mf

EMPLOYMENT TRIBUNALS

Claimant: **Miss J Anderson**

Respondent: **BA CityFlyer Ltd**

Heard at: **East London Hearing Centre**

On: **12, 13 & 14 December 2018 & (in chambers) 8 January 2019**

Before: **Employment Judge Jones**

Members: **Mr S Morphew**
Ms B Saund

Representation

Claimant: In person (assisted by her sister)

Respondent: Mr Line (Counsel)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that: -

1 The Claimant was a disabled person for the purposes of the Equality Act 2010.

2 The Claimant's complaint of disability discrimination succeeds as follows:

2.1 The Respondent failed to comply with a duty to make reasonable adjustments.

2.2 The Respondent treated the Claimant unfavourably because of something arising in consequence of disability by dismissing her and giving her a poor reference.

2.3 The Respondent failed to show that the treatment was a proportionate means of achieving a legitimate aim.

3 The Claimant is entitled to a remedy for her successful claims.

4 The Tribunal will list a remedy hearing and send the parties a Notice of the remedy hearing date.

REASONS

1 The Claimant brought complaints of unfair dismissal and disability discrimination by her ET1 claim filed with the Employment Tribunals on 19 April 2018. The Respondent filed its Grounds of Resistance on 24 May 2018 resisting all the Claimant's complaints.

2 The Tribunal apologises to the parties for the delay in the promulgation of the judgment and reasons in this case. This was due to pressure of work and the Judge's ill-health. The judgment was agreed between the Judge and Members at the in chambers day on 8 January 2019. It has taken up to now until the judgment and reasons could be promulgated to you.

3 At a preliminary hearing before EJ Brown on 16 July 2018 the Claimant's complaint of 'ordinary' unfair dismissal was struck out as she had not been employed by the Respondent for two years as is required by section 108(1) of the Employment Rights Act 1996.

Evidence

4 The Tribunal had a lever arch bundle of papers. We had live evidence from the Claimant on her own behalf and from Julie O'Neill, Inflight Business Manager and Alex Leach, former Inflight Business Manager; on behalf of the Respondent. We did not hear from Mr Gallardo Barrero but note that in some documents he is referred to as Mr Gallardo while his last name is Barrero. We have used both surnames in these reasons, as appropriate. No disrespect is intended.

5 In relation to the Claimant's disability the Respondent accepted that the Claimant had an impairment but did not accept that it had a substantial adverse effect on the Claimant's ability to carry out day to day activities.

Issues

6 It was agreed at the start of the hearing that the issues were as stated in the case management summary produced by EJ Brown and could be summarised as follows (the full list will be referred to in the section '*Applying law to facts'* below):

6.1 Whether the Claimant was disabled for the purposes of section 6 and Schedule 1 of the Equality Act 2010 (EA 2010) by reason of her bipolar disorder.

6.2 Whether the Respondent treated the Claimant less favourably because of her disability contrary to section 13 EA 2010.

6.3 Whether the Respondent treated the Claimant unfavourably because of something arising in consequence of her disability contrary to section 15 EA 2010 and, if so, is such treatment justified. The Claimant relied on her dismissal and the reference the Respondent provided for her.

6.4 Whether the Respondent failed to make reasonable adjustments for the Claimant contrary to section 20 EA 2010.

7 From the evidence before it, the Tribunal made the following findings of fact. The Tribunal has not made findings on every piece of evidence but has focussed on those matters that relate to the issues in the case.

Findings of fact

8 We find that the Claimant was employed by BA CityFlyer from 5 June 2017 to 20 November 2017 as Cabin Crew operating out of London City Airport. Before joining the Respondent, the Claimant had worked as Cabin Crew for EasyJet. At the time of the hearing, the Claimant worked as Cabin Crew for Scandinavian Airlines.

9 The Respondent operates flights within the UK and to destinations in Europe out of London City Airport and occasionally out of Stansted. In its response the Respondent stated that it operated a system under which members of Cabin Crew could 'bid' for particular flights and/or holidays during any scheduling period. Ms Leach's evidence was that every crew member could bid for specific duties and that they had 8 bids that they could use over a 2-week period. A crew member could use their bid to bid for a particular type of shift. However, the Tribunal was also told that the Respondent could not guarantee anyone would get the shifts they wanted. It is essentially expressing a preference. It was unclear to us how that worked in practice as at the same time, we were also told that Cabin Crew are assigned a particular rota which would only change if they were able to swap shifts.

10 The Claimant would have been one of two cabin crew on a flight. Cabin crew sometimes stayed over at their destination and usually undertook more than one flight in a day or over several days.

Job

11 The Claimant's job description, which was in the hearing bundle, confirmed that her principal accountabilities were as follows:

- To ensure operational safety, security and health and safety responsibilities are performed to the highest standards and are compliant with EASA, British Airways CityFlyer requirements and all other relevant legislation.

- Maintain safety compliance at all times.

- Deliver world-class service excellence in line with the Respondent's service standards and behaviours.

- To ensure compliance with all corporate policies and procedures in accordance with relevant legislation.

- To act as a role model to crew, colleagues and customers.

- To build effective working relationships with colleagues and service partners to work as one team.

- To deliver the crew objectives set by the business.

12 We find that the Claimant was on a six-month probation period from her start date of 5 June 2017. Paragraph 2.1 of her contract confirmed that the Respondent reserved its right to terminate her contract within the probation period or to use its discretion to extend the probation period for a specified period.

Disability

13 In 2010 the Claimant was diagnosed with bipolar affective disease, having experienced severe depression and hypomania for many years. She has been on mood stabiliser medication since 2010. In 2011 she was also prescribed a supplementary antidepressant because she had attempted suicide by taking an overdose. It was her evidence that it had taken a period of about two years for her medication to stabilise and that she had been stable for the past 5 years.

14 The Claimant has had at least two serious suicide attempts before starting her medication. She has been told that it is likely that she will be on medication to control her condition for the rest of her life.

15 We accepted the Claimant's evidence that she had suffered many episodes of severe depression or hypomania before being diagnosed as bipolar. When suffering a depressive episode, the Claimant would forego her personal hygiene, experience listlessness and an inability to get out of bed, sleep for up to 20 hours per day, eat junk food and exhibit a lack of sociability which lead her to isolate herself from her friends by switching off her phone and refusing to answer the door. She would suffer from aches and pains all over her body and find it difficult to get out of bed. When in a hypomanic state the Claimant would talk incessantly, have thoughts at the rate of 100 per minute, irritate those around her with her heightened capacity and be overly controlling. Because of her real suicide attempts there was also a real risk of suicidal ideation.

16 Additional to the features of each episode, the Claimant suffered from the knowledge that this episode would eventually usher in the next opposite one and the anticipation of that or the knowledge of the inevitability of it would also cause her stress and affect her mental health. She had about 4 episodes of depression a year. Although this is the Claimant's account of the history of her condition, it was confirmed by the contents of the letters from the Consultant Psychiatrist, Dr Pop, in the hearing bundle. He also confirmed that the Claimant had also been diagnosed as having borderline personality disorder but that the Claimant found that diagnosis unhelpful and

we note that she has not relied on it in this case. At the time of that diagnosis she asked for a further assessment by a more senior doctor and that was how she came to be seen by Dr Pop who confirmed that it was bipolar affective disorder Type 2.

17 The Claimant's evidence was that she has been managing her condition well since her medication was settled about 5 years ago. The medical records she disclosed show that she had suffered with suicidal ideation in the past. She will have to remain on medication for the rest of her life. Her evidence was that in order to be able to continue working and have a normal life, she would need to continue with her medication and make certain lifestyle adjustments such as ensure that she gets a good night's sleep and stays off alcohol and drugs. In her GP notes, next to the date: 27 August 2010 on page 350, the Claimant's GP noted that the Claimant's mood was unchanged and that she had not heard from the Maudsley Hospital. It also stated that she should '*keep her mood up by routine of regular sleep and exercise'*. Here, the Claimant's GP was endorsing her belief that these lifestyle disciplines were needed in order for her to keep her mood up or maintain stability in her mental health. This was also endorsed by Dr Adanijo, an Occupational Health Physician in 2010 who saw the Claimant when she worked as a student nurse. He suggested changes that should be made to the duty roster to allow the Claimant adequate time off between shifts and to manage the symptoms of her underlying condition. He did not inform the employer of the name of the underlying condition but did inform them that it was likely that the Claimant was covered by the Disability Discrimination Act 1995 or Equality Act 2010.

18 The Consultant Psychiatrist, Dr Barbara Woods in her letter dated 4 January 2011 at page 364 stated that the Claimant was motivated to do whatever she can to improve control of her moods and that she takes medication, exercises regularly, watches her sleep pattern and avoids excess alcohol and drugs in order to do so.

19 The Claimant confirmed in her evidence that while employed by the Respondent she had not gone to her GP to report a deterioration in her mental health as she did not consider that it had reached the stage of being a medical issue. She did not see how her GP could help her get the Respondent to be more disability aware. She said to us that she *'could not take a pill'* for that. She stated that the way she coped with the increasing stress brought on by being given many night stops on her roster was to stop going out and stop socialising. Her evidence was that she took a lot of sick leave to sleep, and cope with her anxiety and low mood. Her anxiety was caused by lack of sleep.

20 As part of these proceedings, Dr Hallstrom produced a medical report on the Claimant for the Respondent dated 29 November 2018. Dr Hallstrom is a Consultant Psychiatrist. He reviewed the Claimant's medical notes and met with her on 27 November. He confirmed that the Claimant does have bipolar disorder Type 2, which is a long-term condition and that it will require her to take medication indefinitely. He confirmed that following the end of her employment with EasyJet the Claimant had been off work between 2 – 31 December 2016 with depression.

21 Although Dr Hallstrom's opinion was that the Claimant was well during her employment with the Respondent, he confirmed that her lifestyle adjustments such as a healthy diet, exercise and avoidance of alcohol and other forms of stress are an important part of her treatment package. Having considered the other medical reports

referred to above, we find that maintaining good sleep hygiene was also an important part of that package. Dr Hallstrom stated that '*it would seem appropriate to adopt a stable lifestyle in order to prevent mental up, which might trigger a relapse in her condition'.*

22 He confirmed that it was the Claimant's opinion that she needed 7 hours good sleep in order to maintain her emotional wellbeing and mental stability. She believed that it reduced the risk of a relapse into her active bipolar mood disorder which was otherwise in remission. Dr Hallstrom also stated that he understood why someone who wished to care for their health and had a potentially serious mental illness would pay close attention to lifestyle issues and how it would be prudent to make sure that they received adequate amounts of regular sleep.

23 Dr Hallstrom confirmed that the Claimant has a mental impairment that has lasted many years and was likely to continue for many more years as it is a long-term condition. He confirmed that the Claimant's condition would have deteriorated had she stopped taking her medication as medication was necessary to maintain her stability.

24 The doctor confirmed that her bipolar mood disorder was stable during her employment with the Respondent. He also confirmed that the deterioration that happened while she was employed by the Respondent was specific to the roster that she had been given by the Respondent and had the roster been more suitable to her needs and had adequate adaptations been made, then she would have managed to work for the Respondent without any problem.

25 The Claimant is stable on her medication and able to function. The Claimant's understanding of her condition was that in addition to her medication, in order to prevent her from getting seriously ill again, she needed to get good quality sleep along with other lifestyle changes such as a good diet, exercise and no alcohol.

26 As part of her induction process into the job, the Claimant saw the BAHS (British Airways Health Service). She told the doctor, Dr Caddis, about her diagnosis. He told her that the information about her diagnosis would not be shared with the managers. The doctor also confirmed that it was likely that her bipolar condition would be covered by the Equality Act 2010. The Claimant arranged for her GP to write to Dr Caddis at BAHS to confirm her diagnosis and fitness for the job.

27 In his letter supporting her appointment dated 5 April 2017, the Claimant's GP, Dr Mitchell, confirmed that she had been diagnosed with bipolar disorder from 2010. He stated that since then she had been stable as regards her mental health as she was compliant with her medication. His medical opinion was that the Claimant was extremely insightful into her condition and knew what symptoms she needed to look out for and was aware of what to do and where to go if she thought that she was becoming unwell again.

28 The Claimant confirmed in the hearing that she had not given her consent to Dr Caddis for details of her condition to be shared with her managers. The Claimant was reluctant to do so after her experiences with previous employers. The Claimant's evidence was that her experience has been that mental health conditions such as bipolar disorder are misunderstood and stigmatised by the public/workplaces and as it

was under control she did not want to be labelled immediately on starting her new job as the 'one with bipolar'. She wanted to prove herself as able before her colleagues and managers found out about her condition. After her conversation with Dr Caddis she believed that her managers would be told that she had a condition which brought her under the Equality Act but not the name of the condition.

29 We find that the Claimant was very disciplined about how she lived in order to ensure that she stayed well. The Claimant's evidence was that she was disciplined in terms of her diet, exercise, alcohol intake and sleep in order to maintain her health and it is likely that this is what her GP referred to when he stated that she was aware of what to do. Dr Hallstrom noted and her evidence to the Tribunal was that it was her belief that if she did not sleep well, then she would be cognitively impaired and would not feel safe to deal with crises that might arise during a flight.

30 Dr Hallstrom confirmed that in his opinion, the disruption the Claimant experienced when she had poor sleep was dealt with by taking time off to catch up on her sleep. He considered that this disruption fell short of a substantial impact on her day to day activities. However, he later stated in the same report that if the Claimant had taken approximately 20 days off work as sick as a result of her need to catch up on sleep because of the effect of the roster she had been given; then it was likely that this would qualify as a substantial impact on her ability to carry out day-to-day activities. It would have resulted in an inability to work for at least 20 days in 5 months. He was unable to confirm this as he had not seen the evidence of the amount of days the Claimant had off sick.

Disability Confident Employer

31 Having experienced treatment that she considered to be discrimination because of her condition at her previous employer, the Claimant was determined to continue in her chosen profession but to find a place to work where she would experience support. She applied to work with the Respondent as it was part of the Disability Confident Scheme. The Claimant believed that an employer who was a Disability Confident employer would be aware of the needs of disabled people and would be supportive. The Disability Confident Scheme document in the bundle stated that through the scheme, employers would challenge attitudes towards disability, increase understanding of disability, remove barriers to disabled people and those with long-term health conditions and ensure that disabled people had the opportunities to fulfil their potential and realise their aspirations.

32 It stated that a Disability Confident Employer was an employer that was on level 2 of the scheme and was one that the scheme recognised as going the extra mile to make sure disabled people get a fair chance. Such an employer would get a badge for its website and other materials.

Diversity Policy

33 We had the Respondent's Diversity and Inclusion Policy in the bundle of documents at page 51. The document stated as follows:

> *"You will not receive less favourable treatment or consideration on the ground of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation, part-time status, being or not being a member of a trade union nor will you be disadvantaged by any conditions of employment that cannot be justified as necessary on operational grounds"*

34 The policy referred to a diversity and inclusion code of practice and set out principles of fairness that should apply to recruitment and selection, promotion, transfer and training, terms of employment, benefits, facilities and services and the way in which grievances, dismissals and redundancies would be handled.

Probation policy

35 The bundle contained the Respondent's Guidance for Managers in managing a probationary period. Managers were told that during the probationary period it was their duty as the line manager to follow a structured process that aims to assess and review the employee's performance, capability, and suitability for the role. They were advised to provide regular feedback, identify and discuss any problems as early as possible and provide support and guidance. They should agree an *"objectives and development plan"* at the start of the employee's employment. The probation period included an expectation that the employee would be provided with clear objectives of what they were expected to achieve. Their performance was to be monitored through regular informal progress meetings and two formal probation review meetings at the three and six-month points.

36 The policy stated that a probationary period provides the new employee with the opportunity to demonstrate that they are able to do the job and apply the knowledge and skills the role requires. At the end of the period, the new employee's manager has to decide whether or not to confirm their employment.

37 There was provision in the Guidance for a new employee's probation period to be extended if their manager considered that their performance had been unsatisfactory or if they had been absent from work for an extended period during their probation. Where an employee has failed to achieve the required standards of performance, conduct or attendance, their line manager would conduct a formal review meeting to discuss this in order to reach a decision about their employment status. Line managers were advised to seek advice from HR if they are considering terminating someone during their probation period.

Sickness Absence policy

38 The Tribunal had the Respondent's sickness absence and returning to work policy in the hearing bundle. Employees were advised to notify their manager/appropriate designated person if they are unable to attend work due to sickness or injury and inform them of the reason for the absence. They should also notify them of their likely date of return to work, if known. If the employee is a member of flight crew they should notify their manager and crew control of their absence as soon as practicable on the first day that they are unfit for work – regardless of whether this is a day on which they are required to attend work. It is the employee's

responsibility to maintain contact with the company and supply a statement of fitness to work covering their absence. The policy clearly stated that colleagues should only return to work following their absence if they are fit.

39 The manager would review the employee's sickness record after each period of absence due to sickness. This would be done in a return to work meeting. The policy set out triggers and levels of absence to assist managers in deciding the level of action required in a particular situation.

40 If the employee's manager had concerns about their level of sickness, the policy stated that the first option was to try to resolve these concerns informally and if that was unsuccessful, the manager would consider going through the formal sickness absence process which might include obtaining a report from an occupational health advisor. Ultimately, the guidance gave the manager the option of considering termination of the employee's employment on the grounds of medical incapacity if their return to work was unlikely to be within a reasonable timeframe.

41 Absence related to a disability under the Equality Act 2010 would be recorded and a return to work discussion would be conducted after every occasion of absence as would happen with non-disability related absence. However, any absence related to a disability would normally be discounted from the triggering process. If the absence was such that it became a cause for concern, then processes might be followed and adjustments made.

42 While taking part in induction training, the Respondent's trainers noticed that the Claimant occasionally yawned. In the written assessment done at the end of the training, it was noted that the Claimant had been yawning and she was advised that she needed to be aware that her body language could be perceived in a negative way by customers and colleagues and as disinterest. It was an otherwise positive review. After the training, one of the Respondent's managers spoke to the Claimant about this. The Claimant informed her that her yawning was a side effect of the medication that she was on. She stated that one of her medications was for her heart. She confirmed that there was nothing else making her tired and that she had not encountered any issues while on duty when she was with EasyJet.

43 The Claimant passed all parts of her induction training.

44 The Claimant was unable to work on 29 June and called in sick to Crew Control to inform them. The Respondent's procedure was that staff had to call Crew Control to let them know of any sickness and also had to make another call to the Duty IBM desk before noon to also let them know that they are unable to attend work. The Claimant on this occasion made one call but not the other.

45 During that day one of the Respondent's Inflight Business Managers, Rafael Gallardo Barrero telephoned to check on her and to tell her that she had not followed procedure as she had not also contacted the Duty IBM desk before noon to report her ill-health and absence from work. The Claimant apologised for the error. Although this had been covered in the induction training she did not remember it until Mr Barrero reminded her. A 'return to work' form completed with a manager on her return confirmed that she had been sick with a urinary tract infection for which she attended

hospital and had been prescribed antibiotics. They also discussed that some medication that she was taking for her bowel and heart problems could make her drowsy and the manager decided to refer her to BAHS.

46 The Claimant was seen by Dr Caddis at BAHS. Dr Caddis confirmed in his report dated 10 July 2017, that the Claimant's medication for ongoing conditions could have the side effect of making her yawn although that would not mean that she was drowsy or incapacitated. He said that the Claimant could self-manage this. He also confirmed that the Equality Act 2010 may well apply to the Claimant but did not clarify what condition that assessment related to. He confirmed that the Claimant was fit for full flying duties *as 'the medication she is prescribed for ongoing medical conditions is not causing any symptoms or incapacity that would impact on flying fitness'*. The doctor did not refer to the Claimant's bipolar disorder but it is likely that this, as well as her heart condition, was what he was referring to by the phrase '*ongoing medical conditions'*.

47 During her induction the Claimant was given a '*Night Stop Preference Form*' to complete. The Claimant was not given instructions on completing it. The Claimant preferred not to have any night stops if possible although she was aware that it was likely that there would be some. She indicated her preference for no night stops by putting a '*0*' next to the words '*maximum night stop'*. The Claimant knew that there were others who wanted to work night stops and she hoped that they would do most of what was available. She completed the form on 5 July 2017. She was not asked to explain what she meant by putting a zero next to the option of maximum night stops. The Respondent did not query the form with the Claimant but the way she completed it was understood to be a request to be allocated the maximum number of shifts available. As a result, the Claimant was assigned most of the shifts involving night flights.

48 Once she started on the job, the Claimant noticed that she had a lot of multiple night stops on each month's roster. She spoke to colleagues about this and it seemed that she was getting more night stops i.e. longer duty rosters, than the people who asked for lots of night stops. She expressed concern about this. At the time of her appointment she was aware that there were likely to be night stops. She was prepared to do some but not as many or as many in succession, that she was rostered to do at the start of her employment. She became concerned when she was asked to do 5 consecutive night stops.

49 We find it likely that the Claimant spoke to her manager Alex Leach who was her Inflight Business Manager about her rostering. Ms Leach initially told the Claimant that it was not possible to change a live roster. It was not clear whether the Claimant referred to her disability status in those early conversations. She was also told that she should try to swap shifts with other crew colleagues. In her live evidence the Claimant was unable to remember the dates on which she had those conversations with Ms Leach because she did not make a note of them. At the time, the Claimant was not contemplating legal action against the Respondent. We find it likely that she did raise the issue with Ms Leach as she was concerned at the number of night stops she had been given and the effect that it might have on her health.

50 In her evidence Ms Leach stated that trips for 4 or 5 nights away were not uncommon. Employees bid for slots and express preferences about night stops and the Respondent tries to accommodate everyone's interests. The Respondent also allowed crew to swap flights between themselves although that had to be approved by Crewing. She stated in her witness statement and in live evidence that it was not really possible to accommodate someone who permanently needed a maximum of two nights away every week.

51 On 22 July the Claimant was off sick for a day because of anxiety and lack of sleep. She spoke to Ms Leach on the day and told her that she was worried about the amount of night stops she was getting. She informed Ms Leach that she did not like to be away from home, did not sleep well in hotels and that her worry about this was causing her anxiety. Ms Leach made a note of their conversation in which she noted that she told the Claimant that the Respondent is a 'touring airline'.

52 On her return to work on 23 July, she spoke to Mr Gallardo and they completed the return to work form. In their conversation, which is recorded on the form, she flagged up to him that she had a couple of medical conditions that BAHS was aware of and that at least one of which was covered by the Equality Act. She informed him that she was worried about the number of night stops she was being allocated and this worry had caused her anxiety which had in turn, affected her sleep and meant that she had only got 4 hours sleep the night before she was due to work. Again, the Claimant made it clear that her ability to sleep properly away from home was a source of concern for her and that it related to her disability.

53 The Claimant was clear in her conversations with Mr Gallardo and Ms Leach that she has a condition which is covered by the Equality Act, that she was doing too many night stops, that she did not sleep well in hotel rooms and that this was a source of worry and anxiety for her.

54 Mr Gallardo's response as noted in his email to other managers dated 23 July was that the Respondent was a touring airline and the Claimant should consider whether that was suitable for her. The Claimant asked whether the Respondent could look at her roster and reduce the number of nights away. He did not give any indication that the Respondent was willing to do so.

55 As she had been advised to try to swap shifts as a way of coping with the situation, the Claimant tried to swap shifts where she could. We found one in the bundle for a standby shift on 3 August, which was agreed. The Claimant found that it was not easy to swap shifts due to the minimum hours rest required between duties. There was other shift swaps later in the chronology, one of which was approved and one that was not.

56 There were many Inflight Assessment forms in the bundle that were about the Claimant and which were completed by her colleagues who worked on flights with her. it is likely that there was one for each flight. The Assessments of the Claimant's performance were all positive. All record the Claimant's '*strong performance'* in all categories. The Respondent had no complaints from customers about the Claimant.

57 The Claimant operated a flight on 2 August during which there was severe turbulence. She took two days off on 3 and 4 August because of back twinges and headache from the severe turbulence. The Claimant called Crewing to notify them of her absence and there was no issue with her reporting of her absence on this occasion.

58 The Claimant first met her manager, Alex Leach on 7 August. We find that they had spoken on other occasions before and on 22 July as set out above but 7 August was the first time they met. During their meeting, the Claimant reported that she had been unable to sleep because she was worried by the amount of time she was spending away from her home in her new role as main crew with the Respondent. She told Ms Leach that she was concerned about the longer trips and informed her that she had a condition that came under the Equality Act 2010. Ms Leach asked her if she had been confirmed that she was fit to fly and she agreed that she had been. Ms Leach asked her if she felt it would be beneficial to talk to BAHS again as she was happy to re-refer her. The Claimant did not feel at that stage, that it would help. She agreed that she would let the Respondent know if that changed.

59 The Claimant's evidence about this meeting was that she revealed that she had been unable to sleep as she was not sure what to do about it. She was new to the Respondent and wanted to make a good impression. When it was put to her in cross-examination, she denied that she was perfectly content. We find it likely that the Claimant thought that as the Respondent already knew that she was a disabled person and that her condition related to her desire to work less night stops, there was no need for a further referral to BAHS.

60 The Claimant applied for a temporary part-time position in August which would have seen her working between 50% and 75% of a full-time post. She was unsuccessful.

61 Although the Claimant asked in July for a reduction in the amount of night stops there was no change to her roster and there was no discussion with her about what would be an appropriate adjustment to her rosters.

62 On 31 August, the Claimant crewed on a flight to Glasgow. The Claimant's evidence was that she was unable to sleep that night, having arrived at the hotel at 11pm, because of some noisy cleaners arguing outside her room. She finally fell asleep at 3am. They were not due to check out until 2.30pm so she believed that she would be able to get the amount of sleep that she wanted before she had to work as Cabin Crew on a flight back to base. The Claimant's case was that during the night, she had to come out of the room and speak to the arguing cleaners and ask them to be quiet and that at one point in the morning she was unable to get back into her room and asked the cleaners to let her in, which they did. She stated that her key did not work and the cleaners told her that she would need to check in again as she should be out of the room by midday if she was going to leave that day. The Claimant's case was that she was unable to get sufficient sleep.

63 She believed that she was unable to fly for the whole day but that she could manage the initial flight back to Glasgow and then offload herself at London City Airport. She spoke to the Captain about this and both him and the SCCM agreed.

When they arrived at City Airport there was another crew member waiting to take her place on the rest of the duty.

64 We find that the Claimant notified Crew Control that she could not work the whole duty. She felt able to crew the flight back to London City Airport where she offloaded herself. She did not work the next leg of the duty.

65 On 20 September Ms Leach asked Helen Hassall to investigate what had happened in Glasgow. Ms Hassell had already begun an investigation as there is an email from her dated 18 September to Craig Munro, the General Manager of the Hilton Glasgow Central. The Respondent's evidence was that as it used this hotel on a regular basis for staff, it was keen to establish whether there was a problem with it. Ms Leach stated that the hotel had been known for having loud parties and she wanted to know whether that had been an issue on this occasion. The incident might have affected the Respondent's choice of hotel for staff in the future. That was the stated reason for Ms Hassall conducting this investigation.

66 Ms Hassall asked Mr Munro to confirm what time the Claimant checked out of the hotel and for the door report for her room from 11pm onwards. She asked whether the cleaners recalled the incident and whether the front office recalled anything from that date. She also set out the Claimant's version of what occurred on the night of 31 August at the hotel.

67 Mr Munro responded on 20 September. He stated that he had investigated the matter. He told her that the door lock report showed that the Claimant had checked in at 22.31 that night and that the door was locked at 02.40am from the inside and not opened again until 12.47pm. He stated that the door lock shows that the Claimant left the room to check out at 12.50pm. He also stated that the executive housekeeper had spoken with the room attendant who had cleaned the room on 1 September who was *'very upset as she denies that a conversation ever took place'*. He stated that she had been with the hotel for 6 years and knew the procedure whenever BA crew stayed there. He stated that there had never been a complaint about her in the past. Lastly, Mr Munro confirmed that the rest of the crew had been in rooms on the same floor as the Claimant, with one in the room directly opposite hers. There were no complaints from any other members of the crew.

68 The information provided by Mr Munro clearly contradicted the information the Claimant had given the Respondent about what happened that night.

69 Ms Hassall became suspicious of the Claimant's version of events. She stated in another email to Mr Munro on 21 *September "Out of interest do you have CCTV in reception? We are anticipating that at some point she will say she went down (clearly she didn't) but we might need it as evidence."* Ms Hassall appeared to have reached a conclusion about the Claimant's version of events even before the investigation had concluded. Mr Munro confirmed that he did have CCTV at reception but the Respondent never asked for it.

70 Ms Hassall reported back to Ms Leach on 21 September. She stated that the Claimant's report did not match what happened. She reported that the Claimant checked out at 12.50 hours and that the National Express bus was not due to collect

the crew from the hotel until 14.30. She stated that she did not know what the Claimant did with the time in between. This apparent discrepancy between her version of events and that of the hotel was not put to the Claimant until the probation review meeting.

71 We had the printout from the door lock reader in the hearing bundle. This was a document that the Claimant saw for the first time at the probation review meeting as she had not been told about this investigation until that time. The printout showed that the Claimant was in Room 711. It was not clear from the printout when the Claimant checked out. Both 'check in' and 'check out' times had been handwritten on the printout in ink. The check-in time was also confirmed on the printout as it recorded that the 'new hotel guest key' was used at 22.31. Contrary to Mr Munro's report, there are instances of the door being opened at 2.40am, 12.47, 12.55 and 14.23. The words 'check out' is written on the printout by hand at 12.50:22. The Claimant strongly disputed that she checked out at 12.50 that day.

72 The Claimant's version was that after she stepped out of the room on two occasions – at around 8.30am and 11.00am - to ask the arguing housekeeping staff to be quiet, she was unable to get back in to the room. Her version was that they told her that she had to get the key re-issued as the time had come for her to vacate the room. During the probation review meeting she stated that she went to the lounge to get a drink and returned to her room to try to get some sleep but could not. She told the Respondent that one of the housekeeping managers opened the door for her. The entry at 12.50:32 shows that 711 tried to open the door and that opening was not allowed as the key had expired. The next entry on the printout is 'Thomas Housekeeping' at 12.55:40 who opened the door with a key. The door was then opened from the inside at 14.23:46. The check-out time was not printed on the printout. The words 'checkout' was written in pen next to 12.50:22. The Claimant's statement recorded that she was not due to check out of the hotel until 14.30 that day and it is likely that that was when she checked out. The Respondent did not question the reliability of the handwritten check-out time on the printout. It was not considered that the hotel had made an error when it indicated the checkout time on the printout. If the checkout time was 14.30 as opposed to 12.50 as the hotel reported, then the rest of the Claimant' version of events is plausible from the door lock report.

73 There was also a statement from one of the room attendants in the bundle. In her statement the room attendant who cleaned the room on 1 September stated that she worked on the 7th floor and did not engage in conversation with any guest. This statement was given on 9 November. She did not give the time of her shift which meant that it would be difficult for the Respondent to confirm whether she was one of the room attendants who the Claimant says that she heard arguing/talking loudly outside her room on the night of 31 August/early hours of 1 September.

74 When asked in the hearing by the Claimant about possible contradictions between the door lock report and her version of events, Ms Leach stated that she could not comment.

75 The Claimant spoke with Ms Leach on 20 September. The Claimant told her that she had spoken to Leon who had confirmed that her night stop preference form had been recorded as 'maximum'. That was why she had been allocated so many

night stops and more night stops than some of her colleagues. She said that this was obviously a mistake as she did not want maximum night stops. They discussed the amount of night stops that the Claimant was getting. The Claimant complained about this. Ms Leach advised her of the reason why that was happening which was due to the interpretation of the way she had completed the form. The Respondent confirmed that it would not be altering her current live rosters but suggested that she swap with other crew members. She was advised that the process was just a request in any event and that at certain times, all crew would be asked to night stop. The amount would depend on the operational requirement at the time.

76 Later that day, Ms Leach sent her the original night stop form which the Respondent had interpreted as the Claimant wanting the maximum number of night stops. In the hearing the Respondent suggested that the Claimant had contributed to the confusion that arose around the night stop preference form as she should have put a tick next to the night stop preference she preferred. The form posed the question as follows:

> *"Where operationally possible, I would prefer;*
>
> *Minimum Night stops …….……..*
>
> *Average Night stops ……*
>
> *Maximum Night stops……...*
>
> *No Preference…….……."*

77 The Claimant indicated her preference by putting a 0 next to the third option, in this way - 'Maximum Night stops….0.'

78 Ms Leach informed the Claimant that the preference had now been updated with her preference for minimum night stops.

79 In her reply email to Ms Leach and copied to all managers on 21 September, the Claimant expressed concern about the number of night stops she had been given and stated that she had tried to swap shifts to reduce the number of night stops that she had to do. She reminded the Respondent that she had two long term health conditions that require specific management in order to ensure her well-being and to ensure that she is able to do her best at work. She informed the Respondent that she had a very structured sleep hygiene routine which proved challenging to adhere to when she is away from her usual environment for extended periods. She stated that disruption to her sleep routine could result in an exacerbation of symptoms directly related to her health conditions. The Claimant indicated that she was open to an appointment with BAHS to see if there were any recommendations in accordance with the Equality Act 2010 that could be made. She stated that she was anxious about her upcoming trips that were already rostered. She stated that this was causing her anxiety which was affecting her sleep and she asked whether the Respondent could either reduce her upcoming rosters or relieve her of them.

80 The Claimant did not receive a response to this email from Ms Leach or any of the other managers.

81 Ms Leach had told her on 7 August that if she changed her mind about a referral back to BAHS she should let her know. However, when she did so in this email she did not receive a response.

82 In her evidence the Claimant stated that she understood that it might be difficult to change a live roster but she was hoping that the Respondent would be able to do something to assist her to relieve her of some of the night duties.

83 The Claimant was off sick on 22 September. It was her evidence that she had been up the previous night crying about the situation and was then unable to work due to fatigue. The trip she had been scheduled to do on her roster was a four-day (three nights away) trip and she informed the Respondent when she telephoned that because of her health conditions she did not cope well with this type of trip.

84 In an email to the IBM email address on the same day, Ms Leach informed her colleagues that the Claimant had triggered stage 1 of the Absence Management Process (AMP). She also stated that the Claimant had been declared fully fit to fly and that her inability to do night stops meant that she was not fulfilling her contractual role. Ms Leach had been advised by someone called Donna, who we assume must be from HR, that she should keep the sickness and roster issues separate as the Claimant was fully fit to fly. She noted that if the Claimant was referred to BAHS, the Respondent would need to make sure that the doctor is aware of her history and that the Claimant is fully fit to fly.

85 Ms Leach had arranged a return to work meeting with the Claimant on her next rostered day which was 25 September. The return to work meeting was with Rafael Gallardo (Barrero). The form noted that the reason for the Claimant's absence had been a nervous breakdown/depression.

86 Mr Barrero completed the return to work form and the referral form to BAHS. On the return to work form he wrote that the Claimant had been referred to BAHS as she had been cleared for all flying duties as her 100% contractual duties when she joined the company.

87 Mr Barrero also wrote to Alex Leach on the same day. He noted that the Claimant told him that she suffered from bipolar disorder and a heart condition and that both conditions were covered by the Equality Act. He told her that she had triggered the Respondent's stage 1 of the Respondent's Sickness Absence process. He noted that the Claimant wanted to dispute some of her absences as she felt that they were related to the stress she had been put under by the maximum night stop roster and the long-term health conditions that she had that were covered by the Equality Act. She told him that she could not do the October roster. The Claimant explained to him how she controlled the environment to allow her to get a good night sleep and that she found it difficult to do so when away from home. The emails showed that he was aware that the Claimant wanted minimum night stops away from home. It would have been apparent that the Claimant was seeking an adjustment based on her being covered by the Equality Act.

88 Mr Barrero understood and repeated in the email that the Claimant had been given full clearance for all flying duties. He referred to what he described as the 'peculiarities' of the aviation industry and the potential operational disruptions. He did not set out what those were in the email. The Tribunal was not clear what that was and how it related to their discussion about the Claimant's roster.

89 In the Tribunal hearing the Claimant denied that she said to Mr Barrero that if she was given full clearance for all flying duties that *'things would get sour then'*. She pointed out that when Dr Caddis later gave a report stating that she had full clearance for all flying duties, things did not get sour.

90 We find that in the email Mr Gallardo gave some additional information about the Claimant and her litigation against a previous employer. He referred to a settlement offer that he said the Claimant told him she had rejected. It is unclear of the purpose of this information in the letter. The Claimant disputed that she said all this to Mr Barrero. She denied ever talking to him about settlement offers or the details of her case against her previous employer. Her evidence to this Tribunal was that she was never offered £30,000 to settle that claim and that she did not share any of the details of the case with him. She recalled discussing with him the charity work that she does for the BBC and her concerns and stress around the forthcoming ET hearing with her former employer. The tone of this part of his email indicated to us that the Respondent, or at least Mr Gallardo, had started to question whether the Claimant was suitable for the job.

91 On 26 September the Claimant woke up exhausted and called in sick. Mr Gallardo telephoned her during the day for more details. The Claimant informed him that when she woke up at 04.00 to prepare for her 06.05 report time, she felt exhausted and tired. The Claimant had recently worked a three-day roster. The roster had originally been from 22 September but as the Claimant had been sick on the first day, she worked between 23 – 25 September. The Claimant confirmed that she had followed the fatigue procedure as expected. She confirmed that although she has days off scheduled on 27 – 28 September, she did not believe that she would be able to do the four-day roster trip beginning on 29 September. Once again Mr Barrero reminded the Claimant that she had been cleared to perform full flying duties.

92 He recorded that the Claimant informed him that the Respondent put her in a terrible position as it had not done anything with her requests that she not be given as many nights stops away from home. The Claimant preferred not to have trips that require longer than 2 consecutive nights away. He noted *"she reiterated to me that she has flagged up her health conditions to all of us and we have done nothing so far to accommodate her demands".*

93 Mr Barrero referred the Claimant to Dr Caddis at BAHS on 26 September 2017. He ticked the questions that asked what support/adjustments the doctor would recommend to assist the Claimant with returning to work. He also ticked the box that asked whether the Claimant's health conditions were covered by the Equality Act and whether her attendance/performance issues were covered by a health condition. However, in the narrative of the referral form he made no reference to reasonable adjustments. He did not ask what reasonable adjustments were required/advisable to

assist the Claimant in being able to do a full roster. He also did not refer to disability. He set out the details of the Claimant's absences from work and asked whether there was a medical barrier that prevented the Claimant undertaking a full flying roster.

94 Dr Caddis met the Claimant on 5 October. In his report, Dr Caddis confirmed that the Claimant had recently had treatment for iron deficient anaemia and that he would expect that treatment to take full effect within the next 2 – 4 weeks. He stated that the anaemia may explain why she was tired but that he did not deem it to the extent that she would be deemed unfit to fly. He also addressed the Claimant's underlying medical conditions. He confirmed that there was no barrier to the Claimant being able to fly as long as those conditions were stable.

95 He confirmed that he had discussed with the Claimant her attitude to night stops. He reported it as follows:

> *"when an individual does hold a negative or specific perception about specific elements of a role (in Jessica's case, it's the successive nightstops) this can result in psychological symptoms/response. With some focussed intervention and reassurance that this does not pose a negative prognosis for her condition. I do not foresee this being a compelling medical barrier for full flying roster going forward. The ultimate determinant of this will be Jessica's approach and resolution of this, and whether the role and its requirements are suitable to her in general and independent to her medical background. I have given her links for resources to use, as well as contacting the company provided support if needed.".*

96 Dr Caddis confirmed that the Claimant's anaemia would clear up over the following 4 weeks. He concluded his report by stating that he expected that as the Claimant's bidding preference in relation to night stops had been adjusted to the correct preference he expected that to also have an effect within the next four weeks.

97 The Respondent understood that medical report to say that the Claimant would be fit for all flying duties within 4 weeks. It was not apparent from the actions taken subsequently that they looked at the passage referred to above which discussed the Claimant's attitude to her work, the fact that she may be experiencing psychological symptoms because of her concerns over the number of night stops or the need for *'focussed intervention and reassurance'* or the doctor's advice that her rosters should reflect her correct bidding preference, where possible. Dr Caddis did not say who should give the Claimant focussed intervention or reassurance. It was the Claimant's evidence that they had a long chat during the appointment and that he gave her advice about managing fatigue, stress and her condition. He wanted to support her to keep the job and recommended books and articles to her that she was to read to assist her in doing so. The Claimant has found those helpful and her evidence was that she continued to use them even at the date of the Tribunal hearing.

98 In her evidence the Claimant observed that Dr Caddis' report stated that there was no barrier to her being about to fly as long as her conditions remained stable. It is her case that her sleep habits are an integral part of her maintaining that stability and that towards the end of her employment with the Respondent she was verging on the

unstable and that was a concern to her. Her evidence was that she was not in a full-on relapse but that she had real worries about her health.

99 Ms Leach's summary of Dr Caddis' report simply referred to Dr Caddis' conclusion of his report. In his conclusion he stated that the Respondent should consider a maximum 2 night stops in a row in a rostered block over the next four weeks to enable the medication for anaemia to work. He confirmed that from November, there would be no requirement for a medical restriction. As stated above, we find that the report was more nuanced than that conclusion. It also addressed the Claimant's ongoing concerns as to how a longer period of night stops could affect her long-term conditions and the doctor's expectation that during that four-week period the corrected Claimant's night stop preference form would also take effect. It also stated that she was only fully fit as long as her condition was stable.

100 It is the Respondent's case that the Claimant failed to follow the procedure for reporting in sick on 28 September. It is the Claimant's case that she was not rostered to work that day. During the hearing the Respondent appeared to suggest that the day on which she had failed to report in sick correctly was the 29 September.

101 We find that on 28 September at 15.43 the Claimant wrote an email to the Respondent's IBM managers' email address to which she attached a copy of a fitness to work note from her GP signing her off from 28 September to 12 October 2017. In the subject line of the email header it stated that it was a fitness to work doctors note. The Claimant did contact the IBM but by email rather than by telephone. It is likely that she was not on the roster to work that day.

102 In the early hours of the following morning, 29 September, the Claimant noticed that she was still on the duty roster for that day. Her duty had not yet started. She telephoned Crewing at 3.25am to ask why she was still rostered on flights when she had a sick note for two weeks. She was ostensibly not calling Crewing to report as sick but to enquire why she was still on the roster because she had already reported as sick. Under the Respondent's policy, any call to report in sickness must take place before noon. The Claimant then called the IBM manager's telephone line at 11.55am to express concern that no-one had called her about her sickness and that she noticed that she was still on the roster. The Respondent considered that she had not followed the procedure. The person at Crewing who took the call reminded her of the sickness procedure and that she needed to always call Crewing to advise of sickness.

103 The Tribunal confirmed these details from an email in the bundle from another manager, Marco Tagliaferri dated 29 September to the managers email address in which he set out the timeline for the Claimant's recent absence.

104 On 14 October, the Claimant and Ms Leach met to discuss Dr Caddis' report and to discuss her period of sickness from 28 September – 12 October. The Claimant agreed to the Respondent's proposal for her to work a maximum of 2 consecutive night stops for a month. She was reassured by her talk with Dr Caddis and by the knowledge that the preference form had been changed to say that she wanted minimum night stops. Although it was not guaranteed that her preference could always be accommodated, the Claimant was hoping to get more of the rosters that she

believed would allow her to get more nights of good sleep at home. The Claimant also wanted to keep her job.

105 They briefly discussed the Glasgow incident although we were not told that she was shown the reports from the hotel which by then the Respondent had received. She was not told that the Respondent did not believe her account of what happened or that it considered that this was a serious misconduct matter.

106 The Respondent did not inform the Claimant at that meeting that she had broken or breached their operating procedures in her decision to offload herself at City Airport or that the correct thing to do would have been to have offloaded herself at Glasgow.

107 This was a meeting mainly to review Dr Caddis' report although they did discuss the Glasgow hotel matter and the Claimant's report of fatigue on 26 September.

108 On 18 October, Ms Leach wrote to the Claimant to confirm the restricted roster plan for the following 2 weeks. Although Dr Caddis had recommended 4 weeks at the beginning of October, there were now only 2 weeks left before 1 November which was when he estimated that this arrangement could end. The Claimant signed to confirm her agreement to the restricted roster for the following 2 weeks.

109 Also, although Dr Caddis had recommended no more than 2-night stops in one duty for the 4 week period of October to allow the Claimant to recover from anaemia, the letter from Ms Leach stated that the Respondent would not give her more than 3 consecutive nights away. We find that in doing so the Respondent did not propose to keep to Dr Caddis' recommendations.

110 On 19 October, Ms Leach also sent an email to Crewing to confirm that a restricted roster had been put in place for the Claimant.

111 Also on 19 October, Ms Leach wrote to Mr Munro at the Glasgow hotel to ask whether there was CCTV still available and whether the door lock report was accurate. This was likely to be in preparation for the probation review meeting. Mr Munro replied to say that there was no CCTV covering the hotel corridors and that there was nothing further to add on the door lock printout.

112 On 20 October, the Claimant found out in an email from Julia O'Neill, another manager – that she had not been appointed to the post of seasonal part-time winter cover which she had been hoping would have given her more flexibility.

113 On 28 October the Claimant swapped a roster for 1 – 3 November with a colleague. The Respondent approved this swap. The Claimant took her colleague's day trips.

114 On 1 November the Claimant was crewing a flight when the bar trolley came loose on landing, fell on its side and slipped down the cabin. The Customer Services Manager (CSM) on the flight wrote a report and we had that in the bundle along with that written by the Claimant and a safety check by Simon Firth, who was the Respondent's Safety and Security Manager.

115 The Claimant's report stated that she knew that she had secured the galley before sitting down and that she checked it twice. She also stated that on examining the latches after disembarking she noticed that they were floppy and moved freely. She reported that the CSM and Captain looked at them too. The CSM reported that when the trolley was picked up and put back in the galley, the latches were still down and the brakes were on. No one was hurt or injured.

116 The Captain provided a report. In it he stated that he personally inspected the latches on the trolley after landing and that they looked 'ok' although the click seemed as though it could be intermittent and the probable cause of the accident. The engineers were called to fix the trolley before the plane's next departure. This was a safety issue and it is possible that someone could have been hurt by a trolley coming loose during a flight or on landing. Simon Firth's report was that there was no fault with the latches on the trolley.

117 The Respondent's case is that the Captain was new and was being diplomatic in his report.

118 We find that the Respondent wrote to the Claimant on 14 November to invite her to a probationary meeting with Ms Leach to be held on 20 November. This was slightly earlier than 6 months as the Claimant started her employment on 4 June. This was the Claimant's first probation meeting. The policy referred to a meeting at the 3-month mark but the Respondent only held this probation meeting with her. The Claimant was required to successfully complete a probationary period to remain in employment. She was advised of her right to be accompanied. The meeting was moved from 15 November as her trade union representative could not make it.

119 The Claimant was advised that the purpose of the meeting was to discuss and review her conduct and performance to date including the following four issues:

- One charge of not adhering to the correct sickness absence procedure on 29 June;
- A separate charge of not adhering to the correct sickness absence reporting procedure on 28 September 2017;
- The conflicting reports from the Hilton hotel in Glasgow;
- The incident on the flight on 1 November when the trolley came loose from the rear galley and entered the cabin.

120 The invitation letter came from Ms Leach and informed the Claimant that it was essential that the acceptable standards of performance and conduct must be maintained so that the Respondent could deliver the highest level of customer service and remain a competitive business. Ms Leach informed her that at the meeting she would decide on whether the Claimant could continue her employment with the Respondent.

121 In preparation for the meeting, the Claimant attempted to forward her inflight assessment forms to Ms Leach. Ms Leach advised her to bring them in to her office.

122 The Claimant was also invited to an informal meeting on 16 November to discuss her sickness absence. By that time, the Claimant had been absent for 20 days within the 5 months since the start of her employment.

123 This was an informal (Stage 1) meeting under the Short-Term Sickness Absence Procedure. The note of the meeting in the bundle records that Ms Leach stated to the Claimant that she should give the Respondent as much information as possible. The Respondent wanted to know whether there was any underlying cause to her absence so that both her and the Respondent could support her to attend work. The Claimant was told that she had reached the trigger of 125 as her Bradford score was 720. Her absence was a cause for concern.

124 The Claimant's evidence was that she had already told the Respondent in meetings and in letters about her ongoing health concerns and her need for shorter rosters as that she could not sleep away from home for long periods of time. The night stop form had recently been amended to reflect her correct preference and she was aware that her probation meeting was to be held in a few days' time. For those reasons, when she was asked what else the Respondent could do to assist her in attending work, she stated that there was nothing. She was willing to wait to see how the night stop preference form would be applied.

125 We find that Ms Leach wrote to the Claimant on 19 November to record the outcome of the sickness absence meeting. She wrote that the Claimant's absences had caused the department problems in providing an efficient service and that the Respondent required reasonable standards of attendance. She informed the Claimant that she had considered it appropriate to issue her with a Stage One letter under the Respondent's Sickness Absence Process. The letter was to remain live on the Claimant's file from 13 October 2017 to 12 April 2018 (for 6 months). There was no mention of disability in the letter. It informed the Claimant that she had to reduce and maintain her Bradford Score to a level below the trigger point.

126 The Claimant was warned that if she was to be absent during the period that the letter was live and her absence level remained above the Respondent's trigger point, the matter may progress to Stage 2, which could result in her being issued with a Stage 2 absence warning. The letter ended with Ms Leach's statement that if the Claimant required any help or support that she should contact her on the telephone number given.

127 We find that the Respondent conducted a probationary meeting with the Claimant on 20 November. The Claimant attended with her trade union representative. Mr Barrero accompanied Ms Leach and acted as a notetaker.

128 The Claimant's evidence was that she was worried going in to the meeting as she was aware that she had not been put on roster for December but had instead been put on standby. This was unusual. A few months before she had tried to exchange a shift for standby and had been refused permission to do so. She did have a few roster swaps approved but that was not a common occurrence.

129 At the probation meeting they discussed the Claimant's performance. The Claimant referred to her inflight assessments from senior crew which were all complementary and positive. There were no incidences recorded of lateness and her uniform standards were recorded as good. Complementary letters/Golden tickets were recorded in the minutes which means that it was likely that the Claimant received those.

130 The meeting went on to discuss the Claimant's absence due to sickness and that this was higher than the Respondent would expect. It was noted that this was being managed under the Respondent's absence management policy and was not going to be addressed in any detail in this meeting.

131 They then discussed the days on which it was alleged that the Claimant had failed to report in sick using the correct procedure. The Claimant disputed that she was on the rota for 28 September but agreed that she had made an error in the way she reported her sickness absence on 29 June and stated that she had learned from it.

132 They discussed the incident at the Glasgow hotel. The Claimant gave her version of what happened on the night of 31 August/morning of 1 September again. She stated that she knew the next morning that she could only do one sector back to City Airport. She did not think that it would have been professional of her to have operated all sectors given how tired she was feeling at the time.

133 In the meeting she was told about the reports from the hotel, although the minutes do not record that she was shown the documents. She stated that the door lock report must be inaccurate. She was clear that the cleaners/hotel staff let her in the room. It is unlikely that Ms Leach believed her as she stated in her witness statement that for them to do so would have been in contravention of hotel policy.

134 The Claimant's case was that she was responsible for assessing her fitness to fly throughout the day and that she had assessed that she was able to do one sector of the duty and not the whole duty.

135 The discussion then moved on to the incident on 1 November when the trolley came loose from the galley during landing and entered the cabin. The Claimant confirmed that she had been in shock after the incident happened as either her or one or more passengers could have been hurt.

136 Ms Leach then discussed with the Claimant why she did not report the incident with the trolley on 1 November to a manager called Kristina who she met shortly after disembarking the plane. The Claimant did not feel that it was appropriate to attempt to talk to a manager about such an important matter if she happened on them in the toilets, which is where she met the manager.

137 Ms Leach confirmed that no defects were found when the latches on the trolley were examined by the engineering team.

138 We find it unlikely that the Claimant was shown the reports from the Captain and the engineers as the notes record that she asked what the Captain wrote. Ms Leach

confirmed to us that the Captain and senior crew members had not been spoken to as part of the consideration of the incident at the probation review stage.

139 The Claimant raised in the meeting that she was concerned for her job as she had noticed that she was on standby a lot over the next month. She observed that this could mean that the Respondent had contemplated dismissing her before the meeting. She stated that it might be that this was happening because she had disclosed too much about her health. She stated that she was capable of doing the job and hoped that the trolley and Glasgow incidents would not stop her from doing so. She stated that she had learnt from the incidents.

140 Ms Leach assured her that no decision had been taken prior to the meeting.

141 The Claimant's union representative referred to the inflight assessments as proof that the Claimant could do the job. The union representative stated that the meeting sounded more like a disciplinary than a probation meeting. The representative also stated that the Claimant wanted to see more evidence in relation to the Glasgow hotel incident and that she had accepted a failure in her practice in reporting sickness and had learnt from that. The Respondent was asked to consider extending the Claimant's probation period according to the provisions in the Respondent's policy.

142 Ms Leach confirmed in the Tribunal hearing that the Claimant's disability was not discussed in the probation meeting. However, she was aware that the Claimant had a diagnosis of bipolar and that she was on medication for it and that it was stable. She was also aware that a reasonable adjustment had been suggested and the Respondent had implemented it. We find that this was likely to be a reference to the adjustment to accommodate the treatment for anaemia that the Claimant had. We did not hear of any adjustments the Respondent made to assist the Claimant with her bipolar disorder. Ms Leach's evidence was that she knew that the Claimant was being supported by BAHS with conditions but once she was declared fit to fly she did not consider any other issues surrounding the Claimant's health.

143 She confirmed in evidence that she was aware that the Claimant had an issue with getting good quality sleep away from home and that this was related to her issue around night stops. She confirmed that she was aware that the Claimant's restriction on night stops was related to her need to sleep at home. She stated that the Respondent considered that it would be very restrictive to start manipulating the rosters to take the Claimant off night stops as they had to treat everyone fairly and consistently. She recalled a conversation with the Claimant about night stops, the stress that it was causing her and the need for her to sleep at home. None of this was discussed at the probation review meeting.

144 Ms Leach's evidence at the Tribunal hearing was that although she was aware of 2 colleagues, apart from the Claimant who had been diagnosed with bipolar disorder, she was not aware of a situation in which the Respondent had made changes to rosters for any crew member that had this condition or any other mental disability. She recollected that one of the two colleagues who had bipolar had been off sick and when she returned to work she was grounded for a period and did office work for a while until she was declared fit to fly. Once her medication was stabilised, Ms Leach's recollection was that that colleague was able to fly as rostered. Ms O'Neill who heard

the Claimant's appeal against dismissal also confirmed that she was aware of this individual and that she had a phased return to work but no reasonable adjustment on a permanent basis.

145 Lastly, she confirmed to us at the Tribunal hearing that the Respondent's managers all undergo diversity and inclusion training but that there had been no training on how that applied in probation or other supervisory meetings.

146 After a short adjournment, the meeting resumed and Ms Leach informed the Claimant and her union representative that she had decided that the Claimant's performance was unacceptable and did not meet the standard required during a probationary period. The minutes did not record that Ms Leach spoke to HR as part of her decision-making process however, it was her evidence in the Tribunal hearing that, in accordance with the Respondent's probation policy, she had spoken to someone in HR, Policy & Casework section, before coming to her decision. There was no record of the conversation.

147 In her witness statement, Ms Leach stated that after reviewing her performance and taking into consideration her condition, she concluded that the Claimant had not met the standard of performance required during her probation period. The Tribunal asked her what this statement meant when it referred to *'taking the Claimant's condition into consideration'* – especially when she also confirmed that her disability had not been discussed. She was unable to provide any further comment.

148 In the Tribunal hearing, the Claimant was asked about Para A, 4.0.2 of the Operating Manual in the Tribunal hearing. She stated that she was not familiar with this paragraph. It stated as follows: -

> *"EASA Ops requires that a crew member shall not fly, and the Company shall not require him to fly, if either has reason to believe that he is suffering or likely to suffer while flying, from such fatigue as may endanger the safety of the aircraft or of its occupants. Furthermore, crew members shall not act as operating Crew if they know, or suspect, that their physical or mental condition renders them unfit to operate. Furthermore, they are not to fly if they know they are likely to be in breach of the FTL scheme."*

Under paragraph 4.0.5 the Manual states as follows: -

> *"The grounds for declaring oneself unfit for duty are sickness, injury or fatigue. Crew members are expected to judge these matters more rigorously than Ground Staff, because they have a prime responsibility for safety procedures, as.."* (the Tribunal was not provided with the next page).

149 These paragraphs were not referred to in the invitation letter to the meeting. It is unlikely that safety procedures were discussed at the meeting as they are not recorded in the minutes of the probation review meeting. Ms Leach's evidence at the Tribunal hearing was that these were matters that she considered when coming to her decision. At the same time, she confirmed that the meeting was taken up with the incident with the cleaners.

150 It was Ms Leach's evidence to us that the issue for her had been not so much what happened on the night but whether the Claimant had followed procedures. She told us that after considering all the evidence that it was more likely than not that the door printout was accurate but that was not her main focus although it had been the focus of the investigation. In the Tribunal hearing, she stated that the main issue had been the question of whether the Claimant had followed procedures in taking the first sector back to City Airport. It was her evidence that cabin crew are required when reporting before every duty to declare that they are fully fit to operate. This is an essential requirement with the Respondent and especially where, such as on this flight, where there is only one other crew member in addition to the Claimant.

151 A note on the Respondent's HR service – People Services – stated that the Claimant's employment had been terminated during her probationary period for unsatisfactory work.

152 The Respondent wrote to the Claimant on 27 November to confirm the decision to terminate her employment contract. The concerns that had been discussed in the meeting were set out in writing in the letter.

153 In the letter Ms Leach stated that the Claimant should have declared herself unfit before reporting for work and operating one sector by flying to City Airport from Glasgow. She referred to Paragraph 4.0.2 of the Respondent's Operating Manual.

154 She stated that after reviewing the Claimant's performance she concluded that she had not met the standard of performance required during the probationary period. The letter did not refer to any consideration of the Claimant's disability.

155 The Claimant's effective date of termination was stated as 20 November 2017. The Claimant was entitled to one week's notice as she was still in her probation period and the Respondent agreed to pay her that amount. The Claimant was not required to work her notice.

156 In the letter the Claimant was asked to return any outstanding items to the Respondent. She would have had in her possession a uniform, iPad and charger, Bar keys and company manuals as part of the equipment she needed to do the job. She was given until 1 November to return any of those that she still had and any other items of the Respondent's property in her possession.

157 The Claimant was advised that she had the right to appeal against that decision. To appeal she had to write to Julie O'Neill who was another of the Respondent's IBM managers. She had to do so within 5 working days of receipt of this letter. She was advised that the appeal manager would review the decision to terminate her contract and may uphold, rescind or otherwise vary the decision.

158 The Claimant was unable to return the Respondent's property by 1 December as she was in Norfolk with her mother who had just had a heart attack. The Respondent believed that she was withholding the property without good reason and informed the Claimant that it would withhold her pay until the company property was returned.

159 In preparation for her appeal the Claimant contacted the Glasgow hotel to conduct some enquiries as she did not agree with the information that the Respondent had been given and because she thought that she had been dismissed because the Respondent preferred the hotel's version of events. The hotel contacted the Respondent before responding to her. They had no further information to give her. It is likely that this was because of the time that had passed since the incident. This was an enquiry in November about an incident which occurred in the evening of 31 August.

160 The Claimant appealed against her dismissal in a letter dated 2 December. She was asked to clarify the reasons for her appeal. The Claimant wrote an email to Ms O'Neill on 6 December in which she stated that she felt that she had been dismissed on untruths and that it had been presumed, without evidence that she was dishonest. At the hearing the Claimant stated that she was unhappy with the decision to dismiss her because she considered that although it had not been mentioned, her disability had been in the background in the decision-makers mind and that the Respondent believed everyone but her in relation to the incidents in Glasgow and the trolley.

161 The appeal hearing was conducted by Julie O'Neill on 14 December 2017. The Claimant was accompanied by a Unite the Union representative. Mr Gallardo (Barrero) accompanied Ms O'Neill and acted as notetaker.

162 The notes of the appeal hearing show that the Claimant stated that she felt that her report of the trolley incident had not been considered. The Claimant had not immediately submitted a report after that incident. She did not recall being told that she had to do so. She could not understand why the Respondent chose to believe that hotel staff in Glasgow rather than her version of events and she felt that the CCTV should have been investigated.

163 The Claimant stated that on the morning of 1 September she spoke to the rest of the crew to decide which option to take. She knew that she felt able to do one duty to City Airport but no flights after that. She stated that she was taken off the last two sectors but the Respondent had taken it that she had chosen to off-load herself at City Airport. She believed that she had done the first sector to assist the company and that she was being penalised for this. At the time, the rest of the crew seemed to support her decision which she believed to have been the best decision at the time.

164 The Claimant stated at the meeting that she felt that since she disclosed her bipolar disability to her managers a few months earlier, everything had '*gone downhill'* from there. She expressed her belief that the outcome of the probation meeting happened because she had disclosed her bipolar disorder. Ms O'Neill stated that she was getting off track.

165 The Claimant explained that she was covered by the Equality Act with her condition and that the Respondent had not taken any steps to try to understand her condition or to help her. She believed that nothing had been done to help her but instead, everything had been stored away to use against her at the probation meeting.

166 Ms O'Neill informed the Claimant that she would conduct further investigations following the appeal hearing and that she would inform the Claimant of the outcome within 7 days, although that timeframe could be extended, if necessary.

167 Ms O'Neill reviewed the evidence that Ms Leach had considered in relation to the trolley incident. She was satisfied that she had looked at the engineer's report which confirmed that the latch had not been faulty and would not have caused the trolley to come loose. Ms Leach had also been unhappy that the Claimant had not reported the incident. She did not uphold that part of the Claimant's appeal.

168 She reviewed all the paperwork surrounding the Glasgow hotel incident, including the door lock report accepting, as Ms Leach did, that the report was accurate as written. She did not uphold this part of the Claimant's appeal either.

169 Ms O'Neill was convinced that the probationary procedure was the appropriate process to use to raise these matters with an employee who is still under probation.

170 She considered the Claimant's bipolar condition and that it could be covered by the Equality Act. It was not recorded in her witness statement that she spoke to HR in considering this appeal but it is likely that she did. She reviewed the reports by Dr Caddis in which he stated that the Claimant was fully fit to fly. That led her to confirm that the reasons for the Claimant's dismissal were in no way connected to her health conditions.

171 Ms O'Neill concluded that Ms Leach's decision to dismiss the Claimant had been fair, reasonable and appropriate in all of the circumstances. She upheld the Claimant's dismissal on the ground that the Claimant had failed to meet the standards of performance required by the company during her probationary period and was not in any way connected to her being bipolar.

172 The Claimant's disability had not been mentioned in the dismissal letter. However, as it had been discussed in the appeal hearing, Ms O'Neill's evidence was that HR advised her to refer to it in the appeal outcome letter.

173 We saw a draft letter that she sent to HR for approval before sending it to the Claimant. HR advised that a section should be reworded. Ms O'Neill was advised that the Equality Act states that the Respondent has to consider reasonable adjustments and consider if the reason for the errors were as a result of the condition and if they were, was there anything that we could have reasonably done to prevent it. The adviser from HR did not ask whether that had in fact been done but advised that the letter should say that Ms Leach had considered the Claimant's disability and that she believes that it was entirely unrelated to the reason for dismissal. The suggested sentence from HR was incorporated into the appeal outcome letter. It was:

> *"I believe that Alex Leach has considered your health condition, but believes that this is totally unrelated to the reasons for dismissal which were clearly listed in the outcome letter".*

174 The appeal outcome letter was dated 21 December 2017. It confirmed Ms Leach's decision and went through all the Claimant's appeal points that had been

discussed in their meeting. She upheld Ms Leach's decision in respect of each of those points.

175 In her responses, Ms O'Neill referred the Claimant to sections of the Respondent's Operating Manual. Those had not been referred to in the probation review meeting or in the outcome letter. Ms Leach's evidence was that those sections had not been referred to in the meeting either.

176 Ms O'Neill concluded her letter by stating that whilst she recognised that the Claimant's condition might be covered by the Equality Act, she did not believe that the incidents stated in Ms Leach's outcome letter were a direct cause of the condition.

177 She stated that as the Respondent had referred the Claimant to BAHS on two occasions and she had been declared fully fit to fly with the only recommendation to adjust the rota for 4 weeks having been implemented; she was satisfied that the Respondent had considered the Claimant's health conditions and the appropriate support had been provided and any necessary adjustments made.

178 The Claimant's appeal was dismissed.

179 The Claimant returned the Respondent's items on 14 December.

180 On 29 January, Scandinavian Airways requested a reference for the Claimant. She had applied to be cabin crew for them. It was agreed in the hearing that it was important for airline staff to have references. We were told that in the aviation industry any gaps in employment over 5 days has to be covered by a reference. The Respondent was asked to complete a questionnaire on the Claimant.

181 The Respondent wrote to Scandinavian Airways. They received the reference around the second week in February. The copy produced in the trial bundle was dated 7 October 2018 and was most likely printed out for insertion into the bundle. The reference confirmed the Claimant's dates of employment and stated that the reason for her leaving was "Dismissal – during probationary period/unsatisfactory work".

182 By the time the reference was received, the Claimant had already been working for Scandinavian Airways for a week or two as she started in January. When the reference was received, she received a telephone call from her managers who told her that the reference was not a good one. She had also obtained a reference from the earlier employer against whom she had brought the tribunal case. She has continued in her employment with them and at the time of the hearing she was still employed there.

183 So far, the reference has not affected the Claimant's employment. She continues to work for Scandinavian Airways. She stated at the hearing that she was in the process of applying for promotion and did not know if the reference would affect her progress. However, by that time she had already been working there for almost a year so it is likely that any assessment of her suitability for promotion would be based on her performance in the job and her potential, as well as any references from previous roles.

184 The Claimant was upset about the reference as she considered that she had worked well during her probationary period and that the inflight assessments from colleagues demonstrated this. She considered her work to have been satisfactory and although it was true that she had been dismissed during her probation period, she took issue with the phrase 'unsatisfactory work'.

185 The Respondent's witnesses referred to it as a 'touring airline' on occasions during the hearing. It was also a term used by Mr Barrero (Gallardo) when he met with the Claimant during her employment. The Tribunal asked for an explanation of the term and how it differs from other airlines. Ms Leach explained that a touring airline is one that does a lot of night stops. Planes would travel to a number of stops before coming back to base.

186 The Respondent had a small number of duties that take-off and land back at City Airport in a day which may then go on to other destinations. There were not many flights that could be described as 'there and back'. Ms Leach's evidence was that the Respondent was restricted in what it could do as City Airport is closed on one day of the week and is a small airport. She was not aware of any changes made for any crew member with a disability.

187 On the second day of the hearing the Claimant produced the document entitled '*BACityFlyer January 2017 Pairings*'. It is unlikely that the Respondent had disclosure of this document beforehand. The Respondent objected to this document being allowed in as evidence. The document was 20 pages of a printout from the Respondent's system. The Claimant stated that she had sent the document to the Respondent's lawyers with the document as an attachment. After an adjournment to enable Respondent's Counsel to take instructions on the document so that we could decide whether to allow it in evidence, we were given a supplementary witness statement from Ms O'Neill dealing with the information in the document. Ms Leach was giving evidence when the document was produced which meant that Counsel could not talk to her about it over the adjournment.

188 It was agreed that although the document stated that it related to January 2017, it really related to January 2018. The entries in it were dated January 2018. We considered the Claimant's application to have the document entered in to evidence. After due consideration, we decided not to allow the document in evidence, mainly because it applied to a period of time when the Claimant was no longer employed by the Respondent. We would allow the issue of whether it was possible for the Claimant to be assigned '*there and back'* flights to be explored in evidence in the hearing. Ms O'Neill was allowed to submit a supplementary witness statement on this issue.

189 In the supplementary witness statement Ms O'Neill stated that she spoke to Aaron Collins, Crew Operations Planning Manager at the Respondent during the hearing, to ask what percentage of flights during January 2018 were '*there and back'* flights. These are flights that do not require cabin crew to have to stay over on their arrival and they can return home on the same day. Ms O'Neill stated that Mr Collins told her that during January 2018 the Respondent had around 996 flights, out of which 12.4% could be described as '*there and back'* flights.

190 We find that during her employment, the Claimant did not ask the Respondent to be assigned to '*there and back'* flights. Ms Leach confirmed that she had not been asked to consider giving the Claimant only '*there and back'* flights. She was aware that the Claimant had anxiety over night stops but the specific pattern of '*there and back'* flights only was never discussed with her. She stated that she did not believe that it could be done on a permanent basis as there would also be issues of sleep deprivation to consider as well as how it would impact the rest of the crew.

191 As already stated, we find that the Claimant was still employed with Scandinavian Airways at the time of the hearing. Her evidence was that this was an airline that did short-haul flights to Europe and that she had been assigned duties of 2 night or less since she started her employment with them. It was her evidence that she had hardly any sick leave with her new employer and that the rosters had worked well for her.

Law

192 The Claimant complained that she was a disabled person and that the Respondent had treated her less favourably because of her disability (section 13 Equality Act 2010 (EA)), failed to comply with a duty to make reasonable adjustments (section 20 EA) and that they had treated her unfavourably because of something arising in consequence of his disability (section 15 EA).

Probation

193 The Respondent's submission was that as the Claimant was on probation the Respondent had a wide discretion as to whether to continue her employment and that statutory fairness did not enter into the equation.

194 The Respondent relied on section 108(1) of the Employment Rights Act 1996 (ERA) which states as follows: -

> "Section 94 does not apply to the dismissal of an employee unless he had been continuously employed for a period of not less than two years ending with the effective date of termination."

195 The Tribunal is therefore not to apply the requirement of statutory fairness to the facts in this case.

196 The Respondent also referred to the case *of JM Hamblin v London Borough of Ealing* [1975] IRLR 354 which was a case of a probationer who had been dismissed. During her probation period a number of complaints were made with regard to her lack of capability, both as regards her failure to grasp her duties and her physical incapability to do aspects of the work. She had been given warnings that unless her performance improved she would be dismissed. She had several indications that her job was in jeopardy – at one point she was given a letter of dismissal which was subsequently withdrawn. When she was eventually dismissed, she brought a complaint of unfair dismissal. The tribunal in that case held that the matter had to be viewed within the context that this was a probation. The court stated that a probationary employee knows that she is on trial and must establish her suitability for

the post. At the same time, the employer must give the employee a proper opportunity to prove herself while reserving the right to determine the employment.

197 This discussion about the fairness of dismissing someone who is on probation was revisited in 2 other cases. Those cases were – *White v London Transport Executive* 1981 IRLR 261 in which the EAT held that the tribunal had correctly found that there is an implied term in the contracts of employment of probationary employees imposing an obligation on the employer to take reasonable steps to maintain an appraisal of a probationer during the trial period, giving guidance where necessary.

198 The other case was *The Post Office v P A Mughal* [1977] IRLR 178 in which the EAT held that in considering the fairness of the dismissal of an employee during a probationary or trial period, the question for the tribunal is: Had the employer shown that he took reasonable steps to maintain appraisal of the probationer throughout the period of the probation, giving guidance by advice or warning such as is likely to have been useful or fair to her. The judgment also stated that it is not for a tribunal to set the standard required for selection of a probationer for employment. The EAT accepted the employer's contention that it is for the employer to set the standards of capacity and efficiency that are required even though this inevitably involves an element of subjective judgment when individual probationers are assessed; and that it is for the employer at the end of the trial period to decide whether the employee measures up to the standards that has been set. In that case the employer had a procedure setting out the way in which a probationer should be supervised, appraised, warned and assessed throughout the probation period, which had not been followed in this instance. The dismissal was therefore found to be unfair.

199 The Tribunal will bear in mind when assessing this case that these authorities were all decided before the introduction of the Disability Discrimination Act 1995 and the Equality Act 2010 which means that there was no consideration of the interaction between the duty to make reasonable adjustments and the otherwise limited duties that an employer has towards a probationer.

Disability Discrimination

200 As the Respondent did not concede that the Claimant was a disabled person, the Tribunal first had to consider whether she was a disabled person for the purposes of the Equality Act 2010.

Disability

201 The Respondent accepted that the Claimant's condition of bipolar disorder is a mental impairment and that it is sufficiently long-term. However, the Respondent did not accept that it had a substantial effect on her ability to carry out day-to-day activities.

202 Section 6(1) of the EA defines disability in this way. When a person (P) has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. In the case of *Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591, Langstaff P stated that when assessing whether the effect of the impairment is substantial the tribunal has to bear in mind the words of section 212(1) of the Act which confirm that it means more

than minor or trivial. The Act does not create a spectrum running smoothly from those matters that are clearly of substantial effect to those matters that are clearly trivial. *'Unless a matter can be classed as within the heading "trivial" or "insubstantial" it must be treated as substantial……There is little room for any form of sliding scale between one and the other'.*

203 To support its position, the Respondent referred to sections of the medical report produced by Dr Hallstrom. The Tribunal noted the EAT's statement in the case of *Abadeh v British Telecommunications plc* [2001] IRLR 23 that while the view of doctors on the nature and extent of claimed disability is certainly relevant, at the end of the day the crucial issue is one for the tribunal to decide on all the evidence. Dr Hallstrom confirmed in his report that it was a matter for the Tribunal to decide whether the Claimant was disabled and not for him.

204 There appeared to be two issues here for the Tribunal. The Respondent did not concede disability in respect of the Claimant's bipolar condition as stated above. It was also part of the Claimant's case that the Respondent's treatment - by not agreeing to her request for less night stops or by failing to reduce the amount of night stops she was rostered to do - caused a deterioration in her health so that she was in danger of her condition being triggered.

205 The Respondent's submissions appear to be aimed at the second issue as it referred to there being no medical evidence to support the Claimant's claim that she suffered deterioration in her symptoms. There was also a reference to the first issue when the Respondent submitted that the Claimant's GP records show that she had only visited her GP once in 2017 regarding her bipolar condition.

206 If an impairment is being treated or corrected, the impairment is deemed to have the effect it is likely to have had without the measures in question (Equality Act Schedule 1, para 5). In the House of Lords case *SCA Packaging v Boyle* [2009] IRLR 746 Baroness Hale stated:

> *'a blind person who can get about with a guide dog is still disabled. A person with Parkinson's disease whose disabling symptoms are controlled by medication is still disabled. An amputee with an artificial limb is still disabled'.*

207 Where someone has had or is having medical treatment, the question for the Tribunal is whether the actual or deduced effects on the Claimant's abilities to carry out normal day-to-day activities are clearly more than trivial.

208 In the case of *Sussex Partnership NHS Foundation Trust v Norris* UKEAT/0031/12 the court pointed out that even though the Equality Act requires a causal link between the impairment and a substantial adverse effect on ability to carry out normal day-to-day activities, it is not material that there is an intermediate step between the impairment and its effects provided that there is a causal link between the two. The Tribunal must ask itself whether the deduced effect of the Claimant's impairment would have itself have had a substantial adverse effect on her ability to carry out normal day-to-day activities.

Knowledge of disability

209 There was a dispute about when the Respondent knew about the Claimant's disability. The Respondent's case is that her managers were not aware of the Claimant's condition until she told them in September. It was the Claimant's case that they should have known that she was disabled much earlier. Under the Equality Act 2010 Schedule 8 Part 3, para 20 it states that:

> *'A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know….*
>
> *(b) that an interested disabled person has a disability and is likely to be placed at the substantial disadvantage referred to in the first, second or third requirement'*.

210 What is meant by the phrase '*reasonably be expected to know"*? In the case of *Gallop v Newport City Council* [2014] IRLR 211 the Court of Appeal held that it was essential for a reasonable employer to consider whether an employee is disabled, and form their own judgment. The employer should not rely solely on unreasoned advice from its OH provider, for example. The EHRC's Statutory Code of Practice on Employment states that if an employee's agent or employee (such as an occupational health adviser or an HR officer) knows, in that capacity, of a worker's disability, the employer will not usually be able to claim that they did not know of it. The Tribunal is aware that this is only guidance. The claim in *Gallop* ultimately failed as the decision-maker did not in fact have knowledge of the disability. It was held that the knowledge of others cannot be imputed to a sole decision-maker.

211 In the case of *Jennings v Barts and The London NHS Trust* UKEAT/0056/12 the EAT stated that the question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the Tribunal. It further held that:

> '*if a wrong label is attached to a mental impairment, a later relabelling of that condition is not diagnosing it for the first time using the benefit of hindsight, it is giving the same mental impairment a different name'*.

Harvey commented that this would suggest that an employer ought to concentrate on the impact of the impairment, not on any particular diagnosis. The burden, given the way the statute is expressed, is on the employer to show that it was unreasonable to have the required knowledge.

The duty to make reasonable adjustments

212 Section 20 of the Equality Act 2010 sets out the duty to make adjustments as follows:

> *"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply…*
>
> *(2) The duty comprises the following three requirements,*

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

(4) The second requirement is a requirement, where a physical feature puts the disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage,

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

213 The Claimant relied on the first requirement.

214 Section 21 deals with the consequences of a failure to comply with the duty and states as follow:

"(1) A failure to comply with the first, second or third requirements is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against B if he fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second and third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of another provision of this Act or otherwise."

215 In the case of *Environment Agency v Rowan* [2008] IRLR 20 the EAT set out Guidance on how an employment tribunal should approach a complaint of a failure to make reasonable adjustments under what was then section 3A (2) of the DDA by failing to comply with the Section 4A duty. The Tribunal must identify the following factors relevant to this case; (amended since the Equality Act 2010): -

215.1 the provision, criteria or practice applied by or on behalf of an employer, or;

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

215.3 the nature and extent of the substantial disadvantage suffered by the employee in comparison to non-disabled persons.

216 The EAT held that an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through this process. Unless it has identified the matters set out above it cannot go on to judge if any proposed

adjustment is reasonable.

217 A tribunal must be careful when identifying the 'provision, criterion or practice' as a failure to identify this correctly risks invalidating, for the purposes of the duty to make reasonable adjustments, any findings of substantial disadvantage by comparison to persons who are not disabled. A provision, criterion or practice could include such matters as the rules governing the holding of disciplinary or grievance hearings or the non-payment of allowances such as sick pay. In the case of *HM Prison Service v Johnson [*2007] IRLR 951 Mr Justice Underhill in the EAT stated that a tribunal must identify with some particularity what 'step' it is that the employer is said to have failed to take in relation to the disabled employee. In that case the court held that the tribunal had failed to set out the specific step the employer had been required to take: merely suggesting that she should have been moved to a 'non-hostile environment' or offered 'other employment' in a non-prison environment, without finding that suitable jobs were available, was insufficient.

218 In relation to the burden of proof in a disability case it was stated in *Johnson* above that it would be an error to regard the fact that a disabled person had been treated badly as fully disposing the question whether his disability (or something related to it) was, or was part of, the reason for the treatment complained of. If it was not, then, however reprehensible the treatment, it was not discrimination.

219 In assessing discrimination complaints tribunals would be expected to go through a staged process to determine whether the claim was proven in applying the burden of proof. In the case of *Project Management Institute v Latif* [2007] IRLR 579 Mr Justice Elias expressly approved guidance on the application of the burden of proof in reasonable adjustment cases as contained in the Disability Rights Commission Code of Practice. He stated that:

> *"The key point is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of duty. There must be evidence of some apparently reasonable adjustment which could be made …… we do think it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not".*

220 If the Tribunal concludes, following application of that process, and with the burden on the Claimant, that there were steps which it would have been reasonable for the employer to take in order to prevent the Claimant from suffering from the disadvantage in question; then the burden would shift to the Respondent to seek to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that another reasonable adjustment had been made or the adjustment identified by the Claimant was not a reasonable one to make.

Direct Discrimination

221 Section 13 of the Equality Act prohibits less favourable treatment by A of a disabled person B, if it is done because of her disability.

222 The Claimant did not refer to an actual comparator in her case which means that it is likely that she was relying on a hypothetical comparator.

223 The Claimant's disability does not need to be the sole reason for that conduct. The question is whether it was an 'effective cause'. The Tribunal may need to look beyond the immediate cause for the conduct in question to determine why the alleged discriminator acted as they did. What, consciously or unconsciously was their reason?

224 In the case of *Amnesty international v Ahmed* [2009] IRLR 884 the EAT, Underhill P presiding stated that:

> 'the basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of ….. in some cases."

Discrimination Arising from Disability

225 Section 15 of the Equality Act states that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

226 Both parties referred the Tribunal to the case of *Basildon & Thurrock NHS Foundation Trust v Weerasingh* UKEAT/0397/14(19 May 2015, unreported) in which it was confirmed that there are two stages to the process that a tribunal has to go through in assessing a complaint under this section. Firstly, it has to focus on the words "*because of something*" and therefore had to identify "*something*"; and secondly, upon the fact that that "*something*" must be *"something arising in consequence of B's disability"* which constitutes a second causative link. If a tribunal got to this point the employer would be able to defend the complaint if it was able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

227 Generally, as with all discrimination complaints, the Tribunal is aware that the burden of proving discrimination complaint rests on the employee bringing the complaint. As this will sometimes rest on the drawing of inferences from the evidence the courts have developed the concept of the reversal of the burden of proof in discrimination cases. This is discussed in a number of cases and is set out in section 136 of the Equality Act which states that:

> "if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. If A is able to show that it did not contravene the provision then this would not apply."

228 The concept of the 'shifting burden of proof' was dealt with most authoritatively in the case of *Igen v Wong [2005] IRLR* and confirmed in subsequent cases including *Madarassay v Nomura International Plc [2007] IRLR 246.* Essentially, this is a two-

stage process. In the first place, the complainant must prove facts from which the Tribunal could conclude in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the complainant. In *Madarassay* the Court of Appeal stated that 'could conclude' must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This means that the Claimant has to set up a prima facie case. Also in *Madarassay* it was stated that a difference in status and a difference in treatment was not sufficient to reverse the burden of proof automatically.

229 In the case of *Laing v Manchester City Council [2006] IRLR* tribunals were cautioned against taking a mechanistic approach to the burden of proof provisions. The focus of the Tribunal's analysis must at all times be the question whether they can properly and fairly infer discrimination and sometimes it will be possible on the facts found to exist for the Tribunal to reach a conclusion that the protected characteristic was not the explanation – without formally going through the two-stage process.

230 In every case the tribunal has to determine the reason why the claimant was treated as s/he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572* "this is the crucial question". It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reasons. It is sufficient that it is significant in the sense of being more than trivial.

231 In assessing the facts in this case, the Tribunal is also aware of the comments made in the case of *Griffiths-Henry v Network Rail Infrastructure Ltd [2006] IRLR 865* that an employer does not have to establish that he acted reasonably or fairly in order to avoid a finding of discrimination. He only has to establish that the true reason was not discriminatory. Obviously, if unreasonable conduct occurs alongside other factors which suggest that there is or might be discrimination, then this could be the something more which leads the Tribunal to conclude that the Claimant had made a prima facie case and shift the burden on to the Respondent to show that its treatment of the Claimant had nothing to do with the Claimant's disability.

Applying the law to the facts found above

Was the Claimant a disabled person at the relevant time?

232 The first question for the Tribunal was whether the Claimant was a disabled person for the purposes of the Equality Act 2010 by reason of her bipolar disorder, during her employment with the Respondent.

233 The Claimant was diagnosed with bipolar disorder in 2010. She has been stable for the last 5 years but she is not cured. Her condition is under control with medication. Dr Hallstrom confirmed that the Claimant does have a bipolar disorder Type 2, which is a long-term condition and that it would require her to take medication indefinitely. We accept his evidence that if the Claimant ever stopped taking her medication, her health would deteriorate. Medication is necessary to maintain her stability.

234 It is this Tribunal's judgment, taking into account the medical evidence and the Claimant's evidence about what life was like before she was diagnosed and with particular reference to her two attempts at suicide, that the deduced effects on the Claimant's ability to carry out day to day activities would be substantial. The Claimant would be unable to function without her medication and would not be able to carry out day to day activities.

235 It is this Tribunal's judgment that the Claimant was a disabled person for the purposes of the Equality Act 2010 at the time of her employment with the Respondent.

236 The question of whether the Respondent's treatment of the Claimant caused her condition to substantially deteriorate between July and the end of November 2017 so that it could separately be considered under the Equality Act was not an issue in the case although the Respondent's submissions appeared to address it as such. We will address any issues that arise in that regard below.

Failure to make reasonable adjustments

Did the Respondent apply the following PCP: Requiring employees, including the Claimant to fly with maximum night stops – which included 3 or more night stops consecutively?

237 As stated above, under Schedule 8, Part 3, paragraph 20 the Respondent is not subject to a duty to make reasonable adjustment if it does not know and could not be reasonably expected to know that the Claimant had a disability and was likely to be placed at the substantial disadvantage referred to in the first requirement as in this case, the Claimant relied on the first requirement.

238 It was the Respondent's case that firstly, it did not know that the Claimant was a disabled person and that secondly, there was no applicable PCP that put her at a substantial disadvantage. We will address those points separately.

Knowledge of disability

239 This was not a matter that the Respondent raised at the preliminary hearing and it was not part of the list of issues but did form part of their case in the hearing and in the submissions at the end.

240 It was the Respondent's case that it did not know that the Claimant was a person with bipolar and a disabled person until she disclosed this to Mr Gallardo on or around 25 September 2017.

241 It is this Tribunal's judgment that in April 2017, at her pre-employment health check, the Claimant told Dr Caddis that she was a disabled person. She also told him that she was a person with bipolar disorder and that she had a heart condition. However, she was aware that the diagnosis would not be shared with her managers at that time. She believed that her managers would be told that she had a condition which was protected under the Equality Act 2010, although they would not be told the name of the condition.

242 She did not inform her managers of her disability at the start of her employment.

This was because of prior experiences at other places of employment where she felt that she had been stigmatised as a person with bipolar before her colleagues/managers had had an opportunity to get to know her and her work.

243 The Respondent was informed by Dr Caddis in a report dated 10 July 2017 that the Claimant had a condition that might bring her under the protection of the Equality Act 2010. We found above that the Claimant had many conversations with Ms Leach during the early days of her employment and asked why she was getting so many duties with multiple night stops. The Claimant could not recall the dates of those conversations but Ms Leach confirmed in that she had been aware that the Claimant had an issue with getting good quality sleep away from home and that she wanted less night stops. She had also been told that the Claimant had conditions that brought her under the Equality Act 2010.

244 At her return to work on 23 July after a day's sick leave the Claimant told Mr Gallardo that she had a couple of medical conditions, one of which he noted was covered by the Equality Act. He shared this information with the other managers on the IBM Managers email. We also found that the Claimant said the same to Ms Leach on 22 July. The Claimant repeated this when she spoke to Ms Leach on 7 August.

245 The Claimant sent an email to Ms Leach, copied to all IBM Managers on 21 September in which she clearly stated that she was a disabled person and that she needed adjustments under the Equality Act. She also clearly set out why the adjustments were needed. In the letter she stated that it was difficult for her to maintain her structured sleep routine when away from home on extended duties and that disruption of her sleep routine could risk an exacerbation of her symptoms.

246 Ms Leach confirmed in evidence that she knew that the issue was about the quality of sleep that the Claimant was able to achieve when away from home and the effect that could have on her long-term health conditions.

247 It is correct that the Claimant told Mr Gallardo in a meeting on 25 September that she was a person with bipolar disorder.

248 We conclude from this evidence that the Respondent was told on many occasions prior to 25 September that the Claimant was a disabled person and that she was covered or protected by the Equality Act 2010. The Respondent did not need to know the exact condition the Claimant had in order for it to be aware that she was a disabled person and that the Equality Act applies. Schedule 8 referred to above only requires that the employer know that an interested disabled person has a disability and is likely to be placed at the substantial disadvantage referred to in the first, second or third requirement.

249 In conclusion, in this Tribunal's judgment, it is not clear whether Dr Caddis told the Claimant's managers in April, before she started, that she was a person with a disability. It is unlikely that this happened.

250 However, it is this Tribunal's judgment that from 10 July onwards the Respondent could reasonably be expected to know, from the Claimant's conversations with managers and from Dr Caddis' reports, that she was someone who had a

disability. It is our judgment that the Respondent could reasonably be expected to know that she was likely to be placed at a substantial disadvantage if her rosters were not altered because of a medical long-term condition.

251 The Claimant has proved that she told the Respondent this on numerous occasions, including those outlined above. The Respondent has failed to prove that it was unreasonable for it to have the required knowledge of the Claimant's disabled status.

252 The Respondent would not have known the exact diagnosis until the Claimant revealed it in the return to work meeting with Mr Gallardo on 25 September but the focus of the law is on whether the Respondent had knowledge that she had a disability and be placed at a substantial disadvantage.

253 It is our judgment that the Respondent could reasonably have been expected to know that the Claimant was a disabled person in or around July 2017.

254 *Was there an applicable PCP that put the Claimant at a substantial disadvantage?*

255 In its submissions the Respondent denied that it applied a PCP in this case. It relied on the evidence from Ms Leach that it was possible to swap duties, express preferences and to bid for different duties.

256 Ms Leach did give evidence that it was possible to swap shifts and that preferences were taken into account - where they did not conflict with the Respondent's operational requirements. At the same time, it was also her evidence that it was not possible to accommodate a crew member who needed a maximum of two nights away each week. The Respondent could not accommodate that, regardless of whether that person was willing to swap shifts or had expressed a preference for less night stops in a week.

257 The Respondent's clear evidence was that it considered that it would be restrictive to start manipulating the rosters to take the Claimant off night stops as it believed that treating everyone fairly meant maintaining rosters as they were produced by Crewing. The Respondent's witnesses who we heard from had never known a situation where adjustments were made to rosters to accommodate disability. Although the Respondent's witnesses could not perceive of how that would work, that did not mean that it could not work.

258 In practice, the Respondent did adjust the Claimant's rosters for a few weeks following Dr Caddis' recommendations but this was not the usual situation and had not been done on the basis of her disability.

259 The Respondent's crew members had rosters prepared for them once they declared their holidays and taking into account rest days. Once the rosters were published, they had to do them. The Respondent did not adjust rosters unless it agreed to a swap that crew had managed to arrange between themselves. There was no assistance in doing so. The Claimant only ever succeeded in swapping two shifts during 5 months of employment. This was not something that happened on a regular

basis. It was not a means of converting the rosters to suit her needs.

260 The Respondent's clear position is that it could not accommodate a maximum of 2-night rosters. This meant that everyone was required to do rosters of a minimum of 3 consecutive night stops a week.

261 In our judgment, the Respondent applied a practice that all crew members had to do a minimum of 3-night stops in every week that they were available for work. They may well be offered less if, for operational reasons such as the Airport being closed or a Bank Holiday, there are less flights. But, they are all required to be able to be rostered to do a minimum of 3 night stops a week. In our judgment, that is the PCP the Respondent applied in this case.

Did that PCP put the Claimant at a substantial disadvantage compared to a non-disabled person in that the Claimant sleeps poorly away from home, which exacerbates her bipolar disorder and makes her anxious and fatigued?

262 The Respondent submitted that the Claimant was not put to this disadvantage. It was submitted that the minimum night stop form was registered from 1 November and that in any event, there was no medical reason for making changes to her rota.

263 In our judgment, the minimum night stop form never came into effect before her dismissal.

264 The Claimant repeatedly told the Respondent that being rostered to do multiple night stops was affecting her health and affected her ability to sleep well so that she feared for the maintenance of her long-term disability.

265 We found that, contrary to the Respondent's submissions, the Claimant did have reason to complain about her night stop allocation. In our judgment, the requirement to be able to do a minimum of 3 night stops a week put the Claimant at substantial disadvantage. The Claimant complained about this on many occasions to Ms Leach.

266 In our judgment, the Respondent never took on board the Claimant's concerns about the quality of sleep she was able to get when working a roster with multiple night stops. In our judgment it was not that her condition had become unstable. It was that she feared that if she did not get sufficient good quality sleep, it was likely to become unstable. With a condition such as bipolar the Claimant should not be expected to wait until it become unstable before asking for help. The consequences of her condition becoming unstable could be life-threatening to her. She had suffered from many episodes of depression or hypomania before she was diagnosed and with at least one suicide attempt even after she began to take medication. It was her belief that this was what she risked if she let her condition become unstable.

267 Was there medical support for her belief? The Claimant's GP's evidence was that the Claimant was extremely insightful into her condition, knew what symptoms she needed to look out for and knew where to go if she thought that she was starting to become unwell. Dr Hallstrom stated that it was appropriate for her to adopt a stable lifestyle in order to prevent 'mental up' which might trigger a relapse in her condition. For the Claimant, getting good quality sleep was a key factor in maintaining the stability

of her condition. Although Dr Hallstrom confirmed that it was the Claimant's opinion that she required good quality sleep to maintain her health conditions, he also stated that he understood why someone who had a potentially serious mental illness would pay close attention to lifestyle issues. He went further and stated that it would be prudent to make sure that such a person received adequate amounts of regular sleep.

268 In our judgment, the Claimant's concerns about achieving good quality sleep were not lifestyle '*demands'* as Mr Gallardo described it but a proven method of maintaining stability in a serious mental health condition that the Claimant had settled on and which all the medical evidence produced to us supported. We say '*proven'* because the Claimant's health has been stable for many years. The medical evidence also confirmed that this was due to her medication and lifestyle choices and not the medication on its own.

269 This was what she tried to explain to the Respondent on many occasions during her employment – both verbally and in the emails and meetings referred to above.

270 The Respondent ignored the Claimant's requests for her rosters to be changed and simply relied on Dr Caddis' assessment that she was fully fit to fly. Whenever the Claimant brought up her health and her need to have good quality sleep to maintain her health, Ms Leach and Mr Gallardo told her that as she was assessed as fully fit to fly they would not discuss it.

271 Dr Caddis was never asked for advice on what the Claimant had to do to maintain her health or keep her bipolar from becoming unstable. He clearly stated in his report that there was no barrier to her being able to fly as long as her conditions remained stable.

272 The application of the PCP to the Claimant meant that she had regular periods when she did not get good quality sleep which led to her experiencing fatigue. She also experienced worry and anxiety about her job. The Claimant took a total of 20 days off over the short period of her employment to recover from the multiple night stops that she was rostered to do, because of anxiety, stress and depression caused by the Respondent's decision to apply its practice to her without alteration. This led to the Claimant being given a Stage 1 warning under the Respondent's Sickness Absence Procedure. The application of this practice put the Claimant at a substantial disadvantage.

273 The Claimant suffered fatigue, anxiety, depression and what she described as a nervous breakdown towards the end of her employment because she had to work these rosters and because the Respondent refused her requests to make changes to them during her employment.

274 The Claimant suffered fatigue on the morning of 1 September which led her to the decision to off-load herself at City Airport rather than continue to work the full roster that she was on. That decision contributed to the decision to terminate her employment.

275 It is this Tribunal's judgment that the Claimant suffered substantial disadvantage because of the way the Respondent's practice of requiring everyone to be available to

work and to actually work a 3+ night roster every week had on her health and her management of her mental health condition in order to keep it stable.

276 Although Dr Hallstrom stated in his report that it was unlikely that the disruption the Claimant experienced at the Respondent had a substantial impact on the Claimant's health, he later stated that if she had taken 20 days off work as sick as a result of her need to catch up on sleep and because of worry and anxiety linked to the rosters; that would qualify as a substantial impact.

277 It is our judgment that the Claimant had taken 20 days off work as sick in the way he described above and that the practice of requiring every crew member to operate rosters of more than 2 nights away each week had a substantial disadvantageous impact on the Claimant in terms of her health and as a consequence, on her employment and her employment record.

Was the following a reasonable adjustment for the Respondent to have to make to avoid the disadvantage: Rostering the Claimant with minimum night stops and/or no more than 2-night stops in one week?

278 It is this Tribunal's judgment that the Respondent did not discuss with the Claimant what reasonable adjustments she wanted. She was never asked what reasonable adjustments to the roster would alleviate the disadvantage she suffered.

279 The Claimant did not get a response to her email of 21 September. In effect, the response was the invitation to the absence management meeting.

280 In response to her request to Mr Gallardo that the Respondent should adjust her rosters, he informed her that the Respondent was a touring airline and could not accommodate her. He also advised her to swap shifts and consider whether this job was right for her. This was not an adjustment. Due to the limitations with swapping shifts it was not an effective way to make the rosters work for the Claimant. It was also not something the Respondent did for her. She had to source the swaps herself and get them approved before the shifts were changed.

281 Mr Gallardo and Ms Leach considered that as the Claimant was assessed as fully fit to fly there was nothing else that they needed to do to accommodate her and to comply with their duties towards her as a disabled person. They relied solely on that assessment by Dr Caddis. They did not consider Dr Caddis' other statements that she was only able to fly if her condition remained stable or that she needed 'focussed intervention and reassurance' to assist her to deal with the psychological effects of the roster on her and that without that, certain elements in the role could result in psychological symptoms.

282 The Claimant did not leave them to guess what she considered to be reasonable adjustments to help alleviate the substantial disadvantage she experienced. She was clear in her email on 21 September and in her conversations with Mr Gallardo on 23 July and Ms Leach on 7 August that she found it difficult to achieve good quality sleep when away from home. She told them that the multi-night rosters were causing her worry and anxiety which was also affecting her ability to get good quality sleep and she asked to either be released from the upcoming rosters of for them to be reduced.

She told them that apart from causing her worry, anxiety and stress not having good quality sleep could risk making her long-term mental health condition unstable. She let them know that this was a condition covered by the Equality Act.

283 Dr Caddis confirmed in his report of 10 July that the Claimant had long-term health conditions that were covered by the Equality Act. That report was to address the Respondent's concerns about the Claimant's apparent yawning in a training session so his comment was that the medication she was prescribed for those conditions was not causing incapacity or the yawning or anything that would impact on her flying fitness.

284 When the Claimant wrote to ask for adjustments she was never asked what adjustments she wanted. Even at the hearing the Respondent was not clear whether the Claimant wanted only '*there and back'* flights or whether she wanted rosters of up to two nights or some other option. This was because there had been no discussion with her about what she wanted and whether it could be accommodated. She was simply told that as she was declared fully fit to fly, she would be put on the roster with everyone else and she had to do whatever roster was given to her.

285 The Claimant stated that she was aware that occasionally she would have to do a 3 or 4-night roster and she was prepared to do those but her hope was that the Respondent would take into account her minimum preference, her request for adjustments to the rosters and Dr Caddis' report and offer her rosters of mainly 1 or 2 nights away. This was also her hope for the period beginning 1 November.

286 Because of the Claimant's anaemia, the Respondent agreed to the 4-week adjustment to her roster recommended by Dr Caddis and to reduce it to a maximum of 2 nights stops a week. By the time this was implemented, there were approximately 2 weeks left. The Claimant met with Ms Leach on 14 October to discuss Dr Caddis' recommendations and the letter from Ms Leach confirming the arrangement was dated 19 October. It is our judgment that even then, the Respondent did not do what Dr Caddis advised it to do as it agreed not to give her more than 3 nights away in one duty rather than 2 nights as he advised.

287 It is our judgment that the Claimant did ask for a permanent change to her rosters so that she was not on multi night stop rosters in a week. In the meeting on 7 August she asked for a change in her rosters to decrease the number of night stops. She repeated this in the meeting on 23 July with Mr Gallardo and in her email of 21 September. She also asked for this in the meeting with Mr Gallardo on 25 September.

288 The Respondent stated in its submissions that she had not asked for the temporary arrangement to be made permanent. However, by the time the arrangement put in place because of her anaemia came to an end the Claimant was facing her probation review meeting and a sickness absence meeting. She was aware that both had the possibility of terminating her employment. The Respondent was aware that the Claimant wanted an adjustment to her rosters. She had asked for this on the occasions referred to above.

289 She did initially refuse a referral back to Dr Caddis in September but asked in her email of 21 September to be referred back to him. There was no response to that

email.

290 The Claimant was able to do her second swap at the beginning of November because she had been scheduled to do a roster of three nights over the 1-3 November. She received the invitation letter to the probation meeting on 14 November. There was no time for further discussion on reasonable adjustments and the Claimant was dismissed soon after.

291 The Claimant's comparators would be her non-disabled colleagues who would not have had a problem completing rosters with 3 or more night stops in one week. It is our judgment that the practice would not have put them at a disadvantage. We did not hear evidence about particular non-disabled comparators in the hearing although we were told that 4 or 5 night stop duties were common and that everyone did them. Everyone was expected to do them as rostered.

292 If the Respondent had adjusted the rosters so that the Claimant was given mostly 2-night stop duties, it is our judgment that she would have been able to catch up on her sleep without having to take time off. She would not have been subject to the Respondent's sickness absence policy and would not have had a Stage 1 warning issued against her. She would also not have had to call in sick on 29 September.

293 It is also our judgment that had the Respondent made the adjustment to her rosters it is unlikely that the incident at Glasgow would have happened as she would have either had sufficient sleep or would only have had to do the sector back to London on 1 September (as part of a 1 or 2 night roster) or the Respondent would have understood her need for sufficient sleep to maintain her mental health condition and would not have considered her decision to only do one sector as a disciplinary matter.

294 It is this Tribunal's judgment that rostering the Claimant with minimum night stops and/or no more than 2 nights stops in a week with occasional longer rosters; would have avoided the substantial disadvantage that the Claimant faced in this job. The Respondent failed to do this and failed to comply with Dr Caddis' recommendation to adjust the rosters to 2 night stops when he advised them to do so to assist in the Claimant's recovery from anaemia.

295 It is this Tribunal's judgment that an adjustment to the Claimant's rosters so that she had a maximum of 2 nights away each week was an adjustment that would have alleviated the substantial disadvantages she faced from the Respondent's practice of requiring everyone to be able to do 3 nights or more.

Has the Respondent proved that this was not a reasonable adjustment? Has the Respondent proved that the disadvantage would not have been eliminated or reduced by the proposed adjustment?

296 We were told that the difficulty with City Airport meant that there was a restriction on '*there and back'* flights for every day of the week. We were also told that the Respondent was a '*touring'* airline which in our judgment meant that each plane was used to do as many flights as possible before returning to base. However, we were not given information or evidence that could lead us to conclude that it was not

reasonable for the Respondent to adjust the Claimant's rosters so that she had a maximum of 2-night stops on her roster at a time. When the Claimant asked, the Respondent simply refused to consider it. Ms Leach's evidence was that the Respondent was not prepared to consider adjusting the rosters to allow her to have a maximum of 2 night stops at a time as it considered that it would be too restrictive to do so and that it would be unfair to the Claimant's colleagues. We were surprised at this statement given the Respondent's status as a disability confident employer.

297 The fulfilment of the duty to make reasonable adjustments can sometimes result in an employer treating an employee in way which might seem more favourable to them such as giving extra time to complete work, more breaks or additional aids. In doing so the employer is complying with the duty to make reasonable adjustments and is treating everyone fairly and consistently.

298 It is our judgment that the Respondent did not try to adjust the rosters to give the Claimant a maximum of 2-night stops in every duty beyond the two week adjustment at the end of October which in reality was to a maximum of 3 nights rather than 2. There was no evidence before the Tribunal that they had tried to do so and failed or that it had been impossible or too difficult to do so.

299 We did not have evidence from which we could conclude that it would not have been reasonable for the rosters to be adjusted to enable the Claimant to have duties with a maximum of 2 night stops a week.

300 It is therefore our judgment that the Respondent has failed to produce evidence that the disadvantage to the Claimant would not have been eliminated or reduced by the proposed adjustment. Had she been given rosters with a maximum of 2 nights in each roster it is highly likely that she would have not have had the level of fatigue, sickness absence, stress, anxiety and worry about triggering her mental health condition and making it unstable that she experienced during her employment.

301 The complaint of a failure to make reasonable adjustments succeeds.

<u>Direct Disability Discrimination/Discrimination Arising from Disability</u>

301.1 *Did the Respondent do the following:*

301.1.1 *Dismiss the Claimant*
301.1.2 *Give her a poor reference*

301.2 *If so, did the Respondent treat the Claimant unfavourably because of something arising in consequence of disability?*

302 *The Claimant contends that one of the reasons the Respondent dismissed her was that she had off loaded herself from 2 flights because she had poor sleep in a hotel, which exacerbated her disability and made her unable to fly.*

303 *The Claimant contends that the Respondent gave her a poor reference for the same reason.*

304 In our judgment, the 'something arising' in consequence of the Claimant's disability were: -

- her fatigue when she did duties with more than 2-night stops leading her to report in sick on approximately 20 days

- her anxiety, stress and worry about her health when the Respondent refused to discuss reasonable adjustments with her because she had been deemed fully fit to fly – which also led her to call in sick; and

- Being concerned about her lack of good quality sleep on the morning on 1 September so that she only did one sector back to London and did not complete her duty

Dismissing the Claimant

305 Has the Claimant proved facts from which the Tribunal could infer that her disability and/or something arising from her disability was the reason for her dismissal?

306 The Claimant had triggered Stage 1 of the Respondent's Absence Management Process and had been given a warning just before the probation review meeting. The Respondent was clear at the hearing and it is also clear in the dismissal letter that her sickness absence itself was not the reason for her dismissal.

307 It is the Tribunal's judgment that the Claimant failed to report her sickness on 29 June in the correct way. She accepted that. It was not her case that her disability caused her to report her sickness incorrectly that day.

308 At that time, the Claimant had recently begun her employment. The Respondent reminded her of what she should have done. It is highly unlikely that the Claimant would have been dismissed for failing to report her sickness correctly on one occasion early in her employment.

309 It is the Tribunal's judgment that the Claimant did report her sickness according to the Respondent's procedure on 29 September. The Claimant sent in a sick note the day before, on 28 September. Her sick note was sent to IBM Managers who she is supposed to contact if she is unable to attend work. She called Crewing at 3.25am the following morning to ask why she was still on the roster as she was sick, which was effectively telling them that she was sick. She also called the IBM Managers line at 11.55am to report sick. Compliance with the Respondent's policy required her to call in to Crewing and the managers before 12noon which she did.

310 We made this judgment based on the evidence that the Respondent had with it at the probation review meeting. It was not clear to us why the Respondent decided that the Claimant had failed to comply with the procedure for reporting in sick when the timeline in the note prepared by Mr Tagliafferi clearly demonstrated that she had called both Crewing and the managers line before the 12noon deadline.

311 It is our judgment that it was reasonable for the Respondent to consider that the Claimant was responsible for the trolley that came loose on landing and drifted into the cabin.

312 It is our judgment that the Claimant was mainly dismissed because of the incident in Glasgow. Was that because the Respondent considered that it showed that she was dishonest? Was it because the Claimant was a danger to passengers and her colleagues because she had not properly assessed her fatigue? Was it because the Respondent decided to use this as a way to dismiss a colleague who was difficult to manage because of her disability and/or something arising from her disability? What difference does the fact that she was on probation make?

313 It is our judgment that at the probation review hearing, as Ms Leach confirmed in her evidence, the focus was on the fact that the Claimant's version of events did not match that of the hotel. The letter of invitation suggest that the Respondent's concern was what was described as the conflicting reports on the incident that it had from the hotel and from the Claimant. The Respondent had initially begun the investigation because it was concerned that the hotel may no longer be a fit for its staff but in our judgment, it quickly became an investigation into the Claimant and the perception that she had not told the truth about what had happened.

314 We came to that judgment because the issue of a possible breach of the operating manual was not referred to in the invitation letter and was not discussed in the meeting. It was not put to her in the meeting that she had breached any operating procedures.

315 That was a matter that occurred to Ms Leach after the meeting while she considered her decision. The Claimant was left thinking that she needed to prove her version of events which is why she contacted the hotel after the probation review meeting to garner further evidence.

316 It is our judgment that it is likely that the incident in Glasgow was not considered as a serious failing on the Claimant's part until after she informed the Respondent about her mental health condition. Until then the Respondent was investigating it as a possible issue with the hotel.

317 While it was the case that the Claimant was on probation, we asked ourselves the question posed in the *Mughal* case: Had the Respondent shown that it took reasonable steps to maintain appraisal of the probationer throughout the period of the probation, giving guidance by advice or warning such as was likely to have been useful or fair to her? What is the effect of the breach of the duty to make reasonable adjustments on the assessment of her performance?

318 From the Respondent's probation policy, we saw that managers were advised to provide regular feedback, identify and discuss any problems as early as possible and provide support and guidance. They should agree an *"objectives and development plan"* at the start of the employee's employment, provide them with clear objectives and monitored their performance through regular informal progress meetings as well as two formal probation review meetings at the three and six-month points.

319 It is our judgment that the Claimant attended and passed her induction training at the beginning of her employment along with other new recruits in what is likely to have been a classroom setting. We were not shown an objectives and development plan for her. She did have a job description which we referred to above.

320 In our judgment, the Respondent had many meetings with the Claimant but those were about her sickness absence or were return to work meetings. Ms Leach and Mr Gallardo met with her in relation to her sickness.

321 The Claimant was not told that her performance on the job was unsatisfactory or that the way in which she did her job was likely to lead to its termination. The Claimant performed well in her job as is demonstrated by the complementary inflight assessments she had from colleagues. In our judgment, scant regard was paid to those at the probation review meeting.

322 It was up to the Claimant (*JM Hamblin*) to prove her suitability for the post. As the employer, the Respondent's responsibility was to give her a fair chance to do so. In our judgment, the Respondent withheld information from the Claimant as to how she was doing in the job before it held the early probation review meeting and did not give her an opportunity to improve. The Respondent also failed to comply with a duty to make reasonable adjustments which meant that the Claimant did not have the support she needed in order to prove her suitability for the post. It was not clear how her fatigue affected her performance but it is likely that it contributed to her actions on the morning of 1 September.

323 It is also our judgment that the decision to dismiss the Claimant was related to her disability in that the reason she was unable to complete her duty on the Glasgow trip was because of fatigue caused by insufficient sleep the night of 31 August. When Mr Gallardo discussed it with her initially she was not told that she had breached the Respondent's Operating Manual procedures or that it was a disciplinary matter. She was not given advice or warning such as envisaged by *Mughal*. It is also our judgment that by the time the Respondent held her probation review meeting they were aware of the exact nature of her disability and it was Mr Gallardo and Ms Leach's opinion that the job did not suit the Claimant because she did not want to do the multi night stops when she was rostered to do so. By the time of the probation review meeting the Claimant had called in sick every time she had a long roster or only done part of it. Even though she told them repeatedly that this was related to her disability and the need to have good quality night sleep to ensure that her mental health condition did not become unstable, the Respondent's managers considered that these were 'lifestyle' demands, which made her unsuitable for their employment.

324 By the time Ms Leach came to assess the Claimant's suitability for employment with the Respondent at the end of the probation meeting she had in her mind the matters discussed in the meeting and the fact that the Claimant had a disability which meant that she experienced difficulties in complying with the requirement or practice that she should do or be available to do 3+ night stops in a roster and was calling in sick during most rosters and/or not completing them. She was of the belief that the Respondent could not accommodate the Claimant's request to reduce the number of night stops she had away from home as it was considered unfair to others and she was not sure that the Claimant's requests were anything to do with her disability since Dr

Caddis had assessed her a fully fit to fly. Although these matters were not discussed with the Claimant in the meeting, it is our judgment that they were in Ms Leach's mind and were the main reasons for her dismissal as the Respondent considered that they made the Claimant unsuitable for employment as cabin crew in a touring airline along with her matters referred to above as arising from her dismissal.

325 In our judgment that is why the discussion in the meeting was focussed on the apparent inaccuracies in her account of what happened in Glasgow when compared with the hotel's door key printout and not about the Operating Manual and her breach of it.

326 In our judgment the other facts that support this conclusion are as follows: Firstly, that the Respondent ignored the Claimant's email of 21 September where she set out again her request for reasonable adjustments and where she asked for a referral back to BAHS. There was no response to it. The Respondent never engaged with her requests beyond Dr Caddis' statement that she was fully fit to fly. Secondly, the Respondent did not discuss the breaches of the Operating Manual in the probation review meeting which we were told was the misconduct which warranted terminating her employment. Instead the discussion in the probation review meeting, as Ms Leach confirmed, was about the discrepancy between the Claimant's account and the hotel's printout. The invitation letter to the meeting referred to that rather than any possible breach of the Operating Manual and it is likely that at the time it was considered that she had not been telling the truth. When she challenged the hotel's version in the meeting, the issue was changed to an issue of not reporting fatigue in breach of the Operating Manual, although this had not been discussed with her.

327 Thirdly, it was not apparent to us that Ms Leach considered whether it was appropriate to extend the Claimant's period of probation. It was not compulsory that the Respondent should extend the probation but as the union representative asked her to consider it, we would have expected her to do so and to say why it was not an appropriate option. It was not referred to in the decision letter or in her witness statement for the Tribunal hearing. As the Claimant had met all the standards set out in the inflight assessments and was committed to flying, this should have been considered. We do not know why the Respondent did not consider this.

328 Fourthly, we considered Ms Leach's statement in her witness statement that she decided that dismissal was appropriate, after taking the Claimant's condition into consideration. In our judgment, this is exactly what happened. She was unable to explain this statement in the hearing and it was not submitted to us that this was a slip or that, as suggested later, she considered the disability and decided that the conduct was so serious that it outweighed any other matter. If that were the case, as this was her witness statement we would have expected it to say that. It is our judgment that it is highly likely that the Respondent considered that the Claimant's disability made her unsuitable as cabin crew in a touring airline. Lastly, the Respondent relied solely Dr Caddis' statement that she was fully fit to fly and used it as a reason to ignore everything the Claimant said about her condition and her need to have good sleep in order to maintain her condition. Dr Caddis was never asked what the Claimant needed to do in order to maintain her condition or whether she was wrong about the need to maintain good sleep hygiene as a way of doing so.

329 In our judgment these facts lead us to conclude that the 'something arising' from the Claimant's disability – her fatigue, her decision not to do the whole roster on the morning of 1 September or to only work one sector because of fatigue, her stress and anxiety about her rosters and repeated requests for adjustments to her roster to ensure that she maintained her condition – along with the Respondent's assessment that they made her unsuitable for the job - were the main reasons for her dismissal.

330 In our judgment it is highly unlikely that the Claimant would have been dismissed as having failed her probation if the issues had been solely that she failed to report her sickness using the correct procedure on one or two occasions and because of the trolley incident or because she flew one sector in a duty when she had assessed herself as being well enough to do it and had discussed it with the rest of the crew. It is likely in our judgment, that those would have been considered as evidence of the need for further training/coaching and she would have been warned and advised about them and allowed to remain in the Respondent's employment. It is our judgment that although the Claimant was on probation she was entitled to advice, support, training, warnings as well as a three-month meeting before the final probation review meeting. She did not have the three-month meeting which would have been an opportunity for any issues to have been pointed out to her for her to address. She was not given that opportunity.

331 It is also our judgment that in considering the Claimant's appeal against dismissal, Ms O'Neill did not consider whether the Respondent had complied with its duty to make reasonable adjustments or whether that duty arose. When the Claimant brought up her disability in the meeting and her requests for adjustments to her rosters she was told that she was going off point.

332 We were not told that Ms O'Neill spoke to Ms Leach as part of her consideration of the Claimant's appeal. Instead, she reviewed the paperwork that Ms Leach considered and came to the same conclusions.

333 We did not import a requirement of reasonableness into our consideration of the Claimant's dismissal. We were clear that this was a dismissal during a probation and that the unfair dismissal standards were not appropriate in this case. However, as Ms O'Neill was advised by HR to write in the letter that Ms Leach considered the Claimant's disability it would have made sense for her to have checked that she did in fact do so and how it featured in her decision-making – if indeed it did. Ms Leach did not attend the appeal meeting.

334 As the Claimant's disability was not mentioned in the dismissal letter and we were not told that she spoke to her about it. In those circumstances, how can Ms O'Neill state that it was totally unrelated to Ms Leach's reasons for dismissal?

335 Taking all the above factors into consideration and being aware that the Claimant was on probation at the time of her dismissal and had a high percentage of good performance reviews from all crew members with whom she worked, it is our judgment that the Claimant was dismissed mainly because of something arising in consequence of her disability i.e. her fatigue, her decision not to do the whole roster on the morning of 1 September or to only work one sector because of fatigue, her stress and anxiety about her rosters and repeated requests for adjustments to her roster to

ensure that she maintained her condition; and the Respondent's assessment that she was unsuitable for the job; rather than because of her performance.

Giving the Claimant a poor reference?

336 In relation to the reference, it is our judgment that the person who completed the reference form was neither Ms Leach or Mr Gallardo. It was someone in HR who did not know the Claimant. It was written with reference to Ms Leach's decision.

337 The Claimant's failure to secure the trolley correctly could be described as poor performance. However, it is unlikely that this on its own would have been sufficient reason to dismiss her. Although it was a safety matter we were not told that it would have been sufficient to dismiss on its own. We were not told that probationers were not allowed to make any mistakes. The incident which we judge was the main reason for her dismissal was the Glasgow incident which we judge to have happened as a consequence of the Respondent's failure to make reasonable adjustments and lack of or disturbed sleep on the previous evening.

338 It is therefore our judgment that the reference was partially true and was also based on something arising from her disability.

339 It is also our judgment that although the Claimant may have been upset by the contents of the reference it has not harmed her job prospects and has not impeded her progress. She secured employment shortly after her dismissal and although her new employers acknowledged that it was not a good reference they continued to employ her up to the Tribunal hearing.

Was the Respondent's treatment of the Claimant a proportionate means of achieving a legitimate aim?

340 Although the Respondent did not make submissions on this point, it is likely that the Respondent's legitimate aim is to run a viable business providing safe travel for its passengers and crew. It also has to have crew members available for work so that flights do not have to be cancelled and the service can continue uninterrupted.

341 It is likely that those factors were taken into consideration when the probation policy was created, giving a new crew member the right to a 3 month as well as a 6-month meeting, a training and development plan and advice, support and training. There is an expectation that there may be training needs and support required by new members of staff. From the facts found above, it is our judgment that the Claimant only had return to work meetings with her managers and telephone calls when she was sick. Most of the meetings she had with managers were about her sickness absence.

342 The Claimant failed to report her sickness following the correct procedure within weeks of starting her employment. She failed to properly secure the trolley just before the probation review meeting. In our judgment, she did report sick to the Respondent on time in September and the incident in Glasgow was initially treated as her story not adding up. The issue of the Operating Manual was never put to her until later.

343 The stated reason for dismissal was 'unsatisfactory work'. If she had done unsatisfactory work then it would have been appropriate and proportionate for her to

have failed her probation and for her employment to be terminated. It is our judgment that 'unsatisfactory work' was not the main reason for her dismissal. As set out above, the main reasons for her dismissal arose from her disability and the Respondent's refusal to engage with it and make the adjustments that she needed in order to allow her to perform well.

344 When providing a reference, the Respondent as her former employer would have the legitimate aim of being accurate and fair. Although the reference was partially true in that there was one incident – the trolley – that could be described as poor performance, it is unlikely that she would have been dismissed solely for that. If she had not been disabled, it is our judgment that she would not have been dismissed and that reference would not have been written in that way.

345 In the circumstances, the Respondent has failed to prove that its treatment of the Claimant was a proportionate means of achieving a legitimate aim.

346 The complaint of discrimination arising from disability succeeds.

347 *(Direct Discrimination) If so, did the Respondent treat the Claimant less favourably than it treated or would treat a comparator (in not materially different circumstances):*

347.1 The Claimant contends that her manager reacted negatively to being told that the Claimant had bipolar disorder in September 2017 and that, thereafter, the Respondent had a negative attitude to the Claimant, which led to the Respondent dismissing her and giving her a bad reference.

347.2 If so, has the Claimant proven primary facts from which the Tribunal could properly conclude that the difference in treatment was because of disability?

348 It is our judgment that Mr Gallardo was dismissive of what he referred to as the Claimant's 'demands' when she told him of her condition and asked for reasonable adjustments. That was unfortunate, given the Respondent's status as a disability confident employer and the Claimant was upset by that. However, Ms Leach made the decision to terminate her employment. That decision was not made by Mr Gallardo.

349 It is our judgment that the Claimant was dismissed because of something arising from her disability.

350 It is also our judgment that the reference provided for the Claimant was written in the way that it was because of something arising from the Claimant's disability.

351 The Claimant has failed to prove facts from which we could infer that the Respondent treated her less favourably than it treated or would treat a comparator in not materially different circumstances. It is not our judgment that the Respondent treated the Claimant in the way that it did because she was a disabled person but because of something arising from her disability, as stated above.

352 The complaint of direct discrimination fails.

353 The Claimant is entitled to a remedy for her successful claims. The Tribunal will shortly send a notice of a remedy hearing to the parties. If the matter is resolved between the parties then the Tribunal should be notified immediately.

Employment Judge Jones

Date: 28 October 2019