THE EMPLOYMENT TRIBUNALS

Claimant: **Miss E Peace**

Respondent: **Her Majesty's Revenue & Customs**

Held at: **North Shields** **On:** **12, 13, 14, 15, 16, 19 and 20 August 2019 and 21 August 2019 (in chambers)**

Before: **Employment Judge Aspden**
Mr T Denholme
Mr S Hunter

Appearances

For the Claimant: In person
For the Respondent: Mr D Bain, counsel

JUDGMENT

The claimant's claims of discrimination and harassment in claim numbers 2501305/2018 and 2503200/2018 are not well founded. Those claims are dismissed.

REASONS

The claims and issues

1. By a claim form filed on 26 June 2018 (Claim Number 2501305/2018) the claimant advanced claims to the Tribunal of disability discrimination. By a second claim form filed on 30 September 2018 (Claim Number 2503200/2018) the claimant advanced additional claims to the Tribunal of disability discrimination. By a third claim form filed on 4 April 2019 (Claim Number 2500615/2019, 'the third claim'), the claimant advanced further claims to the Tribunal of disability discrimination. The respondent

denies all liability to the claimant. By an order made on 11 April 2019 Employment Judge Johnson directed that the three claims be heard together.

2. The claims were subject to extensive case management, including at preliminary hearings on 29 August 2018, 9 October 2018, 10 January 2019, 1 March 2019, 29 April 2019 and 16 July 2019.

3. At the preliminary hearing before Employment Judge Buchanan on 10 January 2019, the claims and the issues arising in the first two claims were identified. The claims and the issues arising in the third claim were identified at a preliminary hearing on 29 April 2019, again before Employment Judge Buchanan.

4. The respondent has conceded that the claimant was a disabled person, within the meaning of that term in the Equality Act 2010, with effect from 5 July 2018 by virtue of the impairment of depression. Before we began hearing evidence we asked the claimant what impairment she says she had that constituted a disability. She described the impairment as 'depression and anxiety and stress'.

5. We noted that it was not clear from the list of issues what the respondent's position was as to (a) its knowledge of the claimant's disability after 5 July 2018 (the date from which the respondent concedes the claimant was a disabled person by virtue of the impairment of depression); and (b) in relation to the complaints of failure to make reasonable adjustments, its knowledge of whether the provisions, criteria or practices ('PCP's) relied on were likely to put the claimant at a substantial disadvantage compared to non-disabled persons. We raised this issue with Mr Bain and he confirmed that (a) the respondent concedes that as at 5 July 2018 it had actual or constructive knowledge that the claimant had a disability by virtue of the impairment of depression; and (b) in relation to the complaints of failure to make reasonable adjustments, the respondent denies that it knew or could reasonably be expected to have known that claimant was likely to be placed at substantial disadvantage by the PCPs relied on compared to non-disabled persons. We explained that, in so far as it relates to claims of a failure to make reasonable adjustments, the agreed list of issues needs to be read so as to include the additional issues.

List of claims

6. As noted above, the claims being made by the claimant in these proceedings were identified in the case management hearings before Employment Judge Buchanan. They are set out below. The consolidated list of the issues that it was agreed fell to be determined at this hearing, including the additional issues referred to above, is annexed to this judgment. To avoid confusion, we have identified each complaint by the same letter used by EJ Buchanan in his notes following the preliminary hearings and have followed his approach of grouping the complaints together by reference to the three sets of proceedings and then the type of discrimination alleged.

Claim Number 2501305/2018

7. Direct Disability Discrimination allegations: section 13 of the Equality Act

7.1. **Allegation (a).** Because of her disability, Stephen Younger ('SY') treated the claimant less favourably than he would have treated a comparable non-disabled employee on 30 January 2018 by deeming her to be 'too mentally unstable to make reasonable decisions regarding her own welfare' and permanently moving her.

7.2. **Allegation (b). This allegation is permitted to proceed as a result of a successful application to amend made by the claimant on 10 January 2019.** Because of her disability, SY in an email dated 3 January 2018 send to David Carr ('DC') treated the claimant less favourably than he would have treated a comparable non-disabled employee by using her diagnosis of depression to belittle her. The claimant relies on a hypothetical compactor in respect of this allegation.

7.3. **Allegation (c). This allegation is permitted to proceed as a result of a successful application to amend made by the claimant on 10 January 2019.** Because of her disability, SY treated the claimant less favourably than a comparable non-disabled employee by allowing Gina Walker ('GW') to require the claimant to attend a meeting in respect of leave allocation for the forthcoming year on 23 January 2018. The claimant relies on GW as her comparator in respect of this allegation.

7.4. **Allegation (g).** Because of her disability, the claimant was treated less favourably than other coaches by having her request of 16 March 2018 to step back from an aspect of her role refused. The claimant relies on other coaches present at that meeting as actual comparators namely Linda Younger, John Wilson and an employee whose first name is Karen.

7.5. **Allegation (h) This allegation is permitted to proceed as an allegation of direct discrimination and not as an allegation pursuant to section 15 of the 2010 Act.** Because of her disability, DC treated the claimant less favourably than he would have treated comparable non-disabled employee by not doing an OH referral and once again asking what adjustments the claimant required on about 13 April 2018.

7.6. **Allegation (l) This allegation is permitted to proceed as a result of a successful application to amend made by the claimant on 10 January 2019.** Because of her disability, the claimant was treated less favourably on 12 February 2018 by Ian Robison than her non-disabled subordinates (including Michelle Venters) by not being awarded an 'exceeded' grading for her performance

8. Allegations of Discrimination arising in consequence of disability: section 15 of the 2010 Act

8.1. **Allegation (d).** At or around the middle of 2018 DC treated the claimant unfavourably by deciding not to progress her grievance. DC did this because he perceived that the claimant was mentally unstable, which perception arose in consequence of the claimant's disability.

8.2. Allegation (e) This allegation is permitted to proceed as a result of a successful application to amend made by the claimant on 10 January 2019. At a meeting on 2 March 2018 DC treated the claimant unfavourably by suggest that the claimant was lying. DC did this because he perceived that the claimant was mentally unstable, which perception arose in consequence of the claimant's disability.

8.3. Allegation (f) This allegation is permitted to proceed as a result of a successful application to amend made by the claimant on 10 January 2019. On or around 7 February 2018 Ian Robison ('IR') treated the claimant unfavourably by handing the management (which the claimant had hitherto been dealing with) of the ongoing absence of the claimant's colleague Anita to a colleague. IR did this because he perceived that the claimant was mentally unstable, which perception arose in consequence of the claimant's disability.

9. Allegations of Failures to make Reasonable Adjustments: sections 20/21 of the Equality Act

9.1. Allegation (i) The respondent applied the following PCPs which put the claimant, a disabled person, at a substantial disadvantage compared to non-disabled persons:

9.1.1. Requiring the claimant to work in a business area (P11D) in which GW had management responsibilities until 8 December 2017 or thereabouts?

9.1.2. Requiring the claimant to move business areas in December 2017.

9.1.3. The respondent failed to comply with its duty to make reasonable adjustments to avoid that disadvantage.

9.2. Allegation (j) The respondent applied a PCP of moving the claimant to a new business area (coaching) with no support in January 2018. This put the claimant, a disabled person, at a substantial disadvantage compared to non-disabled persons. The respondent failed to comply with its duty to make reasonable adjustments to avoid that disadvantage.

9.3. Allegation (k) The respondent applied a PCP in January 2018 of requiring the claimant to perform the business coach role. This placed the claimant, a disabled person, at a substantial disadvantage compared to non-disabled persons. The respondent failed to comply with its duty to make reasonable adjustments to avoid that disadvantage.

10. Allegation of Harassment: section 26 of the Equality Act. The claimant alleges that the respondent committed the following acts/omission constituting unwanted conduct related to her disability, which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

10.1. Allegation (h) in the alternative to the section 15 claim bearing the same letter above. On 13 April 2018, DC refused to make an OH referral and once again ask the claimant what adjustments she required. This had the

purpose or effect of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Claim Number 2503200/2018

11. Direct Disability Discrimination allegations: section 13 of the Equality Act.

11.1. Allegation (m). Because of her disability, Tracy Raitt ('TR') treated the claimant less favourably than she would have treated a comparable non-disabled employee by failing to put the claimant in the redeployment pool on 2 July 2018.

12. Allegations of Failure to make Reasonable Adjustments: sections 20/21 of the Equality Act

12.1. Allegation (n). The respondent applied a PCP of requiring the claimant to remain working as a processor on or around 5 July 2018. This placed the claimant, a disabled person, at a substantial disadvantage compared to non-disabled persons. The respondent failed to comply with its duty to make reasonable adjustments to avoid that disadvantage.

13. Discrimination arising in consequence of disability: section 15 of the Equality Act

13.1. Allegation (o). On 7 July 2018 TR treated the claimant unfavourably when she imposed a formal attendance warning on the claimant and so failed to properly apply the sickness absence management policy by adjusting that policy as its terms require when managing the absence of a disabled person. TR did this because the claimant had been absent from the workplace, which was something arising from the claimant's disability.

13.2. Allegation (p) On 30 July 2018 TR treated the claimant unfavourably when she failed to look for posts or seek out posts for the claimant. TR did this because of the claimant's sickness absence warning implemented on 7 July 2018, which was something arising from the claimant's disability.

13.3. Allegation (q) On 30 July 2018 and subsequently the claimant was treated unfavourably by TR and HR Business partner Theresa Young ('TY') when they failed to allow the claimant to apply for other vacancies and /or seek out other vacancies as a priority mover or otherwise. They did this because of the claimant's sickness absence warning implemented on 7 July 2018, which was something arising from the claimant's disability.

14. Allegations of Harassment: section 26 of the Equality Act. The claimant alleges that the respondent committed the following acts/omissions constituting unwanted conduct related to her disability, which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

14.1. Allegation (r) On 31 July 2018 TR arranged for the claimant to go and see the work involved in a potentially vacant post only for the claimant to be told that there were no such vacancies and that in any event the area was in an area managed by SY whom the claimant had told TR she no longer wished to work for.

14.2. Allegation (s) On 31 July 2018 Theresa Young ('TY') advised the claimant by email to apply for jobs she sees through the normal process when TY knew the claimant could not do so by reason of the above-mentioned sickness absence warning.

14.3. Allegation (t). By amendment permitted on 10 January 2019 On 27/28 August 2018 TR communicated with HR and others and painted the claimant in an unfavourable light and referred to a grievance submitted by the claimant when such matters should have remained confidential at all times.

Claim Number 2500615/2019

15. Direct Disability Discrimination allegations: section 13 of the Equality Act.

15.1. Allegation (u) Because of her disability, Carl Matthews ('CM') treated the claimant less favourably than Kerri Holder and Yvonne Robinson on 21 January 2019 and continuing to 25 March 2019 when he gave the claimant no work to do and did not chase up the comparators to provide information on their availability and tasks which would have enabled him to spread work more evenly and give the claimant work to do.

15.2. Allegation (v). Because of her disability, CM treated the claimant less favourably than Julie Picken when, in a telephone call on 6 March 2019 with others present, he berated the claimant and criticised her IT skills and stated that the claimant could not work on the project/design team.

16. Allegations of Failure to make Reasonable Adjustments: sections 20/21 of the Equality Act

16.1. Allegation (w) The respondent applied a PCP of requiring the claimant to carry out her contractual duties. That PCP put the claimant at a substantial disadvantage compared to non-disabled persons as she had nothing to do. The respondent failed to comply with its duty to make reasonable adjustments to avoid that disadvantage.

Applications to postpone/amend

17. On 31 July 2019 the claimant made an application to postpone this hearing on the ground that she wished to bring a further claim against the respondent, which she thought should be heard alongside the existing claims. That application was refused by Employment Judge Garnon.

18. At the beginning of the sixth day of this hearing the claimant asked for permission to amend her claim. The claimant wished to add complaints of 'neglecting duty of care

and bullying by abuse of power'. We refused that application for reasons that were given during the hearing.

Adjustments

19. When the dates for this final hearing were agreed at the preliminary hearing before EJ Buchanan, there was some discussion about appropriate adjustments to enable the claimant to participate effectively. EJ Buchanan recorded in his note that the seven day time estimate was intended to ensure the claimant could be provided with breaks during the course of the hearing.

20. At the preliminary hearing on 16 July 2019 before Employment Judge Arullendran, there was a further discussion about appropriate adjustments that could be made at this hearing to enable the claimant to participate effectively. The claimant explained that her disability makes it difficult for her to be in a room with lots of people and said that two of the respondent's witnesses, Mr Carr and Mr Younger, frighten her. It was agreed that the claimant would give her evidence from the representative's table, with her back to the witnesses. Mr Bain, who represented the respondent at that hearing and at this final hearing, indicated that he was sympathetic to the claimant's position and would minimise the number of witnesses in the hearing room at any given time. Mr Bain did so throughout the hearing.

21. On the sixth day of this hearing, after hearing evidence from Prof Turkington and Mr Lagay, we were due to hear evidence from the respondent's two remaining witnesses: Ms Gorbould and Mr Matthews. The claimant, who appeared to be somewhat distressed at this point, said she no longer felt she could do herself justice in cross-examining the respondent's remaining witnesses. We agreed to adjourn at 12:45 for an extended break over the lunch period and explained to the claimant that upon returning from that break we would talk further about how best to proceed. We explained that possible options included adjourning for the rest of the day and restarting the hearing the following day; adjourning the hearing for a longer period to give the claimant more time to recover, prepare and, possibly, seek medical advice and/or legal assistance; and/or that the claimant may be able to provide the Tribunal with a list of questions that she wanted to ask the remaining witnesses and the Tribunal could in turn put those questions to the witnesses. Mr Bain suggested a further alternative might be to 'de-couple' the third claim given that the evidence of the witnesses from whom we had not yet heard was relevant only to the complaints made within that claim. That would mean, in effect, staying those proceedings until after we had reached a decision on the complaints within the first two sets of proceedings; the claimant would then be able to decide whether she wished to proceed with the remaining claim, in light of the decision on the first two claims, and, if she chose to do so, the hearing could continue at a later date.

22. After that adjournment, at 2:15 pm, the claimant explained that her preference would be to 'de-couple' the third claim (allegations (u), (v) and (w)), as suggested by Mr Bain. Mr Bain confirmed that, in all the circumstances, the respondent did not object to the proposed course of action. Accordingly, we directed that proceedings in the third claim be stayed until we reach a decision in the first two sets of proceedings. We explained that the claimant will then be asked to say whether she wishes to continue with the third set of proceedings. If she does, the hearing will resume on 7

and 8 November 2019 (on which date we said we would also address the remedy in respect of the first two claims if any parts of those claims were successful). We adjourned the hearing of the first two claims then until the following morning when we heard closing submissions from both parties.

23. In light of the above, we have not yet determined any of the issues arising in respect only of the complaints made in the third claim.

Relevant legal framework

24. It is unlawful for an employer to harass an employee: Equality Act 2010 section 40. It is also unlawful for an employer to discriminate against an employee in the way it affords him or her access, or by not affording him or her access, to opportunities for transfer or for receiving any other benefit facility or service, by dismissing him or her or by subjecting him or her to any other detriment: section 39(2) of the Equality Act 2010.

25. Conduct which amounts to harassment, as defined in section 26 of the Equality Act, does not constitute a detriment for the purposes of section 39: Equality Act 2010 s212(1). Subject to that provision, for the purposes of section 39, a detriment exists if a reasonable worker (in the position of the Claimant) would or might take the view that the treatment accorded to him or her had, in all the circumstances, been to his or her detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

Disability

26. Section 6 of the Equality Act 2010 says: 'A person (P) has a disability if -(a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.' Substantial means 'more than minor or trivial': Equality Act s212(1). The effect of an impairment is long-term if it has lasted for at least 12 months or is likely to last for at least 12 months or for the rest of the life of the person affected. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur: Equality Act Schedule 1, paragraph 2. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if -(a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect: Schedule 1, paragraph 5.

27. 'Likely' in this sense means 'could well happen': SCA Packaging v Boyle [2009] ICR 1056. This has to be assessed in the light of the information available at the relevant time, not with the benefit of hindsight: Richmond Adult Community College v McDougall [2008] EWCA Civ 4, [2008] ICR. 431.

28. The Secretary of State has issued statutory guidance on matters to be taken into account in decisions under section 6(1). The current version dates from 2011. It says, amongst other things:

28.1. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness.

28.2. A disability can arise from a wide range of impairments which can be:

- impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy;

- mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post traumatic stress disorder, and some self-harming behaviour;

- mental illnesses, such as depression and schizophrenia;…'

28.3. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people.

28.4. 'The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. …This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1….Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect. For example, a person who develops pneumonia may be admitted to hospital for treatment including a course of antibiotics. This cures the impairment and no substantial effects remain.'

28.5. 'In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an

effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).'

29. In Goodwin v Patent Office [1999] IRLR 4, the EAT gave the following guidance as to the correct way to approach the definition of 'disability'-

(1) The tribunal must look carefully at what the parties say in the ET1 and ET3, with standard directions or a directions hearing being often advisable; advance notice should be given of expert opinion. The tribunal may wish to adopt a particularly inquisitorial approach, especially as some disabled applicants may be unable or unwilling to accept that they suffer from any disability (though note that even here the tribunal should not go beyond the terms of the claim as formulated by the claimant: Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 644, EAT).

(2) A purposive approach to construction should be adopted, drawing where appropriate on the guidance on the definition of disability.

(3) The tribunal should follow the scheme of [what is now s 6], looking at (i) impairment, (ii) adverse effect, (iii) substantiality and (iv) long-term effect, but without losing sight of the whole picture.

30. The Employment Appeal Tribunal gave valuable guidance as to how the definition of disability applies in the case of conditions described as 'depression' in J v DLA Piper UK LLP [2010] ICR 1052. Underhill J said, at para 42:

'The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness—or, if you prefer, a mental condition—which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or—if the jargon may be forgiven—'adverse life events'. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians…and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived.'

31. This passage was approved and applied in the more recent case of Herry v Dudley Metropolitan Council [2017] ICR 610, where the EAT added the following comment:

> 'Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the employment tribunal to assess.'

Harassment

32. Under section 26 of the Equality Act 2010, unlawful harassment occurs where the following conditions are satisfied:
(a) an employer engages in unwanted conduct related to a protected characteristic, which includes disability;
(b) the conduct has the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

33. In deciding whether conduct has the effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee, each of the following must be taken into account—
(a) the perception of the employee;
(b) the other circumstances of the case; and
(c) whether it is reasonable for the conduct to have that effect.

34. Where a Claimant contends that the employer's conduct has had the effect of creating the proscribed environment, they must actually have felt or perceived that their dignity was violated or an intimidating, hostile, degrading, humiliating or offensive environment was created for them: Richmond Pharmacology v Dhaliwal [2009] ICR 724, EAT. A claim of harassment will not be made out if it is not reasonable for the conduct to have the effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee: Ahmed v Cardinal Hume Academies (29 March 2019, unreported).

35. Whilst a one-off incident may amount to harassment, a Tribunal must bear in mind when applying the test that an 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration: Weeks v Newham College of Further Education UKEAT/0630/11, [2012] EqLR 788, EAT. The fact that a Claimant

is slightly upset or mildly offended by the conduct may not be enough to bring about a violation of dignity or an offensive environment and the Court of Appeal has warned tribunals against cheapening the significance of the words of the Act as they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment: Land Registry v Grant [2011] ICR 1390, CA. And as noted by the EAT in Richmond Pharmacology v Dhaliwal, 'while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the… legislation…) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

Direct discrimination

36. Section 13 of the Equality Act 2010 provides that it is direct discrimination to treat an employee less favourably because of disability than it treats or would treat others.

37. In determining whether there is direct discrimination it is necessary to compare like with like. This is provided for by section 23 of the Act, which says that in a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

38. To establish a claim of direct discrimination, the less favourable treatment must have been because of the disability itself, not something occurring in consequence of it: Ahmed v The Cardinal Hume Academies UKEAT/0196/18 (29 March 2019, unreported).

Discrimination arising from disability

39. An employer discriminates against a disabled employee if it treats that person unfavourably because of something arising in consequence of his or her disability and the employer cannot show either (a) that it did not know, and could not reasonably have been expected to know, that the employee had the disability; or (b) that the treatment was a proportionate means of achieving a legitimate aim: Equality Act 2010 s15.

40. 'Unfavourably' must be interpreted and applied in its normal meaning; it is not the same as 'detriment' which is used elsewhere but a claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable: Williams v Trustees of Swansea University Pension and Assurance Society [2018] UKSC 65, [2019] IRLR 306.

41. Simler P in Pnaiser v NHS England [2016] IRLR 170, EAT, gave the following guidance as to the correct approach to a claim under Equality Act 2010 s 15:
    - A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B.
    - The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is

likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

- The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

Failure to make reasonable adjustments

42. Under section 39(5) of the Equality Act 2010 a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination: Equality Act 2010 s21.

43. Section 20 of the Equality Act 2010 provides that the duty to make reasonable adjustments comprises three requirements, set out in s 20(3), (4) and (5). This case is concerned with the first of those requirements, which provides that where a provision, criterion or practice of an employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

44. In considering whether the duty to make reasonable adjustments arose, a Tribunal must consider the following (Environment Agency v Rowan [2008] IRLR 20):
    44.1. whether there was a provision, criterion or practice ('PCP') applied by or on behalf of an employer;
    44.2. the identity of the non-disabled comparators (where appropriate); and
    44.3. the nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

45. A duty to make reasonable adjustments does not arise unless the PCP in question places the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial (ie more than minor or trivial) and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

46. An employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the employee (a) has a disability; and (b) is likely to be placed at the substantial disadvantage. So far as knowledge of disability is concerned, this means the duty to make adjustments will

not arise unless the employer has actual or constructive knowledge of the facts constituting the employee's disability ie that the employee has (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his or her ability to carry out normal day-to-day duties. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in the Equality Act.

47. The predecessor to the Equality Act 2010, the Disability Discrimination Act 1995, contained guidance as to the kind of considerations which are relevant in deciding whether it is reasonable for someone to have to take a particular step to comply with the duty. Although those provisions are not repeated in the Equality Act 2010, the EAT has held that the same approach applies to the 2010 Act: Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, [2015] ICR 169. This is also apparent from Chapter 6 of the Code of Practice on Employment (2011), issued by the Equality and Human Rights Commission, which repeats, and expands upon, the provisions of the 1995 Act. The 1995 Act provided, as does the Code of Practice, that in determining whether it is reasonable for an employer to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—
    47.1. the extent to which taking the step would prevent the substantial disadvantage;
    47.2. the practicability of the step;
    47.3. the financial and other costs of making the adjustment and the extent of any disruption caused;
    47.4. the extent of the employer's financial and other resources;
    47.5. the availability to the employer of financial or other assistance to help make an adjustment; and
    47.6. the type and size of the employer.

48. The Code of Practice goes on to set out examples of steps which an employer may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments.

Burden of proof

49. The burden of proof in relation to allegations of discrimination and harassment and is dealt with in section 136 of the 2010 Act, which sets out a two-stage process.

    49.1. Firstly, the Tribunal must consider whether there are facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the claimant. If the Tribunal could not reach such a conclusion on the facts as found, the claim must fail.
    49.2. Where the Tribunal could conclude that the respondent has committed an unlawful act of discrimination against the claimant, it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed, that act.

50. The Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258 made the following points in relation to the application of the burden of proof:
    50.1. 'It is important to bear in mind in deciding whether the claimant has proved facts from which the Tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of … discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in.'
    50.2. In deciding whether the claimant has proved such facts, it is important to 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.
    50.3. It is important to note the word 'could' in the legislation. 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.
    50.4. 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.
    50.5. Where the claimant has proved facts from which the Tribunal could conclude that the respondent has treated the claimant less favourably because of disability, it is then for the respondent to prove that it did not commit that act or, as the case may be, is not to be treated as having committed 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 the protected characteristic.

Evidence

51. We heard evidence from the claimant and took into account written statements from Mr Paul Freeman and Mr George Jones, which were submitted in support of the claimant's claim. For the respondent we heard evidence from Miss Gina Walker (a manager in the team in which the claimant used to work), Mr Iain Robison (the claimant's line manager until January 2018), Mr David Carr (the claimant's direct line manager between January 2018 and April 2018), Mr Steven Younger (Head of Customer Services (PT operations)), Mrs Tracy Raitt (the claimant's line manager following Mr Carr) and Mr Ryan Lagay (an HR Business Partner). We also heard evidence from Prof D Turkington, a consultant psychiatrist who had been instructed jointly by the parties to prepare a report on the claimant for the purpose of these proceedings.

52. In addition, we were referred to a number of documents in a bundle comprising over 2000 pages spanning four lever arch files. We explained to the parties at the outset of the hearing that would only take into account the documents that we were specifically referred to.

The disability issue

53. The first issue we have considered is when the claimant became a disabled person within the meaning of that term in the Equality Act 2010. The claimant's case is that she was a disabled person at the time of all of the events about which she complains. The respondent accepts that the claimant was a disabled person by virtue of the impairment of depression as from 5 July 2018 (and that it knew, or ought reasonably to have known, that she had that disability as from that date) but submits that the claimant was not a disabled person before that date.

Evidence and primary findings of fact

54. The claimant started work for the respondent on 4 March 2013. Initially she was employed as a temporary Administrative Officer ('AO'). Then, on 7 November 2014, she was taken on as a permanent AO. In December 2016 the claimant was promoted to a management level ('O grade') position in the department known as PT Operations (or PTOps). In this role the claimant had line manager responsibility for a team of AOs carrying out 'P11D work.' This was the first line management role the claimant had held.

55. At the time of the matters with which we are concerned, there were two other P11D teams, each of which was managed by an O grade manager. The claimant's line manager in this role was Mr Robison. Mr Robison has been employed by HMRC since 1974. At this time he was the higher officer ('HO') at the Employer and Engagement Teams at Benton Park View and Waterside House at HMRC and had been since around January 2013. He was responsible for the management of five band O managers who were split between the sites at Benton Park View and Waterside House. In addition he had responsibility for the claimant and her team of AOs. The other two P11D teams were managed by Miss Walker, who also had responsibility for other band O teams in the Employer Engagement Team. The fact that they each managed more than one team across different buildings meant they would each provide cover when the other was away from work or off-site. This meant Miss Walker had some managerial contact with the claimant, even though she was not her direct line manager. That contact increased between May and August 2017 as Miss Walker was the project manager for the 'P11D project' that year (when the volume of P11D work increases).

56. From quite early on in her time in her new role the claimant felt she was having to take on more work than she should have had to. She also felt that one of her colleagues was not performing well and that this was affecting her ability to do her job. By March 2017 the claimant started to feel that the stress of work was having a significant impact on her. In early March 2017 the claimant told Mr Robison she felt uncomfortable with the work situation and asked if there was a possibility of a move. A few days later the claimant attended a meeting with Mr Robison and Miss Walker and one of her O grade colleagues in which she became upset.

57. On a number of occasions between March and May 2007 the claimant felt that Miss Walker had treated her unfairly; in particular the claimant felt Miss Walker had subjected her to unjustified criticism. The claimant's perception of the situation led her to ask for a meeting with Miss Walker's line manager, Mr Carr. At the relevant time Mr Carr was the senior officer delivery manager for the north-east region for delivery group two and a business coach manager for delivery group two. He has

been employed by HMRC for over twenty years. When the claimant met with Mr Carr she was visibly distressed. The claimant told Mr Carr that she was not comfortable with Miss Walker managing her. Following that meeting, the claimant continued to feel that Miss Walker was treating her unfairly. The claimant met with Mr Carr again on 30 May 2017 and raised further concerns about Miss Walker. Again, she was crying and distressed in this meeting. At the meeting Mr Carr suggested a mediation meeting with Miss Walker, which the claimant agreed to and which went ahead in June 2017. Later that day the claimant met with Mr Robison and they put in place a stress reduction plan. Mr Carr arranged for a second mediation meeting to take place on 26 June 2017. The claimant was accompanied at this meeting, and the earlier mediation meeting, by a trade union representative. At the end of the second mediation meeting Mr Carr agreed that Mr Robison should take back management responsibility of the claimant and her team in respect of HR matters but that in relation to P11D project work Miss Walker would remain responsible. Mr Carr suggested arranging another mediation meeting but the claimant said that wouldn't be needed.

58. The claimant continued to be unhappy about the way she perceived she had been, and was being, treated by Miss Walker and in July 2017 the claimant filled in a work-related stress report and filed a formal grievance against Miss Walker. The stress report was a standard form document provided by the respondent for employees to complete when they believed they were being caused work-related stress. The claimant explained the cause of her stress as 'various interactions with the HO Gina Walker which are outlined in my formal complaint'. In a box asking her to explain how her health had been affected the claimant said 'I become emotional very easily, especially whilst at work and I feel isolated a lot of the time so I'm left out of discussions. I have said on numerous occasions that I am not happy and not enjoying my role. I come in every day that Gina is in expecting her to either tell me off or tell all three of us off, usually about the workflow, but I also feel that I try to manage the work on the P11D teams to the best of my ability but get little support from the other two O bands which makes me anxious about getting the work done. I also constantly find Gina discussing things with an AO and wonder why she's not discussing it with the manager which makes me wonder what is going on which also makes me anxious.' In her grievance form the claimant filled in a box entitled 'please state the resolution you are seeking.' The claimant said 'my first choice would be a move out of this business area for either myself or Gina. My relationship with Gina has irretrievably broken down and I cannot work with her because she continually undermines me.'

59. The stress report and grievance were passed on to Mr Carr. Mr Carr completed his part of the stress report and forwarded it to his manager, Pauline Lincoln. Another manager, Alison Crichton, was appointed to investigate the claimant's grievance. Towards the end of July 2017 the claimant made further complaints against Miss Walker which were also forwarded to Ms Crichton to investigate.

60. In early August the claimant asked Mr Carr if he would ask Miss Walker to sit elsewhere as the claimant did not want her sitting nearby. Mr Carr told the claimant he would speak to Miss Walker and ask her not to sit near the claimant if there was a desk available for her to work at elsewhere. Mr Carr had that conversation with Miss Walker. A few days later the claimant sent another email to Mr Carr about an

email Miss Walker had sent to her which the claimant felt was inappropriate. Mr Carr arranged to meet with the claimant on 7 August. On that date, however, the claimant phoned to say she was not fit enough to attend work.

61. The claimant saw her GP on that date, who gave her a fit note saying that she was unfit for work due to work-related stress. The claimant's GP notes record that she was experiencing stress at work that had been 'building over a few months since personnel changes-difficulties with senior.' The notes record, and we find, that the claimant was tearful and that she said her appetite was off, her sleep was disturbed and she had some physical symptoms of anxiety (although what those symptoms were was not recorded). The claimant's GP observed that the claimant needed time away to prevent further impact on her health. The claimant's GP issued a sick-note for two weeks. Further sick notes, giving 'work-related stress' as the reason were issued by the claimant's GP on 23 August, 5 September, 19 September, 17 October and 24 October (backdated to 23 October).

62. The claimant remained off work for that reason until 24 October 2017 when she returned to work. The claimant told us she returned because she was concerned about the impact of her absence on her job.

63. During the claimant's absence on sick leave, Mr Robison spoke to her on a number of occasions. He first spoke to the claimant on 8 August and asked what he could do to facilitate her return to work. Initially she said nothing so Mr Robison asked if a move from the team would help. The claimant said that it would. The claimant told Mr Robison that she could not work in her current work environment because she could not work with Miss Walker. In subsequent telephone conversations whilst the claimant was absent on sick leave Mr Robison explained to the claimant that he, Mr Carr and Mr Younger were exploring whether there were any O Band vacancies that the claimant could move to. Mr Younger is, and was at the time, Head of Customer Services (PT Operations) at HMRC. He has been employed by HMRC since 1991 and has been at his current grade for a number of years. He has direct line management responsibility for ten members of staff and is responsible for around a thousand members of staff at the Benton Park View offices of HMRC. For three years he was the diversity and inclusion rep for the Benefits and Credits section.

64. During the claimant's absence, Mr Robison suggested to her various options for moves. In August Mr Robison told the claimant there was a vacancy available that she could move to in the records retrieval service. The claimant said she did not want to take up that role, partly because she felt people in that team would find out the reason for her move but also because she felt the work in that team was of a lower quality. Mr Robison also offered the claimant a role in account maintenance. The claimant decided not to accept that role, again because she felt people would talk about her reason for moving. Mr Carr also identified a posting the claimant could take up in the team he managed ('delivery group 2' or 'DG2'). The claimant turned down this offer, again on the basis that she felt staff in DG2 might know people in the P11D team and talk about why she had moved.

65. Although the claimant had said in her grievance 'my first choice would be a move out of this business area for either myself or Gina', during her absence she criticised

managers for focusing on looking for a new role for her, rather than moving Miss Walker. In an email to Mr Robison on 31 August the claimant said 'I have said move me OR Gina. All I know is that so far you have tried to move me. I have done nothing wrong, unless there are issues that have not yet been mentioned to me. I have been told on numerous occasions that I was doing well with managing the work on P11D so please advise on why the only option is to move me.' After she returned to work the claimant told Mr Robison that she no longer wished to move out of the P11D area.

66. At some point, although exactly when is not clear, Mr Robison obtained the claimant's consent to obtain an occupational health report. The claimant did not see anybody in occupational health until December 2017.

67. In the mean-time, the claimant's grievance against Miss Walker was considered by Ms Lincoln. In October 2017 the claimant was told her grievance was not upheld. The claimant appealed and Mr Younger was appointed to deal with the appeal. As part of the appeal process, Mr Younger met with the claimant to discuss the appeal. When discussing her appeal with Mr Younger, the claimant repeated that she no longer wanted to move out of P11D. She said that, from her perspective, Miss Walker was in the wrong and that it was she who should be moved.

68. Mr Younger did not uphold the appeal. However, he agreed with the claimant that the relationship between her and Miss Walker had broken down. As the mediation meetings run by Mr Carr earlier in the year had not been successful, Mr Younger recommended that the claimant be moved to a new team. He explained this to the claimant. He also decided that, in the interim, he would ask Mr Carr and Ms Lincoln to ensure that, as far as possible, Miss Walker would not be involved in the HR cases that were managed by the claimant and that she should keep work issues with the claimant to a minimum. In his response to the appeal Mr Younger offered the claimant support in finding a different role and offered to meet her to discuss the options open to her. Mr Younger identified a number of teams that the claimant could potentially join that he felt would be suitable.

69. The day after the claimant learned that her appeal was unsuccessful, she raised a second formal grievance against Miss Walker. On 8 December Mr Younger met with the claimant and her union rep to discuss her second grievance. The claimant said, again, that she felt she should not have to move and that Miss Walker should be moved. Mr Younger felt concerned about the claimant's well-being in this discussion because, in his view, she kept focusing on the same issues again and again, including many of the points raised in her original grievance against Miss Walker. Mr Younger explored with the claimant the possibility of further mediation but the claimant said she did not feel that would be effective. Mr Younger suggested to the claimant that she move to a new team and said that, in addition, he would act as her mentor to help her deal with the change to a new role. This was an unusual proposition as, although Mr Younger does regularly mentor other managers, it tends to be those in more senior roles or people on development schemes. The claimant was hesitant about the suggestion but the claimant's union rep told her that she would not receive a better offer. Mr Younger left the claimant to speak with her union rep and when he returned to the room the claimant agreed to withdraw the second grievance and move to another team with Mr Younger supporting her as a mentor.

Mr Younger agreed to meet with the claimant on a monthly basis as her mentor but said the claimant could contact him any time if she had any issues. The purpose of the meetings was to help the claimant develop new skills in whichever role she was undertaking and to support her with developing her career.

70. Following that discussion Mr Younger asked Mr Carr to find the claimant a new seat in a different building starting the following Monday where she could work until an alternative post was arranged. He also said he wanted to discuss with Mr Carr a new job for the claimant and suggested that, in the meantime, they look across his group to see what options there might be. Mr Carr contacted the claimant the same day and arranged somewhere for her to sit and for her to be provided with processing work to do. The claimant emailed Mr Younger on 14 December to say she still felt really upset about the prospect of moving teams and would really prefer not to. She said she felt as though there were adjustments that could be made on the P11D teams to make her more comfortable. She also suggested that the Occupational Health adviser she was due to see on 22 December might come up with some suggested adjustments.

71. The new work arrangements organised by Mr Carr began during week commencing 11 December 2017. The claimant moved out of the P11D team and joined a team in a different building which carried out investigations into returns from schemes in the construction industry. The claimant carried out processing work for Mr Carr (although Mr Robison remained the claimant's line manager). Mr Carr ensured the claimant had support from a colleague whenever needed. He also ensured that IT functionality was fast-tracked through so the claimant had the correct IT functionality as quickly as possible. Mr Carr was asked by the claimant for more complex processing work which he agreed to.

72. The position was intended to be a temporary move while Mr Younger looked for a suitable permanent role for the claimant to move to. The claimant retained her O band grading. Mr Younger continued to look for alternative roles for the claimant. He contacted a colleague, Mr Dyson, who at the time was the head of customer service for sites in the north-east, south of the Tyne, to ask whether there were any suitable O Band roles available in Washington. He also contacted a Mr Barnes, an HR business partner, to see if there were any suitable roles across the customer services group but he was told that there were not.

73. On 22 December, the claimant saw an occupational health advisor, Mr McAllister. Mr McAllister prepared a report following that meeting. Mr McAllister reported that the claimant had last seen her GP on 25 October 2017 and the GP had advised at the time that she had work-related stress. Mr McAllister carried out a non-diagnostic medical mental health assessment and said the claimant's score 'indicates severe stress and severe low mood.' The claimant told Mr McAllister that her energy level was about 50% and said she had not been socialising with friends and that she did not feel she could face household chores at that time. The claimant told him that she felt stressed at the time and that she felt her stress had increased since returning to work (at the end of October). She told Mr McAllister that she felt fit for work where she was but said stress adjustments had not been made to help her cope at work. When speaking with Mr McAllister, the claimant attributed her illness to two things: being asked to move; and being 'micromanaged by a higher officer'. She told Mr

McAllister, however, that her work helped her cope with her stress and that her work performance had not been affected by her current stress but that she felt a move would be detrimental to her health and was likely to make the stress worse. Mr McAllister advised the claimant to see her GP (the claimant had recently moved and needed to register with a new GP) and to consider contacting the respondent's counselling service to seek support. It appears from Mr McAllister's report that the claimant had, during her sick leave, made contact with HMRC's counselling service. Mr McAllister reported that in his opinion the claimant was fit for work 'with adjustments'. He recommended a re-referral in four weeks to review the claimant's stress level. He also recommended that the respondent consider: '1. limiting contact between the claimant and the HO involved in the grievance to help the claimant's stress to reduce; 2. if a management decision has been made that Miss Peace is to be moved I would advise such a move does not occur until this lady's health has improved. At present this lady is receiving no treatment despite the severity of her stress symptoms.' Under the heading 'current outlook' Mr McAllister said 'stress is not an illness in itself but it can cause serious illness if it isn't addressed and at present this lady is at increased risk of needing sick leave if her current level of stress persists. Miss Peace's health should improve with the above adjustments however in the longer term if a management decision has been made for this lady to move it may be beneficial to this lady's health (once she is well enough to cope with such a move).' Mr McAllister expressed the opinion that the claimant's stress was 'unlikely to be considered a disability because it has not lasted longer than 12 months.'

74. Mr Carr received Mr McAllister's report on 22 December. Mr Younger also saw the report and, on 3 January 2018, he sent an email to Mr Carr documenting the reasons why he did not feel it was appropriate to move the claimant back to the P11D team. In this email he said 'I am really concerned about Erika's mental well-being'. Mr Younger clearly believed that if the claimant returned to the P11D team the difficulties the claimant had experienced with Miss Walker would persist and the claimant's stress levels would remain high. He said he would ask the claimant to seek medical support as recommended in the OH report.

75. On 4th January 2018 Mr Younger had his first mentoring session with the claimant. The claimant told Mr Younger she had changed her mind and wanted to go back to P11D. The claimant was very upset in this meeting and Mr Younger was concerned about her and asked her to go to her GP, which she agreed to do.

76. After the occupational health report had been received, Mr Robison considered the claimant's absence as against the respondent's absence management process. He decided that, taking into account the high level of stress the claimant was experiencing, he would not manage the claimant's attendance down a formal route as he felt that would add further stress to the claimant. Mr Robison explained this to the claimant on 8 January 2018.

77. On 23rd January 2018 Mr Carr told the claimant that a role had been identified for her in his team as a performance coach. Mr Carr had arranged for the claimant to shadow and be 'buddied' by other coaches in the team. Mr Carr had discussed this role with Mr Younger, who felt that the claimant would be excellent in the role. Mr Younger believed Mr Carr was an outstanding leader and hoped that, with his

support, the claimant would do very well and enjoy her new role. The claimant told Mr Carr that she would try the new role although she made it clear she had reservations. She told Mr Carr she thought the job sounded like it involved a lot of training of groups of people that she did not think was appropriate for her to do given her general disposition. She also was concerned that the coaching role would involve coaching on IT matters which she did not feel comfortable with. Mr Carr arranged a meeting to complete a stress-reduction plan for the claimant.

78. The claimant arranged to see her GP on the 25 January 2018. The claimant's GP notes record that she told her GP that she had long-standing issues with a manager at work and felt she was being punished. She told her GP that she was thinking about it all the time, worried about her future at work, tearful all the time, not sleeping, over-eating, had poor concentration and felt isolated. The claimant's GP diagnosed depression and prescribed medication.

79. After her doctor's appointment on 25th January the claimant told Mr Carr that she had been diagnosed with depression.

80. On 30 January 2018 the claimant met with Mr Younger and they talked about her GP visit. The claimant told Mr Younger that she had been diagnosed with depression. This was the claimant's second mentoring meeting with Mr Younger. In that meeting the claimant insisted that she wanted to go back to the P11D team. Mr Younger asked the claimant to consider how she might react should Miss Walker walk by in the corridor as they left the room. The claimant became very upset at that point. Mr Younger thought she was having a panic attack. When the claimant settled down he said something to the effect that this was why the claimant could not go back to the P11D department. Mr Younger was very concerned about the claimant's wellbeing given how emotional she was in the meeting and how she had reacted to the idea of encountering Miss Walker. He was convinced it would be inappropriate for her to return to the P11D team

81. Mr Carr put in place support and training for the claimant in the new role as described in his witness statement. The claimant began the new role in the week commencing 29th January 2018. The claimant was supported by other coaches in the coaching role and they involved her in activities. She attended coaching workshops. Mr Carr spoke to business managers in the employer group to explain that the claimant would be in contact with them to visit their business areas so that she could get a better understanding of their workloads and those business managers were happy to support that. Mr Carr also gave the claimant the option to shadow him on some calls so that she could understand the wider picture across the employer group. Mr Carr held weekly team meetings, which included the claimant, in which coaches would discuss what work everyone had on and their priorities and who would lead and drive different work forward. Mr Carr told the claimant, as well as all other business coaches, that they should put themselves forward for any of the training packages that were being delivered and said he was more than happy to approve any of the coaches going on any of the training courses that were available for coaches.

82. Mr Carr put in place a stress-reduction plan for the claimant on 2nd February 2018 and carried out a review on 15th February 2018, meeting with the claimant. He felt

that the claimant was doing well in the business coach role. Mr Younger regularly asked Mr Carr for updates and he too believed that initially she seemed to be doing well. During review meetings and other meetings between Mr Carr and the claimant, however, the claimant mentioned a number of times that she wanted to go back to the P11D team. Mr Carr did not think that was appropriate because it would mean working with Miss Walker which would cause the claimant stress again.

83. On 14 February 2018, the claimant spoke with an occupational health advisor, Ms Jenny Barnes, who prepared a short report. The claimant told Ms Barnes that her sleep pattern was disturbed and she remained upset at events in the workplace, including the change in her role. Ms Barnes suggested to the claimant that she may benefit from some cognitive behavioural therapy. Ms Barnes said 'Miss Peace remains upset at the change role. Ideally she would like to revert back to her previous role where she felt comfortable….If this is not possible then I would advise that she needs appropriate support and training in order to understand the exact needs of the new role and for this support to continue. In my opinion her current condition is unlikely to be afforded covered by the Equality Act 2010.'

84. The claimant saw her GP again on 26th February 2018. The claimant told her GP that she did not feel better with the medication. Her GP suggested it was worth persisting with the medication. The claimant saw her GP again on 21st March 2018, 10th April 2018, 22nd May 2018, 12th June 2018 and 19th June 2018.

85. On 28 February 2018 the claimant put in another formal grievance in which she said that Miss Walker had defamed her during the grievance process the previous year. She also criticised the decision to move her out of P11D and about other matters about which she was unhappy that had occurred in 2018.

86. In early March 2018 the claimant and Mr Carr exchanged e-mails about the parts of the coaching role the claimant would be more comfortable with. Mr Carr had agreed with the claimant that she did not need to support staff with the upskilling of the digital skills in the workshops as 'digital ambassadors' would always be available to lead or run the workshops. The claimant had made Mr Carr aware that she was not confident in running the workshops.

87. On 14 March 2018, ahead of Mr Younger's third mentoring meeting with the claimant, Mr Younger asked a colleague, Lauren Battersby, to join them in the meeting, which the claimant agreed to. Miss Battersby ran a programme for wellbeing and mental health strategy and had a lot of experience relating to health and wellbeing that Mr Younger felt would be beneficial to the claimant. The claimant was subdued in the meeting. In that meeting the claimant again expressed a desire to return to the P11D team and said she had 'unfinished business' with Miss Walker.

88. On 14 March 2018 the claimant e-mailed Mr Carr saying she was experiencing very high levels of stress and said she felt she needed another referral to occupational health to 'see what else can be done'. She asked Mr Carr to arrange a referral. Mr Carr responded by asking the claimant for further information about the adjustments she felt might be needed.

89. In the meantime, Mr Carr took advice from HR about the claimant's most recent grievance and considered the respondent's grievance policy. On the strength of that advice and the contents of the policy he decided that grievance should not be progressed because he felt it did not meet the relevant test in that policy. He believed it related to continued dissatisfaction regarding business matters which had already been the subject of a grievance. Mr Carr told the claimant of his decision on 21st March 2018. The claimant was unhappy about that decision.

90. On 3rd April 2018 the claimant began a period of sick leave. Her doctor, in a fit note, said the reason was 'stress at work'. That absence continued until the claimant returned to work on 19th June 2018. During her absence the claimant had six sessions of CBT and saw some improvement in her mental health.

91. It is clear that, by the time the claimant began this period of absence, she was unhappy with Mr Carr, partly because the claimant was unhappy with the decision not to progress her third grievance, but also because she felt Mr Carr should have referred her to occupational health immediately upon her request instead of asking her to discuss the adjustments she felt were needed. She was also unhappy in the coaching role and, during her absence, the claimant raised concerns about the demands of the coaching job and a perceived lack of support from Mr Carr. It is more likely than not that the claimant was still unhappy about the fact that she had been moved out of the P11D role.

92. Mr Carr asked Mrs Raitt if she would be the keeping in touch manager for Miss Peace during her absence. Mrs Raitt agreed. Mrs Raitt is the senior officer for delivery group seven, which is part of the personal tax operations in the customer services group north-east England at HMRC. She has been employed by HMRC for over twenty-seven years and in a leadership role for over twenty-four years.

93. During the claimant's absence the claimant refused to interact with Mr Carr any longer. It became clear to Mr Younger that the claimant's relationship with Mr Carr had broken down and that the claimant did not feel able to undertake the coaching role. Mr Younger decided that it would be better for the claimant to be managed by somebody else. He asked Mrs Raitt, to carry out that role. Mr Younger decided to allocate the claimant to Mrs Raitt to manage for two reasons: firstly, he believed Mrs Raitt to be an outstanding manager with a great deal of experience and a warm and friendly manner, which Mr Younger felt would be suitable for supporting the claimant; secondly, Mrs Raitt was based in another office, where the claimant would not encounter the people against whom she had raised grievances.

94. Mrs Raitt met with the claimant on 18th April. Mrs Raitt and the claimant agreed that they would keep in touch every week during her absence and the claimant contacted Mrs Raitt as agreed. The claimant and Mrs Raitt completed a work-related stress report with input from Mr Carr.

95. Mr Carr referred the claimant back to occupational health. Consequently, the claimant was reviewed again by another occupational health physician, Dr Bell, on 19th April 2018. His opinion was that the claimant 'continues to experience active symptoms of anxiety as well as to a lesser extent depression.' He said 'I think the situation is reactive to the background situation and work rather than endogenous,

so the prospects are good for resolution, particularly if the background perpetuating factors can be resolved. With her current level of symptoms I do not think she is well enough to return to work, particularly since her symptoms appear to be triggered by and aggravated by reminders of the workplace and contact with work. Returning to work too early will serve to entrench the association of anxiety symptoms and the workplace…..she is now engaging with appropriate medical support and we would expect this to have a positive impact on her symptoms and function.'

96. On 3 May 2018 Mrs Raitt held a formal attendance meeting with the claimant as she had been absent for twenty-eight days. The meeting was a formal meeting held in line with the respondent's policy on absence. They discussed the claimant's return to work with an expected return to work in six weeks, based on what the claimant had discussed with her GP. They discussed the claimant joining Mrs Raitt's team and agreed that Mrs Raitt would make an OH referral when she returned from annual leave on 15 May, which she did.

97. During this meeting, the claimant asked Mrs Raitt whether she could work as a business coach in the P11D area, working for somebody other than Mr Carr. Following the meeting, Mrs Raitt asked Mr Carr and Mr Rutherford, who was Mr Carr's line manager, if that would be possible. Mr Carr said there was not a vacancy for a coach on P11D at the time. Mrs Raitt explained this to the claimant. Mrs Raitt also asked whether it would be possible for the claimant to move to an analyst role or, longer term, to move to a coach role with a different workload. Mr Rutherford emailed a number of senior delivery managers within PT operations asking whether they had any O band vacancies for a performance coach (business analyst) role. No vacancies were identified as a result of that enquiry.

98. On or around 22 May, the claimant had a consultation with occupational health, following the referral that had been made by Mrs Raitt. The occupational health advisor prepared a report but they retracted it after the claimant objected to something in the report. We were not shown a copy of that report.

99. Mrs Raitt met with the claimant again on 6 June. The claimant was unhappy that she was not being allowed to return to work as a business coach in the P11D area. Mrs Raitt explained to the claimant again that there was no vacancy available as a coach in P11D for the claimant to move into. Mrs Raitt did not have a permanent role in her team that did not involve line management. However, she offered the claimant a return to work on a temporary basis as part of her own team to enable her to settle back into the work environment whilst they looked for a suitable permanent role for her. Mrs Raitt offered the claimant the opportunity to carry out some job shadowing and training with a view to supporting her team leaders and advisers with processing work: either P11D work, which the claimant was familiar with, or Construction Industry Scheme work or National Insurance casework, both of which Mrs Raitt could arrange training for. Mrs Raitt also suggested that that the claimant could also shadow people in other roles so as to give her an opportunity to gain experience and knowledge of the wider O band roles and identify something she might feel suited to. The claimant agreed to this and said she wanted to be trained on the National Insurance aspect of processing work. However, she made it clear she believed she should have been allowed to take up a coach role in P11D. Mrs Raitt told the

claimant there was a vacancy as a 'penalties' coach in her previous area but the claimant did not want to go back to that area.

100. Mrs Raitt spoke to Mr Carr on 6 June 2018 and asked about the role of performance coach on P11D work again. Mr Carr reiterated that that was not possible, even on a temporary basis. He referred again to the fact that there was no vacancy. Based on Mrs Raitt's evidence we find it more likely than not that he also mentioned that he did not think it would be appropriate for the claimant to work with the P11D team given that she had previously been unhappy working with Miss Walker. In an email the following day, Mrs Raitt explained that it would not be possible for the claimant to perform a coaching role in P11D. In response, the claimant asked who had made that decision saying 'please let me know in writing exactly who has made the decision to refuse the only adjustment I have asked for and why'. In that email the claimant also explained why she did not feel the penalties coach role was suitable, saying she was not comfortable going back to the coach role because no matter how much shadowing she does she is not the type of person who is comfortable with facilitating (i.e. training groups of people) or training on things she does not know about. The week before the claimant returned to work she sent an email in which she said she wanted it to be clear that she was returning 'under the circumstances that my job is under threat'. She also said that she did not think it was fair that she was not returning to an 'actual role'.

101. The claimant returned to work on 19 June, to a role which involved completing processing work within Mrs Raitt's team, as discussed in the meeting of 6 June. Mrs Raitt arranged training on the processing aspect of the work for the claimant. The claimant and Mrs Raitt agreed a short-term reduction in hours to support the claimant's return to work and Mrs Raitt asked the claimant where she would like to sit within her area and gave her a choice of available desks to sit at. Meanwhile Mrs Raitt asked managers in all of the areas within PT Operations based at Benton Park View who had O band roles that did not have line management responsibility if they had any opportunities for the claimant to job shadow.

102. The claimant was not happy doing processing work as she felt this should only be completed at AO grade and not at her grade. The claimant wanted Mrs Raitt to explore whether a move to tax credits could be arranged as this was an area the claimant had previously worked in. On 4th July 2018 the claimant e-mailed Mrs Raitt saying the following: 'I would just like to put clearly in writing that I am not happy with the situation. I cannot foresee a time when I will be comfortable with being an O band, sitting amongst AOs, completing an AO processing task, ….' The claimant also said in that e-mail 'I understand that training and experience will make me more confident in and understand the task, but the point is it's not an O band role and by no means permanent. Not to mention the fact that people's perception of me does cause me anxiety…..I know you don't have any roles, and that you have no control outside of your command, but I just don't believe there is no role, anywhere in customer services that I could take up.'

103. The claimant had a telephone consultation with Dr Massey, of occupational health, on 5th July 2018. Dr Massey referred to the claimant's continuing problems with her psychological health and said 'the issues seem to relate to her feeling that the organisation has not been able to identify work that represents a good match for

her capabilities and skill-set, and that she feels in a state of limbo as she states that she is not working in a defined role and feels uncertain as to her career future. The situation has gradually taken its toll on her psychological health in the intervening period. As you know there have been periods where she has not felt able to work, and although she has been back in work over recent weeks she continues to struggle with her sleep, has become fairly reclusive, and feels tearful and irritable much of the time.' He went on to say this:

> *'Miss Peace is already receiving appropriate treatment to support her psychological health and well-being as far as possible, but problems are ongoing and it is predictable that they will remain so for as long as the employment relationship issues remain ongoing…Fundamentally the underlying problems here exist within the employment relationship and the psychological problems that Miss Peace is experiencing are secondary to these. It follows that medical treatment can only be a partial benefit to her, as it is addressing the symptoms rather than the underlying cause and instead it will be a change of circumstances – meaning a resolution to these issues – that will be needed for her to regain her normal sense of health and wellbeing…..In my view Miss Peace's symptoms have been sufficiently severe and enduring that it would be appropriate to manage her case on the assumption that she is likely to be a disabled job holder for the purposes of the Equality Act. In terms of adjustments it is really a question of engaging with Miss Peace as effectively as possible, and taking what steps you can (ie those measures which are operationally feasible) to try and identify work that represents a good match for Miss Peace's capabilities and skill-set and to give her what clarity and reassurance you can in relation to the longer term.'*

Prof Turkington's report

104. We were referred to a psychiatric report prepared by Prof Turkington for the purposes of these proceedings. Prof Turkington saw the claimant on 17th June 2019 and prepared his report on 20th June 2019. He was instructed to prepare his report by the claimant and the respondent jointly. The letter of instruction, sent by the respondent's representative but approved by the claimant, noted that the respondent admitted the claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 with effect from 5th July 2018. The parties asked Prof Turkington to prepare a report to assist the parties and the tribunal in their determination of whether or not the claimant was a disabled person at any point in time prior to 5th July 2018 and, if so, from what point in time. The parties provided Prof Turkington with various documents to assist him in preparing his report, including the claimant's medical records and the occupational health reports, the claimant's claim form and the disability statement she prepared on 30th October 2018 as well as a report prepared by the claimant's GP dated 1st November 2018 and a psychological report prepared by Dr L Wilkinson dated 23rd April 2019. The parties also provided Prof Turkington with guidance on the Equality Act and in the letter of instruction set out the definition of disability. The parties asked Prof Turkington to address in his report the following matters:

104.1. the nature of the impairment from which the claimant suffered prior to 5th July 2018

104.2. when it was first diagnosed and by whom

104.3. the stage at which 'the diagnosis reached a point that it was likely that the effect was long-term in the sense that it was likely to last at least twelve months, or the total period for which it lasts is likely to be at least twelve months, or was likely to last for the rest of the claimant's life';

104.4. the stage at which the claimant's ability to carry out normal day to day activities was adversely affected;

104.5. what medication and what other treatment the claimant received, if any, and over what period, identifying what the consequences would be on the claimant's ability to carry out normal day to day activities if the claimant had not taken medication or submitted to medical treatment during the relevant period;

104.6. if the condition affected the claimant's ability to carry out normal day to day tasks, whether the effect was substantial, in the sense that it was more than minor or trivial;

104.7. if the condition is or has been variable from time to time, an idea of approximate dates when the adverse effects have been substantial and an opinion as to whether they are so currently.

105. The letter of instruction went on to explain matters that should be taken into account, or ignored, in considering whether the claimant's impairment had, or would likely to have a substantial adverse effect on her ability to carry out normal day to day activities. The letter of instruction contained a definition of disability as follows: 'a person has a disability for the purposes of the EA if a he/she has a physical or mental impairment, which has a substantial and long-term adverse effect on his/her ability to carry out normal day to day activities. An impairment will be regarded as 'long-term' if it has lasted at least twelve months, or if it is likely to last at least twelve months, or if it is likely to last for the rest of the affected person's life. Where an impairment has in the past had a substantial adverse effect but has now ceased to do so, it will be treated as continuing to have a substantial affect if the affect is likely to recur ('likely' means 'could well happen' – it does not mean probable). 'Normal day to day activities' is anything which is not abnormal or unusual.

106. In his report, Prof Turkington reviewed information from the various documents he was provided with and described the claimant's symptoms as at the date of the consultation in June 2019. Prof Turkington then went on to describe a history of the claimant's symptoms based on the account given to him by the claimant. That history referred to the claimant being very emotional in a work situation in March 2017 and having felt stressed prior to that. The report referred to the claimant saying she started worrying a lot about her work situation and, by August 2017, when she went off sick, feeling very stressed, anxious, trapped and sad. Miss Peace told Prof Turkington that by the summer of 2017 she was becoming more withdrawn, but believed she was still working efficiently. She said that she started over-eating and her sleep started to deteriorate and she then felt increasingly down and anxious. She described her time off work between August and October 2017 to Prof Turkington, saying she felt her confidence and personality had been 'destroyed' and that she spent her time watching television and reading books, but did not enjoy them and could not really concentrate on them. She described to Prof Turkington being worried all the time and becoming increasingly withdrawn and irritable. The claimant told Prof Turkington that she was really anxious in the October of 2017 but by the middle to end of January 2018 her mood had changed, and she felt really low in mood. She told Prof Turkington that she was so low that she had thoughts of

walking into the sea and drowning herself. She reported prominent feelings of hopelessness at having given up and was still over-eating. The claimant told Prof Turkington that she was down all the time since January of 2018 and was having powerful thoughts of wanting to kill herself. She told Prof Turkington she had been like that since January of 2018 and there seemed to be nothing positive in her life. She told Prof Turkington that she had not improved at all since January 2018 though there was period in June 2018 when she was not at work and doing CBT and her mood improved slightly although she was still anxious and low. Prof Turkington recorded that the claimant had had no prior relevant medical history.

107. Prof Turkington expressed the opinion in his report that the claimant 'suffered from a mental impairment as described in the Disability Act ie depression of moderate severity as of 25th January 2018. This was originally noted by Mr Brian McAllister (Occupational Health Advisor) on 23rd December 2017 who then referred Miss Peace to her GP who made the diagnosis.'

108. Prof Turkington gave evidence on the sixth day of the hearing. In answer to questions, Prof Turkington explained that he reached the conclusion that the claimant suffered from an impairment as of 25th January 2018 having read the GP entry of that date, the GP having diagnosed depression on that date. He said that when the claimant had visited her GP on previous occasions he did not think her mental health had hit the level at which it could be described as a mental impairment.

109. Prof Turkington had been sent a copy of a psychological report prepared by Dr Wilkinson for the purposes of these proceedings on the instruction of the claimant. Dr Wilkinson assessed the claimant and prepared her report in April 2019. Dr Wilkinson's report records that the claimant reported constant difficulties with mood and anxiety since March 2017. Dr Lindsay expressed the opinion that the claimant had developed 'a generalised anxiety disorder which resulted in a deterioration in her situation and her view of herself and thus triggered the development of a depressive disorder. I would therefore consider her to have a primary diagnosis of generalised anxiety with a comorbid diagnosis of depression.' She also said 'in my opinion, Miss Peace has been suffering from symptoms of anxiety since March 2017 and began to suffer from symptoms of depression shortly after (these are first documented in her medical notes in August 2017).' Commenting on this report, Prof Turkington told us that he did not believe the claimant met the criteria for generalised anxiety disorder but he did feel she met the criteria for moderate clinical depression. He said in his view the claimant had clinical depression with prominent anxiety.

110. Dr Wilkinson said in her report that the claimant was experiencing symptoms of depression since August 2017. Prof Turkington told us he agreed that there was a component of sadness at that time but that it did not become prominent until January 2018 by which time, he said, there had been 'a clear escalation up to a diagnostic level.' We asked Prof Turkington how he would distinguish between what he referred to as clinical depression and other kinds of depression of the sort referred to by Dr Wilkinson in her report that the claimant was experiencing in mid-March 2017. Prof Turkington explained that 'depression' as a mood is something everybody gets and, in that sense, could be described as 'sadness'; the unremitting load of clinical depression is different: it is something that keeps going. He explained that before

January 2018 the claimant had sadness but it was fluctuating. By the time the claimant saw her GP on 25th January 2018 it was much more prominent and unremitting. He said that the difference with clinical depression is that the brain chemistry has changed and there is a lack of energy and no pleasure in life. Prof Turkington described this as 'a whole different level.' He said stress builds up to a level where it affects the brain chemistry and the individual cannot cope with the level of stress. Prof Turkington said it could be seen from the claimant's medical records that on 25th January 2018 when the claimant saw her GP she had a whole different level of symptoms to that which she was reporting previously. In answer to questions from Mr Bain, Prof Turkington explained that one can also experience anxiety without having a generalised anxiety disorder. He Interpreted Dr Wilkinson as saying that, although the claimant had symptoms of anxiety and depression in 2017, it only developed into a disorder subsequently.

111. We asked Prof Turkington if it was possible the claimant had depression, in the clinical sense, before the date on which she saw her GP on 25th January. He said it was possible although that did not come through in the medical records. He also made it clear he did not think the claimant had the mental impairment of depression when the claimant saw the occupational health advisor on 22nd December 2017. Prof Turkington said that, although by the time the claimant saw occupational health on 22nd December 2017 the deterioration in the claimant's mental state was a concern, he felt there was not enough there to show that the claimant met the criteria of having a mental impairment. He noted that the occupation health report was slightly contradictory in that it referred to the claimant's performance being affected yet talked about reports of severe low mood and severe stress and fifty-percent energy levels. He said this was slightly contradictory in that with a moderate depressive episode it would be difficult to work.

112. In his report, Prof Turkington said the following about the effects of the claimant's depression: 'In terms of undertaking day to day activities in a setting of moderate depression (with anxiety) this would have become difficult as of 25th January 2018 due to insomnia, poor concentration and low energy.' He expressed the opinion that 'the impact has been substantial as between 28th January 2018 and early June 2018 in that Miss Peace did not have the energy or concentration to carry out normal tasks such as tidying the house, going for walks or going shopping. There was no substantial impairment for a brief period of time following the course of six CBT sessions which ended in June 2018.' At the hearing Prof Turkington confirmed that the reference to 28th January 2018 in that part of his report was mistake and he intended to refer to 25th January 2018. Prof Turkington went on in his report to say 'it is my opinion that there has been substantial impact on her ability to carry out day to day activities between 28th January 2018 and early June 2018 and since 5th July 2018. Miss Peace continues to have a substantial impact on her ability to carry out normal day to day activities.'

113. Addressing the likely duration of the adverse effects of the claimant's impairment, Prof Turkington went on to say 'the diagnosis did not reach a point that it had lasted or would have been considered to be likely to last for over twelve months until the accepted date of 5th July 2018. There were concerns as of the GP appointment of April 2018 as at that time there had been no improvement with Sertroline 50mg and the dose was increased to 100mg. There were suicidal thoughts and this lady was

given the number for the crisis team. However, by June of 2018 this lady scored as being depression and anxiety free on the PHQ-9 and GAD-7. This shows substantial variability in the degree of mental impairment.'

114. Prof Turkington said, in response to our questions, that in concluding that it wasn't until early July 2018 that the effects of the claimant's impairment could be said to be likely to last twelve months, he had in mind the guidance in the letter of instruction and the test he had applied was whether it 'could well happen.' He said that he knew that was the test to apply before it was set out in that letter. Prof Turkington explained that the reason that he reached the conclusion he did about the likely future effects of the claimant's impairment was that one would expect depression to recover with treatment, including CBT, and anti-depressant medication and that looked like what was taking place in the claimant's case. He said if the underlying work-related stresses were addressed, his opinion was that the effects of the impairment would not be long-standing. We asked Prof Turkington, if he had seen the claimant on 25 January 2018 how likely he would have thought it was that the effects of the claimant's impairment would last for twelve months. In response he said that normally depression will resolve in two to three months if the underlying causes are worked on and as a psychiatrist looking at the claimant's situation he would expect a recovery if the claimant was given the right treatment and the work related issues were addressed. He said that if the work-related issues were not addressed he would see that as a 'powerful maintaining factor' and it would be possible the effects could last twelve months, although the anti-depressants and therapy could still have worked and with medication and therapy he would still have been hoping for a recovery. In response to a question from Mr Bain, Prof Turkington said that if the tribunal concludes that the claimant had an impairment from late December that would not change his view that it did not become long-term until July 2018.

115. Prof Turkington expressed the view that it is a struggle to work with moderate depression. On being asked whether it was unusual for somebody with the claimant's condition to be working, Prof Turkington said that she was unwell and was going to struggle in the work environment and that most people in that position would be off work but if the individual was going to be at work it would help to be on restricted duties with minimum stress and perhaps some kind of repetitive work with some supervision. Prof Turkington also said that as one of the stressors the claimant had experienced was her relationship with a particular manager, moving the claimant to a place where she would be near that manager would have exacerbated the claimant's work-related stress. He also said that if the claimant was in a role about which she knew nothing and which was very demanding then that would not help the claimant either and it would be better for her not to be in work. He said that taking in new duties would be very difficult and managing a team of people would also be too taxing for somebody with clinical depression even if the team was limited to, say, ten to twelve people.

Conclusions on the disability issue

116. We accept that the claimant was experiencing stress at work as early as March 2017 as a consequence of which she experienced low mood and anxiety and related symptoms. She became upset easily at work, had difficulty sleeping, her appetite

was affected and she was withdrawn. Because of the stress she was feeling at work she took an extended period of sickness absence between August and October 2017.

117. Prof Turkington's expert opinion is that the claimant had a mental impairment, namely depression of moderate severity, as of 25th January 2018. He acknowledged that the claimant may have had that impairment or shortly before that date but not as early as 22 December 2017 when the claimant saw an occupational health adviser. The distinction Prof Turkington made between depression as an impairment (clinical depression) and low mood and anxiety is in line with the distinctions made by the employment appeal tribunal in the cases of J v DLA Piper UK Ltd and Perry v Dudley Metropolitan Council. It is clear to us that the claimant's low mood and anxiety in 2017 were a reaction to problems she perceived at work. As the year progressed the claimant's unhappiness grew deeper. Her dissatisfaction was compounded by the fact that her grievance was not upheld, a decision which the claimant felt unable to accept. She also felt a deep sense of injustice (whether or not warranted) at the fact that Miss Walker, the subject of her grievance, was not moved out of the P11D team, and found it difficult to move on from this.

118. We accept Prof Turkington's expert conclusion that, until January 2018, the claimant did not have a mental impairment but rather was experiencing a reaction to circumstances at work that she perceived to be adverse and which manifested itself in low mood and anxiety and related symptoms.

119. The claimant told Prof Turkington that her mental health deteriorated in January 2018. That is consistent with Prof Turkington's opinion that, by January 2018, the claimant had developed an impairment, namely moderate clinical depression. Although Prof Turkington identified 25 January 2018 as the date from which the claimant had an impairment, he pinpointed that date only because that was the date the claimant had visited her GP. We accept the claimant may have developed clinical depression at an earlier time in January, shortly before that date, but certainly not as soon as December 2017, for the reasons given by Prof Turkington.

120. We also accept Prof Turkington's conclusion, for the reasons he gave, that the claimant did not have Generalised Anxiety Disorder but rather that the impairment she had was moderate clinical depression with prominent anxiety.

121. We conclude that with effect from 25 January 2018, or very shortly before that date, the claimant had an impairment for the purposes of the Equality Act 2010, namely moderate clinical depression with prominent anxiety.

122. In order to constitute a disability within section 6 of the Equality Act, the impairment must have an effect on the claimant's ability to carry out normal day-to-day activities that is both substantial (in the sense of being more than minor or trivial) and long term. Mr Bain did not seek to argue that the claimant's depression did not have a substantial adverse effect on the claimant's ability to carry out day-to-day activities with effect from 25 January 2018. He did however submit that the adverse effect of the claimant's depression could not be said to be long-term until 5 July 2018.

123. As noted above, the effect of an impairment is long-term if it has lasted for at least 12 months or could well last for at least 12 months. As we have found that the claimant did not have an impairment until 25 January 2018, or very shortly before that date, it is clear that the adverse effects of the impairment cannot have lasted for at least 12 months at any time before 5 July 2018 (or indeed before January 2019). The question is whether, at any time before 5 July 2018, it was the case that the substantial adverse effect of the impairment on the claimant's ability to carry out day-to-day activities could well last at least 12 months (in other words, for the rest of 2018 and into 2019).

124. Prof Turkington's opinion is that 'the diagnosis did not reach a point that it had lasted or would have been considered to be likely to last for over twelve months until the accepted date of 5th July 2018.' We are satisfied that in reaching that opinion, Prof Turkington had in mind the correct test i.e. whether it 'could well happen.'

125. We accept his expert opinion that normally depression of the kind experienced by the claimant will resolve in two to three months if the underlying causes are worked on i.e. if the individual receives the right treatment and the work-related issues are addressed. Based on Prof Turkington's responses to our questions, we find that the likelihood of the claimant continuing to experience the adverse effects of her depression for 12 months or more was directly linked to the likelihood of her receiving the right treatment and of the work-related issues being addressed.

126. The claimant recognised the need to see her GP in early January 2018. It is clear then that she was willing to seek appropriate treatment and there was no reason to think she would not receive it.

127. As for the question of whether it was possible the work-related issues would not be satisfactorily addressed, we must remind ourselves that this question has to be considered in light of the circumstances that pertained at the relevant time i.e., initially at least, in January 2018. We are not permitted to take into account the fact that we know how things actually turned out and that the workplace difficulties were not in fact resolved.

128. As at January 2018, based on what was known and what had happened up until that date, the chances were high of the claimant's workplace stressors being removed, in our judgement. The claimant was being supported by a very senior manager, Mr Younger, who had experience in dealing with equality related issues. Although he had not upheld her appeal against the grievance she submitted, we accept that he was genuinely concerned and committed to finding the claimant a suitable alternative role that she would do well in. He had organised a move out of the P11D team and away from Miss Walker, whose presence was a stressor for the claimant. Whilst the claimant did not agree with that move, we accept it was done for good reason and with the genuine aim of resolving a stressful situation for the claimant and it could not have been predicted that the claimant's unhappiness at that move would become as entrenched as it did. Mr Younger had offered to work with the claimant as her mentor to help her in her career. This further illustrates the concern that was being taken over the claimant and her mental health, as does the fact that Mr Robison decided not to issue a warning under the attendance management process following the claimant's absence in 2017. Furthermore,

although the claimant was not happy about moving into a coaching role, she was doing so under the stewardship of another senior and very experienced manager, Mr Carr, who was aware of her mental ill health and had previously demonstrated that he took the claimant's concerns seriously by arranging mediation sessions and completing appropriate stress assessments when the claimant first became upset and raised her concerns about Miss Walker in 2017. In any event, there was no reason at that time to think that, if that position did not work out, a suitable alternative role for the claimant could not or would not be found elsewhere, particularly given Mr Younger's involvement and the fact that the respondent is a very large organisation with a range of managerial roles that might, in principle, be suitable for the claimant. Indeed the claimant had been offered other roles by Mr Younger and Mr Carr in 2017.

129. Looking at the evidence in the round, as at January 2018, we conclude that it was not likely that the adverse effects of the claimant's depression and anxiety would last for 12 months or more: it would not be appropriate to say that those effects could well last beyond the end of the year given the efforts that were being made to address the work-place stressors.

130. In our judgement, that was still the case up until July 2018. Although, before then, it became clear that the claimant was finding it difficult to put the past behind her and move on from her dispute with Miss Walker, and in addition was unhappy about a number of issues in relation to Mr Carr, and the coaching role, she continued to receive managerial support, particularly from Mr Younger and, in the new role, from Mr Carr. When it became apparent the coaching role was not working out, Mr Younger arranged for a new, and again very experienced, manager to take over managing the claimant. Dr Bell of occupational health said in April 2018 'the prospects are good for resolution' Efforts continued to find the claimant a suitable alternative role and the claimant saw a brief improvement in her condition in June. A temporary role was found for the claimant doing the kind of work that Prof Turkington says was appropriate, to ease her back into the work environment whilst a suitable permanent role was found.

131. The respondent has conceded that, as of 5 July 2018, the effects of the claimant's impairment were likely to (ie could well) continue for the remainder of the year and into January 2019. Prof Turkington supports that conclusion. We agree with that conclusion. Although the respondent's managers were still committed to finding a suitable role for the claimant, the success of that endeavour would depend on the claimant. By early July the claimant was increasingly voicing her frustration at what she saw as a lack of real progress in finding her a role she felt was suitable. This is apparent from the email of 4 July and Dr Massey's record of what the claimant told him the following day. By 5 July 2018, the adverse effects of the claimant's impairment had continued for almost 6 months, despite the respondent's efforts to find the claimant a suitable post, and we find that – as at that date – it was the case that those effects were likely to continue for the rest of the year and into 2019 (ie for 12 months from when the claimant first had the impairment). The claimant has not persuaded us that the same could be said at any time before 5 July 2019, however.

132. Therefore, we conclude that the claimant did not have a disability, within the meaning of that term in the Equality Act 2010, before 5 July 2018.

Implications of decision on disability for claim number 2501305/2018

133. The claimant's complaints within claim number 2501305/2018 are those lettered (a) to (l) inclusive.

134. The claimant's complaints (a)-(l) all concern acts or omissions which occurred before the claimant had a disability within the meaning of section 6 of the Equality Act. Although allegation (d) referred to an act/omission 'at or around the middle of 2018' we have found as a fact that Mr Carr decided not to pursue the claimant's grievance in March 2018 ie before the claimant was a disabled person.

135. The claims set out at allegations (a), (b), (c), (g), (h) and (l) are all complaints that, because of her disability, the claimant was treated less favourably than others were, or would have been. As the claimant was not a disabled person at the time of the acts complained of, the claims must fail.

136. The claim set out at allegation (h) is also put as a complaint that the respondent subjected the claimant to unwanted conduct related to her disability, which conduct constituted harassment within the meaning of that term in the Equality Act. As the claimant was not a disabled person at the time of the act complained of, the claim must fail.

137. A claim of discrimination under section 15 of the Equality Act can only succeed if the claimant was a disabled person at the time of the unfavourable treatment alleged. As the claimant did not have a disability at the time of the matters complained of, it follows that the claims set out at allegations (d) (e) and (f) must fail.

138. A duty to make reasonable adjustments only applies in relation to a person who has a disability. As the claimant did not have a disability at the time of the matters complained of, it follows that the claims set out at allegations (i), (j) and (k) must fail.

139. In conclusion, none of the claimant's complaints within claim number 2501305/2018 are made out.

Claim number 2501305/2018

Further findings of fact

140. As recorded above, the claimant returned to work on 19 June 2018, to a role which involved completing processing work within Mrs Raitt's team. The claimant was not the only O band manager doing this kind of work at the time. During the claimant's absence, a review of the O band role within PT operations took place to ensure HMRC had the right amount of O bands and the right support structure in place. Consequently, some O grade staff were displaced from their existing roles and were required to complete processing work on a temporary basis.

141. The claimant gave Mrs Raitt a copy of her OH report on 5 July 2018. Mrs Raitt said she would explore further whether there were suitable open positions within PT operations.

142. The respondent has an absence management policy which provides for a series of steps including 'unsatisfactory attendance meetings' and 'written improvement warnings'. Steps are taken under the policy when the amount of absence on sick leave reaches certain trigger points. A trigger point for a full-time member of staff is reached after eight working days or four spells of absence in the current twelve-month period. Because the claimant's absences from work between 3 April 2018 and 19 June 2018 and September and November 2017 had exceeded the trigger point, Mrs Raitt held a formal unsatisfactory attendance meeting with her on 3rd July 2018. Following that meeting Mrs Raitt issued a first written improvement warning on 7 July 2018.

143. HMRC's policy on eligibility for internal advertised vacancies provides that applicants are not eligible to apply for advertised jobs if they are subject to formal poor performance and/or poor attendance procedures whilst in the improvement period, unless stated otherwise in the job description. The policy also provides that managers must not support applicants if they do not meet the eligibility requirements of the vacancy. The fact that the claimant had been given an attendance warning precluded her from applying for advertised job vacancies, including the job that the claimant had identified in the fraud investigation service.

144. Mrs Raitt was on leave from 9 July 2018 to 25 July 2018. Upon Mrs Raitt's return, the claimant sent her an email on 26 July 2018 saying 'in my current situation, I am technically in the 'redeployment pool' for HMRC staff, or I should be. I cannot apply for jobs given my current formal warning. I have been advised by the union that people with disabilities should be given priority, and the redeployment pool is the first place people should go to anyway.' The claimant went on to refer to a job that she had become aware of that she would like to be put forward for. This was a job in HMRC's fraud investigation service which had been advertised internally. In subsequent emails the claimant also asked about other jobs that she had seen advertised internally. In line with the policy referred to above Mrs Raitt told the claimant she could not explore advertised vacancies for her.

145. The 'redeployment pool' mentioned by the claimant was a reference to the redeployment register maintained by HMRC in accordance with their internal redeployment and relocation policy document. That policy begins with an overview which says 'as our workforce and location requirements change, HMRC will: move people with the work in accordance with our mobility and transfers policy; or redeploy people into other suitable alternative posts; or support people to find solutions where they can't be redeployed within HMRC.' In an introductory section, the policy states 'HMRC takes a corporate approach to dealing with the redeployment of staff due to departmental reinvestment, reductions in work, office closures and changes in organisation design.' The policy goes on to say 'where lines of business are not able to readily identify redeployment solutions, they will consider whether people need to go on to the redeployment register.' The policy then explains the purpose of the redeployment register as follows: 'the redeployment register is centrally managed by the Redeployment and Exits Team. Its purpose is to seek redeployment for people whose current job has ended and who have no alternative job opportunities within their line of business. Being on the redeployment register gives people: priority status for jobs in HMRC at their substantive grade, for

managed moves and advertised posts; access to a range of HMRC redeployment tools.' In a section headed 'Entering the redeployment register' the policy says: 'entry to the redeployment register is strictly controlled by lines of business and HR. To qualify for entry to the redeployment register, one of the following conditions must be met: roles have disappeared, or numbers have been cut; or HMRC is withdrawing from the current location; or the line of business is withdrawing from the current location; you've had a migration one to one and will be outside of RDT and unable to travel to the new location. Note: people who don't meet these conditions can't swap with someone who is already on the redeployment register.'

146. Mrs Raitt reviewed the redeployment policy. She believed the claimant did not fit the criteria as she was not seeking a new role because her role had disappeared or because numbers had been cut and, in any event, there was a role for her in the directorate. Mrs Raitt told the claimant she was not in the redeployment pool.

147. Whilst Mrs Raitt was on leave, the claimant had emailed Theresa Young in HR expressing the belief that she was in the 'surplus' pool of O bands in Mr Younger's area and saying 'I am therefore effectively in the redeployment pool'. She also said she was 'now covered by the Equality Act'. She went on to say that she had heard of some jobs coming up in the tax credits team but that she could not formally apply at present due to being on a stage 1 review period. She asked if she could be moved to that team. Ms Young replied that she was not aware of any PTOPs NEE staff in the return redeployment pool and suggested the claimant speak to her manager to clarify her position and work with them to secure a suitable vacancy in PTOPs NEE. She went on to say 'alternatively you would need to apply for any vacancies that you are interested in once you were in a position to meet the eligibility criteria' and attached a link to the online policies and guidance on redeployment and vacancies. The claimant forwarded that email to Mrs Raitt and asked her for clarification. She referred again to the tax credits job, saying 'is there no way to move me into this role?' Mrs Raitt replied that the claimant was not in the redeployment pool, that she believed Ms Young and Mr Younger were making enquiries about possible vacancies and that she herself was in the process of arranging some job shadowing for the claimant. The claimant replied on 31 July, copying in Ms Young, saying she believed she should be in the redeployment pool and asking why she was not. Ms Young responded by email later that day saying, again, that there were no PTOps NEE staff on the redeployment register. She went on to say '… If your role has recently been subject to change then your manager will work to secure you a suitable post in PTOPs NEE. If alternatively, you would like to apply for a role outside of PT operations you would need to apply for any vacancy that you are interested in, taking into account the eligibility criteria.' She went on to include a link to the redeployment and vacancies policies and guidance and urged the claimant to speak to her line manager, Mrs Raitt, in the first instance.

148. We accept the evidence of Mrs Raitt and Mr Younger that, throughout this period, they and others, including Ms Lincoln, were taking steps to find a permanent position for the claimant. Five potential roles had been identified by Mr Younger and Ms Lincoln which might be suitable for the claimant. These were roles in the LRAT Team, Planning Team, Assurance Team, CI Team and SRM team. We accept Mr Younger's evidence that he would have been able to arrange for a role to be provided for the claimant in any of those teams even if there was no existing

'vacancy'. Mrs Raitt sent emails out to these teams asking if the claimant could carry out job shadowing. Mrs Raitt also arranged for the claimant to go on some 'go and see' visits in various departments within Benton Park View where there were O band roles that did not include line management responsibility. Mrs Raitt had arranged visits to areas where she had been told there were potential vacancies (she had started arranging these visits and job shadowing opportunities before the claimant returned from sickness absence in June and continued making further arrangements in July after she herself returned from holiday). The claimant responded to say that she did not have an interest in two of the areas and she also felt one of the areas was very IT orientated and she would need to improve IT skills to work in that role. The claimant did, however, visit some of the teams. On at least one of those visits the claimant was told by one a senior manager within the team that there were not any vacancies in that particular team. However, Mrs Raitt had been told by Ms Lincoln that a move to those teams could be accommodated if any of the roles suited the claimant, notwithstanding the absence of any formal vacancies. This is in line with Mr Younger's evidence and we accept that Ms Lincoln and Mr Younger would have ensured that the claimant was provided with a role within any of these teams had she been interested in pursuing that option.

149. HMRC has a 'priority movers' policy for, amongst others, those with a disability. Under that policy, when an individual is accorded 'priority mover' status they are given prior priority over vacancies ahead of others, including people on the redeployment register, without the need for interview. The policy begins 'our first consideration is always to retain the jobholder in their current role, therefore reasonable adjustments must be considered to achieve this. Only in exceptional circumstances where, all reasonable adjustments and options have been explored within the current directorate and there are no reasonable adjustments which would enable the individual to continue in their existing role or in another role within their directorate, an application for priority mover status can be made.'

150. On 7 August 2018 Ms Young told Mrs Raitt that the claimant did not currently meet the criteria for priority mover status. She said her understanding was that alternative posts were being considered for the claimant. She said that if a suitable post was available in the North-East England group then it would be expected that the jobholder would be deployed into that post rather than be put on the priority mover register. Mrs Raitt forwarded that email to the claimant and explained that 'on reviewing the guidance you currently would not fall into the category as priority mover or redeployment.' She confirmed that, as discussed, she had been exploring suitable roles for the claimant within the NEE group and said there was currently a vacancy in LRAT that she could offer the claimant. The claimant had already completed some job shadowing in the team. This was a clearly defined, established O band role based in a different building to that in which Mr Younger was located. Mrs Raitt thought this was a suitable role for the claimant. The claimant responded by email neither accepting nor rejecting that role but saying she failed to see how she did not meet the criteria of a priority mover.

151. There was a further exchange of emails between Mrs Raitt and the claimant about priority mover status on 13 and 14 August. Mrs Raitt, having sought advice from HR, explained again that the claimant did not meet the criteria for priority mover status. She explained that she felt the vacancy on the local resources team (LRAT)

which she had offered the claimant met the requirements of her OH report and provided the reasonable adjustments to reduce the stresses identified in her stress reduction plan. Mrs Raitt accompanied this explanation with links to the relevant policy documents and guidance. The claimant replied, saying she did not feel comfortable with a move to the LRAT team because it would cause her stress for a number of reasons including that it was IT oriented and she is not confident in her IT skills; the LRAT team work for Mr Younger's staff; and that she was concerned about how she would be perceived in the LRAT team because of 'indiscretion' and questions being asked about why she was there.

152. Around this time, Mrs Raitt felt her relationship with the claimant was breaking down. The claimant had said she wanted to bring her solicitor to and/or record face-to-face meetings and expressed a preference to communicate by email if that was not possible. Mrs Raitt was finding it difficult to deal with the volume of emails she was receiving from the claimant and felt the tone of her emails had become quite aggressive. She sought further guidance from HR colleagues and her line manager's own line manager and was advised that, given that things were becoming difficult, she should complete a 'priority mover form' so that the claimant could be considered for priority mover status.

153. On 22 August Mrs Raitt emailed the claimant saying, amongst other things, that as the claimant had said the LRAT team role was unsuitable the next step would be to consider priority mover status. Mrs Raitt told the claimant she felt she could not enter into further email correspondence with her but would be willing to discuss anything further face-to-face. Mrs Raitt's evidence was that she felt that she couldn't enter into further email correspondence with the claimant because of the impact it was having on her and she had come to believe that nothing she was doing was helping the claimant.

154. On 27 August Mrs Raitt completed a priority mover form for the claimant and emailed it to Vicki Brookes, the HR business director, copying in Ms Lincoln, her own line manager. She forwarded that email to the claimant at the claimant's request. Mrs Raitt did not meet up with the claimant before completing the form. Her evidence was that this was because she felt the relationship had broken down. The form was sent to Ms Brookes as it was she who had responsibility for determining whether the claimant satisfied the criteria to be accorded priority mover status. We accept the respondent's evidence that priority mover forms are not shared with other managers.

155. The priority mover form includes sections for an individual's manager to complete entitled 'current duties' and 'Give details of reasonable adjustments in place/under consideration.' In the 'current duties' section Mrs Raitt wrote 'Involved in part processing of NI case work, which involves dealing with customer enquiries and allocating NI paid to the correct account. This work is usually carried out at AO grade. This work is a temporary adjustment put in place to help Erika return to work following long-term sickness absence and concerns that Erika raised with her previous management. This role also allows Erika the opportunity to focus on her development, complete some job shadowing to identify where her skills gaps are to then hopefully arrange a move to a more permanent O band role.' In the 'reasonable adjustments' section Mrs Raitt wrote 'Erika was successfully promoted to an FLM

role within approx the last 2 ½ years. She was moved to a performance coach role following the outcome of a grievance that Erika submitted. Erika has also carried out the role of a Coach at O band grade however she feels her current skill set are not comparable with this role. Following a period of sickness absence Erika returned to work in my area completing NI casework as noted above. Erika has completed job shadowing to identify roles that she has the skills for. Erika has identified her skills are within Tax Credits. She has advised that her skills set currently does not include management responsibility, measured KPI's. Within PT ops NEE I have identified an O band role within the local resources team, which appeared to be best match for Erika's skill set however Erika has turned down this opportunity as she has advised she does not have the relevant IT skills, she feels that the links to the HOCS is still there and also she feels that relationships between my area and the new area are too close and may lead to indiscretions.'

156. The claimant complained to Ms Lincoln about the way Mrs Raitt had filled in this form. In her email she said she was not doing processing work as an adjustment but as a management request. She said several O bands had been also asked to do that kind of work. She suggested that 'paints me as looking like I cannot complete an O band role. There is also no reason to mention my sick leave or my management issues. There is also no mention of the coach role not being there anymore. Tracey has just made it look like I couldn't do it'. The claimant also objected to the reference to her grievance and said 'Tracey has just used various negative things to paint me in a really bad light to someone who doesn't know anything about me, apart from this.'

157. In her closing submissions the claimant suggested that Mrs Raitt along with Mr Younger and Pauline Lincoln colluded to stop her getting priority mover status. She suggests the evidence for this is that it took 3 ½ weeks for her to be granted priority mover status after the form was submitted, which the claimant appears to consider an unduly long time. She also says that the document at page 1883 of the bundle confirmed that Ms Lincoln, Mrs Raitt and/or Mr Younger were in 'conferences' with the senior HR business partner for PT ops, Ms Biddle, and that Ms Biddle told them of the extent of the claimant's deteriorating mental health and yet they did not move her. We do not accept there was any such collusion on the part of Mrs Raitt, Mr Younger or Ms Lincoln. The document at page 1883 of the bundle is a record of an interview with Mr Younger as part of the investigation of a subsequent grievance raised by the claimant, in which he merely said that he believed that, in the period when the claimant had been asking for priority mover status and alternative role was being sought, Mrs Raitt and Ms Lincoln had case conferences with Ms Biddle. It was entirely appropriate for managers to seek advice from HR in these circumstances. There can be nothing remotely suspicious about that. Nor does the fact that it took 3 ½ weeks for the claimant's priority mover status to be approved appear an unduly long period. The claimant also refers to it becoming 'clear in court that Shelley Biddle notified the business area of the extent of my deteriorating mental health'. This seems to be a reference to an incident described by Mr Younger in his evidence, when Ms Biddle became concerned for the claimant's well-being due to something she had seen referred to in a document that suggested the claimant might harm herself if not given priority mover status. Ms Biddle wanted to satisfy herself that the claimant was safe and well and interrupted a meeting between Mr Younger and Ms Lincoln to ask if they knew where she was. They all went to seek out Mrs Raitt at

that point to ask if she knew where the claimant was. The claimant was later found to be safe and well. We accept Mr Younger's account of that incident. It provides no support for the claimant's contention that managers colluded to prevent the claimant getting priority mover status.

158. The claimant was given priority mover status in late September 2018. By this time Mrs Raitt's direct line manager, Ms Lincoln, had taken over line management of the claimant in order to support both the claimant and Mrs Raitt.

Conclusions

159. The claimant's complaints within claim number 2503200/2018 are those lettered (m) to (t) inclusive.

Allegation (m) – direct discrimination.

160. The claimant alleges that, because of her disability, Mrs Raitt treated her less favourably than she would have treated a comparable non-disabled employee by failing to put the claimant in the redeployment pool.

161. It is not in dispute that the respondent did not put the claimant n the redeployment pool at any time between her return to work and the date she was given priority mover status. All concerned understood that the claimant would be carrying out processing work only as a temporary measure and that a new permanent role should be found for her.

162. HMRC has a redeployment and relocation policy document which sets out the criteria that are to be applied in deciding whether somebody is eligible to be entered in the redeployment pool/register. Reading that policy as a whole, it is clear that the purpose of this policy is to find suitable alternative work for employees where HMRC no longer needs them to carry out their current job due to organisational changes. This is reflected in the sections of the policy setting out the overview of the policy, an introduction to the policy, the purpose of the policy, and the qualification criteria. Furthermore, the policy makes it clear that it only applies to those who have no alternative job opportunities within their existing line of business.

163. The reason a new role was being sought for the claimant was because she was no longer carrying out her previous role as a Coach. The reason the claimant was not carrying out that role was because the claimant did not wish to do so as she felt it incompatible with her skills and abilities and therefore found it stressful and also she did not wish to work with Mr Carr. The claimant had asked to work as a coach in P11D but there was no vacancy there and, in any event, Mr Carr did not feel it appropriate for the claimant to work with the P11D team given her history of difficulties with other people in that team. The claimant's move out of the Coach role was not connected in any way with any organisational changes of the type envisaged in the redeployment and relocation policy, including the review of O band roles (and not, for that matter was the claimant's move out of her earlier role in P11D). Furthermore, we have found as a fact that Mrs Raitt and managers were actively looking for alternative rules for the claimant both within and outside the claimant's current directorate.

164. It is for the claimant to show facts from which we could conclude that a comparable employee who did not have a disability would have been placed in the redeployment pool. For these purposes, a comparable employee would be somebody who was no longer carrying out their usual role for reasons unconnected with any organisational change of the type envisaged in the redeployment and relocation policy and for whom the same efforts to find alternative employment were being made as were being made for the claimant.

165. In our judgment, the facts do not support an inference that such a person would have been placed in the redeployment pool at all, let alone that they would have been placed in the redeployment pool when alternative job opportunities within their existing line of business were still being explored. Placing such a person in the redeployment pool would go against the purpose of, and the criteria set out in, HMRC's internal policy and guidance and as the guidance clearly says: 'entry to the redeployment register is strictly controlled by lines of business and HR'. In all the circumstances, we find the claimant has not shown facts from which we could conclude that the respondent treated her less favourably, because of her disability, than it would have treated others whose material circumstances were not materially different.

166. Even if the claimant had established a prime prima facie case and the burden of disproving discrimination had shifted to the respondent, we accept Mrs Raitt's evidence that the reason neither she nor anyone else placed the claimant in the redeployment pool was because they did not believe the claimant satisfied the criteria for being placed on the register as set out within the redeployment policy and not because of the claimant's disability. We are satisfied that the claimant's disability played no part in Mrs Raitt's decision not to place the claimant in the redeployment pool.

167. That being the case, we do not accept that the claimant was treated less favourably, because of her disability, than any non-disabled person would have been in the same circumstances.

168. It follows that the claim of direct disability discrimination set out at allegation (m) is not made out.

Allegation (n) - failure to make reasonable adjustments

Did the respondent apply a PCP of requiring the claimant to remain working as a processor on or around 5 July 2018?

169. The claimant alleges that the respondent applied a PCP of requiring the claimant to remain working as a processor on or around 5 July 2018, which placed the claimant at a substantial disadvantage compared to non-disabled persons, and the respondent failed to comply with its duty to make reasonable adjustments to avoid that disadvantage.

170. The respondent accepts that it applied a PCP of requiring the claimant to work as a processor following her return to work on 19 June 2018. The claimant was still working as a processor as at 5 July 2018, by which time she was a disabled person (within the meaning of that term in the Equality Act).

Did this PCP place the claimant at a substantial disadvantage compared to a non-disabled person?

171. The claimant's case appears to be that, as processing work was usually carried out by AO band staff, rather than O band staff, requiring her to do this kind of work disadvantaged her. This is effectively what she told Mrs Raitt in her email of 4 July 2018.

172. At the relevant time, the claimant was not the only O band worker doing processing work. Other O band workers who had been displaced as a result of a review, were doing the same kind of work as the claimant. Whilst we accept that the claimant felt uncomfortable doing work that was usually reserved for more junior employees, any of the other O band workers doing that kind of work were likely to have felt equally uncomfortable about it.

173. Furthermore, it was understood and accepted by both the claimant and Mrs Raitt that the claimant was only working as a processor as a temporary measure until a suitable O band position could be found for the claimant. The claimant had returned from a period of ill-health absence lasting several weeks. It was entirely appropriate for the respondent to arrange for the claimant to do work that, on the face of it, the claimant would not find too challenging, to assist the claimant to settle back in to the workplace. As Mr Bain points out, this is exactly the sort of work that Prof Turkington suggests would have been appropriate for the claimant to do. Mrs Raitt explained to the claimant at the time of her return to work that this was a temporary move to enable her to settle in and the claimant was aware of the steps that were being taken, not just by Mrs Raitt but by others, to find a suitable permanent O band position for her.

174. In all the circumstances, we do not accept that requiring the claimant to work as a processor on a temporary basis to settle her back into the workplace while a permanent role was sought placed the claimant at a disadvantage that was more than minor or trivial compared to non-disabled persons.

Did the respondent fail to make reasonable adjustments to avoid the disadvantage?

175. If we are wrong about that, and the claimant's anxiety at carrying out work below her paygrade was greater, or had more of an effect, than would have been the case for somebody without her disability, and if the respondent knew, or ought reasonably to have known, that was the case, the claimant's case is that an adjustment of looking elsewhere for vacancies in the context of the claimant having priority mover status would have been a reasonable adjustment. As an alternative the claimant says she should have been put on the redeployment register.

176. As recorded in our findings of fact, the claimant was ultimately awarded priority mover status. The claimant's case is that she should have been awarded that status much sooner i.e. as soon as the occupational health report was received in July. However, the respondent's 'priority movers' policy provides that such status is only to be given in exceptional circumstances where there are no reasonable adjustments which would enable the individual to continue in their existing role or in another role within their directorate. It was reasonable, and in accordance with the terms of that policy, for Mrs Raitt and others to explore fully the possibility of alternative employment within the claimant's own directorate before an application was made for priority mover status. The search for alternative work began before the claimant even joined Mrs Raitt's team upon her return from sickness absence. It continued after Mrs Raitt's return from holiday on 25 July 2018 and a role could have been found for the claimant in the teams identified by Mr Younger and Ms Lincoln if she had been willing to take it up. Miss Peace appeared to suggest in her submissions that Mrs Raitt was dilatory in searching for opportunities for alternative employment for her. We do not accept that was the case. It was entirely appropriate for her to arrange for the claimant to do work that, on the face of it, the claimant would not find too challenging, to assist the claimant to settle back in to the workplace. In any event, Mrs Raitt started making enquiries about work shadowing opportunities before the claimant even joined her team. She was on holiday following receipt of the July occupational health report until later that month and within a very short time of her return from holiday continued her efforts to help the claimant find a suitable alternative role.

177. In all the circumstances, we find that the respondent did make reasonable adjustments to limit the claimant's time doing processing work by seeking alternative employment at an appropriate time. In our judgment, applying for priority mover status for the claimant sooner than Mrs Raitt did was not a reasonable adjustment for the respondent to make. Nor was placing the claimant on the redeployment register a reasonable adjustment for the respondent to make given that the claimant did not satisfy the criteria for inclusion in the register due to the reasons why a job was being sought for her and the fact that job opportunities within the claimant's existing line of business were still being explored.

178. The claim set out at allegation (n), that the respondent discriminated against the claimant by failing to comply with a duty to make reasonable adjustments, is not made out.

Allegations (o), (p) and (q) - discrimination arising in consequence of disability: section 15 of the Equality Act

179. The claimant alleges that the respondent treated her unfavourably on 7 July 2018 because of her absence from the workplace, by giving her a formal attendance warning. The claimant also contends that the respondent treated her unfavourably because of that warning by failing to look for posts or seek out posts for her on 30 July 2018 and by failing to allow her to apply for other vacancies and/or seek out other vacancies as a priority mover or otherwise on 30 July 2018 and subsequently. The claimant's case is that her absence from the workplace, and the sickness absence warning given to her because of that absence, both arose in consequence of her disability.

180. It is not in dispute that Mrs Raitt gave the claimant a formal attendance warning on 7 July 2018 because of the claimant's period of sickness absence between 3 April 2018 and 19 June 2018. Nor is it in dispute that, under the respondent's policies, this meant the claimant was unable to apply for jobs outside PT Operations.

181. It is not in dispute that the claimant's absence between 3 April 2018 and 19 June 2018 was related to her depression. During the period of that absence, however, although the claimant's depression was an 'impairment', the claimant did not have a disability within the meaning of that term in section 6 of the Equality Act. That being the case, neither the claimant's absence from work during that period, nor the warning for that absence, can have been something 'arising in consequence of her disability'.

182. It follows that, even if giving the claimant the absence warning constituted unfavourable treatment (which the respondent does not admit), that treatment was not because of something arising in consequence of the claimant's disability. Similarly, even though the claimant was prevented from applying for jobs outside PT Operations because of the warning, that treatment was not because of something arising in consequence of the claimant's disability. For the same reason, even if the respondent had treated the claimant unfavourably because of that warning by failing to look for posts or seek out posts for her (which the respondent denies), that treatment would not have been because of something arising in consequence of the claimant's disability.

183. For these reasons the claims set out at allegations (o), (p) and (q), of discrimination within section 15 of the Equality Act, are not made out.

Allegation (r) – disability related harassment

184. The claimant contends that Mrs Raitt subjected her to disability-related harassment by arranging for her to go and see the work involved in a potentially vacant post on 31 July 2018. The claimant submits this constituted harassment because, on her case, no such vacancies actually existed and, in any event, the work was in an area managed by Mr Younger whom the claimant had told Mrs Raitt she no longer wished to work for.

185. Mrs Raitt arranged for the claimant to go and see the work involved in a number of areas. Although some of the areas in which Mrs Raitt arranged for the claimant to see the work were in Mr Younger's area, not all of them did. We accept the respondent's case, supported by the evidence of Mr Younger and Mrs Raitt, that Mr Younger would have been able to arrange for a role to be provided for the claimant even if there was no existing 'vacancy'.

186. Setting aside the question of whether the conduct in question in arranging these visits was related to disability, we turn to the purpose of arranging for the claimant to see the work involved in those areas- specifically, whether the purpose was to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It is for the claimant to show facts from which we could conclude, in the absence of an explanation, that this was Mrs Raitt's

motivation. In our judgment, the facts do not come anywhere close to supporting an inference that it was. The decision to send the claimant to view work in other areas was made in the context of a search for a suitable alternative role for the claimant. Whilst the claimant had expressed unhappiness at working within Mr Younger's area, she had only a few weeks earlier been asking for a move to work as a coach for the P11D team for which he was responsible. Furthermore, the claimant had asked to be given priority mover status. One of the criteria for being accorded priority mover status as a disabled person under the respondent's policy was that the possibility of alternative roles within the employee's existing directorate had been fully explored. In all the circumstances, viewed objectively, it was not unreasonable for Mrs Raitt to continue to explore the possibility of finding a suitable role for the claimant even in the area Mr Younger had responsibility for, particularly given that Mr Younger is such a senior manager, with overall responsibility for such a large team, that he is unlikely to have day-to-day dealings with every member of staff falling within his command and, in any event, the claimant had not articulated in any detail her reasons for not wishing to work within Mr Younger's directorate.

187. In any event, even if the claimant had done enough to shift the burden of disproving harassment to the respondent, we accept that Mrs Raitt's motivation in sending the claimant to see the work done in other areas, even those within the area overseen by Mr Younger, was not to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Mrs Raitt was making genuine efforts to find the claimant a suitable role at O band that she would feel comfortable working in in the longer term. Mrs Raitt's evidence was that arranging the 'go see' visits and work shadowing was part of those efforts and designed to help the claimant broaden her knowledge of the O band roles available that did not involve line management. We accept her evidence on this point, which was consistent with what she discussed with the claimant when talking about her return to work in June and what she said in subsequent correspondence.

188. As for whether Mrs Raitt's conduct in arranging such visits had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, it is again a relevant consideration that the decision to send the claimant to view work in other areas was made in the context of a search for a suitable alternative role for the claimant. For the reasons already explained, it was not unreasonable for Mrs Raitt to cast the net widely, including by exploring potential roles in Mr Younger's area. The claimant may not have known that a role could be created even where an existing 'vacancy' did not exist, and we accept that may have caused her some confusion and discomfort. However, it in no way can that reasonably be said to have violated the claimant's dignity. Nor was it reasonable for it to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, keeping in mind the warnings from the Court of Appeal (in Grant) and the Employment Appeal Tribunal (in Dhaliwal) about not cheapening the significance of words used in the Act, even allowing for the possibility that the claimant's mental ill health may have caused her to be more sensitive than might otherwise be the case. It follows that even if the claimant subjectively perceived that it had that effect (and there is little evidence that that was the case, although as noted above, we accept that we accept that the claimant found the situation she was in upsetting and she was frustrated and anxious, particularly as she herself had identified vacancies she wanted to be

considered for) we find that Mrs Raitt's conduct in arranging the visits did not have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant given that it was not reasonable for it to have that effect.

189. Therefore, the claim of disability related harassment set out at allegation (r) is not made out.

Allegation (s) – disability related harassment

190. The claimant contends that Ms Young subjected her to disability-related harassment by, on 31 July 2018, advising the claimant by email to apply for jobs she sees through the normal process when Ms Young knew the claimant could not do so by reason of the sickness absence warning she had been given earlier that month.

191. This allegation of harassment concerns the email from Ms Young in which she said 'If your role has recently been subject to change then your manager will work to secure you a suitable post in PTOPs NEE. If alternatively, you would like to apply for a role outside of PT operations you would need to apply for any vacancy that you are interested in, taking into account the eligibility criteria.' That email came after the claimant had told her a week earlier that she was not eligible to apply for vacancies because she was in a stage one review period.

192. We did not hear evidence from Ms Young, who retired early in 2019. It is, however, for the claimant to prove facts from which we could conclude that Ms Younger's comment constituted disability related harassment.

193. Setting aside the question of whether the conduct in question was related to disability, we turn to the issue of whether, in sending that email, Ms Young's intention was to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for her. In our judgment, the facts do not support any inference that such was Ms Young's intention. There is no evidence that there was any animosity between Ms Young and the claimant or that Ms Young might have any motive to deliberately upset the claimant. The contents of the email are not, viewed objectively, remotely offensive, degrading or humiliating. At most, one could conceivably infer that Ms Young did not pay careful attention to the claimant's earlier email in which she said she was ineligible to apply for internally advertised posts. More likely, it seems to us, is that Ms Young was simply reiterating the advice she had previously given ie the claimant would be able to apply for advertised vacancies as and when she became eligible under the terms of the policy. In that regard we note that the evidence before us does not suggest Ms Young knew when the claimant's warning was due to expire, the claimant having simply told her that she had been given such a warning.

194. As for the effect of the email, we accept that the claimant perceived Ms Young's email to be dismissive, feeling that Ms Young had not engaged properly with her enquiry, and this might have left her feeling irritated and frustrated and added to the stress and anxiety she was feeling at this time. However, in no way can the email reasonably be said to have violated the claimant's dignity. Nor, in all the circumstances, including the fact that there was no history of animosity between the

claimant and Ms Young and the claimant had no reasonable cause to suspect that she was acting in bad faith, was it reasonable for it to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Again, we refer to the warnings from the Court of Appeal (in Grant) and the Employment Appeal Tribunal (in Dhaliwal) about not cheapening the significance of words used in the Act by treating minor upsets as falling within their remit. Therefore, even if the claimant subjectively perceived that it had that effect, and again there is little evidence that that was the case, we find that Ms Young's conduct in sending this email to the claimant did not have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her as, in all the circumstances, it was not reasonable for it to have that effect.

195. Furthermore, the facts do not support an inference that Ms Young's conduct in sending this email was in any way related to the claimant's disability.

196. It follows that the claim of disability related harassment set out at allegation (s) is not made out.

Allegation (t) – disability related harassment

197. The claimant contends that Mrs Raitt subjected her to disability-related harassment by, on 27 and/or 28 August 2018, communicating with HR and others and painting the claimant in an unfavourable light and referring to a grievance submitted by the claimant when such matters should have remained confidential at all times.

198. This complaint concerns the way in which Mrs Raitt completed the priority mover form, which she sent to HR at the end of August 2018. The claimant objects to the fact that Mrs Raitt referred to the claimant doing AO work (one grade lower than hers) as an adjustment as opposed to it being a business request made of several O bands. The claimant submits that made it look as if she was incapable of doing work at O level. The claimant also submits that it was inappropriate for Mrs Raitt to mention the claimant sick leave and grievances. The claimant's case was that Mrs Raitt did this to paint her in a poor light.

199. Mrs Raitt's actions can only constitute harassment under the Equality Act if her conduct was related to disability and had either the purpose or the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

200. We deal first with Mrs Raitt's intention referring to these matters in the priority mover form. The claimant's case is that Mrs Raitt was motivated by bad faith to refer to irrelevant matters in the priority mover form and thereby 'paint her in a bad light'. We have found that, by this time, the relationship between Mrs Raitt and the claimant was breaking down. The claimant might consider that supports her case that Mrs Raitt wanted to damage her chances of obtaining priority mover status. However, it is difficult to see how it can have been in Mrs Raitt's interests to jeopardise the claimant's application for priority mover status, which, by that point, presented the best chance of a move to a new role for the claimant, which would have solved the difficulties Mrs Raitt was experiencing in her dealings with the

claimant. We have rejected the claimant's suggestion that Mrs Raitt along with Mr Younger and Pauline Lincoln colluded to stop the claimant getting priority mover status. The evidence before us suggests Mrs Raitt acted professionally in her dealings with the claimant. What is more, the contents of the form were factually accurate: the form asked what the claimant's current duties were. Mrs Raitt described those duties accurately. It was perfectly proper of her to go on to explain why the claimant was currently performing those duties. As recorded above, the reason a new role was being sought for the claimant was because she was no longer carrying out her previous role as a Coach. The reason the claimant was not carrying out that role was not because there was no longer a vacancy there but because the claimant had said she did not want to do the coaching role any longer because she felt it incompatible with her skills and abilities and, also, she did not wish to work with Mr Carr. The claimant's move out of the Coach role was not connected in any way with any organisational changes or the surplus of O bands. Mrs Raitt's description of why the claimant was doing this work was both accurate and relevant given that the claimant was seeking to be accorded priority status in relation to alternative roles on the basis of her ill-health, and it was necessary to show what adjustments had been made in the past and also appropriate set out, briefly, the claimant's recent workplace experience. The reference to the claimant's sickness absence and the recent history of her experience and changes of roles, including the passing reference to a grievance, was relevant background information. Furthermore, the form itself was prepared only for consideration by the head of HR in determining whether the claimant should get priority mover status. In our judgement, there are no facts from which we could conclude that, in completing the form as she did, Mrs Raitt's purpose was to violate the claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

201. As for the effect of the way the priority mover form was completed, the content of the priority mover form cannot reasonably be said to have violated the claimant's dignity. Nor, in all the circumstances, including the fact that the contents of the form were factually accurate, relevant and for limited circulation, was it reasonable for it to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Therefore, even if the claimant subjectively felt that it had that effect, (and again, although the claimant was unhappy about the way with the form was completed, there is little evidence that that was the case) we find that Mrs Raitt's conduct, in completing the priority mover form as she did, did not have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant given that it was not reasonable for it to have that effect.

202. It follows that the claim of disability related harassment set out at allegation (t) is not made out.

203. In conclusion, none of the claimant's complaints within claim number 2503200/2018 are made out.

EMPLOYMENT JUDGE ASPDEN

REASONS SIGNED BY EMPLOYMENT JUDGE ON
3 October 2019

Annex
List of Issues

Disability – relevant to all three claims

1. Was the claimant a disabled person prior to 5 July 2018 and if so, when did she become disabled? It is **noted and recorded** that the respondent accepts the claimant was a disabled person from 5 July 2018 onwards by reason of the mental impairment of depression.

2. Did the respondent know or ought the respondent reasonably to have known that the claimant was a disabled person prior to 5 July 2018 and if so, when did it have actual or constructive knowledge?

Claim Number 2501305/2018

Direct Disability Discrimination allegations: section 13 of the 2010 Act.

Allegation (a)

3. Did Stephen Younger ('SY') treat the claimant less favourably than a comparable non-disabled employee on 30 January 2018 by deeming her to be '*too mentally unstable to make reasonable decisions regarding her own welfare'* and permanently moving her? The claimant relies on a hypothetical comparator in respect of this allegation.

4. If so, was that treatment because of her alleged disability? The claimant will set out in her witness statements the factors on which she relies to evidence that any such treatment was because of her alleged disability.

Allegation (b). This allegation is permitted to proceed as a result of a successful application to amend made by the claimant on 10 January 2019.

5. Did SY in an email dated 3 January 2018 send to David Carr ('DC') treat the claimant less favourably than a comparable non-disabled employee by using her diagnosis of depression to belittle her? The claimant relies on a hypothetical compactor in respect of this allegation.

6. If so, was that treatment because of her alleged disability? The claimant will set out in her witness statements the factors on which she relies to evidence that any such treatment was because of her alleged disability. The claimant will assert that the subject matter of this allegation only came to her attention in July 2018 when she was able to review her personnel file.

Allegation (c) This allegation is permitted to proceed as a result of a successful application to amend made by the claimant on 10 January 2019.

7. Did SY treat the claimant less favourably than a comparable non-disabled employee by allowing Gina Walker ('GW') to require the claimant to attend a meeting in respect of

leave allocation for the forthcoming year on 23 January 2018? The claimant will rely on GW as her comparator in respect of this allegation.

8. If so, was that treatment because of her alleged disability? The claimant will set out in her witness statements the factors on which she relies to evidence that any such treatment was because of her alleged disability.

Allegation (g)

9. Was the claimant treated less favourably than other coaches by having her request of 16 March 2018 to step back from an aspect of her role refused? The claimant will rely on other coaches present at that meeting as actual comparators namely Linda Younger, John Wilson and an employee whose first name is Karen.

10. If so, was that treatment because of her alleged disability? The claimant will set out in her witness statements the factors on which she relies to evidence that any such treatment was because of her alleged disability.

Allegation (h) This allegation is permitted to proceed as an allegation of direct discrimination and not as an allegation pursuant to section 15 of the 2010 Act.

11. Did DC treat the claimant less favourably than a hypothetical comparable non-disabled employee by not doing an OH referral and once again asking what adjustments the claimant required on about 13 April 2018? The claimant will identify the characteristics of the hypothetical comparator in her witness statement.

12. If so, was that treatment because of her alleged disability? The claimant will set out in her witness statements the factors on which she relies to evidence that any such treatment was because of her alleged disability.

Allegation (l) This allegation is permitted to proceed as a result of a successful application to amend made by the claimant on 10 January 2019.

13. Was the claimant treated less favourably on 12 February 2018 by Ian Robison than her non-disabled subordinates (including Michelle Venters) by not being awarded an 'exceeded' grading for her performance

14. If so, was that treatment because of her alleged disability? The claimant will set out in her witness statements the factors on which she relies to evidence that any such treatment was because of her alleged disability.

Allegations of Discrimination arising in consequence of disability: section 15 of the 2010 Act

Allegation (d)

15.Was there a decision not to progress the claimant's grievance by DC at or around the middle of 2018?

16.If so, did that amount to unfavourable treatment because of a perception that the claimant was mentally unstable?

17.If so was the perception of mentally instability something that arose in consequence of the claimant's alleged disability?

18. If so, was the decision objectively justified?

Allegation (e) This allegation is permitted to proceed as a result of a successful application to amend made by the claimant on 10 January 2019.

19. Did DC suggest that the claimant was lying at a meeting on 2 March 2018?

20. If so, did that amount to unfavourable treatment because of a perception that C was mentally unstable?

21. If so was the perception of mentally instability something that arose in consequence of the claimant's alleged disability?

22. If so, was the decision objectively justified?

Allegation (f) This allegation is permitted to proceed as a result of a successful application to amend made by the claimant on 10 January 2019.

23. Was the management (which the claimant had hitherto been dealing with) of the ongoing absence of the claimant's colleague Anita handed to a colleague on or around 7 February 2018 by Ian Robison ('IR') and not the management of the claimant's absence?

24. If so, did that amount to unfavourable treatment because of a perception that the claimant was mentally unstable?

25. If so was the perception of mentally instability something that arose in consequence of the claimant's alleged disability?

26. If so, was the decision objectively justified?

Allegations of Failures to make Reasonable Adjustments: sections 20/21 of the 2010 Act

Allegation (i)

27.Did the respondent apply PCPs of either:
a. Requiring the claimant to work in a business area (P11D) in which GW had management responsibilities until 8 December 2017 or thereabouts?
b. Requiring the claimant to move business areas in December 2017?

28. If so, did those PCPs put the claimant at a substantial disadvantage compared to a non-disabled person?

28a If so, did the respondent know or could it have reasonably been expected to know that claimant was likely to be placed at substantial disadvantage by the PCP compared to non-disabled persons.

29. If so, would the adjustments suggested by Brian McAllister in his report dated 22 December 2017 namely limiting contact between the claimant and GW and delaying any move until the claimant's health had improved, have:
a. Avoided that disadvantage; and
b. Been reasonable adjustments for R to have made?

30. Did the respondent fail to make those adjustments, and if so, when would it have been reasonable for them to have been made? It is **noted and recorded** that it is the claimant's case that such adjustments were never made for her.

Allegation (j)

31. Did the respondent apply a PCP of moving the claimant to a new business area (coaching) with no support in January 2018?

32. If so, did that PCP put the claimant at a substantial disadvantage compared to a non-disabled person?

32a If so, did the respondent know or could it have reasonably been expected to know that claimant was likely to be placed at substantial disadvantage by the PCP compared to non-disabled persons.

33. If so, would either (a) moving her back to her previous area or (b) giving her training, have:
a. Avoided that disadvantage; and
b. Been reasonable adjustments for the respondent to have made?

34. Did the respondent fail to make those adjustments, and if so, when would it have been reasonable for them to have been made?

Allegation (k)

35. Did the respondent apply a PCP in January 2018 of requiring the claimant to perform the business coach role?

36. If so, did that PCP put the claimant at a substantial disadvantage compared to a non-disabled person?

36a If so, did the respondent know or could it have reasonably been expected to know that claimant was likely to be placed at substantial disadvantage by the PCP compared to non-disabled persons.

37. If so, would allowing her to focus on the parts of that role she was most comfortable with have:
a. Avoided that disadvantage; and

b. Been reasonable adjustments for the respondent to have made?

38. Did the respondent fail to make those adjustments, and if so, when would it have been reasonable for them to have been made?

Allegation of Harassment: section 26 of the 2010 Act

Allegation (h) in the alternative to the section 15 claim bearing the same letter above

39. Did DC refuse on 13 April 2018 to make an OH referral and once again ask the claimant what adjustments she required?

40. If so, did that amount to unwanted conduct related to disability?

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

Time Issues

42. To the extent that the above alleged conduct occurred before 30.01.18, being the date 3 months prior to the commencement of ACAS Early Conciliation, did it form part of a continuing course of conduct which continued after that date?

43. If not, would it nevertheless be just and equitable to extend time to permit the Tribunal to consider the claim?

Claim Number 2503200/2018

Direct Disability Discrimination allegations: section 13 of the 2010 Act.

Allegation (m)

44. Did Tracy Raitt ('TR') treat the claimant less favourably than a comparable non-disabled employee by failing to put the claimant in the redeployment pool on 2 July 2018? The claimant will rely on a hypothetical comparator in respect of this allegation and will set out in her witness statement the characteristics of that comparator.

45. If so, was that treatment because of the claimant's alleged disability? The claimant will set out in her witness statements the factors on which she relies to evidence that any such treatment was because of her alleged disability. It is **noted and recorded** that the events of 4 July 2018 referred to by the claimant in this claim form are background information only.

Allegations of Failure to make Reasonable Adjustments: sections 20/21 of the 2010 Act

Allegation (n)

46. Did the respondent apply a PCP of requiring the claimant to remain working as a processor on or around 5 July 2018?

47. If so, did this PCP place the claimant at a substantial disadvantage compared to a non-disabled person?

47a If so, did the respondent know or could it have reasonably been expected to know that claimant was likely to be placed at substantial disadvantage by the PCP compared to non-disabled persons.

48. If so, would an adjustment of looking elsewhere for vacancies in the context of the claimant having priority mover status have been a reasonable adjustment and would that adjustment have avoided any substantial disadvantage?

Discrimination arising in consequence of disability: section 15 of the 2010 Act

Allegation (o)

49. On 7 July 2018 was the claimant treated unfavourably by TR when she imposed a formal attendance warning on the claimant and so failed to properly apply the sickness absence management policy by adjusting that policy as its terms require when managing the absence of a disabled person?

50. If so, did that amount to unfavourable treatment because of the claimant's absence from the workplace?

51. If so, was the absence something that arose from the claimant's disability?

52, If so, was the treatment objectively justified?

Allegation (p)

53. On 30 July 2018 was the claimant treated unfavourably by TR when she failed to look for posts or seek out posts for the claimant?

50. If so, did that amount to unfavourable treatment because of the claimant's sickness absence warning implemented on 7 July 2018?

51. If so, was the sickness absence warning something that arose from the claimant's disability?

52, If so, was the treatment objectively justified?

Allegation (q)

49. On 30 July 2018 and subsequently was the claimant treated unfavourably by TR and HR Business partner Theresa Young ('TY') when they failed to allow the claimant to apply for other vacancies and /or seek out other vacancies as a priority mover or otherwise?

50. If so did that amount to unfavourable treatment because of the claimant's sickness absence warning implemented on 7 July 2018?

51. If so, was the sickness absence warning something that arose from the claimant's disability?

52, If so, was the treatment objectively justified?

Allegations of Harassment: section 26 of the 2010 Act

Allegation (r)

53. On 31 July 2018 did TR arrange for the claimant to go and see the work involved in a potentially vacant post only for the claimant to be told that there were no such vacancies and that in any event the area was in an area managed by SY whom the claimant had told TR she no longer wished to work for?

54. If so, was that unwanted conduct related to the claimant's disability?

55. If so, was the purpose of TR to violate the claimant's dignity or create the prohibited environment for her?

56. if not, was that the effect of the behaviour of TR taking account of all the circumstances, the perception of the claimant and whether it was reasonable for the behaviour to have that effect?

Allegation (s)

57. On 31 July 2018 did Theresa Young ('TY') advise the claimant by email to apply for jobs she sees through the normal process when TY knew the claimant could not do so by reason of the above-mentioned sickness absence warning?

58. If so, was that unwanted conduct related to the claimant's disability?

59. If so was the purpose of TR to violate the claimant's dignity or create the prohibited environment for the claimant?

60. If not, was that the effect of the behaviour of TR taking account of all the circumstances, the perception of the claimant and whether it was reasonable for the behaviour to have that effect?

Allegation (t)
By amendment permitted on 10 January 2019

61. On 27/28 August 2018 did TR communicate with HR and others and paint the claimant in an unfavourable light and did TR refer to a grievance submitted by the claimant when such matters should have remained confidential at all times?

58. If so, was such conduct unwanted conduct related to the claimant's disability?

59. If so was the purpose of TR to violate the claimant's dignity or create the prohibited environment for her?

60. If not, was that the effect of the behaviour of TR taking account of all the circumstances, the perception of the claimant and whether it was reasonable for the behaviour to have that effect?

Time Issues

61. To the extent (if at all) that the above alleged conduct in claim 2503200/2018 occurred before 18 June 2018, being the date 3 months prior to the commencement of ACAS Early Conciliation, did it form part of a continuing course of conduct which continued after that date?

62. If not, would it nevertheless be just and equitable to extend time to permit the Tribunal to consider the claim?

Statutory Defence

63. Does the respondent succeed in showing that it took all reasonable steps to prevent those accused by the claimant of discriminatory conduct from doing those things or things of that description?

64. Does the respondent succeed in advancing the defence contained in section 109(4) of the 2010 Act?

Claim Number 2500615/2019

Direct Disability Discrimination allegations: section 13 of the 2010 Act.

Allegation (u)

65. Did Carl Matthews ('CM') treat the claimant less favourably than Kerri Holder and Yvonne Robinson on 21 January 2019 and continuing to 25 March 2019 when he gave the claimant no work to do and did not chase up the comparators to provide information on their availability and tasks which would have enabled him to spread work more evenly and give the claimant work to do.

66. If so, was that treatment because of her alleged disability? The claimant will set out in her witness statements the factors on which she relies to evidence that any such treatment was because of her disability.

Allegation (v).

67. Did CM in a telephone call on 6 March 2019 with others present treat the claimant less favourably than Julie Picken by berating the claimant and criticising her IT skills and stating that the claimant could not work on the project/design team?

68. If so, was that treatment because of her alleged disability? The claimant will set out in her witness statements the factors on which she relies to evidence that any such treatment was because of her alleged disability.

Allegations of Failure to make Reasonable Adjustments: sections 20/21 of the 2010 Act

Allegation (w)

69. Did the respondent apply the PCP of requiring the claimant to carry out her contractual duties?

70. If so, did that PCP put the claimant at a substantial disadvantage compared to a non-disabled person? The claimant will assert that she had nothing to do and was put at a substantial disadvantage as a result.

70a If so, did the respondent know or could it have reasonably been expected to know that claimant was likely to be placed at substantial disadvantage by the PCP compared to non-disabled persons.

71. If so, would it have been a reasonable adjustment to move the claimant to a project/design team on 13 March 2019 or before or later?

72. Did the respondent fail to make those adjustments, and if so, when would it have been reasonable for the move to have been made? It is **noted and recorded** that it is the claimant's case that such adjustments were not made by the time she moved to another team within the Directorate on 25 March 2019.