4. Mr Caulcutt voiced concerns that he would need his Disabled Employee Trigger Point to be adjusted as he was more likely to get chest infections working in an open plan environment. He was told that if his absence reached 23 days he would be referred to occupational health and they would "look at the options at that time".

38.5. It was agreed Mr Caulcutt would move to the main office on 1st May 2013 and would be located in the furthest point away from the public.

39. By email of 1st May 2013, Mr Doughty requested a new occupational health referral, as Mr Caulcutt's GP had confirmed that Mr Caulcutt had "chronic asthma" and that this was significantly different from ordinary "asthma" which had been referred to in the occupational health referral.

40. On 1st May 2013, Mr Caulcutt moved to work in the main room and Leanne Lewis became his immediate line manager. He was still undertaking some finance work and was working as part of the lone parent team in a non-customer facing role. Ms Jones's notes report that he was feeling a bit lost with the new procedures and worried that he was slower than colleagues; Ms Jones arranged for a colleague to sit with Mr Caulcutt to give him additional support in the first few days.

41. In July 2013 Mr Caulcutt was absent from work for 2 days due to an allergic reaction to hay fever medication. In September 2013 he was absent for 2 days due to breathlessness. In his return to work interview on 5th September, Leanne Lewis notes that he was still not completely better but was able to function within his job role. She also notes that Mr Caulcutt *"now takes diazepam to calm his feelings of anxiousness and needed to take them prior to returning to work"*. She also notes that Mr Caulcutt's GP had referred him for cognitive behaviour therapy.

The First Instruction to Attend Group Training

42. It was around this time (September 2013) that DWP were rolling out new training courses. Mr Caulcutt would have been required to attend this training, but was very concerned that attending group training would make him unwell. By letter dated 9th September 2013, Mr Caulcutt's GP requested DWP exempt him from attending this training; he explained that Mr Caulcutt was experiencing *"a period of increased stress"* and *"… He finds these group sessions/ meetings very difficult and feels they heighten his anxiety symptoms and he would find the need to take medication to ease his stress level if needed to attend. We would be grateful if possible that Mr Caulcutt be exempted from these meetings or other alternative arrangements."*

43. Upon receipt of this letter, at a meeting on 11th September 2011, Cheryl Jones (Mr Caulcutt's former line manager) and Leanne Lewis (Mr Caulcutt's new line manager) undertook an Individual Stress Risk Assessment with Mr Caulcutt and he was excused from attending the training course. Ms Jones recorded *"[Mr Caulcutt] wants it noted that his doctor states that there is a deterioration in his health and that being in an environment with perfumes and hairsprays are exacerbating his condition. He acknowledges that this is outside our control being a customer facing office, as we have already made reasonable adjustments for his health condition when placing him in the main office and deciding on his current job role, in line with current business needs."*

44. However, having discussed the matter further with Eiddwen Borland (the manager of the Caernarfon office), Ms Lewis subsequently had to instruct Mr Caulcutt that he was now obliged to attend the training. On 17th and 18th September 2013, Leanne Lewis sought advice from CCAS as to whether Mr Caulcutt should be exempt from attending an "Awareness" training session that was to advise staff of changes in the wider DWP. The notes of this discussion state *"[Mr Caulcutt] has produced a note from his GP however the note does not confirm that attending the event will have a direct detrimental effect on [Mr Caulcutt]'s health. In essence the letter reads more along the lines of the officer would prefer not to attend."* In her advice on 17th September, Susan Bowe, CCAS officer, concluded the request to be excused from the event was more likely to be a preference than a necessity and it was reasonable to convey to Mr Caulcutt that he needed to attend the training. In the discussion on 18 September 2013, "Sally G" in CCAS noted *"the employee has failed to provide medical evidence to support that he cannot attend due to a health condition"* and noted that Mr Caulcutt had now been told he had to attend the training. Sally G did note that she had discussed with Ms Lewis, the possibility of seeking OHS advice on how best to support Mr Caulcutt through training events.

45. As well as being worried about having to attend training, Mr Caulcutt had the additional pressure of Ms Borland mentioning (on two occasions; on 20th and 23rd September 2013) that he needed to attend training as he might have to undertake front line duties in March 2014 if the lone parent work reduced. Mr Caulcutt's email of 23rd September 2013 notes that he was now having to take diazepam every other day to be able to attend work.

46. Whilst Mr Caulcutt was concerned about the impact of attending training courses and of colleagues' perfumes on his health, by September 2013, Mr Caulcutt appears to have settled into his new role and tasks. His September 2013 Monthly 121 discussion form reports that he is *"enjoying [his] new role and new challenges"*. His Mid-Year Performance Review, dated 18th October 2013 did not identify any particular development needs and reports that whilst he has developed his own procedures that might be slower than other

procedures, he is training others and continuing to complete all the finance tasks alongside his lone parent work. There was no indication in the mid year report that Mr Caulcutt was at risk of not getting his "Box 2 mark" for the year.

47. In November 2013, Mr Caulcutt required hospital treatment for flu, a chest infection and exacerbation of his asthma and was off work for 5 days (11th to 15th November). In his "welcome back discussion" on 18th November 2013, Leanne Lewis notes Mr Caulcutt is *"still unwell, but feeling better than he did".*

48. On 20th November 2013, Mr Caulcutt completed a routine Display Screen Equipment questionnaire for Ms Lewis. In it, as well as noting his difficulty seeing the screen clearly, Mr Caulcutt noted *"My health condition (asthma) is affected by air pollutants (perfumes etc)".*

49. On 4th December 2013, Ms Lewis reviewed Mr Caulcutt's Individual Stress Risk Assessment with him, and noted *"[Mr Caulcutt] has mentioned that air pollution (fragrances, hairspray, aftershave etc) sometimes affects his breathing out on the office open forum…[Mr Caulcutt] has provided a print form guidance which states that DWP should protect staff from environments which make them unwell (Asthma Charter). Have discussed this at length, and we have agreed to have a week's trial, whereby if [Mr Caulcutt] feels his asthma is aggravated by triggers at work; he is able to use the allocated room to bring his breathing under control for a short period. [Mr Caulcutt] is concerned that he is having to take extra medication to remain in the office environment, e.g. ventolin three times daily as opposed to three times weekly. He is concerned about the long term effect this will have on his health."*

50. An asthma attack on 10th December 2013, caused Mr Caulcutt to be off work for two days. On 12th December 2013, in his welcome back discussion, Ms Lewis notes he is *"feeling better, but not 100%."* Mr Caulcutt explained that his asthma was significantly worse, such that the asthma nurse had advised him to carry his asthma alert card on him at all times. On Cheryl Jones (his former line manager)'s advice, Mr Caulcutt placed a copy of this card in DWP's first aid box.

51. By January 2014, the Lone Parent work for South East Wales, had been moved to Mr Caulcutt's office, which meant he had a significant increase in the volume of his work. However, everyone was aware this was a temporary situation and all were concerned that the Lone Parent work might be permanently taken away from the Caernarfon office in the near future. To this end, on 15th January 2014, Mr Doughty (Mr Caulcutt's union representative) wrote to Elaine Mahon, DWP's HR Business Partner, in the following terms: *"[Mr Caulcutt] is disabled and suffers with chronic asthma and eczema whilst it is accepted that stress can trigger / exacerbate these conditions. Moreover it should be noted that [Mr Caulcutt] qualifies for DLA for these disabilities…[he] has therefore worked with reasonable adjustments*

in place for many years (in finance) although possibly this understanding had not been formalised at that time. However with the demise of finance his situation had to be looked at again which led to a raft of reasonable adjustments being put in place which included non front of house work amongst other matters. He has now been offered a package under the VER scheme but [he] feels that he is essentially being forced to take the package as he suspects that the only alternatives would be either front of house work in Caernarfon or a transfer to the Bangor Contact Centre."

52. Mr Doughty also wrote to John Bisby, DWP's North and Mid Wales District Manager, on 17th January 2014, explaining *"I can confirm that [Mr Caulcutt]'s present back of house (non customer facing role or whatever it is called) is recorded as a reasonable adjustment because direct contact with the public leads to [Mr Caulcutt] becoming stressed leading to very serious asthmatic attacks which we would contend constitutes a substantial disadvantage."*

53. On 23rd January 2014, Leanne Lewis tried to refer Mr Caulcutt to the DWP's Reasonable Adjustments Support Team ("RAST"). (Despite the discussion of a referral in March 2013, Mr Caulcutt had not yet been referred for this support). Ms Lewis was advised by CCAS that she needed an up-to-date OHS report before the referral could be made to RAST.

54. On 27th January 2014, Mr Caulcutt was absent from work for one day, due to a stomach bug.

55. On 31st January 2014, Ms Lewis met Mr Caulcutt to discuss his situation. She had asked him to consent to a further OHS referral; Mr Caulcutt was considering this request. At the meeting on 31st January, Mr Caulcutt again reported that *"perfumes, hairspray, aftershaves and deodorants are irritating his asthma, and that in the time he has been placed in the open forum area (the past year) he needs to take a week's worth of meds (inhalers) in one day to cope."* Ms Lewis asked for medical evidence to support this. Mr Caulcutt was unhappy about another referral to OHS as he felt the previous referral had been biased. Mr Caulcutt also mentioned that he had been provisionally diagnosed as having general anxiety disorder.

56. Also on 31st January 2014, Ms Lewis sought assistance from CCAS. In the notes of this discussion, it is clear Ms Lewis felt Mr Caulcutt's attitude was inappropriate, but she felt unable to address this as a result of his anxiety.

57. On 3rd February 2014, Mr Doughty attended a joint union meeting with DWP. The minutes of this meeting confirm that John Bisby and Elaine Mahon assured Mr Doughty that all disabled employees would be entitled to access to reasonable adjustments and that each case would be looked at individually, bearing in mind the "reasonable" nature of any adjustment.

Further Instruction to Attend Group Training

58. On 5th February 2014, Mr Caulcutt's colleague, Ms Evans was due to attend training ("the Commitment course") that afternoon. In a conversation with Mr Caulcutt in the morning, she remarked that she couldn't cope with attending this training and had been awake in the night worrying about it. At 9.30am Ms Borland, Manager of the Caernarfon office, reminded Ms Evans that the training was about to begin, to which Ms Evans replied she was not feeling well and could not attend. Ms Borland then asked Mr Caulcutt to attend the training, to which he replied that he needed to take his Diazepam first, but this was at home. Mr Caulcutt texted his wife to ask her to bring in his medication, but was not able to speak to her and told Ms Borland he would not be able to attend the training either. Ms Borland commented *"nice to be able to pick and choose".* This comment was overheard by Mr Caulcutt and Ms Evans who were both upset. Mr Caulcutt told Leanne Lewis he felt he was being bullied by Ms Borland and wrote a formal complaint to Bev Lovatt, Operations Manager.

59. Also on 5th February 2014, Elaine Mahon advised Leanne Lewis that there needed to be an OHS referral a.s.a.p. and that it was not unreasonable to request that Mr Caulcutt attend training as the training was intended to assist him with future roles.

60. On 6th February 2014, Bev Lovatt met Mr Caulcutt. She offered to mediate between Mr Caulcutt and Ms Borland and advised him that Ms Borland would be on leave for two weeks. Ms Lovatt also asked Mr Caulcutt to consent to the OHS referral. Ms Borland was off work due to stress between 6th February 2014 and 10th March 2014.

61. On 7th February 2014, Mr Caulcutt provided consent for a further occupational health referral. In the weeks that followed, Ms Lewis sought advice from CCAS on the questions that were being put to the occupational health officer and discussed the wording of these questions with Mr Caulcutt.

62. On 12th February 2014, Mr Caulcutt was off work for one day due to an allergic reaction to the flu jab.

63. On 13th February 2014, Ms Lewis and Mr Caulcutt reviewed the Individual Stress Risk Assessment again and Ms Lewis noted *"Mr Caulcutt wishes for it to be noted that he feels his health has been deteriorating for many months. [Ms Lewis] acknowledges this and will await the outcome of the OHS in order to move forward."*

64. In a lengthy email on 17th February 2014 to Leanne Lewis, Mr Caulcutt explained the thought of going on the course in March was *"causing [him] great distress and is currently having an adverse effect on [his] health*

conditions which will only increase as the date gets nearer." He explained that to attend the course he would need to take a double dose of Diazepam before the morning and afternoon sessions and would have to try to concentrate on his breathing to get through the day. Mr Caulcutt explained that he was now under the care of the community mental health team and was taking sleeping tablets. He reported his asthma was deteriorating daily and he had been prescribed steroids: he was suffering an acute exacerbation of asthma and his eczema was requiring more steroid ointment. He commented *"Anxiety of course is a major trigger for both conditions."* In this email, Mr Caulcutt then set out a list of reasonable adjustments that he considered would assist him to complete the training without risking his health. These included the trainer providing him notes instead of him attending the course; Mr Caulcutt meeting the trainer for a short period or Mr Caulcutt learning from a colleague instead of attending the training. Mr Caulcutt also made it clear he was not refusing to attend training; he was just asking to be able to do it in a different format. Finally he noted that when he had completed his therapy sessions, attending training may not be as big a problem as it was at that point in time.

65. By email of 18th February 2014, CCAS (who had considered Mr Caulcutt's request of 17th February) advised Cheryl Jones that none of his suggested adjustments would be possible. Instead, she should look at the specific aspects of the training that were making Mr Caulcutt anxious and try to make adjustments around these, for instance, suggest Mr Caulcutt sit near the back or by a window.

66. By email of 20th February, Cheryl Jones wrote to Mr Caulcutt explaining that the nature of the training required a group dynamic; non attendance would mean Mr Caulcutt would not have been "upskilled" and he would be at a disadvantage in performing possible future job roles. HR and CCAS had advised it was a reasonable request to require Mr Caulcutt to attend this training. Ms Jones was looking into the possibility of Mr Caulcutt attending a later course to enable him to attend further counselling in the meantime. He would have a room available for breathing exercises before, after and during the training session.

67. In response to this email, by email of 20th February 2014, Mr Caulcutt explained that a reasonable adjustment is one that removes the substantial disadvantage that is affecting the disabled person - the separate room for breathing exercises would not remove the feelings of panic and anxiety he would experience whilst in the training room or the anxiety that was affecting his health in the run up to the training session. Further, how could he be upskilled if his health condition, or the considerable medication he would have to take to be in the room, prevented him from participating in the discussion.

68. Ms Jones forwarded Mr Caulcutt's latest email to Bev Lovatt, who rather unhelpfully, coldly commented about Mr Caulcutt's serious concerns "I despair."

69. By email of 20th February 2014, Elaine Mahon, DWP's HR Business Partner added her thoughts to the advice Ms Jones had previously received. She advised *"[Mr Caulcutt] needs to decide to either do the training in Caernarfon (with his reasonable adjustments as normal / required) or…delay and do it elsewhere in a few week's time ..which will probably be a in a different location……[Mr Caulcutt]'s participation in the session is down to [Mr Caulcutt]….If he is able to attend but unable to participate and all the reasonable adjustments are in place for him, then it would impact on his ability to do the job and then it becomes a capability issue….it does beg the question, if [Mr Caulcutt] thinks he may not be well enough to participate in the training required to do the job, then can he confidently know will he be well enough to do the job?".*

70. On 21st February 2014, Ms Jones stated in her email to Mr Caulcutt, *"all reasonable adjustments have been discussed and are in place ie private lockable room for your use ie application of emollients, breathing techniques etc….any reasonable adjustments you require on the training days you could discuss with your line manager eg sitting by the window or by the door and being able to leave the training room for short periods… The decision has been made that management expect you to attend the training. It is now your decision whether you will attend the training on 4th and 5th March or…attend …at a later date in another office"*

The February 2014 Occupational Health Report

71. On 21st February 2014, Leanne Lewis completed the OHS referral form. In it she explains Mr Caulcutt's relevant conditions are *"stress, anxiety, panic attacks, chronic asthma, severe eczema and general anxiety."*

72. In her occupational health report, dated 26 February 2014 and addressed to Leanne Lewis, Sharron Shewan, Occupational Health Adviser notes that Mr Caulcutt's asthma and eczema *"had stabilised more effectively as he got older, until approximately 12 months ago when he was moved to an office with other employees…**his sickness absence has significantly increased over the last 12 months, having 47 days' absence on 7 occasions whereas the previous 12 month period had 5 days' absence on 3 occasions….***

"…Management may wish to consider allowing Mr Caulcutt to return to his previous working environment, reducing exposure to the apparent triggers such as perfumes, deodorants, open plan office area where he is likely to contract more infections which in turn exacerbates the

asthma and eczema, as this was assisting his health and there has been a deterioration with this since moving to his current environment….

"….In my opinion unless there is a change to Mr Caulcutt's working environment his physical health is likely to remain poor or worsen."[Tribunal's emphasis]

73. In light of the recommendations in the OHS report, Mr Caulcutt questioned whether he still needed to attend the training. Ms Lewis stated that he did need to attend the training and he wouldn't be allowed to be based in the finance room again. Mr Caulcutt requested an urgent meeting with Bev Lovatt. On 3rd March 2014, Bev Lovatt met Mr Caulcutt and told him that he must attend the training course the next day. She also rather disingenuously, told Mr Caulcutt that she had not been involved in the decision that he had to attend; her thoughts on his request for reasonable adjustments had been clear in her "I despair" email of 20th February 2014.

The Training Session on Tuesday 4th March 2014

74. On 4th March, fearing he would be disciplined if he did not attend, Mr Caulcutt tried to attend the training session. He took two Diazepam and two Imodium before leaving home and was sick on arrival at work. He sat at the back of the training room and a friend opened a window to help with the air quality. He tried his breathing techniques and tried focusing on a photo of his daughter. Someone joked about Mr Caulcutt's volumetric (an appliance that is used with an inhaler) looking like a cocktail shaker, but in his state of panic, Mr Caulcutt felt everyone was laughing at him. During the first speaker Mr Caulcutt had to leave the room and wasn't able to return until the tea break. Immediately after the tea break, Mr Caulcutt had to apply creams and his skin bled through his shirt. When he returned to the training room, Mr Caulcutt had a panic attack, during which he was sick, and started to cry uncontrollably. A colleague cleared other staff from the room, but Mr Caulcutt's panic attack, triggered a very severe asthma attack. Luckily Paul Phipps, the first aider was able to follow the guidance on Mr Caulcutt's emergency asthma card, as Mr Caulcutt was not able to talk and he could barely breathe. Leanne Lewis phoned for an ambulance and a Rapid Response paramedic attended. Mr Caulcutt was taken by ambulance to A&E, on oxygen, attached to a heart monitor and with a cannula fitted for medicine. His consultant advised he'd had a severe asthma attack. Mr Caulcutt described it as being the worst asthma attack he had experienced since childhood; he thought he was dying. Mr Caulcutt was discharged from hospital late in the afternoon, but described feeling "in a state of shock" for weeks afterwards.

75. Incredibly, on 6th March, rather than expressing concern about Mr Caulcutt's health, given his life-threatening asthma attack the previous day, his

managers were more concerned with chiding him for not correctly following the absence reporting procedure. As Mr Caulcutt remarked, he didn't think he needed to phone in sick given that he'd been "carted off in an ambulance". Leanne Lewis's notes of 10th March 2013 record that she was the only manager to enquire after Mr Caulcutt's health after that life-threatening incident. This is a very poor reflection on the other managers that were also responsible for Mr Caulcutt's health and safety.

The First Written Warning

76. On 10th March 2014, Mr Caulcutt briefly returned to work ahead of a GP appointment at 10.30am. At that appointment, his GP signed him off work for two weeks, due to anxiety / the asthma related admission. Mr Caulcutt briefly returned to work to give Ms Lewis his medical certificate, at which point she suggested he should consider the VER package that was being offered as the department was changing and he needed to consider his health.

77. Whilst Mr Caulcutt was at home recovering from this severe asthma attack, Ms Lewis phoned him to advise him his office was losing the South Wales lone parent work and so he would need to consider front line work. Ms Lewis said she knew Mr Caulcutt would not like this, but these were the only jobs that would be available, so Mr Caulcutt should consider the VER package if he couldn't manage this work. Ms Lewis also mentioned that she would be sending Mr Caulcutt a letter about his absence level. Mr Caulcutt said he had not passed the trigger point, but Ms Lewis said she needed to give him 5 days notice of the meeting.

78. Ms Lewis's letter of 17th March 2014 advised Mr Caulcutt that his absences had reached the point where she had to consider formal action; "the Trigger Point". Her letter explained he was invited to a meeting on 24th March 2014 at which he would have an opportunity to discuss any problems affecting his attendance and Ms Lewis would explain any help and support available. The letter warned,

    "…I also have a duty to remind you that your employment with [DWP] could be affected if your attendance remains unacceptable. At the end of the meeting I will decide what further action to take. This may mean that you are given a First Written Warning followed by a 6 month Review Period. I may also refer you to [OHS] but only if you agree. The OHS specialises in giving advice on preventing or resolving health related problems that affect your ability to attend work or do your job."

79. Mr Caulcutt's Disabled Employee's Trigger Point was 23 days in a rolling 12 month period, of which up to 8 days could be for reasons not related to disability.

80. DWP's Attendance Procedure provides:

"2.4 If the Trigger Point is increased it is known as the Disabled Employee's Trigger Point….Formal action will begin when:

- *Absences that are not related to the disability reach or exceed 8 working days or 4 spells of absence; or,*
- *The combination of disability-related and any non-disability related absences reach or exceed the Disabled Employee's Trigger Point.*

…

2.6 The formal stages for irregular absences are:
Stage 1- First Written Warning
Stage 2 - Final Written Warning
Stage 3 - Consideration of dismissal / demotion
Stage 4 - Dismissal / demotion

2.7 A First or Final Written Warning is followed by a 6 month Review Period. If attendance is satisfactory during this period, no further action is taken except that the employee entered a phase called the "Sustained Improvement Period". This lasts for 12 months from the end of the 6 month Review Period. If attendance becomes unsatisfactory during the Sustained Improvement Period, the Sustained Improvement Period ends and formal action resumes from the next stage. This means that:

- *A Final Written Warning is considered if a First Written Warning has already been given, or*
- *Demotion or dismissal is considered if a Final Written Warning has already been given.*

2.8 Attendance is unsatisfactory during the Review Period if it reaches 50% of the employee's day Trigger Point….

2.9 Attendance is unsatisfactory during the Sustained Improvement Period if it reaches the employee's usual Trigger Point in a rolling 12 month period between the date of the First or Final Written Warning and the end of the Sustained Improvement Period."

81. Turning to consider Mr Caulcutt's absence in the 12 months covering 18th March 2013 to 17th March 2014:, up until 4th March 2014 (when he experienced the severe asthma attack at the training event), Mr Caulcutt had 13 days' absence:

Dates	Reason	Working days absent	Cumulative Total

25.2.13 - 1.4.14	Work related stress	Cheryl Jones disregarded this absence as it had been triggered by an incident in work	
10.7.13 - 11.7.13	Reaction to hay fever medication	2	2
2.9.13 - 3.9.13	Asthma	2	4
11.11.13 - 15.11.13	Flu / chest infection / asthma hospital treatment	5	9
10.12.13 - 11.12.13	Asthma	2	11
27.1.14	Stomach bug	1	12
12.2.14	Allergic reaction to flu jab	1	13

82. Following the severe asthma attack at the training event on 4th March 2014, Mr Caulcutt had been absent from Wednesday 5th March until Monday 10th March (3 days); he had attended work on Monday 10th for 90 minutes before being signed off until 24th March 2014 (a further 5.5 days absence including 17th March 2014). This meant at the point of writing her letter on 17th March 2014, Mr Caulcutt actually had 21.5 days' absence in the previous 12 month period and had not yet exceeded his Trigger Point.

83. Ms Lewis realised she had made an error in calculating Mr Caulcutt's absence level and phoned Mr Caulcutt to explain she would be sending an amended letter.

84. On 24th March 2014 Mr Caulcutt returned to work and Ms Lewis completed his Welcome Back discussion. They agreed a two-week workplace adjustment (reduced hours).

85. On 25th March 2014 Ms Lewis wrote a similar letter to that quoted in paragraph 81 above, with the only difference being that this one stated *"From 23.03.13 to 23.03.14 you have been absent from work due to sickness for 30 days. This means that your absences have reached the point when I must consider formal action (called the Consideration Point)."* The letter invited Mr Caulcutt to attend a meeting on 1st April 2014.

86. By 23rd March 2014, Mr Caulcutt had 25.5 days' absence in the previous 12 months, so he had exceeded his Disabled Employee's Trigger Point of 23 days, however, 12.5 of these days stemmed from the severe asthma attack that he suffered attending the training session.

87. Upon receipt of this letter from Ms Lewis, on 25th March 2014, Mr Caulcutt phoned CCAS for advice. Melanie Truelove advised him, "*There is information in Attendance Management Procedures Paragraph 3.2– Special Circumstances which may apply in your case and that you can discuss within the meeting. Attendance Management Advice Q 9 also contains information which you may find helpful.*

88. The sections Mr Caulcutt was being referred to provide:

"***Attendance Management Procedures***

*3.2 The manager must consider all known circumstances and have a possible course of action in mind before the meeting. However, the outcome of formal action is **not** predetermined, and interviews can result in one or more <u>outcomes</u>. They should not give a First Written Warning at the meeting if either:*

a) One of the circumstances detailed in the list below applies:

- *Reasonable adjustments have been identified but not yet made.*
- *The employee is disabled, the absence is directly related to the disability and it is reasonable to increase the Trigger Point.*
- *Absence due to injury leave, up to a maximum of 6 months.*
- *Taking into account the exceptional nature and/or circumstances of the absence and the employee's satisfactory attendance record it would be perverse, unfair or disproportionate to give a warning. An employee has a satisfactory attendance record if their absence level before the current episode was below the Trigger Point in effect at that stage of the procedures….*

or

b) They believe for reasons not detailed in the list that a First Written Warning would be inappropriate….An occasional fluctuation of the level of disability related absence would usually be supported and would not normally trigger warning or dismissal action."

"Attendance Management Advice

Question 9. When should the manager consider taking attendance management action for someone with a Disabled Employee's Consideration Point?

… the combination of disability-related and any non-disability related absences reach or exceed the disabled employee's consideration point then formal action should also be considered.
<u>Example</u>

Deciding what is a reasonable level of absence to support for a disability is not an exact science and decisions to take formal action should not turn on a disabled employee going a day or two over their consideration point;

Before taking action the manager should first consider whether the reasons for the consideration point being reached or exceeded and the business impacts of this justify tolerance of the higher level of absence.

The manager should consider taking formal action where:

- *There has been no relevant changes to the employee's disability, such as treatment or prognosis; and/or*
- *Absences are in excess of what the OHS considers reasonable for the condition, taking into account the nature of the disability, the employee's record, treatment history etc.*
- *The disabled employee's consideration point has been reached or exceeded and the absences have risen to a level which can no longer be supported.*

Up to date OHS advice may be needed to establish whether there has been any change to the disability and the effects/ effectiveness of treatment."

also relevant is advice given under Question 6

"Disabled employees' consideration points should be managed with a small amount of leeway to avoid causing anxiety from the risk of a warning."

89. DWP's "A to Z of reasonable adjustments" document also provides:

"Attendance Management: All staff, regardless of disability, should be subject to the department's policies and procedures. However, if attendance is unsatisfactory, before initiating any policy procedure we must ensure that it is not for a reason related to the person's disability and if so, that we have exhausted all options in relation to providing reasonable adjustments that might enable them to improve their attendance or performance. RAST can assist with advice on the options in relation to providing reasonable adjustments but are not able to advise on attendance management policy related issues."

90. On 26th March 2014, the day after receiving Ms Lewis's letter, Mr Caulcutt asked Ms Lewis to find out if VER was still available to him. Ms Lewis made enquiries and it was agreed that Mr Caulcutt could accept the package provided he did so by the end of 27th March 2014. Following discussions with his wife, Mr Caulcutt decided not to accept the VER package.

91. On 1st April 2014, Ms Lewis conducted Mr Caulcutt's Attendance Review Meeting. Mr Caulcutt was supported by Paul Phillips, trade union representative and Cheryl Jones attended to take notes. Pertinent points from this meeting were:

    - Ms Lewis initially thought Mr Caulcutt had 30 days' absence but subsequently agreed it was 25.5 days' absence.
    - Mr Caulcutt explained his health was deteriorating and his anxiety was affecting his asthma which then made him more anxious.
    - Mr Caulcutt explained if he had a written warning with his health deteriorating he would not be able to take sick leave and would have to use his holidays
    - Mr Caulcutt referred to the advice received from CCAS and submitted that a few days over the disability consideration point was acceptable
    - Mr Phillips pointed out that Mr Caulcutt was a good employee who had never had a warning and it would be unfair to issue a warning if it may exacerbate his condition.
    - Mr Caulcutt was concerned that he would struggle in the new role and needed Ms Lewis to look at the reasonable adjustments to ensure they had all been exhausted
    - Ms Lewis emphasised that Mr Caulcutt would be customer facing in the new role and "categorically" he would not be moving back to finance.

92. In her notes, Ms Lewis had noted that Mr Caulcutt's consideration point was 23 days but had previously been 28 days.

93. Following the meeting on 1st April, Ms Lewis sought advice from CCAS. The advice she received from Stephanie Cowie included *"We discussed that the OHS report has recommended reasonable adjustments for the business to consider. I advised if consideration has been given and there is rationale behind why the recommendations cannot be implemented then the formal attendance action can proceed. We discussed the outstanding referral to RAST. I explained that the business can choose to either issue the warning now and if any new information is highlighted from RAST referral rescind the warning if appropriate, or await the outcome of the referral and take the necessary action at that stage. You will need to consider that the RAST referral may not conclude quickly and that potentially the member of staff could have cleared 3-4 weeks in their review period had the warning been issued immediately."* <u>The tribunal notes this advice contradicts DWP's policies (see paragraphs 91 and 92 above, which explicitly require a manager to have exhausted all options before initiating attendance management action).</u>

94. On 1st April 2014, Ms Lewis wrote to Mr Caulcutt confirming she was giving him a First Written Warning and that his attendance would be monitored for the next 6 months ("the Review Period"). She explained that if his attendance was unacceptable at any time during the Review Period she may issue a Final Written Warning and if it continued to be unacceptable after this he could be dismissed. Sickness absence of 11.5 days or more in the 6 month Review Period would be unacceptable. She went on to explain that if his attendance was satisfactory in the Review Period, his attendance would be monitored for a further year. This meant if his absence exceeded 23 days in a rolling 12 month period in the next 18 months he would face a final written warning and even dismissal. As Mr Caulcutt was also being told that he was expected to move into a customer facing role, this must have caused him tremendous anxiety.

95. In her witness statement, Ms Lewis explained her decision to give Mr Caulcutt the warning as follows:

- She decided against increasing his Disabled Employee Trigger Point *"because his pattern of absences did not show that he was unable to keep within it".*
- She did not regard the warning to be inappropriate *"as [she] could not say that there was a reasonable expectation of improvement"*
- *"[She] was satisfied that all reasonable adjustments had been made".*
- She was not persuaded to disregard the period of absence following the asthma attack at the training course as *"all reasonable adjustments had been made and the claimant was properly required to attend the training course".*

96. In cross examination it was apparent that Ms Lewis did not fully comprehend the DWP's reasonable adjustment processes. She accepted that at the point of giving the written warning, Mr Caulcutt had a disability that was deteriorating, he was working in a hostile environment (for his asthma) and would be facing further challenges in the changing role; she could not clearly articulate her reasons for giving the warning other that saying she did it *"because of the circumstances".* She agreed that she did not write down her reasons / rationale for giving a warning and could not explain how she had actually taken into account all the circumstances. When it was suggested that Mr Caulcutt's asthma attack at work could have been regarded as an industrial accident (which permits up to 6 months' absence), Ms Lewis initially replied that the decision to send Mr Caulcutt on the training course was not her decision; she then said that Mr Caulcutt could have looked at it being an industrial accident, without realising that <u>the onus was on her</u> to consider whether it should be regarded as an industrial accident so this absence was discounted. Ms Lewis also admitted that on Mr Caulcutt's attendance record, she had erroneously recorded the time off after the severe asthma attack in

work as being due to "anxiety" rather than "anxiety / asthma-related admission" as the GP certificate had stated; she had also indicated that this absence was not disability-related on Mr Caulcutt's attendance record.

97. Ms Lewis had completed the RAST (Reasonable Adjustments Support Team) referral form on 31st March 2014, but she did not email this to them until 2nd April 2014. The form asks whether the employee has a customer facing role, to which Ms Lewis responded *"Not currently, but this is due to change in May 2014".* In the referral, Ms Lewis explained "*Barrie has chronic asthma and eczema and he feels that the air quality in the office is detrimental to him. This is due to perfumes aftershaves deodorants and hairspray as worn by colleagues and members of the public..... A recent OHS recommended that Barrie is relocated to his previous location, however this is not possible due to business needs and the nature of Barrie's duties (assistant work coach)."*

The Box 3 Marking

98. Mr Caulcutt's End of Year Performance Review was dated 3rd April 2014. Ms Lewis has selected Box 3 as the final rating for his overall performance between 1st April 2013 and 31st March 2014. Mr Caulcutt was unaware of this assessment until May 2017 (see below). It is difficult to identify from this document, or indeed any document, how Mr Caulcutt was not achieving the expected outcomes or behaviour standards. This is surprising as the DWP's People Performance Procedures explains that *"the manager and employee are jointly responsible for having regular performance discussions throughout the year….They are vital to ensure employees are aware of their performance against the 'What' delivery of objectives and the 'How' impact of behaviour competencies and values…..Managers should use these discussions to give feedback by recognising good performance and achievements and* ***identifying any areas needing further development or remedial action to be taken….Depending on what is being discussed it may be useful to record brief notes of the main points of the meeting.****" [tribunal's emphasis]*

99. On 7th April 2014, as he was going to be commencing a new role, Mr Caulcutt started his Individual Training Plan (for front-line work); this envisaged him being fully working on the front line by 19th May 2017. Mr Caulcutt was very anxious about working directly with the public especially as some of DWP's clients were having benefits sanctioned and were angry. He increased his medication and was having to take more painkillers as his eczema became worse.

100. By letter dated 7th April 2014, Mr Caulcutt appealed the written warning. His letter explains:

- it had been distressing receiving the letter whilst off sick with anxiety and asthma;

- the calculation of 30 days was inaccurate as he had only been off for 25.5 work days;
- Q9 guidance on Attendance Management explains that the disability consideration point is not an exact science so a manager should allow 1 or 2 days over and he was only ½ day over this….and this ½ day was when he was taken into hospital from work in an ambulance;
- reasonable adjustments had been identified by OHS that would greatly reduce his absence;
- DWP had not exhausted reasonable adjustments and RAST had not yet been involved;
- through stress risk assessments and OHS reports his manager was fully aware work place factors were a major contributing factor in the deterioration in his health;
- his manager could just increase his disability consideration point in the short term as it had been reduced previously;
- the Attendance Management Policy says "occasional fluctuation of level of disability related absence would usually be supported"; and
- the written warning itself puts [him] at a substantial disadvantage given the physical and psychological nature of disabilities and that his most recent OHS said his health is likely to remain poor or worsen.

101. On 9th and 10th April 2014, Ms Lewis had discussions with Jo Leyland, from DWP's RAST team. Surprisingly, nobody in the RAST team had any discussions with Mr Caulcutt himself, at any time.

102. As a result of the discussions with RAST, on 10th April, Ms Lewis emailed Ms Shewan (who had provided the February 2014 OHS report) to enquire whether Mr Caulcutt would be assisted by DWP installing a hot or cold humidifier in the office. In addition, Ms Leyland (RAST Case Consultant) instructed Trilium to assess the air quality in the Caernarfon office. In her email of 17th April she stated *"[Mr] Caulcutt feels the air quality is effecting his health condition and we would therefore request the check is performed ASAP."* The tribunal were surprised by the lack of detail provided in this instruction.

103. On 10th April 2014, Mr Caulcutt contacted CCAS for further guidance in relation to the first written warning. Kate Hemsworth advised him *"when Q9 of the [Attendance Management Advice] refers to formal action not hinging on employees going "1 or 2 days over the trigger point". this isn't specifically 1 or 2 days but more an intent that managers should be reasonable in all the circumstances. You went 2.5 days over the consideration point - we discussed that although this is over 1 or 2 days, this doesn't mean that the principles of Q9 can't be considered."*

104. On 23rd April 2014, Mr Caulcutt contacted CCAS for further guidance. Suzanne Lloyd advised him:

"Occupational Health recommended that you be moved from your current working environment, which your managers say is not an option, they have however engaged RAST to look at what can be done to improve your working environment. Employee Assist recommends that you put to the Appeal Manager that as reasonable adjustments are outstanding a warning is not appropriate and this is certainly something worth including in your appeal.

You have also been reading about the asthma charter and mental health charter that DWP have signed up to and are considering including these in your appeal. If you think that the decision made about you contravene what has been signed up to in these charters then this is also relevant to your appeal."

105. On 1st May 2014, Alan Shenton heard Mr Caulcutt's appeal against the written warning. Mr Caulcutt was supported by Gail Moore his trade union representative. Leanora Watkins attended as note-taker. During the course this meeting, Mr Caulcutt mentioned that other colleagues had not received attendance letters when they were off work. He stated that his disability consideration point had only been breached by 2.5 days; he had taken advice from CCAS who had said it could have been waived due to the circumstances of the asthma attack at work that led to him exceeding the consideration point. Mr Caulcutt explained Ms Lewis was well aware his condition was deteriorating and that reasonable adjustments in the OHS report had not yet been made.

106. In his letter of 7th May 2014, Mr Shenton explained that Mr Caulcutt's appeal had been unsuccessful. His findings were:

"I agree that your line manager made an error in issuing a formal letter…after only 14 days of continuous absence…However the First Written Warning was issued to you under the Department's Irregular Attendance process and not the Continuous Absence process. Therefore whilst regrettable this was not a failure to follow the attendance management process…

….Whilst it is clearly wrong that you were issued with a formal letter, you were told, before and upon receipt, not to worry and to ignore its tone.

You also told me that your line-manager incorrectly stated the number of days that you were absent at the start of your First Written Warning interview. The minutes of the meeting confirm this. Again it is regrettable that this error was made. However the revised number of days absent was still in excess of your trigger point and therefore a First Written Warning could still be considered at that interview.

As you stated…the Department's Attendance Management Advice refers to the decision making process in cases where disabled employees slightly exceed their trigger point. Having read the guidance, the case notes and your line-manager's requests for guidance from CCAS I am satisfied that she took full account of all the relevant factors before issuing the warning and her decision did not "turn on a disabled employee going a day or two over their Trigger Point.

…It is clear from the case notes and from what you told me that discussions around "reasonable adjustments" had been ongoing for some time. Although there is still no agreement between yourself and your manager on this subject, I am satisfied that there were genuine ongoing efforts on their part in supporting you stay in work."

107. On 7th May 2014, Mr Caulcutt learnt for the first time of the Box 3 mark; in his evidence, he explained he was not aware of the Box 3 marking until 7th May 2014, when Ms Lewis told him she had provisionally given him this rating. Mr Caulcutt was shocked by this news as he had not previously been given any indication that Ms Lewis was unhappy with his work.

108. On 13th May 2014, Mr Shenton wrote a further email to Mr Caulcutt explaining "*It was only when I received Leonara's minutes that I realised I hadn't covered your last point in my decision letter and I sincerely apologise for this….The point to which you refer was that, in your opinion, the last two periods of sickness were work related caused by the pressure of attending the Claimant Commitment training. I think that the issue of what reasonable adjustments should have been in place will only be clear once the RAST report has been completed. Until that point there remains a difference of opinion between yourself and your manager. If RAST suggest that more needs to be done to support you in the workplace then a decision will need to be taken on whether those measures were relevant to your attendance at the Claimant Commitment training. If they were, then my expectation would be that your First Written Warning will be rescinded.* Crucially, Mr Shenton had missed the fact that Mr Caulcutt had suffered an asthma attack at the training event, so he did not consider the provisions in the Absence Management Procedures relating to industrial injury. In part he had missed this, as Ms Lewis had accidentally attributed this absence as being due to "anxiety" rather than "anxiety / asthma-related admission".

109. By email dated 15th May 2014 and addressed to Ms Lewis, Mr Caulcutt objected to the Box 3 marking: *"…As you know the box marking awarded at the end of the reporting year shouldn't come as a surprise and I'd had no indication that my work was not up to the required standard….If the matter can't be resolved then as discussed I would like you to accept this email as a request for a grievance."*

110. During a meeting on 20th May, Ms Lewis advised Mr Caulcutt that she needed more evidence to be able to change the mark to a Box 2. She explained that she saw his performance as coming into the "must improve" bracket overall. She also told Mr Caulcutt that he could improve his mark by upskilling on frontline duties. Mr Caulcutt provided more evidence by email of 22nd May 2014. On 28th May 2014, Mr Caulcutt provided further evidence again, which explained the additional duties that Mr Caulcutt undertook relating to finance and as stationery clerk and secure print officer, which, he stated, took up to 2 hours each day. Mr Caulcutt also explained that his medical breaks took 30 minutes each day. Mr Caulcutt submitted that as he only had 2 or 3 hours each day to work on lone parent tasks, it would be unfair to expect him to meet the lone parent benchmark of 40 to 50 appointments booked daily. The tribunal notes that Mr Caulcutt had previously been told in his meeting with Ms Borland in April 2013 that there were no individual targets.

111. On 3rd June 2014, as he was finding it difficult to cope with frontline duties, Mr Caulcutt enquired about the possibility of moving to Bangor to a non-customer facing role. Working from Bangor would entail extra travel, and transport costs for Mr Caulcutt and presented difficulties caring for his daughter. Ms Borland passed on Mr Caulcutt's enquiries about reasonable adjustments that would be available at Bangor.

112. On 12th June 2014, Ms Lewis decided that Mr Caulcutt's evidence was insufficient to change the mark and told Mr Caulcutt that the Box 3 mark would not been changed. When he said that he had submitted lots of evidence as requested, she replied that his behaviour was pulling him down too. When he asked what she meant, Ms Lewis said that he had caused her lots of additional work due to HR matters. Mr Caulcutt explained that this was not fair as he was only exercising his rights as a disabled employee.

113. In evidence, when asked to explain the Box 3 marking, Ms Lewis said she would give work out each day to her team based on what each person had been able to complete previously. She felt that Mr Caulcutt seemed to spend a lot of time looking at guidance on his computer.

114. In a chain of emails on 20th June 2014, it was clear that Mr Caulcutt's complaint about the Box 3 marking would not be resolved informally; the chain ended with Ms Lewis explaining Mr Caulcutt needed to complete a G1 form, which starts the formal grievance procedure.

115. By email of 26th June 2014, Ms Leyland, RAST adviser, forwarded to Ms Lewis the emails from Trillium which confirmed they could only complete temperature and humidity checks and that the readings for these had fallen

within the acceptable range for a workplace. Mr Caulcutt was not advised of this until his meeting with Eiddwen Borland on 24th July 2014.

Mr Caulcutt's grievance about the Box 3 marking

116. On 1st July Mr Caulcutt emailed a formal grievance to Ms Lewis in an attempt to challenge the Box 3 marking. In it he submitted that Ms Lewis should have held regular 1-2-1 meetings and he should have been made aware if his performance had dipped since the mid term review. He also complained that Ms Lewis's attitude and style of management had completely changed…. *"Until [Ms Lewis] can understand that my disabilities affect my work and my work affects my disabilities then my health and possibly my performance will continue to suffer as my OHS report stated."*

117. Ms Lewis was absent from work between 1st July and 5th August 2014. On 3rd July, Mr Caulcutt emailed his grievance to Ms Borland (who was his line manager during Ms Lewis's absence). Ms Borland requested information as to why the grievance was being presented out of time. Mr Caulcutt explained he had originally requested a grievance in his email of 15th May, but had been trying to resolve this informally with Ms Lewis since that point.

118. At Mr Caulcutt's request, Ms Borland was also progressing his request for a transfer to Bangor Service Centre. By letter of 7th July, Mr Caulcutt learnt his transfer request had been granted and he was due to commence work in Bangor on 29th September 2014.

119. Ms Borland sought advice from HR as to whether she should hear Mr Caulcutt's grievance out of time. She was advised *"it may be better for you to hear the grievance so you can investigate if what he is saying is true.."*

120. On 9th July, Ms Borland considered a stress reduction plan with Mr Caulcutt.

121. On 15th July 2014, Mr Caulcutt's GP had wanted to sign him unfit for work, but Mr Caulcutt was concerned he would ultimately lose his job, so Mr Caulcutt's GP wrote a fit note that required DWP to give Mr Caulcutt non confrontational work. Mr Caulcutt returned to work and was visibly distressed when meeting Cheryl Jones. He confirmed he was unable to do the "floor walking"; Ms Jones agreed he would not be expected to undertake floor walking for the next two weeks. The following day there was a further discussion as Ms Jones had made enquiries with Ms Lovatt who had suggested they could speak to the Bangor Service Centre to see if Mr Caulcutt could transfer sooner, if he was finding it difficult to cope. Mr Caulcutt declined this offer as he wanted to see whether the RAST team would be able to come up with any further adjustments.

122. In email exchanges with Ms Borland at the end of July 2014, Mr Caulcutt set out in detail, his medical conditions and the impact upon his work so this could be sent to RAST for them to further consider reasonable adjustments. Included in this information were photos of Mr Caulcutt's feet, which Mr Caulcutt said were bleeding. Unbeknown to Mr Caulcutt, Ms Borland had also made a note that Mr Caulcutt had attended 2 open-air concerts with his family, which had been noticed on Facebook. Ms Borland also noted that Mr Caulcutt had refused to consent to a further OHS referral as the February 2014 OHS report had been so favourable to him. Ms Borland sought advice from HR and was told *"a RAST referral would only be appropriate if OHS or Trillium advise that it is required".*

123. On 24th July, Mr Caulcutt met Ms Borland and learnt that the RAST enquiry had only considered the air quality and was now being closed. Mr Caulcutt was upset and explained that both he and Mr Shenton had understood the RAST team would be undertaking a wider investigation.

124. Mr Caulcutt set out his concern (about the limited extent of the RAST enquiry) in an email of 31st July, which he asked Ms Borland to forward to Wendy Yeomans or another senior colleague for consideration. Ms Borland forwarded his concerns to Bev Lovatt.

125. In email exchanges at the end of July / start of August, Mr Caulcutt and Ms Borland set out the adjustments that Mr Caulcutt was seeking and the adjustments that Ms Borland was agreeing to enable Mr Caulcutt to continue to work pending his transfer to Bangor. Ms Borland had agreed:

- Mr Caulcutt would have a podium chair and would not undertake floor walking until this was provided;
- a member of staff who wore perfume would be relocated to work in an area away from Mr Caulcutt;
- staff had been requested not to spray aerosols in the team room;
- Mr Caulcutt continued to have 30 minutes to apply emollients and the private room was available for this;
- it was not possible to provide disability leave, due to other staff holidays, but Ms Borland had provided some additional leave.

126. On 18th August 2014, Jo Leyland had a discussion with Ms Borland and agreed that the RAST referral would now be closed. This appears to be because Ms Borland understood there needed to be a new OHS report that recommended a referral to RAST and Mr Caulcutt was not consenting to a new referral to OHS.

127. In an exchange of emails dated 27th August 2014, Mr Caulcutt stated *"I did not want to leave the Caernarfon office but you have refused to provide*

me with a position that incorporates reasonable adjustment having regard to my disabilities…" This was strongly denied by Ms Borland, who stated in her response *"…I have never refused to consider reasonable adjustments and many have been made during my time in Caernarfon…On no occasion…. have you made me aware of a change of heart regarding your voluntary move".*

128. This was followed by further emails in which Ms Borland was seeking confirmation that Mr Caulcutt still wanted to go ahead with the transfer to Bangor and Mr Caulcutt restated his position. By email of 29th August, Mr Caulcutt indicated he would be attending the training on 1st September, which meant he would be going ahead with the transfer to Bangor.

129. On 1st September Mr Caulcutt commenced his training in Llangefni for his new Bangor-based role.

Ms Lovatt's emails of 8th and 9th September 2014

130. By letter dated 2nd September 2014, Ms Borland invited Mr Caulcutt to a meeting on 15th September at which she would consider his grievance.

131. By 4th September, Ms Borland was aware that Mr Caulcutt has approached ACAS and there was an ongoing early conciliation case as she mentioned it to HR in seeking advice.

132. In response to Ms Borland's letter of 2nd September 2014, on 8th September 2014, Mr Caulcutt sent an email that included,

"…I therefore request copies of all the CCAS and any other advice obtained in connection with my case relating to the late grievance decision…

I wish to confirm that I am disabled and as such I submit that I have the right to reasonable adjustments so that I do no suffered substantial disadvantages in comparison with non-disabled colleagues. Furthermore I submit that I also have the right not to suffer unfavourable treatment as a consequence of my disabilities. Notwithstanding this I was given a Box 3 marking whilst I believe that such action constituted disability discrimination and is contrary to s 15 and 20 of EqA 2010".

133. That same afternoon, Ms Borland forwarded this email to Wendy Yeomans and Bev Lovatt (Operations Manager) with the comment *"I find this a bit threatening, what do you think?….Can I change my mind, don't want to play anymore!!!"*

134. A few minutes later (still 8th September 2014), Bev Lovatt replied (only to Ms Borland),

"Im sick of seeing Disabled, Reasonable adjustments in his emails. I said I didn't think we should be lenient and hear his grievance as he didn't follow the correct procedure following his informal chat. It is his responsibility to find out how he puts forward a formal request not yours. As he is someone in guidance so often Im not too sure I believe he didn't know the process.

To my mind, scrap the meeting, let him winge like crap and raise it on his ET - he doesn't deserve us to be 'nice' to him"

135. On 9th September, at 10.19am Ms Borland replied to Ms Lovatt's email,

"Hi Bev, I agree. I've spoken to CCAS and have been advised that I have 2 options. The first is a risk in as much as I tell him that due to the nature of his email and the fact that I perceive this to be threatening and intimidating, I refuse to attend the meeting and he may wish to pursue the matter with a member of SLT….Or I refuse to see him given the potential accusation of impartiality and that we hand this over to another Band D…..What do you think?"

136. Ms Borland obviously decided to pass the grievance on to another manager, as her email to Mr Caulcutt at 11.22am on 9th September, stated

"Barrie, your comments are noted and as such I have taken advice regarding the tone of your email which I felt to be both threatening and intimidating. On this advice I have decided not to meet with you on Monday as I feel this could be detrimental to my health. If you wish to pursue the matter you will need to email Bev Lovatt in order for her to make arrangements for another manager to hear your grievance."

137. Ms Borland forwarded a copy of this email to Ms Lovatt, who replied to Ms Borland at 2.24pm, *"Can you pull together for me the emails from the start regarding his EOY marking please? I want to prepare in anticipation of his email arriving* [followed by an image of a smily face]"

138. Ms Lovatt sent a further email to Ms Borland at 2.27pm on that same date *"Email them over that's fine. I've just read through this email again with a chuckle to myself - absolute bloody nonsense. Sharon Clamp as his TU rep…….ace* [followed by an image of a smily face]*"*

139. On 10th September, Mr Caulcutt emailed Bev Lovatt (as suggested by Ms Borland). He wrote *"I was surprised but nevertheless sorry that [Ms Borland] felt my email was anything other than business-like. I can assure you my only intention is to present as strong a case as I can in my grievance and/or appeal and try to move on from what has been a torrid year for me. I am quite willing to carry on with the grievance meeting on Monday as*

arranged….but I appreciate that you may not be able to pluck another manager out of thin air at such short notice. Is this something you can arrange? I would appreciate your help in this matter."

140. By email on 11th September, Bev Lovatt advised Mr Caulcutt that <u>she</u> would be hearing his grievance on 18th September 2014.

141. Bev Lovatt did hear Mr Caulcutt's grievance; at their meeting on 18th September, Sharon Clamp attended as Mr Caulcutt's trade union representative and Ruth Jones attended to take notes. Important points that were raised during this meeting were:

- the End of Year Box 3 mark had come as a total surprise; Mr Caulcutt had no prior indication his performance had dipped;
- Mr Caulcutt explained he had only had one 1-2-1 meeting with Ms Lewis between September 2013 and March 2014;
- in September 2013 he was completing a new job role, in a new location with a new manager;
- Ms Lewis had not taken into account the other duties (eg finance) Mr Caulcutt was performing;
- Mr Caulcutt felt that he was seen to be a nuisance because he sent emails about his reasonable adjustments.

142. On 29th September 2014, Mr Caulcutt was transferred to the Bangor Processing Centre and commenced a non-public facing role.

Ms Borland's "comfort zone" remark

143. By email of 29th September 2014, Ms Borland provided Mr Caulcutt with his latest Mid Year Review in which she had assessed him as being Box 3 "must improve". In her email she explained,

"My decision regarding an indicative Box Marking is a must improve. My reason for this is recorded within the report, but my opinion is that as you were new to the role of a multifunctional officer within a customer facing office, you were out of your comfort zone and by your own admission, you were only just getting into your stride when you moved to join your colleagues at the Bangor Service Centre and I believe that with further mentoring and consolidation an achieved marking would not be out of your reach by the EOY."

144. By letter dated 3rd October 2014, Ms Lovatt confirmed to Mr Caulcutt that she was not upholding his grievance. She explained that his additional evidence had been considered by Ms Lewis and her decision had remained the same. Ms Lovatt was satisfied that reasonable adjustments were in place

to support Mr Caulcutt. She also found that it was Mr Caulcutt's responsibility to instigate 1-2-1 discussions as well as his line manager's.

145. On 13th October 2014, Mr Caulcutt appealed the outcome of this grievance. This appeal was heard on 28th October 2014, by Karen Brown, Operations Manager. At the appeal hearing, Mr Caulcutt repeated the matters he had brought to Ms Lovatt's attention.

146. By letter dated 4th November, Karen Brown confirmed to Mr Caulcutt that his appeal was not upheld. In particular, she referred to 1-2-1 meetings being a joint responsibility. She also stated that Mr Caulcutt needed to present evidence to his line manager to demonstrate the competencies and personal objectives; Mr Caulcutt had mentioned that he felt his line manager was not aware of all the things he did - Karen Brown felt this suggested he had not clearly demonstrated these in the evidence he had provided.

Mr Caulcutt's grievance against Ms Borland

147. Mr Caulcutt presented a separate grievance, on 10th October 2014, about Ms Borland's use of the phrase *"you were out of your comfort zone"* in her email of 29th September 2014. This grievance also referred to a second complaint, relating to Ms Borland's treatment of Mr Caulcutt since February 2014, but the tribunal have not considered this aspect of the grievance as this goes beyond the issues identified in this tribunal case.

148. The grievance about Ms Borland was considered by Debbie Rogers on 21st November 2014. She concluded that this remark had been *"used in an overall constructive context".* She found there was no evidence to support the assertion that this term was used in relation to Mr Caulcutt's reasonable adjustments.

149. By email of 19th December 2014, Mr Caulcutt appealed the outcome of his grievance against Ms Borland. On 4th February 2015, Nicola Bellis, Operational Delivery Manager, heard this appeal. On 27th February she wrote to Mr Caulcutt to explain her findings:

- She believed that Ms Rogers had undertaken a full and fair process.
- She did not believe that Ms Borland had forced Mr Caulcutt to move to Bangor Service Centre.
- *"having considered carefully the use of the phrase 'out of his comfort zone'"* she did not see it as being malicious.

<u>The Law</u>

150. Section 39(2) Equality Act 2010 ("EqA") provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include (at Section 39(2)(b) EqA) in the way the employer affords the employee access to any benefit, and (at Section 39(2)(d) EqA) by subjecting an employee to any detriment.

151. Section 39(4) EqA provides an employer must not victimise an employee and Section 39 (5) EqA provides an employer has a duty to make reasonable adjustments for a disabled employee.

152. Section 40 EqA provides an employer must not harass an employee.

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

"Disability"

154. Section 6 of the Equality Act 2010 provides a person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

155. Schedule 1 to the same Act explains that an impairment is "long-term" if it has lasted or is likely to last for at least 12 months or the rest of the life of the person affected.

156. The Guidance On Matters To Be Taken Into Account In Determining Questions Relating To The Definition Of Disability (2011), was issued following the Equality Act 2010. This explains in detail, the intended meaning of "substantial adverse effect". A substantial adverse effect is one that is more than a minor or trivial effect.

157. The 2011 guidance also provides helpful guidance on determining whether the impairment affected the claimant's ability to carry out normal day-to-day activities.

Disability Discrimination

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

> **…[the Disability Discrimination Act 1995] is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminate against women. Treating**

> **women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment."**

156. This element of more favourable treatment is reflected in the two types of protection that are unique to disability: Section 20-21 EqA (failure to make reasonable adjustments) which requires an employer to take action in certain circumstances and Section 15 EqA (discrimination arising from disability) which is focussed upon making allowances for disability.

Failure to make reasonable adjustments

156. Disability discrimination can take the form of a failure to comply with the duty to make reasonable adjustments (see Sections 20, 21(2), 25(2)(d) and 39(5) EqA).

157. Section 20 EqA imposes, in three circumstances, a duty on an employer to make reasonable adjustments. They include, at Section 20(3) EqA, circumstances where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in comparison with those who are not disabled. The duty then requires an employer to take such steps as it is reasonable to have to take to avoid the disadvantage (Section 20(3) EqA).

158. Again, Section 212(1) EqA defines "substantial" as "more than minor or trivial"; it is a low threshold. However this exercise requires the Tribunal to identify the nature and extent of the claimant's substantial disadvantage in meeting the PCP, because of his disability (see *Chief Constable of West Midlands Police v Garner* EAT 0174/11).

159. Mr Tinkler, on behalf of DWP correctly submitted that Mr Caulcutt bears the burden of proving each PCP put him at a substantial disadvantage in comparison with non-disabled colleagues. As the EAT stated in *Project Management Institute v Latif [2007] IRLR 519:*

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

160. When assessing whether there is a substantial disadvantage, the Tribunal must compare the position of the disabled person with persons who are not disabled. This is a general comparative exercise and does not require the individual, like-for-like comparison applied in direct and indirect discrimination claims (see Smith v. Churchill's Stairlifts plc [2006] IRLR 41 CA and Fareham College Corporation v. Walters [2009] IRLR 991 EAT). The House of Lords confirmed in *Archibald v Fife Council* [2004] UKHL 32 that an employer is no longer under a duty to make reasonable adjustments when the disabled person is no longer at a substantial disadvantage in comparison with persons who are not disabled.

161. In considering whether Mr Caulcutt was placed at a substantial disadvantage by the application of the attendance policy, both Mr Tinkler and Mr Doughty have drawn our attention to the Court of Appeal's decision in *Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1264,* which considered the application of an attendance policy similar to the one in this case.

162. In *Griffiths*, as in this case, the respondent's attendance management policy contained a number of provisions that enabled a manager to make adjustments for a disabled employee. The manager in *Griffiths* had a discretion to increase a disabled employee's consideration point beyond the 8 days in a 12 month rolling period and could set a Disabled Employee's Consideration Point, appropriate for that employee.

163. In *Griffiths*, the claimant had a 62 day absence from work as a result of post viral fatigue and fibromyalgia. She did not have an agreed Disabled Employee's Consideration Point; she was given a written warning having exceeded the Consideration Point of 8 days absence in the 12 month rolling period. Ms Griffiths identified two adjustments that she contended her employer ought to have made: firstly she said her employer should not treat the 62 day absence as counting against her under the policy; secondly she wanted the policy to be modified so that in future should was allowed longer periods of illness absence.

164. The Employment Tribunal that considered Ms Griffiths claim, found that no duty to make reasonable adjustments had arisen and, in any event, it was not reasonable for an employer to be expected to make either of the adjustments she sought. A minority member would have upheld Ms Griffiths's claim. The Employment Appeal Tribunal, (with Mr Recorder Luba QC presiding) agreed with the Employment Tribunal on both points. Further the Employment Appeal Tribunal found that the adjustments sought were not of a kind that came within Section 20 EqA 2010.

165. When the Court of Appeal considered the case, Lord Justice Elias firstly considered the correct formulation of the relevant PCP:

In my judgment, the appropriate formulation of the relevant PCP in a case of this kind was in essence how the ET framed it in this case: the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That is the provision breach of which may end in warnings and ultimately dismissal. Once the relevant PCP is formulated in that way, in my judgment it it clear that the minority member was right to say that a disabled employee whose disability increases the likelihood of absence from work on ill health grounds, is disadvantaged in more than a minor or trivial way. Whilst it is no doubt true that both disabled and able bodied alike will, to a greater or lesser extent suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is obviously greater for that group of disabled workers whose disability results in more frequent and perhaps longer absences. They will find it more difficult to comply with the requirement relating to absenteeism and therefore be disadvantaged by it.

166. Lord Justice Elias then considered the comparison exercise required by Section 20 EqA,

One must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled, or a category of them, than it does on the able bodied.

167. Whilst ultimately he dismissed the appeal (as he concluded the Employment Tribunal had grounds upon which they were entitled to find that the adjustments sought were not reasonable), Lord Justice Elias found that both the majority of the Employment Tribunal and the Employment Appeal Tribunal had been wrong to hold that the S20 EqA duty had not been engaged:

The duty arises once there is evidence that the arrangements placed the disabled person at a substantial disadvantage because of her disability. That in my judgment was unarguably the position here.

168. There are supplementary provisions in Schedule 8 EqA. Paragraph 20 of that Schedule provides that the duty to make reasonable adjustments only arises where an employer knows (or ought reasonably to know) of both the disabled person's disability and of the substantial disadvantage to which the person is placed.

169. Once the duty has arisen, the Tribunal must consider whether the respondent has complied with it by taking such steps as it was reasonable to have to take to avoid the disadvantage. The DDA formerly set out a non-exhaustive list of possible adjustments that might be taken by employers and,

although these have not been replicated in the EqA, they can be found at paragraph 6.33 of the EHRC Code of Practice. Of particular relevance to this case would be an adjustment whereby a procedure for assessment or testing could be modified. In many cases, the question of compliance with the duty will turn on whether a particular adjustment was (or, if not made, would have been) "reasonable". This is an objective test to be determined by the Tribunal and can be highly fact-sensitive. It is a rare example of Tribunals being permitted to substitute our own views for those of the employer where we consider, in effect, that it ought to have reached a different decision. Lord Hope explained in *Archibald v Fife Council* [2004] IRLR 651, that sometimes the performance of this duty might require the employer to treat a disabled person, who is in this position, more favourably to remove the disadvantage attributable to the disability.

170. The Tribunal has considered Mr Justice Langstaff's guidance in *The Royal Bank of Scotland v Ashton* [2010] UKEAT/0542/09 and notes the importance, in a reasonable adjustments claim, of considering the result, not the particular process by which it has been reached.

171. In *Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1264,* Lord Justice Elias considered whether the adjustments the claimant had proposed could amount to a "step" within the meaning of S20(3) EqA; he found that both proposed adjustments came within this definition and that the Code of Practice on Employment (2011) envisaged adjustments similar to these.

172. It is important to assess whether a proposed adjustment would have avoided the disadvantage – in lay terms, whether it would have worked. As with the non-exhaustive list of adjustments, the DDA formerly set out the factors that ought to be taken into account when determining whether an adjustment was reasonable and, although they have not been replicated in the EqA, they remain in broadly equivalent terms at paragraph 6.28 of the EHRC Code of Practice. They include: whether the steps would be effective; the practicability of the steps; the financial and other costs of making the adjustment; the extent to which it would disrupt the employer's activities; the extent of the employer's financial or other resources; the availability to the employer of financial and other assistance to help make the adjustment (such as advice through Access to Work) and the type and size of the employer.

173. In *Leeds Teaching Hospital NHS Trust v Foster* [2011] UKEAT/0552/10/JOJ Keith J confirmed that it was not necessary for the Tribunal to find there was a "real prospect" of the adjustment removing the particular disadvantage; it was sufficient for the tribunal to find that there would have been "a prospect" of that.

Discrimination arising from disability

174. S15 Equality Act 2010 (“EqA”) provides,

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.

175. The first point to note in a s15 claim is that the tribunal does not need to compare the claimant’s treatment to that of a comparator, real or hypothetical. The claimant must prove “unfavourable treatment”, i.e. that they have been put at a disadvantage, and that this was as a result of something arising in consequence of the claimant’s disability. The EHRC Employment Code explains that arising in consequence includes anything which is the result, effect or outcome of the person’s disability.

176. The claimant has to demonstrate less favourable treatment: it is not enough to show they have been differently treated.

177. When considering whether a person has received unfavourable treatment because of something arising as a consequence of their disability the tribunal has to determine “what was the alleged discriminator’s reason for the treatment in question” and has had regard to the authority of R (on the application of E) v Governing Body of JFS & others [2010] IRLR 136, SC (in which Lord Phillips emphasised the tribunal is required to identify “What were the facts the respondent considered to be determinative when making the decision?” It is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.)

178. When considering proportionality, Mr Tinkler, on behalf of DWP, refers the tribunal to Lord Justice Pill’s words in *Hardy and Hansons Plc v Lax* [2005] ICR 1565:

The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal…is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment upon a fair and detailed analysis of the working practices and business considerations involved as to whether the proposal is reasonably necessary.

Harassment

179. S26 EqA provides,

> **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.**
>
> **(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.**

180. The effect of s26 is that a claimant needs to demonstrate 3 essential features: unwanted conduct; that has the proscribed purpose or effect; and that it relates to disability. There is no need for a comparator.

181. The EHRC Employment Code explains that unwanted conduct can include *"a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour"*.

182. *"Unwanted"* is the same as "unwelcome" or "uninvited."

183. When considering whether the conduct had the proscribed effect, the tribunal undertakes a subjective/objective test: the subjective element involves looking at the effect the conduct had on the claimant (their perception); the objective element then considers whether it was reasonable for the claimant to say it had this effect on him. The EHRC Employment Code notes that relevant circumstances can include those of the claimant, including his/her health, mental health, mental capacity, cultural norms and previous experience of harassment; it can also include the environment in which the conduct takes place.

184. In *Richmond Pharmacology v Dhaliwal* [2009] ICR 724, Mr Justice Underhill P, held that in assessing whether the effect of the conduct, objectively viewed, fell within either of the two paragraphs:

One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended that if it was evidently intended to hurt.

185. Mr Tinkler on behalf of DWP, has drawn the tribunal's attention to Lord Justice Elias's comments in *Grant v HM Land Registry* [2011] EWCA Civ 769

……even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.

186. Mr Doughty on behalf of Mr Caulcutt, has drawn the tribunal's attention to the Employment Appeal Tribunal's decision in *Ukegheson v London Borough of Haringey* UKEAT/312/14/RN, which emphasises that in a harassment case, "context is all-important".

Victimisation

187. S27 EqA provides,

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;**
- **(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.**

188. Essentially, to succeed with a victimisation claim, a claimant must establish two matters: that they have been subjected to a detriment (see next paragraph) and that this was because s/he had done a protected act or the employer believed s/he had done or might do a protected act.

189. In discrimination law, a "detriment" occurs when, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment. (see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL).

190. In relation to s27(2)d EqA, it is not necessary for the claimant to use the words "Equality Act", however the asserted facts must be capable of amounting to a breach of the Equality Act.

191. A person claiming victimisation does not need to show the detrimental treatment was received solely because of the protected act. Per *Nagarajan v London Regional Transport* 1999 ICR 877, if the protected act has a "significant influence" on the employer's decision-making, discrimination has been proved. It was later confirmed in *Igen Ltd v Wong* 2005 ICR 931, that for an influence to be "significant" it has to be "an influence which is more than trivial".

Burden of proof

192. S136 EqA provides,

> **Burden of proof**
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
> **…(6) A reference to the court includes a reference to—**
> **(a) an employment tribunal;**

193. S136 Equality Act 2010 establishes a "shifting burden of proof" in a discrimination claim. If the claimant is able to establish facts, from which the Tribunal could decide, in the absence of any other explanation that there has been discrimination, the Tribunal is to find that discrimination has occurred, unless the employer is able to prove that it did not. In the well-known *Igen Limited and others v Wong* and conjoined cases 2005 ICR 931, the Court of Appeal gave the following guidance on how the shifting burden of proof should be applied:

- It is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant that is unlawful. These are referred to below as "such facts".
- If the claimant does not prove such facts their discrimination claim will fail.
- It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.
- In deciding whether the claimant has proved such facts, remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
- It is important to note the word "could" in [s136]. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
- In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
- These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a questionnaire….
- Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
- Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of [disability], then the burden of proof moves to the respondent.
- It is then for the respondent to prove that he did not commit that act.

- To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of [disability], since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
- That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [disability] was not a ground for the treatment in question.
- Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

194. However, it is also established law that if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a Tribunal to find that even if the burden of proof has shifted, the employer has given a fully adequate explanation of why they behaved as they did and it had nothing to do with a protected characteristic (e.g. disability). (see *Laing v Manchester City Council* 2006 ICR 1519)

Time Limits

195. S123 EqA prescribes time limits for presenting a claim:

> **(1) …Proceedings…may not be brought after the end of-**
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
> **(b) such other period as the tribunal thinks just and equitable**
> **…**
> **(3) For the purposes of this section-**
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something -**
> **(a) when P does an act inconsistent with doing it, or**
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

196. The leading authority on determining whether “conduct extends over a period of time”, or not, is the Court of Appeal decision in the *Commissioner of Police of the Metropolis v Hendricks* 2003 ICR 530. This established that the employment tribunal should consider whether there was an “ongoing situation” or “continuing state of affairs” (which would establish conduct extending over a period of time) or whether there were a succession of unconnected specific acts (in which case there is no conduct extending over a period of time, thus time runs from each specific act). As Lord Justice Jackson indicated in *Aziz v First Division Association* [2010] EWCA Civ 304, in considering whether there has been conduct extending over a period, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents.

197. Mr Doughty on behalf of Mr Caulcutt has referred the tribunal to HHJ Clark’s guidance on the correct approach to considering whether it is just and equitable to extend time, as explained in *Rathakrishnan v Pizza Express (Restaurants) Ltd* UKEAT/0073/15/DA.

Conclusions

Mr Caulcutt’s Disability

198. Mr Tinkler, Counsel representing DWP, confirmed that DWP accepts that at all relevant times Mr Caulcutt has been a disabled person for the purposes of Equality Act 2010, by reason of his chronic asthma and severe eczema. DWP deny that Mr Caulcutt’s anxiety or work related stress has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities such that these ought to be regarded as a disability.

199. Having considered the evidence, the tribunal finds that stress and anxiety significantly aggravate Mr Caulcutt’s chronic asthma and severe eczema and DWP have been aware of the impact of stress and anxiety upon Mr Caulcutt’s disability since February / March 2013.

200. The tribunal accepts Mr Doughty’s submission on behalf of Mr Caulcutt, that anxiety has been a part of an overall disability that embraces chronic asthma and severe eczema. Mr Caulcutt’s anxiety has a profound impact on his asthma; he described experiencing unrealistic fears, which lead to a panic attack which in turn can trigger a serious asthma attack, as happened at the training event on 4th March 2014.

201. Mr Caulcutt has routinely taken antidepressants to be able to attend work, a situation that his former DWP line manager, Ms Lewis, has been aware of since July 2013. As the Employment Appeal Tribunal explained in *J v DLA Piper* [2010] UKEAT/0263/09, the tribunal should consider whether Mr Caulcutt’s anxiety would have had a substantial adverse effect on his ability to

carry out normal day-to-day activities, without this medication. Clearly, Mr Caulcutt's anxiety was making it difficult for him to attend work and without this medication, he would have found it very difficult to do so. The tribunal notes Mr Caulcutt was having to dramatically increase his tablets, to be able to attend work, such was the level of his anxiety.

202. In February 2014, Mr Caulcutt was diagnosed as having General Anxiety Disorder ("GAD"). The tribunal has been provided with an Occupational Health Report prepared by Elaine Hough on 18th December 2014 in which she notes Mr Caulcutt was continuing to experience difficulty coping with his anxiety and explains that symptoms of GAD can last for many months, but the condition can last many years and would have a significant impact on Mr Caulcutt's ability to undertake normal daily activities.

203. The tribunal notes that in an Occupational Health Report prepared by Natasha Saxty on 23rd October 2015, Mr Caulcutt is described as being *"on treatment for anxiety and depression"*. She reports that Mr Caulcutt's mental health is affecting his sleep and appetite and that he continues to experience problems with fatigue, concentration, memory and retaining information.

204. The tribunal finds that by October 2015, Mr Caulcutt's mental impairment by reason of anxiety and depression, was having such a substantial and long-term adverse effect on Mr Caulcutt's ability to carry out normal day-to-day activities that it would be regarded as a disability in its own right.

The Attendance Management Procedures: the reasonable adjustment claim

205. The DWP's attendance management policies and the enforcement of these policies do constitute a practice of requiring employees to maintain a certain level of attendance at work in order to not be subject to the risk of disciplinary sanction. This PCP was applied to Mr Caulcutt as well as his fellow colleagues.

206. Did this PCP place Mr Caulcutt at a substantial disadvantage when compared to non-disabled colleagues? The DWP's written Attendance Management Procedures, Attendance Management Advice and A to Z of Reasonable Adjustments have been carefully drafted to help a manager avoid inadvertently discriminating against a disabled employee. The guidance set out in paragraphs 91 and 92 above is excellent and should be carefully heeded by managers when considering a disabled employee's attendance. Mr Doughty explained, in both his opening and closing submissions, that Mr Caulcutt's complaint is not about the policies themselves, as they allow reasonable adjustments; his complaint is about the application of the policies in his particular circumstances.

207. The policy fixes a "consideration point", ie a number of days' absence in a rolling 12 month period, beyond which an employee may face disciplinary sanction; in attempting to comply with this requirement, (ie stay within the consideration point), a disabled employee, like Mr Caulcutt, whose disability increases the likelihood of absence from work on ill health grounds, is disadvantaged in more than a minor or trivial way. Whilst both disabled and able bodied employees, would suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is far greater for that group of disabled workers whose disability results in more frequent or longer absences. They will find it more difficult to comply with the requirement relating to absenteeism and therefore be disadvantaged by it.

208. Mr Tinkler submits that the fact Mr Caulcutt had 23 days as his consideration point, when colleagues without a disability had only 8 days as their consideration point, removes Mr Caulcutt's substantial disadvantage as the policy is treating him more favourably than a colleague without a disability. The tribunal do not accept this to be the case. To adopt Lord Justice Elias's phrase, the policy still *"bites harder on the disabled, or a category of them, than it does on the able bodied".* Colleagues without a disability have a reasonable expectation of being able to keep their absence within their consideration point (8 days); colleagues with a disability like Mr Caulcutt's, which caused his physical health to be "poor" (see February 2014 Occupational Health report), were at a much greater risk of exceeding their consideration point (23 days). Further and in the alternative, colleagues with a disability which results in frequent or longer absences, are at a greater risk of exceeding their Consideration Point (even if it is an increased number of days), than a colleague that does not have that type of disability. Colleagues without a disability probably give their consideration point very little thought; colleagues with a disability like Mr Caulcutt are very conscious and in Mr Caulcutt's case experience considerable stress about keeping within their consideration point.

209. The tribunal finds that the DWP's practice of requiring employees to maintain a certain level of attendance at work in order to not be subject to the risk of disciplinary sanction, did place Mr Caulcutt (and other colleagues with a disability that resulted in longer or more frequent absences) at a substantial disadvantage, compared to his able-bodied colleagues.

210. Was DWP aware of Mr Caulcutt's disability and that he was likely to be placed at a substantial disadvantage by the requirement to maintain a certain level of attendance?

210.1. DWP were fully aware of Mr Caulcutt's chronic asthma, severe eczema and the anxiety he was experiencing working in the open plan office.

210.2. In April 2013, ahead of the move into the open plan office, Mr Caulcutt advised Ms Borland and Ms Jones that his condition was deteriorating, and that he would need his Disabled Employee Consideration Point to be increased beyond 23 days as he was likely to get more chest infections following the move.

210.3. Ms Lewis had numerous Welcome Back interviews with Mr Caulcutt in which she was recording that he was not completely better; she also had numerous meetings with Mr Caulcutt in which Mr Caulcutt advised her he was struggling with his health working in the "hostile environment' of the open plan office (ie increased exposure to perfumes / infections).

*210.4.*Mr Caulcutt's GP had written to DWP and Ms Lewis had received the February occupational health report that stated: *…his sickness absence has significantly increased over the last 12 months, having 47 days' absence on 7 occasions whereas the previous 12 month period had 5 days' absence on 3 occasions…Management may wish to consider allowing Mr Caulcutt to return to his previous working environment, reducing exposure to the apparent triggers such as perfumes, deodorants, open plan office area where he is likely to contract more infections which in turn exacerbates the asthma and eczema, as this was assisting his health and there has been a deterioration with this since moving to his current environment….In my opinion unless there is a change to Mr Caulcutt's working environment his physical health is likely to remain poor or worsen."*

211. The tribunal are satisfied that DWP were aware of Mr Caulcutt's disability and that it placed him at a substantial disadvantage in meeting the requirement to maintain a certain level of attendance. The S20 EqA duty to make reasonable adjustments was engaged; at the point of Mr Caulcutt's attendance reaching his Consideration Point, DWP had a duty to consider reasonable adjustments to avoid this disadvantage.

212. The written Attendance Policy and guidance had important exceptions and provisions designed to remove the substantial disadvantage that a disabled employee was at in complying with the policy. It is crucial that managers fully understand these and are alert to the the pressure that a disabled employee experiences when a written warning is given: Having received the written warning, Mr Caulcutt was in a much worse position than a colleague without a disability: Mr Caulcutt found himself having to keep within 11.5 days' absence in the next 6 months, whilst working in an environment that was having a profound impact on his disabilities; his prognosis was that his condition would remain poor or worsen if he continued to work in this environment; stress also aggravates his disability - the stress he experienced was such that when his GP wanted to sign him off work, he persuaded his GP to prescribe reasonable adjustments to enable him to stay in work.

Attendance management decisions should not be taken lightly, particularly when they involve a disabled employee.

213. DWP's policy actually instructed Ms Lewis to make reasonable adjustments. DWP's A to Z of Reasonable Adjustments instructed her that she could not take action until she had "*exhausted all options in relation to providing reasonable adjustments that might enable them to improve their attendance or performance.*"

214. The policy advised her **not to** give a warning if she could:

214.1. reasonably increase the Disabled Employee's Consideration Point - Mr Caulcutt had previously had a DECP of 28 days and had managed his attendance well for many years. Ms Lewis discounted this option as she felt *"his pattern of absences did not show that he was unable to keep within his DECP",* which was an unusual conclusion.

214.2.discount up to 6 months' absence as "injury leave". The tribunal do not understand why the 12.5 days were not disregarded as Mr Caulcutt clearly had an "injury" in the workplace when he suffered a severe and life threatening asthma attack at the training session. Had this time been disregarded, Mr Caulcutt would have been well within his DECT.

214.3. make further reasonable adjustments that were outstanding: Ms Lewis was aware that the February 2014 occupational health report had suggested RAST involvement and that RAST had not yet been instructed.

214.4.say that *"taking into account the exceptional nature and/or circumstances of the absence and the employee's satisfactory attendance record it would be perverse, unfair or disproportionate to give a warning. An employee has a satisfactory attendance record if their absence level before the current episode was below the Trigger Point in effect at that stage of the procedures".* Again, Ms Lewis could have regarded:

a) the severe asthma attack prompted by attending training; and / or

b) the move into the "hostile" open plan environment (particularly after 32 years of working in a separate room);

as being exceptional circumstances.

215. If Ms Lewis had disregarded the 12.5 days (leaving Mr Caulcutt on 13 days' absence) would this have been effective in removing the substantial disadvantage that he faced? At the point the written warning was issued, Mr Caulcutt was working in the open plan office and was due to start new customer-facing duties imminently. His eczema and asthma are aggravated by stress. Whilst he was likely to experience further absences, he had the comfort of being 10 days away from his consideration point. The tribunal is

satisfied this would have been an effective adjustment. This would also have been a practical adjustment from the employer's perspective: Mr Caulcutt still had a Disabled Employee's Consideration Point that he needed to remain within, so DWP were still able to manage his attendance going forward. This would have entailed no financial cost for DWP and it would not have disrupted their activities or created extra pressure for DWP in any other area, thus the tribunal considers this was a reasonable adjustment that DWP ought to have taken.

216. Further and in the alternative, Ms Lewis could have increased Mr Caulcutt's DECP. He was only a few days over his DECP and was within the 28 day DECP he'd had previously. Would this have been effective in removing the substantial disadvantage? Given that he was facing an stressful workplace changes ahead, Mr Caulcutt may have had to have a temporary increase to a DECP greater than 28 days, to say 35 or 40 days, but this is envisaged in the DWP policy which explains that occasional fluctuations of disability related absence would usually be accommodated. Of course, it was DWP that was changing Mr Caulcutt's role to a customer-facing role; this was after 32 years in a non-customer facing role and DWP were aware this was going to be a difficult change for Mr Caulcutt given his disabilities; as such it would have been reasonable to temporarily increase his DECP considerably, which would have been effective in removing the substantial disadvantage that he faced. In avoiding disciplinary action, Ms Lewis would have been avoiding the stress that caused him and Mr Caulcutt would have had a better chance of keeping his absences within a reasonable level. Given the prognosis in the February 2014 occupational health report, was it likely that Mr Caulcutt was going to have such lengthy further periods of absence that a temporary extension of the DECP was of limited value? Mr Caulcutt had worked in the open plan office for 10 months (May 2013 to Mar 2014) ahead of the severe asthma attack at the training day. During that 10 months he had 13 days' absence. With reasonable adjustments, once Mr Caulcutt had overcome the initial stress of workplace changes, the tribunal considers he would have been able to sustain a reasonable level of absence, ie under a DECP of 28 days per year. A temporary increase to Mr Caulcutt's DECP beyond 28 days that was kept under review would not have caused difficulty or expense for DWP and would have been practical, therefore the tribunal is satisfied it was a reasonable adjustment that DWP ought to have taken.

217. Further and in the alternative, Ms Lewis could have instructed RAST and awaited their advice before considering the written warning. The tribunal note that both she and Mr Shenton appear to have been swayed by guidance that by giving the warning first, they were helping Mr Caulcutt as the Review Period was activated sooner and would come to an end sooner. This was totally inappropriate advice and contradicted the policies, which stated that all reasonable adjustment options had to be exhausted before action was taken.

Far from helping Mr Caulcutt, issuing the warning significantly increased the pressure upon him and increased the likelihood of future absence (given his disability is aggravated by stress). It was wrong to consider the warning as only having consequences for the next 6 months; following a warning an employee's attendance has to remain satisfactory for the next 18 months or that employee would face a final written warning. This was a pressure that Mr Caulcutt was acutely aware of. Would instructing RAST have been effective in removing the substantial disadvantage? A full instruction to RAST might have helped DWP managers properly explore alternative employment options for Mr Caulcutt. It was apparent to the tribunal that Mr Caulcutt's managers felt there was only open plan work available for Mr Caulcutt in Caernarfon, but Mr Shenton's evidence was that in his office he had been able to find an alternative role for a disabled colleague. Unfortunately, RAST were not instructed prior to the written warning and when they were instructed, it was only on a very limited basis, rather than being a full review of the adjustments Mr Caulcutt needed. Had RAST been properly instructed prior to attendance action being taken, it is more probable than not that managers would have realised that attendance action was inappropriate in Mr Caulcutt's circumstances. Instructing RAST would not have been expensive, or onerous, particularly given the size and resources of DWP. The tribunal finds that this was a reasonable adjustment that the DWP ought to have taken.

218. Ms Lewis failed to make reasonable adjustments when she issued the written warning and Mr Shenton failed to make reasonable adjustments when he considered Mr Caulcutt's appeal, as he too, failed to instruct RAST first, discount the latest period of absence or increase the DECT.

The Attendance Management Procedures: the discrimination arising from disability claim (s15 EqA)

219. In closing submissions, Mr Tinkler on behalf of DWP, accepted that the first written warning was issued because of absences which arose, at least in part, as a consequence of Mr Caulcutt's disability. It is also conceded that the written warning amounted to "unfavourable treatment" for the purposes of S15 EqA. DWP submit that the first written warning was a proportionate means of achieving a legitimate aim.

220. The tribunal do accept that the effective management of absence is a legitimate aim; DWP does have a real need to keep employee' attendance at a reasonable level to be able to function.

221. However, the attendance management policies, **as drafted**, were the proportionate means of achieving this legitimate aim. They achieved the aims of effectively managing attendance, without discriminating against disabled employees. In departing from these policies and ignoring the important safeguards that were within them, Ms Lewis's response was

disproportionate. She could have achieved the aim of managing Mr Caulcutt's attendance by increasing his DECP or having informal discussions about his attendance. Issuing a warning was a disproportionate response, given that Mr Caulcutt had experienced the severe asthma attack in work and that he was working in a new 'hostile' environment and that reasonable adjustments had been identified by OHS but not undertaken. Ms Lewis's unduly harsh approach was not corrected by Mr Shenton on appeal, thus DWP has treated Mr Caulcutt unfavourably because of something arising in consequence of his disability and this treatment was not a proportionate means of achieving a legitimate aim.

The Performance Management Procedures: the reasonable adjustment claim

221. The DWP's People Performance Procedures and the application of these policies do constitute a practice of requiring employees to maintain a certain level of work in order to not be subject to the risk of disciplinary sanction. This PCP was applied to Mr Caulcutt as well as his fellow colleagues.

222. Did this PCP place Mr Caulcutt at a substantial disadvantage when compared to non-disabled colleagues?

223. Again, the DWP's written policy and the A to Z of Reasonable Adjustments have been carefully drafted to help a manager avoid inadvertently discriminating against a disabled employee. In particular the tribunal notes that 5.11 states *"An employee's disability and/or working patterns will be taken into account before any objectives are agreed. It is the responsibility of managers to ensure that reasonable adjustments are made to an employee's objectives to ensure that they have the same opportunity to meet them as any other employee".*

224. Mr Caulcutt's written objectives were matters like "*ensure finance procedures are carried out accurately and correctly on a daily basis in accordance with JCP guidance for cashiers".* Instead of measuring how Mr Caulcutt was performing against these objectives, Ms Lewis appears to have measured the amount of work Mr Caulcutt was able to process on a daily basis and compared this with his colleagues. The difficulty with this approach was:

224.1.that Mr Caulcutt was undertaking other work in addition to the lone parent work (eg the finance duties);

224.2.crucially, Mr Caulcutt's ability to process the work had been hindered by his not being able to attend training events (due to his disability) so he was slower undertaking tasks as he had to look up guidance; and

224.3. Mr Caulcutt had less time to process work, as he had to take 30 minutes of rest breaks each day to apply emollients as part of his reasonable adjustments.

225. The requirement (PCP) that Ms Lewis was applying to Mr Caulcutt (and others) was a requirement for employees to maintain a certain level of work (ie amount of work) in order to not be subject to the risk of disciplinary sanction. In attempting to comply with this requirement, (ie process enough work on a daily basis) a disabled employee, like Mr Caulcutt, whose disability requires additional daily rest breaks, is disadvantaged in more than a minor or trivial way. Further and in the alternative, in attempting to comply with this requirement a disabled employee, like Mr Caulcutt, who as a result of their disability has not been able to access training courses, is placed at a substantial disadvantage. Ms Lewis and her managers were aware that Mr Caulcutt's disability had prevented him from attending training courses and were aware that he needed 30 minutes of additional breaks each day to apply emollients for his eczema. Ms Lewis knew of Mr Caulcutt's disability; it is reasonable to expect her to know that he was likely to be placed at a substantial disadvantage by the requirement that he maintain a certain amount of work each day in order to not be subject to disciplinary sanction.

226. The tribunal finds that the DWP's practice of requiring employees to maintain a certain level of work in order to not be subject to the risk of disciplinary sanction, did place Mr Caulcutt (and other colleagues with a disability that required additional rest breaks) at a substantial disadvantage, compared to his able-bodied colleagues. Further and in the alternative, it placed Mr Caulcutt (and other colleagues with a disability that prevented access to training courses) at a substantial disadvantage, compared to able-bodied colleagues. Further and in the alternative, it placed Mr Caulcutt (and other colleagues with failing health) at a disadvantage compared to able-bodied colleagues. The S20 EqA duty was triggered; at the point of assessing Mr Caulcutt's performance, Ms Lewis had a duty to make reasonable adjustments to avoid this substantial disadvantage.

227. The tribunal notes that DWP had made some adjustments to assist Mr Caulcutt in performing his work, including the 30 minute additional breaks, access to a private room, positioning Mr Caulcutt as far away as possible from the public and relocating a colleague that wore perfume and hairspray.

228. It was particularly unfair for Mr Caulcutt's work to have been "measured" by Ms Lewis, as in April 2013, Ms Borland had assured Mr Caulcutt and Mr Doughty that there were no individual targets.

229. Ms Lewis should have made adjustments to the manner in which she assessed Mr Caulcutt's performance against his written objectives. The DWP's People Performance Procedures provide for objectives to be

measured against evidence - Ms Lewis said she was considering Mr Caulcutt's evidence, but in fact, she was undertaking her own "measuring" exercise and comparing his production rate to colleagues' production rate. If Ms Lewis had fairly and objectively considered whether Mr Caulcutt's evidence demonstrated the objectives, that would have removed the disadvantage.

230. Further, Ms Lewis should have recorded precisely how she was going to be assessing Mr Caulcutt's performance - if it was going to be based on measuring the amount of work he was completing or the speed with which he was completing work, this should have been recorded, with a clear adjustment to reflect the reduced amount of time he had to complete tasks (given the additional rest breaks) and to reflect the speed with which he was able to undertake tasks, given that he was new to this role, had been unable to attend the training course and was experiencing failing health.

231. The tribunal are satisfied that these would have been reasonable adjustments for Ms Lewis to make as they would have been effective in removing the substantial disadvantage that Mr Caulcutt faced. These adjustments would not entailed any expense and would not have been onerous for Ms Lewis and therefore she ought to have taken them.

232. Of course, Ms Lewis's failure to make reasonable adjustments could have been rectified when Mr Caulcutt's grievance was considered. Ms Lovatt, who heard Mr Caulcutt's grievance, was fully aware of the difficulties Mr Caulcutt had experienced since Spring 2013; she was copied in on emails discussing the need for him to attend training in February 2014 and actually met Mr Caulcutt the day before the training event on 4th March 2014; she was aware that his disability made it difficult for him to attend training events. She was also made aware, by Mr Caulcutt's grievance, that his health was deteriorating and that this may have had an impact on his performance. Instead of considering his grievance in a fair and professional manner, she wrote the highly offensive emails of 8th and 9th September 2014. Mr Caulcutt was denied the opportunity of having a fair appeal, which meant the failure to make reasonable adjustments endured.

The Performance Management Procedures: the discrimination arising from disability claim (s15 EqA)

233. The tribunal are satisfied that the Box 3 marking constitutes unfavourable treatment; it resulted in Mr Caulcutt missing out on a considerable bonus payment and it was a step in the DWP's performance management procedures.

234. Ms Lewis gave Mr Caulcutt a Box 3 mark as she considered he was not processing work as quickly as his colleagues - this was, at least in part, due

to his poor health (as a result of his disability) and the comfort breaks he needed to take for his disability. Further his work was hampered by "having to look things up" as he had not been able to access the training course because of his disability. The tribunal are satisfied that his Box 3 marking was because of matters arising in consequence of Mr Caulcutt's disability.

235. Whilst DWP's People Performance Procedures have the legitimate aim of managing employee performance, given that Mr Caulcutt had moved into a new role, in a new challenging environment and Ms Lewis was aware that his health was deteriorating as a result of this change, it was not proportionate for her to give this warning. Looking at Mr Caulcutt's objectives, it would have been possible to assess his performance with evidence other than 'measuring' the amount of work he was processing. Given that the DWP's policy required her to *"take into account the experience of the employee in the job role for new entrants/ promotees and trainees"* she could have looked at the evidence that supported his achievements in learning a new role and coached him in areas that he needed to improve. The written warning given by Ms Lewis was not a proportionate means of managing his performance.

236. Turning to consider the Bev Lovatt's "turning down" of Mr Caulcutt's appeal, Mr Caulcutt did not have a fair and considered appeal hearing. The tribunal considers that being denied a fair opportunity to appeal a performance management decision amounts to "unfavourable treatment" for the purposes of s15 EqA.

237. In Ms Lovatt's emails of 8th and 9th September 2014 she stated *"Im sick of seeing Disabled, Reasonable adjustments in his emails….To my mind, scrap the meeting, let him winge like crap and raise it on his ET - he doesn't deserve us to be 'nice' to him"* and *"I've just read through this email again with a chuckle to myself - absolute bloody nonsense."* Ms Lovatt is clearly referring to Mr Caulcutt's previous requests for reasonable adjustments, which is a consequence of his disability. The tribunal finds that, at least in part, Ms Lovatt did not give Mr Caulcutt a fair appeal hearing because of his previous requests for reasonable adjustments. This treatment was not related to any legitimate aim. It was wholly inexcusable, unprofessional and cannot be justified. It was discrimination arising from disability.

The Harassment claims: Ms Lovatt's emails

238. The tribunal found that Ms Lovatt's comments in her emails of 8th and 9th September amount to unwanted conduct related to disability. The tribunal then considered whether these comments had the <u>purpose</u> of violating Mr Caulcutt's dignity or creating an intimidating hostile degrading humiliating or offensive environment for him. It is very concerning that an experienced manager should **ever** use these words. Taking into account the context of these emails - they were hastily typed responses to a single colleague, we

concluded that Ms Lovatt was not deliberately trying to violate Mr Caulcutt's dignity or create a hostile environment for him. Mr Caulcutt and others only became aware of these emails when they were disclosed as part of the litigation processes.

239. We discussed at length whether these comments had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for Mr Caulcutt. The tribunal were concerned that in the chain of emails between Ms Lovatt and Ms Borland they were starting to validate each others thoughts. However, because it was limited to only these communications in a short period of time, when taken in context, the tribunal concluded it did not have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for Mr Caulcutt.

240. We considered whether these comments had the effect of violating Mr Caulcutt's dignity. We considered Mr Caulcutt's perception of these comments and the surrounding circumstances. Mr Caulcutt was upset by these comments, however, he was not aware of them at the time. He learnt of these comments through the tribunal's disclosure procedures.

241. The tribunal then considered whether it was reasonable for Mr Caulcutt to feel his dignity had been violated in these circumstances. Mr Caulcutt can see, that these remarks were never intended for a wider audience; in short, he was never supposed to hear them. There was no intention to actually offend him. Whilst they are wholly unpleasant and unprofessional comments, the tribunal finds that they did not violate Mr Caulcutt's dignity and did not amount to harassment.

The Harassment claims: Ms Borland's 'comfort zone' remark

242. Mr Caulcutt objected that Ms Borland's use of the words 'comfort zone' was a reference to him having had to move out of the finance room; to him having lost this reasonable adjustment. Having considered the paragraph as a whole and the document that it appeared in, the tribunal find that this was a wholly innocent remark on Ms Borland's part. She was using a common colloquial expression. She followed it by another colloquial expression *"you were just getting into your stride".* The final sentence of that paragraph was one of encouragement. This was not unwanted conduct related to disability, and does not amount to harassment. Further it did not amount to discrimination arising from disability, as it was not unfavourable treatment.

The Victimisation claim

243. We are satisfied that Mr Caulcutt's email of 8th September 2014 amounted to an allegation that employees of DWP had committed acts which would amount to a contravention of the Equality Act 2010, namely failure to

make reasonable adjustments and disability-related discrimination, and this allegation was made by Mr Caulcutt in good faith. This was a "protected act" as defined in S27(2)d EqA 2010.

244. Did DWP subject Mr Caulcutt to a detriment because he alleged a breach of EqA? Firstly the tribunal considered whether Bev Lovatt's emails of 8th and 9th September 2014 could be said to be "subjecting Mr Caulcutt to a detriment". Recalling that Mr Caulcutt was not aware of these emails at the time, the tribunal have difficulty saying that a reasonable worker would or might take the view that he has been disadvantaged in the workplace in these circumstances. If Ms Lovatt had sent a negative email to a future employer, it would be different, but these were comments sent to Mr Caulcutt's current manager. The tribunal was not persuaded that the emails could be regarded as "subjecting Mr Caulcutt to a detriment".

245. However, in addition to sending these emails, Ms Lovatt went on to hear and dismiss Mr Caulcutt's appeal against the Box 3 marking. We have already found that Ms Lovatt did not give Mr Caulcutt a fair appeal hearing because of his previous requests for reasonable adjustments. We are satisfied that denying Mr Caulcutt a fair opportunity to appeal the Box 3 marking did amount to subjecting him to a detriment - a reasonable worker would take the view they had been disadvantaged in the workplace by this. When we consider matters that Ms Lovatt had in mind in dismissing Mr Caulcutt's appeal, we find that the claimant's email of 8th September 2014 had more than a "significant influence" on Ms Lovatt's decision. We find that Ms Lovatt denied Mr Caulcutt a fair appeal hearing and this was, largely because he had asserted that employees of DWP had committed breaches of the EqA.

Time Limits

246. The claimant notified ACAS under its early conciliation procedures on 27th August 2014; the DWP submits that the complaints relating to the first written warning and the Box 3 marking are time barred. However, in evidence, Ms Lewis confirmed that she did not reach a final decision on the Box 3 marking until 12th June 2014, meaning that this complaint was clearly notified to ACAS within the 3 month time-limit.

247. Turning to the first written warning, this was dated 1st April 2014. However, the tribunal are satisfied that Ms Lovatt and Ms Borland's negative views of Mr Caulcutt's requests for reasonable adjustments were filtering down to Ms Lewis and her decision making, such that they were responsible for an ongoing situation, a continuing state of affairs, in which Mr Caulcutt as a disabled employee requiring reasonable adjustments was being treated less favourably than able-bodied colleagues. This was "conduct extending over a period" as distinct from a succession of unconnected or isolated specific acts.

For instance, the tribunal notes that in September 2013, having initially excused Mr Caulcutt from attending training on account of his health, Ms Lewis changed her opinion following a conversation with Ms Borland. The tribunal notes that only Ms Lewis was concerned about Mr Caulcutt's health following him being rushed to the hospital by ambulance. Mr Caulcutt was an employee who had happily worked at DWP for over 32 years - in the space of just over 4 months he was given a written warning, a Box 3 marking and was the subject of truly offensive emails. As the last act, in this conduct extending over a period, was on 3rd October 2014, when Bev Lovatt rejected Mr Caulcutt's grievance against the Box 3 marking, all of Mr Caulcutt's claims have been presented within time.

248. For the sake of completeness, had the tribunal found that the first written warning was an isolated act, rather than being part of a continuing state of affairs, the tribunal were satisfied that it was just and equitable to extend the time limit and that the complaint had been presented within this time. Mr Caulcutt's appeal against this warning was determined by Mr Shenton. In his email of 13th May 2014, Mr Shenton expressed his opinion that *"If RAST suggest that more needs to be done to support you in the workplace then a decision will need to be taken on whether those measures were relevant to your attendance at the Claimant Commitment training. If they were, then my expectation would be that your First Written Warning will be rescinded."* Mr Caulcutt was aware that the February 2014 occupational health report had supported further reasonable adjustments. The tribunal are satisfied that in these circumstances Mr Caulcutt was entitled to regard the written warning as being a provisional decision rather than being the final decision. Mr Caulcutt was not aware that the written warning would remain until 24th July 2014, when he was told that the RAST investigation had now been concluded. Mr Caulcutt notified ACAS on 27th August 2014, so acted upon the "final" decision without delay.

249. Mr Caulcutt having succeeded with his claims of failure to make reasonable adjustments, discrimination arising from disability and victimisation, the tribunal give the following directions:

Directions

1. No later than 12th May 2017, Mr Caulcutt (or his representative) is to write to the tribunal and to the DWP (or its representative) setting out all the remedies that he is seeking in the discrimination claims. This should include:

    a. any suggestions of appropriate recommendation(s) that the tribunal could make, which he considers would assist in reducing the adverse effect of this discrimination upon him (see s 124(2)c & s124(3) Equality Act 2010);

b. all sums sought as compensation, showing how these sums have been calculated;

c. any claim for injury to feelings, which should indicate which of the bands established by the Court of Appeal in *Vento v The Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871 (as adjusted by *Da'Bell v NSPCC* [2010] IRLR 19) he contends the injury to feelings award should fall within; and

d. any claim for aggravated damages.

2. No later than 12th May 2017, Mr Caulcutt is to provide the DWP with copies of all documents relevant to his losses.

3. No later than 12th May 2017, Mr Caulcutt is to provide the DWP and the tribunal with a written statement explaining the impact the discriminatory acts have had upon him. This document will be used as Mr Caulcutt's evidence at the remedy hearing.

4. No later than 26th May 2017, the DWP are to write to the tribunal and to Mr Caulcutt, confirming to what extent the remedies sought by Mr Caulcutt are contested. This should include:

a. any suggestions of appropriate recommendation(s) that the tribunal could make (see s 124(2)c & s124(3) Equality Act 2010);

b. the DWP's calculations of compensation;

c. the DWP's assessment of the correct Vento (Da'Bell) band for any injury to feelings award.

5. No later than 26th May 2017, the DWP are to provide Mr Caulcutt, copies of any documents they hold that are relevant to Mr Caulcutt's losses.

6. The remedy hearing will be listed for the first available date after 2nd June 2017 (with a 1 day time estimate), to be heard in the North Wales area, if possible. By 12th May 2017, parties are to write to the tribunal, confirming their availability to attend during the period 2nd June 2017 to 31st August 2017.

7. Parties are to endeavour to agree the contents of the bundle of documents for the remedy hearing. The DWP are requested to prepare 4 copies of this bundle for the tribunal's use, which should be brought to the hearing.

8. If any party wishes to apply for further directions, or to vary the directions made above, they should send their application with reasons in writing to the tribunal office no later than 14 days from the date of these directions, with a copy to the other party. Any party who wishes to object to the

application must send their objection in writing to the tribunal office within 7 days of receiving the application, with a copy to the other party.

Judgment posted to the parties on

27 April 2017

For Secretary of the Tribunals

EMPLOYMENT JUDGE HOWDEN-EVANS

Dated: 27th April 2017