EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Evans**

Respondent: **GE Capital Funding Services Limited**

Heard at: **Cardiff** **On: 28th 29th 30th May & 3rd June 2019**

(Chambers discussion: 2nd July 2019)

Before: **Employment Judge Howden-Evans**
Mr D Ryan
Mrs M Humphries

Representation:

Claimant: Mr A Joseph (Counsel)

Respondent: Mr R Mackay (Counsel)

RESERVED JUDGMENT

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

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

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

3. Contrary to s40(1)a and s26 of Equality Act 2010 the Respondent has harassed the Claimant by unwanted conduct related to her disability.

REASONS

Introduction

4. The claimant, Mrs Evans, commenced employment as an Accounts Receivable Specialist with the respondent, GE Capital Funding Services Limited on 5th March 2012, working at the respondent's GE Aviation Wales Finance Department at a site in Nantgarw, Cardiff. The claimant was initially employed on a part-time contract working 17.5 hours per week. In December 2013 her contract was changed to a full-time contract working 37.5 hours per week.

5. GE Capital Funding Services Limited is part of the General Electrical group of companies. Its activities include guaranteeing, insuring and making financial loans.

6. Since 14th June 2016, the claimant has been on long-term sick leave and has been unable to return to work. She was initially signed off work with work related stress. In in May 2017 a clinical psychologist confirmed the claimant was experiencing recurrent depressive disorder. In August 2017, Canada Life confirmed the claimant was eligible for income protection by reason of her ill-health, under the respondent's group income protection benefit scheme.

7. On 1st April 2018, an intra-group transfer took place which meant the claimant became employed by GE Capital Europe Limited. On 1st April 2019, the claimant's colleagues and the work the claimant had previously undertaken was TUPE transferred to a third party Genpact. The claimant continues to be employed by GE Capital Europe Limited, to be able to continue receiving payment under the group income protection scheme.

8. Following a period of ACAS early conciliation, on 24th January 2018, the claimant presented an ET1 claim form alleging disability discrimination. By ET3 response, the respondent denied all allegations, asserted the claimant did not have a disability and asserted the claims had been issued out of time so the tribunal did not have jurisdiction to hear the claims.

The Issues

9. During case management, the claimant (who did not have legal representation at that point in time) set out the 21 events she alleged amounted to disability discrimination in a Scott Schedule. The respondent has added their response to each allegation on the Scott Schedule.

10. During case management, the respondent accepted the claimant has had a disability since December 2016, by reason of her ongoing anxiety and depression. The respondent accepts it has been aware of the claimant's disability since December 2016.

11. As some of the allegations of discrimination relate to incidents prior to December 2016, it was agreed the tribunal would need to determine whether the claimant had a qualifying disability at an earlier date and whether the respondent had actual or constructive knowledge of this at a date earlier than December 2016. The claimant asserts that at all relevant times she has had a disability (as defined in s6 Equality Act 2010) and that the respondent has been aware of her disability since 2013.

12. The tribunal will also need to determine whether any of the claimant's claims are time-barred - Is there a continuing act of discrimination extending over a period of time, or a series of distinct acts? If any claim has not been presented within time, is it just and equitable for the time limit to be extended?

13. By the time of the final hearing, the issues to be determined by the tribunal, extracted from the Scott Schedule, were:

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

A. Has the respondent applied any of the following alleged provisions criteria or practices ("PCP") to the claimant and to others not sharing her disability *[adopting the claimant's numbering of items and wording on her Scott Schedule at pages 44 to 64]:*

1. any PCP of not undertaking any occupational health assessment following sick leave of 2 months;

7. any PCP of requiring employees in the claimant's department to run a case load of a prescribed amount of work; or

9 & 10. any PCP of waiting a certain amount of time before referring an employee for early intervention via Group Income Protection?

B. If the respondent has applied any of the PCPs referred to in paragraph 13 A (above) has this placed an interested disabled person (the claimant) at a substantial disadvantage in comparison with non-disabled persons? If so, what was the Claimant's substantial disadvantage?

C. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?

D. If not, did the respondent breach the duty to make reasonable adjustments? Did the respondent take such steps as it was reasonable to have to take to avoid the alleged disadvantage?

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

Discrimination arising from disability (s15 Equality Act 2010)

E. Did the claimant receive unfavourable treatment from the respondent or from any employee of the respondent? In particular, did any of the following events occur and did they amount to unfavourable treatment: *[adopting the claimant's numbering of items and wording on her Scott Schedule at pages 44 to 64]:*

1. In or around November 2013, Ms Lewis and/or HR Manager's failure to carry out a return to work assessment by occupational health or other health professional following the claimant's 8-week stress related sick leave.

3 In 2014, Ms Lewis placing the claimant on a performance improvement plan.

5. On 21st March 2016, Ms Lewis recording the claimant had *"demonstrated some resistance and anxiety to change"* on the respondent's HR systems.

8. On 15th June 2016, the respondent's failure to contact the claimant or offer her support during the grievance process which lasted a number of months.

11 On 17th November 2016, Ms Smith's proposal for the claimant to have a reconciliation with Ms Lewis.

12 On 13th January 2017, Ms Smith's repeated suggestion for the claimant to have a reconciliation with Ms Lewis.

13 After the Occupational Health Report of 25th November 2016, the respondent's failure to arrange the occupational health review recommended in that report.

14 On 27th January 2017, Ms Smith's insistence and repeated suggestion for the claimant to have a reconciliation with Ms Lewis.

15. Between 8th December 2016 and 3rd January 2017, Ms Smith's

failure to liaise with the claimant on a number of occasions.

17. The respondent's treatment of the claimant's grievance of 2nd February 2017, namely it being conducted inappropriately and unfairly and holding the grievance hearing in the bar of a hotel, with no privacy.

18. On or around 9th April 2017, the respondent's refusal to allow the claimant full access to the range of job opportunities

19. The respondent's failure to deal with the claimant's grievance of 2nd February 2017 expeditiously.

21. The respondent's decision on 1st August 2017 to instigate capability proceedings (formal absence management) in relation to the claimant.

22. The respondent's failure to deal with the claimant's grievance of 15th August 2017 expeditiously.

F. If there was unfavourable treatment (as set out in paragraph 13 E), was this "because of" something arising in consequence of the claimant's disability? If so, was this treatment a proportionate means of achieving a legitimate aim? Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person?

Harassment (s26 Equality Act 2010)

G. Has the respondent or one of its employees engaged in unwanted conduct related to disability? In particular did the following events occur and did any of the following amount to unwanted conduct <u>related to disability</u>. *[adopting the claimant's numbering of items on her Scott Schedule at pages 44 to 64]:*

2. On or around 1st December 2013, Ms Lewis encouraging the claimant to increase her working hours.

3. In 2014, Ms Lewis placing the claimant on a performance improvement plan, subjecting the claimant to intensive scrutiny and supervision.

4. On 31st August 2015, Ms Lewis threatening the claimant she would be downgraded to "development needed" status at her next review if she was not up to date on her own work and advising her to "cope better with [her] anxiety" and think of the impact the claimant was having on her colleagues.

5. On 21st March 2016, Ms Lewis recording the claimant had *"demonstrated some resistance and anxiety to change"* on the respondent's HR systems.

6 On 13th June 2016, Ms Lewis criticising the claimant's work ethic and saying "When you were off sick others had to deal with your workload" to the claimant.

7 On 14th June 2016, Ms Lewis criticising the claimant's work ethic.

14. On 27th January 2017, Ms Smith's insistence and repeated suggestion for the claimant to have a reconciliation with Ms Lewis.

16. On 31st January 2017, Ms Smith's email stating she would contact occupational health to consider recommendations with regards to the claimant returning to her current role.

20 & 21 On 27th July 2017, Ms Hoeckel stating if the Claimant got a lawyer involved Ms Hoeckel would move to the absent management route and talk about terminating the claimant's employment.

H. If there was unwanted conduct related to disability, did this have the purpose of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant?

I. If there was unwanted conduct related to disability, did this conduct have the effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant?

J. If it had "the effect" referred to in paragraph 13 H was it reasonable for this conduct to have that effect, taking into account the claimant's perception and all the circumstances of the case?

The Hearing

12. Throughout the Hearing, the claimant was represented by Mr Joseph, counsel. The respondent was represented by Mr Mackay, counsel.

13. The tribunal had the benefit of an agreed bundle of 518 pages. Detailed witness statements were prepared for each of the 5 witnesses. On Day 3 of the hearing, with both parties' consent, the tribunal listened to a short recording of a conversation between the claimant and Ms Hoeckel on 27th July 2017 (a transcript of this conversation appears at p 468).

14. At the outset of the hearing, Mr Mackay on behalf of the respondent, explained there was an issue as to whether two of the claimant's allegations (Items 20 and 21 on the Scott Schedule) relied on evidence that was inadmissible as being part of a wider without prejudice discussion. Having made submissions on whether this evidence was inadmissible, both parties agreed the tribunal should hear all the evidence and, if, as part of its final deliberations, the tribunal found there was material that formed part of without prejudice discussions that should not be admitted, the tribunal would disregard this evidence in reaching its conclusions. The tribunal used the remainder of Day 1 to read the bundle of documents and witness statements. On Day 2, we started hearing evidence. All witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: the tribunal had already read each witness's statement in full, so there was:

    14.1. opportunity for supplemental questions before
    14.2. questions from the other side;
    14.3. questions from the tribunal; and
    14.4. any re-examination.

    Mindful of the claimant's health, and the health and needs of other witnesses, the tribunal ensured there were regular comfort breaks and that all witnesses felt able to stop at any time they needed to take a rest.

15. During the hearing, we heard evidence from:

    15.1. The claimant on Day 2 of the hearing;
    15.2. The claimant's husband, Mr Evans, on Day 3;
    15.3. Ms Lewis, who had been the claimant's Team Leader, on Day 3;
    15.4. Ms Hoeckel, one of the respondent's HR Business Partners, on Day 3; and
    15.5. Ms Smith (formerly Ms Booth), one of the respondent's HR Managers, on Day 4.

16. The final hearing had been listed with a time estimate of 5 days. Due to the availability of witnesses, we were only able to sit on 4 of these days (ie days 1,2,3 and 5 of the original dates listed). By the end of the final day we had heard all the evidence and oral closing submissions, but there was insufficient time for the tribunal to consider its decision. A chambers discussion was arranged on the first available date.

17. Following the hearing, the tribunal were able to meet to consider their decision on 2nd July 2019. The employment judge sincerely apologises for the delay in promulgating this judgment; this delay was caused by the judge experiencing a personal bereavement this summer.

Findings of Fact

The claimant's health

18. The claimant has experienced episodes of anxiety disorder, social phobia and depression on and off since 1999. She has taken anti-depressant medication for "virtually all [her] adult life". The tribunal notes the claimant's medical records and the incidents recorded therein. We also note the consultant psychiatrist's report of 1st June 2018 which notes the claimant has "longstanding recurrent major depressive disorder" and has previously had cognitive behaviour therapy.

19. We note from the claimant's account of her health and the consultant psychiatrist's report that she experiences panic attacks, chest pains, tearfulness, an inability to feel pleasure, sleep problems, feelings of hopelessness, heightened anxiety, loss of appetite and difficulty concentrating.

20. The claimant explained that historically she has found it easier to work part time, to support her health.

Events during 2012

21. In 2012 when she started work for the respondent, the claimant took up a part time position (17.5 hours per week) working as an Accounts Receivable Specialist at the respondent's site in Nantgarw, Cardiff.

22. The claimant accepted that she did not discuss her medical condition during her interview for the post; her medication and coping strategies were working well at that point in time and she did not wish to discuss personal information about her mental health with new colleagues.

23. The claimant worked in an open plan office as part of team of 8, with Ms Lewis being her Senior Team Leader. The claimant accepts she had a good relationship with Ms Lewis initially. The claimant worked as a collector in the receivables team – her role involved following up payment of overdue invoices.

24. Between 15th October 2012 and 19th November 2012, the claimant was off work with "stress and bereavement" following the sudden death of her father. As a kind act of support Ms Lewis and other colleagues attended the claimant's father's funeral. Upon her return to work, the claimant had a return to work interview with Ms Lewis, who checked the GP note said the claimant was fit to return to work. There was no discussion as to whether the claimant needed any additional support. There was no phased return to work or reduction in the claimant's workload; the claimant returned to her usual role working her normal hours.

Events during 2013

25. In January 2013, Ms Lewis completed the claimant's first annual performance appraisal and gave the claimant an overall rating of "development needed". The claimant was very upset and in tears during this appraisal, such that another colleague was asked to come into the room to reassure the claimant. The claimant had thought she was performing well in 2012, so this appraisal outcome came as a shock to her. She started staying in work for an extra hour or two each day (unpaid) as she felt under pressure to perform better.

26. During Spring 2013, the claimant was often in tears at her desk and experienced chest pains. In May 2013 the claimant saw a consultant psychiatrist who confirmed she was experiencing an episode of major depression. The claimant's GP arranged for her to receive counselling. The claimant continued to attend work throughout this period. In cross examination, Ms Lewis accepted that in May 2013 the claimant told her that she had been referred for counselling and may need to start work earlier to be able to leave work earlier to attend counselling sessions.

27. The tribunal accepts the claimant's evidence that on a number of occasions in 2013, Ms Lewis noticed the claimant was in tears at her desk. The claimant's desk was positioned outside Ms Lewis's office. Ms Lewis said that the claimant had confided in her on a number of occasions about the claimant's difficult family issues following the death of the claimant's father. In cross examination, Ms Lewis accepted that on one occasion she had seen the claimant in tears at her desk and on another occasion, she had seen the claimant rubbing her chest when she was sat at her PC. She also accepted that the claimant had been upset on other occasions, but Ms Lewis could not recall specific incidents.

28. Between 6th August 2013 and 15th October 2013, the claimant was off work with anxiety and chest pains. In the Return to Work form that she completed with Ms Lewis, the claimant noted she had been off work for 50 working days with *"chest pains – caused by family death and family issues".* On the same form, following a discussion with the claimant, Ms Lewis noted the claimant had 34 days' absence in the previous 12 months; that the most recent absence was 70 days (including Saturday & Sundays) and the nature of the claimant's illness was "*anxiety and chest pains*". The Return to Work form does not identify any actions or support for the claimant. In cross examination, Ms Lewis explained she didn't feel it was necessary to refer the claimant for occupational health support, as the claimant had confirmed she had recovered sufficiently to return to work. The claimant returned to work to her usual hours and to her full workload.

29. Shortly after she returned to work, in Autumn 2013, the claimant's workload increased as she was expected to take on extra client accounts despite being

a part-time member of staff. The colleague she job-shared with started maternity leave adding to the workload pressures on the claimant. The claimant changed from a part-time contract to a full-time contract in late 2013. The team were short-staffed – whilst new recruits joined the team, they needed to undergo training before they were able to undertake the quantity of work an experienced member of the team could complete.

30. The claimant asserts, and the tribunal accepts, the claimant's work load was one of the heaviest workloads in the team – for instance, immediately before Christmas 2013, she was given a particularly difficult account to add to her portfolio and ended up missing the Christmas party as she was struggling to get to grips with this account.

31. Ms Lewis has suggested the workload was evenly allocated between the team. The tribunal do not accept this assertion. The claimant has referred to the unfair allocation of work in her grievance meeting and explained she was having to work late most evenings to try to stay on top of her work. Other colleagues were not having to do this. A number of the claimant's appraisals acknowledge the claimant had "accounts with complex issues" or a "mix of difficult customers".

Events during 2014

32. In January 2014, during her annual performance appraisal, the claimant was told that she had another overall rating of "*Development Needed*" and Ms Lewis told the claimant that she was being placed on a Performance Improvement Plan (a "PIP") in order to manage and monitor her progress. Ms Lewis told the claimant she would follow this up with HR for the PIP to be documented and reviewed with the claimant.

33. In fact, Ms Lewis did not take any further action in relation to this PIP. (The grievance outcome letter of 15th September 2016 recorded a finding that performance had been used as a threat against the claimant and the claimant had been left in a state of uncertainty. The grievance outcome letter upheld a complaint of bullying).

34. In 2014, as she believed she was subject to a PIP, the claimant felt under even more pressure to work long hours and to not take any time off sick. The claimant clearly was not well during 2014 as she lost 2 stone in weight and dropped to a UK dress size 6. She continued to regularly experience chest pains, something that was noted by her colleagues.

35. This build-up of work-related stress lead to her being hospitalised for a night in September 2014, following an acute episode with her health. Rather than taking time off work, as recommended by health practitioners, the claimant returned to work after 1 day's absence. This absence was recorded as

"Headache with blurred vision" in the claimant's return to work document and Ms Lewis noted the claimant had been treated at the Royal Glamorgan hospital. This was the claimant's only day of sick leave during 2014.

Events during 2015

36. In January 2015, the claimant's appraisal with Ms Lewis recorded an overall rating of "Strong Contributor" and noted the claimant had been awarded a Team Player award. Ms Lewis ends the appraisal with the comment *"stay lean to go fast*". Counsel for the respondent submits and the employment tribunal accepts that this is one of GE Capital's company mottos, rather than Ms Lewis making a personal comment.

37. In 2015 the respondent introduced a CMI tool; a new system of working was adopted globally by the company. The new system included a traffic light system so that every time the claimant took a break or went to the toilet, she had to change a light from green to red. The claimant's evidence, which the tribunal accepts was that Ms Lewis told the claimant and her team of colleagues that the new CMI tool would enable managers "at the highest level" to see what each employee was doing, for instance when they were away from their desk taking a break. The claimant explained she felt the new CMI system put pressure on every member of the team, but she found it particularly difficult to cope with the tool. Ms Lewis's evidence was that the claimant was *"clearly getting quite wound up*" about the new CMI tool. Ms Lewis admits telling the claimant on more than one occasion that she "*needed to cope better with change*". The claimant alleges Ms Lewis said the claimant *"needed to cope better with her anxiety and think of the impact she was having on the rest of the team".* Ms Lewis accepted she had used the word "anxiety" but said it was in the context of saying the claimant needed to *"cope better with her anxiety to change".* The tribunal considered it was unlikely that Ms Lewis would tell the claimant she should *"cope better with her anxiety to change"* or words to this effect. We found, it is more likely than not, that Ms Lewis told the claimant she *"needed to cope better with her anxiety and think of the impact she was having on the rest of the team".*

38. The claimant also alleges that in August 2015, Ms Lewis told her she would be downgraded to "development needed" status at her next review if she was not up to date on her work. Ms Lewis's evidence was that she didn't make threats regarding the claimant's performance rating, but she admits she did make it clear that the claimant was required to make the most of the CMI tool. Ms Lewis believed the claimant was resistant to using the new CMI tool and this was having a negative impact on the claimant's performance and on the moral of her team. During cross examination, the claimant explained she wasn't being resistant to change, she felt unable to cope with the new tool and the pressure she felt using it. The tribunal accepts that it is more likely than not,

that Ms Lewis did warn the claimant she would be downgraded at her next review if her work was not up to date.

39. In September 2015 the claimant had a hysterectomy. As the operation was arranged at short notice, the claimant requested a laptop to be able to handover work to her colleagues. This request was misunderstood by Ms Lewis, who thought the claimant was requesting a laptop to be able to work from home whilst recovering from surgery. Ms Lewis declined the request as she was trying to discourage the claimant from working during sick leave. Unfortunately, this meant the claimant ended up staying at work until 2am on the morning of her operation, handing over her files to her colleagues.

Events during 2016

40. Early in 2016, Ms Lewis completed the claimant's performance appraisal for 2015. She included a number of positive comments *"[The claimant] has worked hard to maximise the benefits of these changes [CMI] & enjoys the additional structure and prioritisation these tools have brought to the team"….[The claimant] has been a great contributor to this year's achievements performing consistently well throughout the year. She received 3 awards for the team member with the highest PD reduction & the highest level of disputes identified / closed in the team collection competitions run throughout the year…. Angeline your enthusiasm, efforts and teamwork is greatly appreciated."* The claimant was given a "meaningful impact" rating overall. Within the appraisal, Ms Lewis commented *"[the claimant] should be more open and optimistic to changes as and when they arise in 2016. She has demonstrated some resistance and anxiety to changes that have occurred in 2015".*

41. At the performance appraisal review meeting, the claimant told Ms Lewis that she felt Ms Lewis treated her differently from other members of the team, in the way she spoke to the claimant sometimes, and that other members of the team had noticed this too. Ms Lewis stated she wasn't aware she had treated the claimant differently.

42. At any one time, the claimant would have a number of clients, whose overdue invoices she was actioning. In 2016, one of the claimant's "clients" was Mr Ozdemir, a Regional Sales Director with the respondent. In cross examination, Ms Lewis accepted that Mr Ozdemir could be a demanding client and accepted Mr Ozdemir had sent the claimant 48 emails during the period 31st May and 9th June 2016 and that the claimant had told her that, whilst she liked Mr Ozdemir, she found Mr Ozdemir to be overly demanding.

43. In addition to Mr Ozdemir's work, in summer 2016 the claimant had a colleague 'Maria''s work coming into her workload as Maria was away from work.

44. On 13th June 2016, the claimant had to attend a GP appointment during work hours. She had notified Ms Lewis of this appointment in advance. Whilst the claimant was away from the office, Mr Ozdemir tried to call the claimant. The claimant had previously told Mr Ozdemir she would not be able to attend all of his conference calls. She hadn't responded to the meeting request for this particular call. Mr Ozdemir tried to speak to Ms Lewis and when he couldn't get through to Ms Lewis, he contacted Ms Lewis's line manager, Wendy Black.

45. When the claimant returned to work after her GP appointment, Ms Lewis told her Mr Ozdemir was not happy that the claimant had not attended his conference call and was unhappy about the level of focus the claimant was giving his accounts. She explained Mr Ozdemir had called Ms Black and *"Wendy was fuming".* The claimant explained she felt she was being bombarded by Mr Ozdemir via email.

46. Ms Lewis told the claimant she needed to ramp up the focus on Mr Ozdemir's accounts. The claimant told Ms Lewis she felt pressured by her personal workload and Ms Lewis replied, "We're all feeling the pressure" and said she felt the work had been shared out fairly. She also said "When you were off sick others had to deal with your workload" to the claimant.

47. On 14th June 2016 the claimant was in the office working late. At 5.45pm Ms Lewis spoke to the claimant and checked the claimant had sent Mr Ozdemir his statement. The claimant confirmed she had been working on Mr Ozdemir's accounts most of the day. She again explained she felt pressured by him. Ms Lewis told her she needed to manage her relationship with Mr Ozdemir and his expectations better, that she needed to "push back". The claimant burst into tears. At this point there was a change in Ms Lewis's tone (as noted on p196). Ms Lewis told the claimant that a different employee had spoken to her about Mr Ozdemir previously and had said that he could be "a bit much". Ms Lewis told the claimant to go home and not to worry. This turned out to be the claimant's last day in work. Subsequently the claimant has been signed off work with stress or stress at work.

The Claimant's first grievance

48. By email of 20th June 2016 the claimant raised a grievance addressed to the respondent's HR Operations. This explained the events of 13th and 14th June 2016 in particular, but also referred to previous occasions when the claimant felt she was unfairly treated.

49. By email of 21st June 2016, the respondent acknowledged receipt of the claimant's grievance and explained Ms Smith would contact her shortly. The claimant responded by email a few minutes later to explain that as Ms Smith was referred to in her grievance the claimant would appreciate it if someone

else could contact her as the claimant didn't feel comfortable discussing her grievance with Ms Smith.

50. By email of 22nd June 2016, the respondent's response explained Ms Misericordia would contact the claimant and follow up on her grievance.

51. By 6th July 2016, as the claimant had not been contacted by Ms Misericordia, the claimant emailed the respondent requesting Ms Misericordia's contact details. She was provided with these later that day but also told she could still contact Ms Smith.

52. The claimant contacted Ms Smith by email of 7th July 2016 with a query about a prearranged holiday. Ms Smith responded by email of 8th July 2016 and attached a copy of the respondent's Employee Assistance programme and sickness absence policy. The Employee Assistance programme provides an employee with access to free confidential counselling.

53. On 11th July 2016, Mr Phil Evans, the respondent's R&D Portfolio Leader chaired a grievance meeting with the claimant. On 18th July 2016, Mr Evans interviewed Ms Lewis as part of his investigation.

54. In his grievance outcome letter of 15th September 2016, Mr Evans upheld the claimant's complaint against Ms Lewis and recommended a referral for disciplinary action, a formal reconciliation process between the claimant and Ms Lewis and coaching and mentoring for Ms Lewis.

55. Following a disciplinary hearing, by letter of 8th November 2016, Mr Rundle, TPS Program Manager, concluded no formal disciplinary action should be taken against Ms Lewis. He confirmed that Ms Lewis would receive coaching and mentoring on her leadership style and recommended a formal reconciliation process to support the relationship between the claimant and Ms Lewis.

Events following the Claimant's first grievance

56. In the meantime, the claimant had emailed her GP sick note to Ms Smith on 20th September 2016 and 18th October 2016. On 8th November 2016, Ms Smith responded and apologised for the delay in responding. Ms Smith arranged a telephone call on 17th November 2016 to discuss any support the respondent could offer.

57. During the call on 17th November 2016, the claimant explained she was still feeling anxious and experiencing chest pains. Ms Smith asked the claimant *"would [she] consider the possibility of reconciliation with Ms Lewis".* In cross examination, Ms Smith explained she mentioned reconciliation as it had been

referred to as an outcome in the grievance. She recalled that at that point in time, reconciliation wasn't something the claimant would consider.

58. On 22nd November 2016, Ms Smith send the claimant a copy of the Employee Assistance leaflet and a Group Income Protection claim form for the claimant to complete.

59. On 22nd November 2016, Ms Smith referred the claimant to occupational health who undertook a telephone consultation with the claimant on 25th November 2016. During cross examination, Ms Smith accepted the referral to occupational health should have happened sooner (the claimant had been on sick leave for 5 months by this point), however, Ms Smith explained she hadn't been the claimant's point of contact for HR until after the grievance outcome. The tribunal note that for a number of months, the claimant appears to have been overlooked by the respondent's HR team – Ms Misericordia had not been in touch with her and Ms Smith believed she shouldn't contact the claimant pending the outcome of the grievance.

60. The occupational health report of 25th November 2016, concluded *"until the work issues have been resolved the potential for [the claimant] to return to work are greatly reduced."* Ms Davies, the occupational health adviser reported the claimant was not fit for work and advised *"in order to support a successful return to work for [the claimant] I would suggest you consider the feasibility of redeployment to a new work environment and manager"*. Ms Davies also notes that a follow up review appointment was recommended for mid-January 2017.

61. The claimant sent emails to Ms Smith on 8th and 12th December 2016, asking Ms Smith to confirm she had received the OH report and income protection claim form.

62. On 13th December 2016, Ms Smith responded by email confirming she was currently off work with ill health. Ms Smith was going through a difficult period in her personal life at the time.

63. On 21st December 2016, Ms Smith emailed the claimant to confirm she had received both documents and proposed a telephone conversation on 22nd December 2016, when she would be able to attend the office. That telephone conversation didn't take place as the claimant didn't see Ms Smith's email in time.

64. On 28th December 2016, the claimant responded to Ms Smith's email of 21st December 2016 and asked if the telephone conversation could be rescheduled. The claimant sent another email on 3rd January 2017, and her trade union representative sent a further email on 6th January 2017, to Ms Smith trying to arrange a meeting / conference call with the claimant and her representative.

65. By email of 9th January 2017, Ms Smith responded and explained she was in the process of moving to a different part of the respondent's group of companies. She suggested possible appointments on 13th, 18th, 19th & 20th January 2017.

66. A telephone conference was arranged for 13th January 2017 and this was attended by the claimant, her trade union representative and Ms Smith.

67. During the telephone conference on 13th January 2017 Ms Smith discussed the occupational health recommendations and explored what type of opportunities the claimant would consider by way of redeployment. She also asked whether, with the right support, the claimant would consider reconciliation with Ms Lewis as this had been suggested as an outcome from the grievance. The claimant confirmed she did not consider this to be an option and made it clear that she did not wish to return to work with Ms Lewis.

68. During the telephone conference on 13th January 2017, Ms Smith explained Canada Life had told her verbally that the claimant was not eligible to receive group income protection. In December 2016, Ms Smith had spoken to Canada Life and had been told verbally that Canada Life did not believe the claimant satisfied their policy definition of incapacity and as such she would not be eligible to receive group income protection under the scheme. Ms Smith confirmed she would chase Canada Life for a written decision. The claimant's company sick pay had come to an end in December 2016.

69. After this telephone conference, Ms Smith sent an email to the claimant explaining how she would be able to take unused holiday if she wished and providing her with various contact details, including support in completing her ESA claim form.

70. On 19th and 27th January 2017, Ms Smith chased Canada Life for a written decision for the claimant.

71. On 27th January 2017, there was a further telephone conference between the claimant and Ms Smith. The claimant reported that she was not feeling well; she was tearful and was experiencing chest pains and a facial rash due to stress. During this call they discussed the claimant being paid for accrued holidays and chasing the Canada Life letter. Ms Smith discussed options for the claimant with regard to returning to work. She mentioned referring back to occupational health for a follow-up appointment. She again asked whether the claimant would consider anything in relation to her current role, for instance reporting to Hassan as her new line manager and having a reconciliation or mediation with Ms Lewis. The claimant became distressed and was upset at again being asked to consider reconciliation with Ms Lewis.

72. Ms Smith also discussed the job criteria the claimant was looking for in relation to redeployment. Following this meeting Ms Smith set up a job alert with this search criteria to be notified of opportunities as they became available.

73. By letter of 27th January 2017, Canada Life confirmed the claimant's claim was being declined; as the claimant's absence was linked directly to workplace issues and a return to work was possible if these issues were resolved, Canada Life considered the claimant was not covered by the scheme.

74. Ms Smith sent the claimant an email on 31st January 2017, noting the action points following their latest conversation. This included a referral to occupational health *"with regards to understanding if there would be any further recommendations for the business to consider with regards to you returning to your current role"* as well as "*you state that you would like to explore alternative roles in the business as your preference…I have attached details of the vacancy you expressed interest in…I have set up a job alert going forward. I will let you know if I see anything else come up and encourage you to look at …website. If there are any positions of interest, please let me know so I can support where I can."*

The Claimant's second grievance

75. On 2nd February 2017, the claimant lodged a second grievance which asserted the respondent had failed to provide HR support to the claimant prior to 8th November 2016, had delayed in actioning the referral to Canada Life and that Ms Smith had subsequently repeatedly placed the claimant under pressure to return to her previous role, despite occupational health guidance that she should be redeployed.

76. As she was unaware of the claimant's second grievance, Ms Smith continued to email the claimant and on 21st February 2017, emailed her details of redeployment opportunities for the claimant to consider.

77. On 22nd February 2017, the claimant and her union representative attended an investigation meeting considering the claimant's second grievance. This investigation meeting was chaired by Barrie Davies, Operations Learning & Development Leader and took place in the hotel bar at the Village Hotel in Cardiff. The tribunal notes that Mr Davies and a colleague had travelled a considerable distance to Cardiff to try to make the venue as convenient as possible for the claimant.

78. It was agreed that the claimant's new HR contact would be Ms Hoeckel. In early March 2017, the respondent helped the claimant to resubmit her Canada Life group income protection claim, including further medical evidence.

79. By letter of 7th April 2017, Mr Davies confirmed his grievance findings. He concluded there was no unwanted behaviour or harassment by Ms Smith. As had previously been agreed, the claimant was assigned a new HR contact. He accepted there had been delays in providing the claimant with the Canada Life claim forms and notifying her of the outcome, however he noted this would not have impacted on the outcome. He recommended that a new Canada Life claim be submitted, and this had already been actioned.

80. By letter of 13th April 2017, the claimant appealed this outcome on two grounds: firstly, she asserted she may not have experienced the loss of earning she was currently experiencing had her Canada Life claim been actioned earlier. Secondly, she requested a decision to relocate her.

81. A grievance appeal hearing took place on 9th June 2017. By letter of 11th July 2017, Mr Haigh confirmed the outcome of the claimant's grievance appeal. He upheld the grievance findings and recommended that all parties should proactively look to the future to support the claimant's return to work or redeployment in an alternative role.

Events following the Claimant's second grievance

82. In the meantime, Ms Hoeckel was looking for alternative roles for the claimant. Ms Hoeckel was at a disadvantage as she worked for the respondent company at their international headquarters in Cheshire and she was looking for redeployment opportunities for the claimant in the Cardiff area. Whilst GE aviation were due to manufacture a new engine and were investing in the Cardiff area, the respondent expected this work to be absorbed by their existing workforce without new roles being created. The claimant was looking for a post in Wales; she declined a post in Bristol as the commute would be too far.

83. Ms Hoeckel did scan through the respondent's opportunities on a regular basis. She explained she had missed an opportunity that was advertised in April 2017. The tribunal accept this was a genuine error rather than a deliberate attempt to conceal this vacancy from the claimant.

84. On 24th and 27th July 2017, there were two telephone conversations between the claimant and Ms Hoeckel – the respondent's position is that both telephone calls were without prejudice discussions and neither conversation is admissible in evidence. The claimant's position is that the first conversation was a without prejudice discussion, but the second conversation was not part of without prejudice discussions and should be admitted in evidence. The tribunal will consider the admissibility of this evidence as part of its conclusions, and will at that point, only if it determines this evidence is admissible, go on to make findings of fact in relation to the second conversation.

85. On 1st August 2017, Ms Hoeckel sent the claimant a lengthy letter which detailed events since February 2017. Whilst this letter stated *"I have personally offered you support in considering alternative roles and will continue to do so",* it also went on to say *"At our meeting on Friday 4 August…I would like to discuss your situation more fully. I would like to discuss your condition to assess your current fitness, the prognosis of your return to your contracted role, to explore again whether there are any adjustments that we can reasonably make to enable a return to that role and otherwise the prognosis of your return to an alternative role and then to explore whether there are any suitable vacancies including to explore your expectations for such process. We will discuss whether a further occupational health referral is required to support our discussion. Depending on the outcome of this review we may need to consider whether, as a result of your current ill-health you are able to continue in your employment.* [Tribunal emphasis]"

86. The claimant's solicitors responded to Ms Hoeckel's letter and as requested by the claimant's solicitors; Ms Hoeckel subsequently responded directly to the claimant. The proposed meeting on 4th August was cancelled. By letter of 3rd August 2017 Ms Hoeckel told the claimant the meeting on 4th August 2017 had not been arranged to terminate her employment but had been arranged as an absence management meeting and that as part of the absence management process one possible outcome was the termination of her employment. Ms Hoeckel suggested a referral to occupational health, so the next meeting between Ms Hoeckel and the claimant could consider the latest occupational health recommendations. She confirmed that she would continue to look for redeployment opportunities for the claimant in the meantime.

87. Between 7th and 17th August Ms Hoeckel made arrangements with occupational health for the claimant to have a face to face occupational health appointment.

The Claimant's third grievance

88. On 15th August 2017, the claimant raised a third grievance, including a complaint that Ms Hoeckel had not informed her of opportunities for redeployment and had threatened to terminate her employment.

89. By letter of 30th August 2017 Canada Life wrote to the claimant confirming they had reviewed her application for group income protection benefit and had concluded she was not yet well enough to perform her role. They overturned the original decision. The claimant was awarded income protection benefit backdated to the point at which she had ceased receiving company sick pay.

90. On 7th September 2017, Ms Sapsford, HR Manager, chaired the claimant's grievance hearing which was conducted by conference call. The claimant attended unaccompanied. By letter of 5th October 2017, Ms Sapsford

explained her findings in detail and concluded that the claimant had not been treated badly by Ms Hoeckel and did not uphold the claimant's complaint.

91. By email on 12th October 2017, the claimant appealed the outcome of her third grievance. On 9th November 2017, a grievance outcome appeal meeting was held, chaired by Mr Kavanagh. The claimant attended unaccompanied. Mr Kavanagh investigated the matters raised by the claimant and concluded in his detailed letter of 29th November 2017, that Ms Sapsford's decisions should be upheld.

The Law

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

93. Section 39 (5) EqA provides an employer has a duty to make reasonable adjustments for a disabled employee.

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

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

"Disability"

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

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

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

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

Disability Discrimination

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

> **"…[the Disability Discrimination Act 1995] is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminate against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment."**

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

Failure to make reasonable adjustments

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

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

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

105. Ms Evans bears the burden of proving each PCP put her at a substantial disadvantage in comparison with non-disabled colleagues. As the EAT stated in *Project Management Institute v Latif [2007] IRLR 519*:

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

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

107. There are supplementary provisions in Schedule 8 EqA. Paragraph 20 of that Schedule provides that the duty to make reasonable adjustments only arises where an employer knows (or ought reasonably to know) of both the disabled person's disability and that they were likely to be at that disadvantage.

The Equality and Human Rights Commission Code of Practice on Employment (2011) ("the EHRC Code of Practice") provides at paragraph 6.19

"**an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.**

Example: A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."

108. Once the duty has arisen, the Tribunal must consider whether the respondent has complied with it by taking such steps as it was reasonable to have to take to avoid the disadvantage. The Equality and Human Rights Commission Code of Practice on Employment (2011) ("the EHRC Code of

Practice") sets out a list of possible adjustments that might be taken by employers in paragraph 6.33. In many cases, the question of compliance with the duty will turn on whether a particular adjustment was (or, if not made, would have been) "reasonable". This is an objective test to be determined by the Tribunal and can be highly fact sensitive. It is a rare example of Tribunals being permitted to substitute our own views for those of the employer where we consider, in effect, that it ought to have reached a different decision. Lord Hope explained in *Archibald v Fife Council [2004] IRLR 651*, that sometimes the performance of this duty might require the employer to treat a disabled person, who is in this position, more favourably to remove the disadvantage attributable to the disability.

109. It is important to assess whether a proposed adjustment would have avoided the disadvantage – in lay terms, whether it would have worked. The EHRC Code of Practice sets out some of the factors that may be taken into account when determining whether an adjustment was reasonable at paragraph 6.28. They include: whether the steps would be effective; the practicability of the steps; the financial and other costs of making the adjustment; the extent to which it would disrupt the employer's activities; the extent of the employer's financial or other resources; the availability to the employer of financial and other assistance to help make the adjustment (such as advice through Access to Work) and the type and size of the employer.

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

Discrimination arising from disability

111. S15 Equality Act 2010 ("EqA") provides,

> **(1) A person (A) discriminates against a disabled person (B) if—**
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

112. The first point to note is, if the employer can show they did not know, and could not reasonably have been expected to know that the claimant had a disability the s15 claim will fail.

Para 5.14 of EHRC Code of Practice explains

"employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'."

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

114. The claimant has to demonstrate unfavourable treatment: it is not enough to show they have been differently treated.

115. In *Pnaiser v NHS England and anor [2016] IRLR 170 EAT, Mrs Justice Simler* summarised the proper approach to determining s15 claims at paragraph 31,

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

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

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

(d) The Tribunal must determine whether the reason/cause (or, if more than one) a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act,…the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal

link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

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

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

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

(h) Moreover, the statutory language of section 15(2) makes clear that the knowledge required is of the disability only and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

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

Harassment

116. S26 EqA provides,

> **Harassment**
> **(1) A person (A) harasses another (B) if—**
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**

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

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

119. "Unwanted" is the same as "unwelcome" or "uninvited."

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

Burden of proof

121. S136 EqA provides,

> **Burden of proof**
> **(1) This section applies to any proceedings relating to a contravention of this Act.**

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

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

- It is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant that is unlawful. These are referred to below as "such facts".
- If the claimant does not prove such facts their discrimination claim will fail.
- It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.
- In deciding whether the claimant has proved such facts, remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
- It is important to note the word "could" in [s136 Equality Act 2010]. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
- In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
- These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw
- Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
- Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of [disability], then the burden of proof moves to the respondent.

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

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

Time Limits

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

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

125. The leading authority on determining whether “conduct extends over a period of time”, or not, is the Court of Appeal decision in the *Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530*. This established that the employment tribunal should consider whether there was an “ongoing situation”

or "continuing state of affairs" (which would establish conduct extending over a period of time) or whether there were a succession of unconnected specific acts (in which case there is no conduct extending over a period of time, thus time runs from each specific act). As Lord Justice Jackson indicated in *Aziz v First Division Association [2010] EWCA Civ 304*, in considering whether there has been conduct extending over a period, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents.

126. In closing submissions, the Tribunal were also referred to the following authorities and considered these are part of their discussions:

Lyfar v Brighton & Sussex University Hospitals Trust [2006] EWCA Civ 1548;
Hale v Brighton & Sussex University Hospitals Trust UKEAT/0342/16/LA;
British Coal Corp v Keeble & Others EAT/496/96;
Unilever Plc v The Procter & Gamble Company [2000] 1 WLR 2436;
Madarassy v Nomura International Plc [2007] EWCA Civ 33;
Eastern & Coastal Kent PCT v Grey UKEAT/0454/08/RN;
The Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley UKEAT/0417/11/RN;

Conclusions

Time limits

127. The respondent asserts that allegations 1 to 18 inclusive on the Scott Schedule relate to claims that have been presented to the tribunal too late and the tribunal does not have jurisdiction to hear these. The claimant asserts there has been a continuing state of affairs, since November 2013, which amounts to conduct extending over a period of time (s 123 (3) a EqA) and that as the claim in relation to the final alleged act of discrimination has been presented within the time, all claims have been issued within the time limit.

128. In this case the allegations contained in the claimant's claims can be summarised as:

A. Failure to make occupational health referral in late 2013 (an omission to act);
B. Comments regarding workload in December 2013 (an act);
C. Comments regarding a performance improvement plan in March 2013 (an act);
D. Negative comments in August 2015, March 2016 & June 2016 (all acts);
E. Failure to make adjustments to workload in June 2016 (an omission to act);
F. Lack of HR support in Autumn 2016 (omission to act);

G. Failure to refer the claimant for group income protection benefit in Autumn 2016 and failure to respond promptly in Winter 2016 (both omissions to act);
H. Comments in Autumn 2016 and Spring 2017 about reconciliation with Ms Lewis (all acts);
I. Conduct of the grievance hearing in Spring and Summer 2017 (an act);
J. Failure to notify of redeployment opportunities (an omission to act);
K. Comments made in August 2017 (an act); and
L. Failure to deal with grievance expeditiously (omission to act).

129. Items A to E relate to the actions/omissions of Ms Lewis; the remaining items relate to the actions/omissions of various HR personnel and managers.

130. In relation to the claimant's claims of failure to make reasonable adjustments, as explained in *Abertawe Bro Morgannwg University Health Board v Morgan [2018] ICR 1194* the impact of S123(4) EqA is that time begins to run at the end of the period in which the employer might reasonably have been expected to make the adjustment; this has to be viewed from the claimant's point of view having regard to the facts known or which ought reasonably to have been known by the claimant at that time.

130.1. In relation to the alleged failure to obtain occupational health report in late 2013 - the last date on which it could be said the claimant could consider her employer should have made the occupational health referral was November 2013 and time began to run at that point. This meant proceedings ought to have been issued before March 2014.

130.2. In relation to the alleged failure to make adjustments to the claimant's workload in her existing role, in June 2016 - the last date on which it could be said the claimant could consider her employer should have made this adjustment was November 2016, as in November 2016 the claimant received the occupational health report indicating the respondent should consider redeploying the claimant. This meant proceedings ought to have been issued in respect of this claim before March 2017.

130.3. In relation to the alleged failure to make adjustments in respect of the time frame for referring an employee for group income protection benefit - the last date on which it could be said the claimant could consider her employer had failed to make adjustments was November 2016, as in November 2016 the respondent did support the claimant's claim for group income protection benefit. This meant time began to run in November 2016 and proceedings ought to have been issued in respect of this claim before March 2017.

131. Mr Joseph submits, on behalf of the claimant, that this should be viewed as a continuing act of discrimination as the claimant's original grievance outcome

identified there had been bullying and there was a failure by the employer to rectify this situation. When we look at the substance of the complaints, we cannot say it was all one continuing state of affairs. Whilst a number of these allegations relate to the behaviour of the claimant's line manager, other allegations relate to decisions and behaviour by many other officers. For instance, the decision by one manager to hold the grievance hearing in the hotel cannot be said to be related to the alleged behaviour of Ms Lewis or any continuing state of affairs. For this reason, the tribunal did not conclude there was "conduct extending over a period" as defined in *Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530*.

132. As proceedings were issued on 24th January 2018, (allowing for the extension provided by the ACAS early conciliation procedures) the claims in respect of alleged acts of discrimination that occurred prior to 6th September 2017 have not been issued within the time limit provided in s123 (1)a Equality Act 2010. This means only claims flowing from incident 22 on the claimant's Scott Schedule have been issued within the requisite time limit.

133. S123 (1) b Equality Act 2010 provides the tribunal with a discretion to extend the time limit if it considers it is just and equitable to do so. In deciding whether to exercise this discretion, the tribunal has properly considered the prejudice that each party would suffer as a result of the decision reached; all the circumstances of the case, including the claimant's disability; the length of and reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the employer has cooperated with requests for information; the promptness with which the claimant acted once she knew of facts giving rise to this claim; and the steps taken by the claimant to obtain appropriate advice.

134. In considering this discretion, in particular the tribunal noted, (in no specific order):

134.1. If the tribunal declined to exercise this discretion, the claimant would be deprived the opportunity to pursue a number of claims that meant a great deal to her and which appear to have some merit;

134.2. If the tribunal exercised its discretion to extend time, the respondent's witnesses would be expected to defend decisions they made over the last 6 years and their memories of events that had occurred may be less accurate than if these proceedings had been presented sooner. However, the tribunal did not find this would cause the respondent any real prejudice as the respondent's decisions were well documented in contemporaneous records and these documents were available to witnesses and the tribunal. The claimant's grievances cover the same matters as those complained of in these proceedings - she lodged her first grievance in June 2016 - as part

of the internal investigations into the grievances, the respondent's decision making was examined and well documented;

134.3. In respect of the length of delay and reasons for delay - the first alleged discriminatory event occurred in November 2013, which means proceedings have been issued four years later than they ought to have been. The claimant has given two reasons for this delay – firstly her ill health and secondly, she was hoping to resolve her complaint through the respondent's internal grievance processes.

134.4. In respect of the claimant's ill health, the tribunal accepts the claimant has experienced anxiety and depression throughout the period in question and since June 2016 this has had such a significant impact on her wellbeing that she has been unable to return to work. As discussed later in this judgment, we have found that the claimant had a disability by reason of her anxiety and depression for the entire period of time. The first allegation of discrimination related to alleged reasonable adjustments that Mrs Evans asserts she needed upon returning to work following 50 days off work with stress and chest pains (in October 2013). The claimant's disability, through anxiety and depression, meant she was already finding it difficult to undertake the level of work she was expected to undertake at that point in time and would have struggled to start tribunal proceedings. The nature of the claimant's disability is such that she finds it difficult to talk about her disability and subsequently found it difficult to speak to her employers about the events she was experiencing. When she did speak out (by way of her grievance of June 2016), her grievance was successful, and she believed her employer would act upon the grievance findings and resolve the situation for her. We are satisfied that it was reasonable for her to have this expectation and for her to refrain from issuing tribunal proceedings.

134.5. The tribunal notes that, for whatever reasons, there have been delays in the respondent's grievance procedures and in providing the claimant HR support during this period, which in part, accounts for the time that had elapsed before the claimant issued proceedings.

134.6. The claimant did seek advice from her trade union representative early in her employment with the respondent. However, she believed the respondent would resolve matters through the internal grievance procedure and we consider it was reasonable for her to adopt this approach given her particular circumstances.

134.7. When the claimant received the final grievance outcome dated 29th November 2017, she realised further internal grievances would not resolve her complaints and acted quickly to issue proceedings. The ACAS early conciliation certificate was dated 5th December 2017 and these proceedings were issued 24th January 2018.

135. In all the circumstances and having considered the prejudice caused to either party as a result of its decision, the tribunal determined it was just and equitable to extend the time limits. The tribunal found the claimant's claims alleging acts of discrimination from October 2013 onwards had all been presented within the time limits set out in s123 Equality Act 2010 and that the tribunal did have jurisdiction to hear these claims.

Mrs Evans's disability

136. Mr Mackay, the respondent's counsel, confirmed the respondent accepts that since December 2016 the claimant has had a disability for the purposes of Equality Act 2010, by reason of her ongoing anxiety and depression. The claimant contends she has, at all times during her employment with the respondent, had a disability. The alleged discriminatory acts occurred at various times during the period October 2013 to November 2017, so the tribunal has asked itself whether, during the period October 2013 to November 2017 (inclusive), the claimant had a physical or mental impairment that had a substantial and long term adverse effect on her ability to carry out normal day-to-day activities.

137. The tribunal first considered whether the claimant could be said to have a physical or mental impairment at that time. The EqA Guidance on the Definition of Disability (2011) notes at A5 that a disability can arise from a wide range of impairments including mental health conditions with symptoms such as anxiety, low mood, panic attacks as well as from mental illness such as depression. The tribunal accepts the findings in the Consultant Psychiatrist's medical report of 14th May 2013 [p99 & 100] and the claimant's GP's report of 1st June 2018 [p95 to 97]; we note the claimant's GP's observation (dated 1st June 2018) that the claimant has *"essentially had recurrent attacks of major depression without any full remission in between"* since the birth of her second child (who is now an adult). The tribunal accepts the claimant has had a mental impairment at all times during her employment with the respondent.

138. The tribunal then considered whether this impairment had affected the claimant's ability to carry out normal day-to-day activities during the period October 2013 to November 2017 (inclusive). The tribunal note the claimant (and her husband)'s evidence of the claimant's tearfulness and chest pains that she has experienced throughout the period in question. Whilst the claimant was able to attend work throughout 2014, she was regularly tearful and experiencing chest pains in work (throughout the period 2013 to 2016). In 2013 and 2017 the claimant was unable to work for significant periods of time as a result of stress / anxiety related illness. The tribunal found that, the claimant's mental impairment had affected her ability to carry out normal day-to-day activities during the period October 2013 to November 2017.

139. The tribunal next considered whether the claimant's impairment had a substantial adverse effect on her ability to carry out normal day-to-day activities during the period in question. During the periods the claimant's GP had signed her off work with stress / anxiety her impairment was clearly having a substantial adverse effect on her day-to-day activities as it was preventing her from going to work. The EqA Guidance on the Definition of Disability (2011) notes (at B3) that the way in which an activity is carried out is a relevant factor when assessing whether an impairment is having a substantial adverse effect on a person's ability to carry out normal day-to-day activities. The tribunal notes that in 2013 and 2014 when the claimant was able to attend work, she was often tearful or experiencing chest pains when working at her desk or attending meetings. We conclude that, in sometimes impacting on her ability to attend work and at other times impacting on the manner in which she was able to perform her work, the claimant's impairment did have a substantial adverse effect on her ability to carry out normal day-to-day activities during the period in question, in that it sometimes prevented her from attending work and at other times caused her to experience bouts of tearfulness and chest pains when attending work.

140. Paragraph 5 of Schedule 1 to the EqA provides

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:
- **a. measures are being taken to correct it, and**
- **b. but for that, it would be likely to have that effect**

(2) 'Measures' includes, in particular, medical treatment and the use of prosthesis or other aid.

141. As the Employment Appeal Tribunal explained in *J v DLA Piper [2010] UKEAT/0263/09*, this means the tribunal should consider whether the claimant's anxiety would have had a substantial adverse effect on her ability to carry out normal day-to-day activities, without her medication. We note the claimant has taken antidepressant medication for most of her adult life. Given the comments in her GP's report of 1st June 2018, we are in no doubt that without this medication, she would have experienced substantial difficulty attending work at all during the period 2013 to 2017.

142. The final point we considered was whether the impairment's substantial adverse effect was also a long-term adverse effect on the claimant's ability to carry out normal day-to-day activities

143. Schedule 1, Part1, Para 1 of the EqA defines "long-term" as

(3) The effect of an impairment is long-term if
- **a. It has lasted for at least 12 months**
- **b. It is likely to last for at least 12 months, or**
- **c. It is likely to last for the rest of the life of the person affected.**

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

144. Given the claimant's GP's report that the claimant had *"essentially had recurrent attacks of major depression without any full remission in between"* for many years prior to 2013, given the severity of the symptoms that the claimant had experienced during an attack of major depression (for instance being hospitalised in 2008), and given the claimant's medication history, the tribunal finds that in 2013, the claimant's mental impairment had already had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities such as attending work and being able to work full time. The impairment was long-term as the claimant had already experienced the substantial adverse effect of it for longer than 12 months. The tribunal concluded that by November 2013 the claimant had a disability, as defined in s6 Equality Act 2010.

The respondent's knowledge of Mrs Evans's disability

145. Mr Mackay has submitted that the respondent was not aware of the claimant's disability, nor could they reasonably be expected to know that the claimant had a disability until December 2016 – in August 2017, Canada Life accepted the claimant met the terms of the group income protection benefit policy and backdated the claimant's income benefit to December 2016.

146. Mr Mackay has referred the tribunal to the fact that the claimant chose not to declare her disability during her application and interview for the role (in 2012).

147. The tribunal considered carefully the claimant and Ms Lewis's evidence and the contemporaneous documents around the time of the return to work interviews that Ms Lewis undertook with the claimant in November 2012 and October 2013. Ms Lewis has recorded "stress and bereavement" on the November 2012 form; this 25-day absence was immediately after the claimant's father's death.

148. In October 2013 the claimant had 50 working days absence and on the Return to Work document she noted the reason for her absence was *"chest pains caused by family death and family issues"*. However following their discussion, Ms Lewis recorded the nature of the claimant's illness as being *"anxiety and chest pains".*

149. Ms Lewis had been told by the claimant in May 2013, that the claimant had been referred for counselling. In 2013, Ms Lewis had noticed the claimant in tears at her desk, rubbing her chest with chest pains and being upset on a number of occasions.

150. The tribunal note a letter dated 14th October 2013 [p191], addressed to the claimant, from the respondent's HR Business Partner, requesting consent for the respondent to obtain a medical report from the claimant's GP and consent to refer the claimant for absence intervention support. There was no evidence that this letter had actually been sent to the claimant.

151. The tribunal are satisfied that by October 2013, when she was filling in the claimant's return to work form noting the claimant had "anxiety and chest pains", Ms Lewis actually knew the claimant had a disability by reason of her ongoing long-term mental health illness – by this point, Ms Lewis knew

> a. the claimant was experiencing mental impairment (she witnessed the claimant being tearful on a number of occasions and knew the claimant was receiving counselling for anxiety)
> b. she knew this was having a substantial and long-term adverse effect on the claimant's ability to carry out day to day activities (she knew the claimant had been unable to attend work for 25 days in 2012 and for 50 days in 2013 with stress / anxiety related illness. By October 2013, to Ms Lewis's knowledge, the claimant had first been substantially adversely affected by stress / anxiety illness at least 12 months earlier).

152. Further and in the alternative, given the guidance in paragraph 6.19 EHRC Code of Practice (see paragraph 108 of this judgment), the tribunal are satisfied that Ms Lewis could reasonably be expected to know that the claimant had a disability; having observed the claimant's behaviour in 2013 and her ill-health absences it is reasonable to expect Ms Lewis to be alerted to the likelihood that this was connected to a disability, which should have led her to explore this further with the claimant.

Conclusions upon whether the conversation on 27th July 2017 was part of a without prejudice discussion

153. The tribunal has been referred to the Court of Appeal decision in *Unilever Plc v The Procter & Gamble Company [2000] 1 WLR 2436* and note Walker LJ's conclusions (at 2448H)

> **"I consider that this court should, in determining this appeal, give effect to the principles stated in the modern cases especially Cutts v Head, Rush & Tompkins Ltd v Greater London Council….Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the Rush and Tompkins case [1989] AC 1280, 1300: *"to speak freely about all issues in the litigation both factual and legal when***

seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts". **Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence with lawyers or patent agents sitting at their shoulders as minders.**
Lord Griffiths in the Rush & Tompkins case noted, at p1300c, and more recent decisions illustrate, that even in situations to which the without prejudice rule undoubtedly applies, the view imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused."

154. We also note that in the *Unilever Plc* case, Walker LJ noted the circumstances of the meeting in that case was described as being "**a high-level meeting between highly skilled professionals representing the interests of multinational groups which are household names. The meeting was held in the context of ongoing discussion with a view to settling a number of issues between the two organisations. It was an occasion for both sides to speak freely. There is nothing (beyond the bare and unembroidered pleading of a threat) to suggest that Procter & Gamble's representatives at the meeting acted in any way that was oppressive or dishonest or dishonourable."**

155. On 24th July 2017, the claimant had a telephone conversation with Ms Hoeckel during which the claimant raised the possibility of her leaving her employment with an exit package. Ms Hoeckel and the claimant discussed terms and at the end of the call, the claimant said she would take advice from her trade union representative before making a decision.

156. On 27th July 2017, the claimant and Ms Hoeckel had another telephone conversation. Unbeknown to Ms Hoeckel, the claimant recorded this conversation on her phone. An agreed transcript of the conversation is at page 468 in the bundle. Mr Mackay, on behalf of the respondent, submits the conversation on 27th July 2017 was part of ongoing without prejudice discussions between the claimant and Ms Hoeckel and applying the *Unilever* decision, the whole of without prejudice discussions are inadmissible in evidence. Mr Joseph, on behalf of the claimant, submits the without prejudice conversation started and ended on 24th July 2017 and the conversation on 27th July 2017 was not a without prejudice discussion.

157. Having considered the evidence, the tribunal concluded the conversation on 27th July 2017 was not a without prejudice discussion. We are satisfied it ought to be admitted in evidence. There was nothing in this conversation to suggest either party was discussing the substance of a settlement package or making any type of admission with a view to reaching a compromise.

158. Further and in the alternative, the circumstances of the claimant's discussion with Ms Hoeckel could not be more different from the circumstances of the meeting described in the *Unilever* case; Ms Hoeckel, an experienced HR Manager, was having a conversation with an employee that was unwell with ongoing anxiety and depression, who did not have a representative with her.

During this conversation, the possibility of the respondent terminating the claimant's employment, was mentioned for the very first time – and this was in response to the claimant mentioning she was using a solicitor. If the conversation on 27th July 2017 had been part of ongoing without prejudice discussions, we consider this is exactly the type of oppressive behaviour that Walker LJ had in mind when he talked about there being exceptional situations, in which the protection afforded to without prejudice discussions has been abused such that the public policy protection from admissibility has to be pulled aside.

159. Having concluded the conversation on 27th July 2017 ought to be admitted in evidence, we note the contents of this conversation below.

160. The conversation on 27th July 2017 started with Ms Hoeckel asking the claimant *"Have you taken advice from your union representative?"* to which the claimant replied *"No I am not using my union".* The conversation continued:

FH: What?

C: I am using an independent solicitor.

FH: Sorry?

C: I am not using my union now. I am using an independent lawyer.

FH: Yeah so, I think there's different ways of looking at this right, because what we have been trying to do is try to….and you know I have worked with you on that…like…like are there alternatives? Can we do? Can we make adjustments? Can we? And we have still done that. Like I don't see like any foreseeable like jobs coming up. However, I have continuously worked with you on that and I think that…that's what I've been doing. Now if you wanna get a lawyer involved…right now…then that becomes like a different conversation because then I can move into like absent management process as well.

C: what does that mean then?

FH: As in like a certain point in time, when you have been absent for quite some time we can talk about like terminating that employment."

161. Having determined the preliminary issues, the tribunal turned to consider the individual claims identified in the Scott Schedule

Scott Schedule Item 1a: Not referring the claimant to occupational health in Autumn 2013: discrimination arising from disability claim

162. Whilst the tribunal found that not being referred to occupational health could be regarded as unfavourable treatment, we were in difficulty considering this claim further as the claimant had not identified the 'something' that was being said to arise in consequence of disability. This claim was not well founded.

Item 1b: Not referring the claimant to occupational health in Autumn 2013: the reasonable adjustments claim

163. The tribunal started by considering whether there was a provision criteria or practice of not referring employees to occupational health despite a prolonged period of sick leave (in the claimant's case 2 months). Having considered Ms Lewis's decision making, we found that she did adopt a practice of not referring the claimant to occupational health despite prolonged periods of sick leave. This was a practice she applied in managing the claimant's absence and we are satisfied she adopted the same practice with other colleagues that did not share the claimant's disability; Ms Lewis was an experienced manager and had undertaken lots of return to work interviews. Her evidence was that if someone felt fit to return to work she did not consider occupational health referral.

164. Did this practice place the claimant at a substantial disadvantage when compared to colleagues that do not have a disability? Both the claimant and a non-disabled colleague returning from prolonged sick-leave would have been denied an opportunity to have their needs assessed to support them to return to work. Both might be returning to a type or amount of work that was ill-suited to their health condition. However, this practice did place the claimant (and others that share her disability) at a substantial disadvantage in comparison with colleagues that do not have a disability, as this practice has a far greater negative impact on a disabled person, in that, because she actually had a disability, the claimant had not only been denied an opportunity to have her needs assessed, she had also been denied an opportunity to have her disability identified and recognised at an earlier stage. Further, and in the alternative, the lack of an occupational health report and any recommendations that it may make bites harder on a person with a disability (whose health condition is likely to be having a substantial and long-term impact on their ability to perform day-to-day activities) than it does on a person who does not have a disability.

165. The tribunal have found that Ms Lewis did have knowledge of the claimant's disability when Ms Lewis was conducting the claimant's return to work interview in October 2013. We are also satisfied that Ms Lewis was aware that the claimant was likely to be placed as a substantial disadvantage by her not

obtaining occupational health advice despite the claimant having been on long term sick leave. Ms Lewis was aware the claimant had been tearful and experienced chest pains in work and was aware the claimant had attended counselling for anxiety earlier in the year. Ms Lewis realised the claimant was experiencing longstanding difficulties with her mental health. Ms Lewis was an experienced manager who had conducted numerous return to work interviews and had just recorded this employee as having had 70 days illness with anxiety and chest pains. The tribunal concluded Ms Lewis realised that if the claimant was referred to occupational health, the claimant was likely to be recognised as having a disability.

166. The tribunal then considered whether the respondent had taken such steps as it was reasonable to have to take to avoid the disadvantage. We started by considering whether the proposed adjustment, namely referring the claimant to occupational health, would have worked, i.e. could it have avoided the substantial disadvantage that the practice of not referring employees to occupational health despite a prolonged period of sick leave, had placed the claimant at? There is longstanding authority (cases such as *Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664* and *Project Management Institute v Latif [2007] IRLR 579*) that failure to carry out a proper assessment is not a breach of duty of reasonable adjustments in its own right, as ordinarily it cannot, of itself, remove any disadvantage. However, in this case, the substantial disadvantage that we have identified, namely the claimant being denied an opportunity to have her disability identified and recognised at an earlier stage, could have been removed by the referral to occupational health. It was a step that could have avoided the substantial disadvantage that the claimant was at when compared to a person who did not have a disability.

167. Objectively viewed, was this a reasonable step, to expect the respondent to take? A referral to occupational health did not cause any practical or operational difficulties for the respondent; there is documentary evidence that an occupational health assessment would cost the respondent circa £212; the respondent is a large employer and part of a multinational group of companies. We conclude, referring the claimant to occupational health in October 2013 was a reasonable step, that the respondent ought to have taken, to avoid the claimant's substantial disadvantage. Ms Lewis failed to make reasonable adjustments for the claimant disability when she adopted a practice of not referring the claimant to occupational health despite prolonged periods of sick leave. The claimant succeeds with her failure to make reasonable adjustments claim.

Item 2: encouraging the claimant to increase her working hours in December 2013: Harassment claim

168. Whilst the tribunal accept that the claimant was having to work long hours and regularly working late to complete her workload, we didn't have any

evidence that the claimant had received 'unwanted conduct' encouraging her to increase her hours as has been suggested. This claim is not well founded.

Item 3a: Placing the claimant on a performance improvement plan ('PIP') in 2014: discrimination arising from disability claim

169. Ms Lewis told the claimant she was being placed on a PIP but did not implement this. Subsequently the grievance outcome concluded performance had been used as a threat leaving the claimant in a state of uncertainty. The tribunal are satisfied this amounted to unfavourable treatment. We were in difficulty considering this claim further as the claimant had not identified the 'something' that was being said to arise in consequence of disability. This claim was not well founded.

Item 3b: Placing the claimant on a performance improvement plan ('PIP') in 2014: Harassment claim

170. The tribunal accepts that being placed on a PIP in these circumstances amounted to unwanted conduct. However, we could not identify how this unwanted conduct was in any way related to disability. We have carefully considered the performance appraisal and it does not contain any comments that could relate to the claimant's disability. The claimant has not been able to proof, on the balance of probability, facts from which we could conclude, in the absence of adequate explanation, that this was disability related harassment.

Item 4: Ms Lewis's comments in August 2015: Harassment claim

171. The tribunal have found that Ms Lewis told the claimant she *"needed to cope better with her anxiety and think of the impact she was having on the rest of the team".* The tribunal accept that being spoken to like this, particularly as this was referring the claimant's mental health, amounted to unwanted conduct and this was related to disability.

172. We then considered whether the unwanted conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The tribunal reminded itself that context is very important and that "violating dignity" and "intimidating, hostile, degrading, humiliating, offensive" are significant words which require the tribunal to look for effects which were serious and marked. We note that Ms Lewis made these comments as part of a larger discussion about the claimant's use of the CMI tool. Whilst it was inexcusable to make reference to the claimant's health condition in this way, when we look at that context of the discussion, we do not accept Ms Lewis was deliberately trying to violate the claimant's dignity or create a hostile environment for the claimant. Ms Lewis was exasperated at the claimant and her colleagues' difficulties adapting to the use of the CMI tool, something which Ms Lewis had little control

over. We do not find this to be unwanted conduct which had the requisite purpose.

173. However, when we turned to consider whether this unwanted conduct had the requisite effect, we found that it did. We accept that this was unwanted conduct related to disability which had the effect of violating the claimant's dignity. Ms Lewis's use of these words deeply upset the claimant as they were referring to her mental health condition and implying that in some way the claimant could control her anxiety. When viewed objectively, as the claimant had previously had long-term sickness absence with anxiety and had been struggling to work with the new CMI tool, which was aggravating her anxiety, the tribunal accepts it was reasonable for the claimant to feel that these words violated her dignity. The claimant succeeds with her disability-related harassment claim. As an aside, the tribunal are concerned that a CMI tool that requires an employee to change a light each time they take a break could cause substantial difficulties for employees with a variety of disabilities, for instance someone with irritable bowel syndrome or someone that has to change dressings; this is something the respondent should reflect upon.

Item 5a: Ms Lewis's comments on the claimant's appraisal in March 2016: Harassment claim

174. The tribunal are satisfied that being described as demonstrating *"resistance and anxiety to changes"* can amount to unwanted conduct, as it is being referred to in negative terms. We also accept that as the remark included a reference to 'anxiety' it can be said to be unwanted conduct related to disability.

175. In paragraph 40 of this judgment we noted that, on the claimant's appraisal record, as well as making the comments, *"[the claimant] should be more open and optimistic to changes as and when they arise in 2016. She has demonstrated some resistance and anxiety to changes that have occurred in 2015",* Ms Lewis had included a number of positive comments about the claimant's performance during the year. In this context, whilst we find it was unwanted conduct, it was not conduct that had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

176. However, we are satisfied that this was unwanted conduct related to disability that had the effect of creating a hostile environment for the claimant. The claimant explained she was very upset that this comment was recorded on the respondent's internal HR management systems and would be considered by people she hadn't even met when she applied for positions internally. As the claimant had ongoing anxiety, and had previously experienced disability harassment from Ms Lewis, the tribunal considers it was reasonable for this comment in the claimant's appraisal to have this effect on the claimant. The claimant succeeds with this disability-related harassment claim.

Item 5b: Ms Lewis's comments on the claimant's appraisal in March 2016: discrimination arising from disability claim

177. Being described as demonstrating *"resistance and anxiety to changes"* can amount to unfavourable treatment, as it is being referred to in negative terms.

178. The tribunal considered "What was the reason for this negative treatment?" and are satisfied that when she was using these words, Ms Lewis had in mind, consciously or unconsciously, the claimant's levels of anxiety. Ms Lewis described observing the claimant was "clearly getting wound up" about the new CMI tool. The claimant's levels of anxiety are clearly something that arises in consequence of her disability. Ms Lewis was treating the claimant unfavourably because of something (the claimant's levels of anxiety) which arose in consequence of her disability. The tribunal has found Ms Lewis knew of the claimant's disability at that point in time. There may have been a legitimate aim, namely improving performance via appraisal, but this is not a proportionate means of achieving this. It was totally unnecessary and inappropriate to link "anxiety" to negativity about change. The claimant succeeds with this discrimination arising from disability claim.

Item 6: Ms Lewis's comments to the claimant on 13th June 2016: Harassment claim

179. The tribunal have found that on 13th June 2016 Ms Lewis said to the claimant "*When you were off sick others had to deal with your workload*". This was said in response to the claimant explaining she was feeling pressured by her workload. The tribunal have found that being told your ill health absence has burdened your colleagues is unwanted conduct; it made the claimant feel bad. We are also satisfied that this was unwanted conduct related to disability – it was referring to the claimant's disability-related sick leave and was making her, a person with anxiety, feel bad about being unable to work during that period.

180. We then considered whether this unwanted conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The context in which these words were spoken was the claimant was being given a 'dressing down' for not having attended Mr Ozdemir's conference call, something that Ms Lewis had been told by her boss, who was "fuming". When the claimant tried to explain she couldn't cope with the level of work she was being expected to do, Ms Lewis was dismissive of this replying "*We're all feeling the pressure*". Ms Lewis knew the claimant experienced anxiety. The tribunal find that when she said, "*When you were off sick others had to deal with your workload*", Ms Lewis was having a dig at the claimant. Given this and Ms Lewis's previous behaviour, the tribunal find this was unwanted conduct

that had the purpose of creating a hostile environment for the claimant. The claimant succeeds with this disability-related harassment claim.

Item 7a: Ms Lewis's comments to the claimant on 14th June 2016: Harassment claim

181. On 14th June 2016, Ms Lewis told the claimant she needed to manage her relationship with Mr Ozdemir better and needed to "push back". The tribunal did not find there to be any link between Ms Lewis's comments and disability. This was not disability-related harassment. This claim is not well-founded.

Item 7b: PCP of requiring employees in the claimant's department to run a case load of a prescribed amount of work: failure to make reasonable adjustments claim

182. The respondent, via Ms Lewis, did have a practice of requiring employees in the claimant's department to run a caseload of a certain level of work; each employee was assigned a number of clients and each client would have a number of invoices that employee was expected to action. This PCP was applied to the claimant as well as her fellow colleagues. The claimant was warned by Ms Lewis that if she was not up to date with her work, she would be downgraded at her performance appraisal review

183. Did this PCP place the claimant at a substantial disadvantage when compared to colleagues that did not have a disability? Both the claimant and an employee without a disability would find it challenging to keep up with the levels of work that the claimant was expected to undertake. However, the claimant was at a substantial disadvantage as she found the CMI tool that she was expected to use to process the work exacerbated the symptoms of her anxiety, making it harder for her to maintain the level of work she needed to complete.

184. Was Ms Lewis aware that the claimant was likely to be placed at a substantial disadvantage? The tribunal are satisfied Ms Lewis was aware of this, as Ms Lewis knew the Claimant experienced anxiety and had noticed the Claimant was "getting wound up" with the CMI tool and had warned her she would be downgraded if her work was not up to date. Ms Lewis had also witnessed the claimant being in tears at her desk and working late. The claimant had told Ms Lewis that she felt pressured by her workload.

185. The tribunal find Ms Lewis was aware of the claimant's disability and that it placed her at a substantial disadvantage in meeting the requirement to maintain a prescribed amount of work. The duty to make reasonable adjustments was engaged.

186. The tribunal considered whether the respondent had taken such steps as it was reasonable to have to take to avoid the disadvantage. The claimant has suggested the respondent ought to have monitored and adjusted the level of the claimant's workload. The tribunal accepts this adjustment could have worked to avoid the claimant's disadvantage. This would not have entailed making significant operational changes – it might have meant the claimant undertaking lower levels of work at times when her anxiety was causing her greater difficulties, but the tribunal are satisfied this was a change the respondent could have accommodated without any real difficulty. The tribunal conclude this was a reasonable step that the respondent ought to have taken. The claimant succeeds with this failure to make reasonable adjustments claim.

Item 8: Failure to contact claimant or offer support during first grievance: discrimination arising from disability claim

187. The tribunal accepts that not receiving HR support during the first grievance process caused the claimant additional anxiety and amounted to unfavourable treatment. However, the tribunal are satisfied that this failure to provide support was in no way whatsoever because of the claimant's disability or anything arising from her disability. There was a breakdown in communication within the respondent's HR team which lead to the claimant not receiving support for a period of time; this was a genuine error. This claim is not well founded.

Items 9&10: PCP of waiting a certain amount of time before referring an employee for early intervention via Group Income Protection: failure to make reasonable adjustments claim

188. The tribunal found there was a practice of waiting a number of months before referring an employee that was on long-term sick leave for early intervention via the Group Income Protection scheme. The respondent should reflect upon this practice as when a person is on long-term sick leave, they are particularly vulnerable; they do not need financial hardship worries to add to their burden.

189. When the tribunal considered whether this practice placed the claimant (and others with disability) at a substantial disadvantage in comparison with colleagues that did not have a disability, the tribunal found it did not. Colleagues that do not have a disability, for instance someone that is recovering from major surgery or an accident could also be off work for a considerable period of time and may also experience financial hardship. This reasonable adjustments claim is not well founded.

Item 11: On 17th November 2016, Ms Smith's proposal for the claimant to have a reconciliation with Ms Lewis: discrimination arising from disability claim

190. The tribunal notes the grievance outcome had suggested reconciliation between the claimant and Ms Lewis. Whilst it might have been insensitive to raise it when Ms Smith did, the tribunal do not find asking someone "would you consider reconciliation?" to be unfavourable treatment.

Items 12 & 14a: On 13th January 2017 & 27th January 2017, Ms Smith's repeated suggestion for the claimant to have a reconciliation with Ms Lewis: discrimination arising from disability claim

191. The tribunal notes by this point in time, Ms Smith and Ms Lewis had both seen the occupational health report which recommended the respondent consider the feasibility of redeploying the claimant to a new work environment and manager. The occupational health report does not suggest reconciliation or envisage a return to work with Ms Lewis. The grievance had upheld a complaint of bullying. The claimant had previously declined the offer of a reconciliation. The tribunal accepts that in these circumstances, yet again, on two separate occasions, suggesting the claimant consider a reconciliation (even with support in place), could be perceived as being pressured to return to the same manager and does amount to unfavourable treatment.

192. When we considered what was Ms Smith's reason for saying this to the claimant, we concluded it was because she was trying to help the claimant return to work because the claimant was on long-term sick leave. The fact the claimant was on long-term sick leave was something arising in consequence of her disability. The tribunal are satisfied there is a causal link between the claimant being on long-term sick leave, which arose in consequence of her disability and Ms Smith's comments.

193. A section 15 claim will not succeed if the respondent can show it did not know and could not reasonably be expected to know that the claimant had a disability. Counsel for the respondent suggests Ms Smith did not know the claimant had a disability and refers to the occupational health report which included the comment *"Equality Act: Unlikely to apply"*. (The occupational health adviser did not have access to the claimant's medical records and had only had one telephone conversation with the claimant). The tribunal have already found that Ms Lewis, the claimant's line manager, was aware of the claimant's disability as she had observed the claimant's behaviour in work, was aware of the claimant attending counselling and was aware of the claimant's ill health absences. Indeed, the respondent accepts it has been aware of the claimant's disability since December 2016. The EHRC Code of Practice 2011 explains (5.17 to 5.19) that if an employee knows of a worker's disability, the employer will not be able to claim that they do not know of the disability and that they cannot therefore have subjected a disabled person to discrimination arising from disability. The Code of Practice emphasises the importance of ensuring that, when information about disabled people may come through different channels, there is a means for bringing that information together to

make it easier for the employer to fulfil their duties under the Equality Act. Ms Lewis's knowledge (or the respondent's accepted knowledge) of the claimant's disability ought reasonably to have been transmitted to the respondent's HR department, including Ms Smith who was the claimant's point of contact at that time.

194. Were Ms Smith's comments a proportionate means of achieving a legitimate aim? The tribunal accept Ms Smith had a legitimate aim in trying to support the claimant to return to work, however, pressuring a person to have a reconciliation with a manager that has been found to have bullied them, when this contradicts occupational health advice, cannot be said to be a proportionate means of achieving this aim. This claim of discrimination arising from disability is successful.

Item 13: the respondent's failure to arrange the occupational health review: discrimination arising from disability claim

195. The tribunal accepts that failing to arrange an occupational health review could amount to unfavourable treatment, as it is denying or delaying that person's opportunity to receive support to return to work. However, the tribunal are satisfied that this failure to arrange the review was in no way whatsoever because of the claimant's disability or anything arising from her disability. This was an oversight by respondent's HR team. This claim is not well founded.

Items 14b: On 27th January 2017, Ms Smith's repeated suggestion for the claimant to have a reconciliation with Ms Lewis: harassment claim

196. Whilst the tribunal accepts this was unwanted conduct, there are no facts to support it being "unwanted conduct related to disability". This claim is not well founded.

Item 15: Between 8th December 2016 and 3rd January 2017, Ms Smith's failure to liaise with the claimant on a number of occasions: discrimination arising from disability claim

197. The tribunal does not accept that Ms Smith 'failed to liaise' with the claimant during this period. Ms Smith was responding to the claimant, to the best of her ability at the time, given that Ms Smith was unwell and going through difficulties in her own life at that point in time. This claim is not well founded.

Item 16: On 31st January 2017, Ms Smith's email stating she would contact occupational health to consider further recommendations: Harassment claim

198. When the tribunal considered the whole tone of this email and the various actions Ms Smith was taking to support the claimant (referred to in the email

itself), including looking for alternative roles for the claimant, the tribunal does not find this to be unwanted conduct. Nor do we find it is conduct related to disability. Further and in the alternative, we do not find this email had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. This claim is not well founded.

Item 17: The respondent's treatment of the claimant's grievance of 2nd February 2017, namely it being conducted inappropriately and unfairly and holding the grievance hearing in the bar of a hotel, with no privacy: discrimination arising from disability claim

199. The tribunal note the respondent's manager travelled a considerable distance to hold the grievance meeting in a venue close to the claimant and was trying to make the meeting as informal as possible (as noted in the minutes). The claimant was accompanied by her trade union representative at this meeting. Neither the claimant nor her representative raised any concern about the venue at the time or in the claimant's later grievance. In these circumstances, the tribunal does not find there to have been any unfavourable treatment. This claim is not well founded.

Item 18: On or around 9th April 2017, the respondent's refusal to allow the claimant full access to the range of job opportunities: discrimination arising from disability claim

200. The tribunal did not find that there had been a refusal to allow the claimant full access to the range of job opportunities. The tribunal noted that Ms Smith had emailed the claimant job opportunities in February 2017 and Ms Hoeckel provided the claimant with redeployment opportunities on 10th August 2017. The tribunal accepted that Ms Hoeckel had genuinely not spotted the opportunity that was advertised in April 2017. There has been no unfavourable treatment. This claim is not well founded.

Item 19: The respondent's failure to deal with the claimant's grievance of 2nd February 2017 expeditiously: discrimination arising from disability claim

201. The tribunal accept that 22 weeks is a long time to consider a grievance and appeal. However, the tribunal finds there was no deliberate delay. There has been no unfavourable treatment. This claim is not well founded.

Items 20 & 21a: On 27th July 2017, Ms Hoeckel stating if the Claimant got a lawyer involved Ms Hoeckel would move to the absent management route and talk about terminating the claimant's employment: Harassment claim

202. Having read the transcript and listened to the recording of the conversation on 27th July 2017, the tribunal finds that Ms Hoeckel was referring to the

absence management process and the possibility of the claimant being dismissed in a threatening way. This was threatening the claimant at a time when she was particularly vulnerable, to put pressure on the claimant to not get a lawyer involved. The tribunal accept that being spoken to like this, amounted to unwanted conduct.

203. We also found this unwanted conduct had the purpose of creating an intimidating environment for the claimant. The context of this discussion is Ms Hoeckel had previously had without prejudice discussions with the claimant which had ended with the claimant considering an exit package. During this conversation a few days later, when the claimant mentioned using a solicitor, Ms Hoeckel panicked and tried to intimidate the claimant with the threat of absences management proceedings and potential dismissal.

204. However, when we turned to consider whether this unwanted conduct was related to disability, we concluded it was not related to disability in any way. Ms Hoeckel would have adopted this approach with an employee that did not have a disability. The reason she used these words had nothing to do with disability; it was the mention of using a solicitor. The tribunal finds this harassment claim is not well founded.

Items 21b: The respondent's decision on 1st August 2017 to instigate capability proceedings (formal absence management) in relation to the claimant.: Discrimination arising from disability

205. The tribunal accepts that Ms Hoeckel's letter of 1st August 2017 was the start of formal absence management proceedings (that ultimately could have led to the claimant's dismissal) and that this amounts to unfavourable treatment.

206. We found that one of the reasons Ms Hoeckel had written this letter was because the claimant had made reference to seeking advice from a lawyer, during their conversation on 27th July 2017. A further significant reason why Ms Hoeckel had written this letter was the claimant's long-term ill health absence (given the extract quoted in our findings of fact at paragraph 85 of this judgment). The claimant's ill health absence was something arising in consequence of the claimant's disability.

207. The respondent accepts it has had knowledge of the claimant's disability since December 2016. The tribunal finds that starting formal absence management proceedings in this manner (ie as a response to an employee making reference to seeking advice from a lawyer) cannot be a proportionate means of achieving a legitimate aim. The claimant succeeds with this discrimination arising from disability claim.

Item 22: The respondent's failure to deal with the claimant's grievance of 15th August 2017 expeditiously: discrimination arising from disability claim

208. This grievance and appeal process was completed within 15 weeks. The tribunal finds this was a reasonable time frame considering the extensive allegations the grievance considered. There has been no unfavourable treatment. This claim is not well founded.

209. The claimant having succeeded with her claims of failure to make reasonable adjustments, discrimination arising from disability and disability-related harassment, the employment judge will set out directions to prepare the case for a remedy hearing in a separate Order.

EMPLOYMENT JUDGE HOWDEN-EVANS

Dated: 10th November 2019

Judgment posted to the parties on

……10 November 2019…….

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For Secretary of the Tribunals