EMPLOYMENT TRIBUNALS

Claimant: **Ms F Yousaf**

Respondent: **Sheffield Hallam University**

Heard at: **Sheffield** **On:** **1, 2 and 3 October 2019**
29 November 2019 in chambers

Before: **Employment Judge Brain**
Mrs B Hodgkinson
Mrs N Arshad-Mather

Representation

Claimant: Mr S Healey of Counsel
Respondent: Mr D Campion of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The claimant was at all material times a disabled person for the purposes of the Equality Act 2010 because of the physical impairment of asthma.
2. At all material times the respondent had (for the purposes of section 15 and section 20 of the 2010 Act) knowledge of the physical impairment of asthma.
3. The claimant's complaint that the respondent failed to make reasonable adjustments pursuant to section 20 of the 2010 Act fails and stands dismissed.
4. The claimant was unfavourably treated for something arising in consequence of disability. However, the respondent has justified the unfavourable treatment and accordingly the complaint brought under section 15 of the 2010 Act fails and stands dismissed.

REASONS

1. This case was heard at Sheffield Employment Tribunal on 1, 2 and 3 October 2019. After hearing each party's case, and then after receiving the helpful submissions from each counsel, the tribunal reserved its judgment. We now set out the reasons for the judgment that we have reached.

2. We shall first set out findings of fact. We shall then consider the issues in the case and the relevant law before going on to set our conclusions.

3. The claimant pursues complaints of disability discrimination. The complaints of disability discrimination are that:

    3.1 The respondent failed to comply with the duty upon it to make reasonable adjustments; and

    3.2 The claimant was unfavourably treated for something arising in consequence of disability.

4. The claimant relies upon both a mental and physical impairment as the relevant disabilities for the purposes of her claims. The mental impairment is that of bi-polar disorder. They physical impairment is asthma. The respondent accepts that the claimant is a disabled person for the purposes of the Equality Act 2010 because of the mental impairment of bi-polar disorder. The respondent makes no such concession in relation to the physical impairment of asthma.

5. The tribunal heard evidence from the claimant. Her witness evidence consisted of her 44-paragraph statement dealing with the history of matters and two witness statements (at pages 232 to 240 and 240A-B) dealing the question of the impact of her bi-polar and asthma upon her. The following witnesses were called on behalf of the respondent:

    5.1 Colleen Mitchell. She was employed by the respondent from January 2018 upon a one-year fixed term grade 7 contract. She held the role of Student Transitions Manager. She left the employment of the respondent in January 2019 upon expiry of the fixed term.

    5.2 Matthew Parkin. He has been an employee of the respondent from 1 January 2000. On 1 October 2018, he was appointed to the role of Head of Student Funding.

    5.3 Sue Palfreyman. She has been employed by the respondent from 9 April 2018. She was appointed to the role of Senior HR Adviser and then was subsequently appointed HR Business Partner with effect from 1 July 2019.

Findings of fact

6. The respondent is of a well-known higher education institution. The claimant commenced her employment with the respondent on 18 January 1993. On 1 April 2016 she was appointed to the role of Transitions Administrator.

7. Copies of contracts of employment issued to the claimant throughout her career with the respondent appear in the bundle. The contract at pages 128 to 136 were signed by her on 22 April 2016 and confirms the date of commencement in her role as Transitions Administrator. This role is now known as Student Funding Administrator. The team were based at the Surrey Building. There appears to be no job description within the bundle. However, the claimant's core duties are set out in the notes of the 'keeping in touch' meeting dated 20 April 2018. We shall return to this document later in these factual findings. Suffice to say, at this stage, that the 'core service' provided by the claimant on behalf of the respondent was to *'support financial capability; one-to-one support of priority students; targeted financial support for priority students.'*

8. The claimant works as part of a team of three. Essentially, her role involves fielding queries in relation to student funding. When giving evidence under cross-examination, the claimant confirmed that her duties involved answering the telephone or replying to student's e-mails. It was put to her by Mr Campion on behalf of the respondent that student enquiries could be about such matters as their problems receiving student loans, students suffering hardship because of the cessation of parental support and housing issues. The claimant agreed that these were examples of the kinds of things that she encounters in her role. She said that "*there are number of examples".* It is not part of her role to decide what, if any assistance the respondent may give to the student. She said that she was *"a second stage triage"* who passes on the information upon the basis of which others decide what assistance may be provided. The claimant also accepted that her role was cyclical in that certain times of the year would be busier than others.

9. This case centres upon the claimant's sickness absence and the respondent's response to it. A copy of the claimant's sickness absence appears at the front of the bundle. (This was unpaginated and placed before the hearing bundle index in the lever arch file that contained the hearing bundle). The claimant took no issue with the accuracy of the respondent's record of her sickness absences.

10. On 25 September 2017, the claimant was invited to attend what was described as a *"formal disciplinary hearing"* to take place on 4 October 2017. (In fact, the hearing took place on 3 October 2017). The letter of invite is at pages 146 and 147.

11. The invite letter was sent to her by Callum Dixon, Student Funding Manager. At the material time, the claimant's line manager was Emily Marsh.

12. The claimant was directed to familiarise herself with the disciplinary procedure and her associated rights under it. Mr Dixon provided her with a link to the disciplinary procedure which is in the bundle at pages 64 to 68. The tribunal

was also supplied with a sickness absence procedure (pages 75 to 83). This says (at section 9.6 on page 79) that escalation to the disciplinary procedure may be appropriate in circumstances where absence has exceeded the respondent's '*acceptable trigger level [where] there is not an underlying medical condition.'* The sickness absence procedure has three stages. These are set out at pages 80 and 81. The first stage contemplates, amongst other things, agreeing a way forward and a time scale for review. The second stage similarly provides for a time scale for review and further meetings and the possibility of moving matters on to stage three. An employee finding themselves at stage three is at risk of dismissal.

13. The disciplinary procedure comprises of four stages (page 66). The tribunal was not in fact referred to the disciplinary procedure as the focus throughout the hearing was upon the sickness absence procedure. In the circumstances, it is perhaps unfortunate that Mr Dixon made reference to the disciplinary procedure and conducted the meeting of 3 October 2017 pursuant to it, when in reality would appear to be the case that it constituted a meeting under the respondent's sickness absence procedure.

14. The sickness absence procedure provides in paragraph four (on page 77) that the respondent uses trigger points to manage sickness absence levels. The trigger points for an employee working five days a week are ten working days or four separate periods of absence in a rolling 12-month period. The claimant works 37 hours a week over a five-day week, and therefore these thresholds applied to her at all of the material times with which the tribunal is concerned.

The stage 1 warning of 3 October 2017

15. The reason for convening the hearing of 3 October 2017 was set out in the third paragraph of the invite letter of 25 September 2017 at pages 146 and 147. This says that:

> *"In the last 12 months you have had seven instances of sickness totalling 13 days. Your manager has set you an action plan and absence target in May 2017 in order to help you to improve your sickness levels. Since that time, you have had a further two absences, totalling four days. In addition, you had left early due to sickness on a further two days – 14 June 2017 and 5 July 2017."*

16. The helpful table setting out the absences which gave rise to the respondent's concern is set out at page 138A dated 28 July 2017. This was an e-mail from Mr Dixon addressed to the claimant. The absences were as follows:

Dates	Days	Reason	Condition
2.6.16 – 30.6.16	21 days	Mental Health	Non-work related stress.
1.7.16 – 8.7.16	6 days	Mental Health	Non-work related stress

12.7.16 – 12.7.16	1 day	Mental Health	Non-work related stress
7.11.16 – 7.11.16	1 day	Allergy or allergic reactions	Allergy
9.12.16 – 9.12.16	1 day	Respiratory	Asthma
6.1.17 – 11.1.17	4 days	Cold/flu/viral	Cold
17.1.17 – 18.1.17	2 days	Musculoskeletal fractures/injuries	Back pain
20.3.17 – 20.3.17	1 day	Respiratory	Asthma
15.5.17 – 17.5.17	3 days	Cold/flu/viral	Cold
15.6.17 – 15.6.18	1 day	Gynaecological	Cystitis

17. According to Mr Dixon, therefore, during the rolling 12 months' period back from 28 July 2017 the claimant had 14 days of absence upon 8 separate occasions. During the calendar year 2017, the claimant had taken 11 days off work due to sickness upon five occasions.

18. Although out of the scope of the 12 months' rolling period from 28 July 2017 the claimant had a significant amount of absence during 2016. That absence had led to Emily Marsh and the claimant agreeing an action plan. This is dated 5 May 2017 and is at page 137. The following objectives were set out in the action plan:

- *"To continue to 'hot desk'.*
- *To discuss the claimant's rota with administrators to ensure a fair distribution of cover.*
- *For the claimant to have a person who she could 'de-brief' when needed.*
- *To ensure that the claimant took a short morning and afternoon break and managed her time and hours to ensure a proper work-life balance.*
- *To look into support in order to help her stop smoking."*

19. The claimant fairly agreed that all of these measures had been put in place by Emily Marsh and were designed to assist the claimant, particularly in light of the fact that she had had significant periods of absence from work for mental health related conditions.

20. The sequence of events leading to the hearing of 3 October 2017 will now be set out. On 8 August 2017 a review meeting was held. This was attended by Mr Dixon who was accompanied by a Human Resources representative. The claimant attended, accompanied by a trade union representative. The claimant attributed her absences with asthma and cold to stress at work. The claimant also said that she was smoking due to stress which had impacted upon her asthma. She had managed to stop smoking during Ramadan. She maintained that her bi-polar condition was under control. The parties agreed to an occupational health referral.

21. The referral was made by Mr Dixon the same day (pages 141 to 143). Mr Dixon sought occupational health advice as to whether there were any further

adjustments that could be made in order to support the claimant, to improve her absence record and assist with her health. He made reference to Emily Marsh's action plan of 5 May 2017 as a reference point for the adjustments that had been made by the respondent to date.

22. An occupational health report was prepared dated 19 September 2017 by Emma Walker-Jackson, Registered General Nurse (pages 144 and 145). Ms Walker-Jackson said that the claimant informed her of her long term mental health issues and of having been diagnosed with bi-polar disorder. The claimant reported that she was not currently taking medication and that she manages her condition quite well. Ms Walker-Jackson noted that the claimant appeared to be smoking to deal with anxiety. She reported that there appeared to be no reason why the claimant could not fulfil the requirements of her post and that with support from her manager and regular meetings to discuss issues, there was no reason why she could not continue to perform well at work. She was supportive of the action plan devised by Emily Marsh.

23. Ms Walker-Jackson suggested a few additional adjustments. She recommended the provision of a quiet area for occasional use when the claimant becomes overwhelmed and a regular *'de-brief'* with her manager. She also recommended flexibility, with the claimant being permitted to vary her working time while maintaining her contractual hours. Ms Walker-Jackson recommended having a *'go-to person'*. She encouraged the claimant to reduce her smoking.

24. Upon receipt of the occupational health report, Mr Dixon wrote to the claimant on 25 September 2017 (pages 146 and 147). He said that:

> *"Having considered the OH report and the information provided by you and your manager, my decision is that this matter does warrant further consideration under the formal PRF process." ('PRF'* refers to the problem resolution framework of which the disciplinary procedure to which we have referred already forms part).

25. The minutes of what was described as a disciplinary hearing and which took place on 3 October 2017, are at pages at 148 – 154. Mr Dixon concluded that the claimant had exceeded the respondent's trigger points. He said (at page 153 and 154), that:

> *"We recognise that you have an underlying mental health condition, which you've expressed that you've been controlling, and the outcome of the occupational health referral, and our discussions is that the absences in the last 12 months are clearly related to that. You've had some improvement in the last 12 months, which we've taken into account, and you've taken some responsibility for the sicknesses that you have had and thought about ways of dealing with those. That being said, you do still exceed the university's acceptable trigger levels and therefore I still consider that to be a pattern of absence which is concerning, and I feel it is appropriate to issue you a warning, but this will be the lowest level warning, which is a stage one formal verbal warning."*

26. This was to remain upon the claimant's record for a period of 12 months. Mr Dixon wrote to the claimant on 4 October 2017 (pages 155 and 156) to confirm the terms of the warning. The claimant was notified that the position would be reviewed in three months' time. She was given a right of appeal. The claimant chose not to exercise the right. As she put it in evidence given under cross-examination:

"what would I have challenged them on?"

The period from 3 October 2017 to 31 October 2018

27. A further action plan was then devised by Emily Marsh in consultation with the claimant. This is dated 12 October 2017 and is at pages 157 and 158. The following were the objectives:

- "*To not exceed absence triggers for a three months' period.*
- *To continue to hot-desk between [rooms] 5215 and 5224. (This was described in the 'actions' section of the document as "time in 5215 for phone/email and 5224 for project/back office work").*
- *To identify a person with whom you can 'de-brief' if needed, eg if the line manager is not available.*
- *To ensure that short breaks are taken in the morning and afternoon with a view to managing time and a proper work-life balance*
- *To take 'time out' if needed*
- *To make use of an Outlook calendar to plan-in appropriate times for projects/tasks/discussions*
- *To look into support to help the claimant stop smoking."*

28. It was agreed that a further review meeting would take place on 12 January 2018.

29. Again, the claimant fairly accepted that the measures summarised in the second to the sixth entries inclusive in the action plan cited in paragraph 27 were implemented by the respondent.

30. A three months' review meeting was held. In the event, it took place on 16 January 2018 (and not 12 January as had originally been planned). The claimant was invited to attend the meeting by way of a letter from Mr Dixon of 4 January 2018 (pages 159). Again, perhaps unfortunately this refers to a *'formal disciplinary review meeting'.*

31. There appear to be no notes of the meeting. However, there is a letter addressed to the claimant from Mr Dixon dated 22 January 2018 in which Mr Dixon confirms the outcome of the review meeting (pages 160 and 161). Following the warning of 3 October 2017, the claimant had had only one instance of sickness absence. This took place on 12 December 2017. She worked for half a day before leaving work early. Mr Dixon records:

"We also discussed that you were continuing to act on your action plan, and you advised me that you had stopped smoking".

32. Mr Dixon confirmed that he did not intend to hold *'a further disciplinary meeting at this time'* in light of the claimant's progress. Mr Dixon said that he would ask the claimant's line manager to continue to monitor the position. When asked about the review meeting of 16 January 2018, the claimant fairly said that:

    "The action plan was working."

33. The next review meeting took place on 20 April 2018. The relevant notes are in the bundle at pages 162 to 166; (we have referred to page 162 already in connection with our findings about the claimant's job role). This meeting was conducted by Ms Mitchell. Upon her appointment to her role in January 2018, she took over as the direct line manager of the claimant (and continued to manage her throughout the duration of the one-year fixed term contract upon which she (Ms Mitchell) was engaged by the respondent). It was noted that the claimant had had no further sick leave and accordingly a further review was scheduled for July 2018. The adjustments arranged by Emily Marsh in the action plan of 12 October 2017 were reviewed and were all found to be working well.

34. The six-monthly review held in April 2018 coincided with the time of a move of the team within which the claimant worked from the Surrey building to the Owen building. When taken to Colleen Mitchell's documents at pages 162 to 166 (recording the review meeting) during her cross examination the claimant raised the point that while she was able to have access to the quiet desk in the Student Funding Administrators' break-out/lunch room (in the Owen building) in compliance with the 12 October 2017 plan, she was unable to work effectively there due to the non-provision of a telephone and a second computer screen. However, she accepted that she had not requested these facilities in April 2018. (She did so at her return to work meeting held on 20 September 2018 (to which we will come to in due course) and the facilities were provided around a week later).

35. The claimant was absent from work on 31 May and 1 June 2018 with chest and respiratory symptoms. She was then absent from work between 5 June and 18 June 2018 with the same symptoms.

36. The total absence between 31 May and 18 June 2018 was 13 working days. Ms Mitchell held a return to work meeting with the claimant on 19 June 2018. A copy of the return to work interview form is at pages 322 and 323. Asthma was given as the underlying reason for the claimant's absence.

37. The next review meeting took place on 18 July 2018. Ms Mitchell's letter to the claimant recording the outcome of the meeting is at pages 168 and 169. Again, this was described as a *"formal disciplinary review meeting".* There are no notes of the meeting. However, the claimant did not take issue with the accuracy of Ms Mitchell's letter.

38. The 13 working days of absence between 31 May and 18 June 2018 was noted in the letter in addition to the one day of absence in June 2017 and the half days taken in June and December 2017. Ms Mitchell noted that the claimant's

absence was in excess of the respondent's trigger points. Ms Mitchell decided not to escalate the matter for further formal action.

39. Ms Mitchell justifies her decision in paragraph 15 of her witness statement. She says that she took no action at this stage:

> *"largely because I wanted to keep encouraging Anna, who had had a good period of attendance, apart from going off at the end of May 2018. I recognised that she had been making positive changes to help reduce her absence, and that she recognised that the stresses of Ramadan and the significant fatigue that she suffered as a result of it, could potentially be avoided by requesting to use her annual leave or to buy up to ten additional days leave which she could possibly use for Ramadan the following year"*

40. Ms Mitchell was therefore inclined to leniency. Ms Mitchell recorded in her letter (at page 169) that, should there be "*any further absence, any other breach of conduct or a failure to meet required standards of performance, further action will be considered".*

41. A further discussion between the claimant and Ms Mitchell took place on 23 July 2018. This was described as a *'keeping in touch'* meeting, the notes for which are at pages 327 to 329. The nine months' review meeting which had taken place on 18 July 2018 was noted (at page 328). There was also a discussion of the reasonable adjustments that had been put in place. This largely followed the pattern that had been established by Emily Marsh on 12 October 2017. However, in addition, two members of staff named James [*surname unknown*] and Lynette Granger had agreed to provide additional support to the claimant when Ms Mitchell was absent or unavailable. Also, the need for a quiet working space had reduced because the new office arrangements in the Owen building afforded a larger and less noisy work environment anyway. It was recorded that hot-desks in Owen (in room 1024) were available for her to use. (It was this arrangement that was later to form the subject of the discussion on 20 September 2019 about the need for the second screen and telephone to which we referred in paragraph 34 above). On a happier note, it was recorded that claimant had attended her 25 years' service celebration dinner on 2 July 2018 for which she had received a certificate and a £150 voucher.

42. The claimant was then absent from work between 16 August 2018 and 11 September 2018. This was a period of 27 calendar days and 17 working days. She was then absent for a further day on 13 September 2018.

43. The absence between 16 August and 11 September 2018 was attributable to the claimant's bipolar condition. The absence on 13 September 2018 was due to a cold. The claimant underwent a return to work interview on 20 September 2018. It was at this meeting that she referred to the issue around the second screen and the telephone in Owen 1024. (This is specifically referred to at page 169E of the notes of the return to work interview form which commence at page 169A). The interview was conducted by Sarah McLellan (who became the claimant's line manager after Ms Mitchell's departure). It was agreed that there should be a phased return to work. The claimant suggested some further

adjustments (at page 169B). She asked for some time to enable her to catch up on her e-mails, for her workload to be kept to a manageable level and some quiet time on a daily basis in order to undertake work away from answering the e-mails and telephone calls. Reference was made to these strategies or adjustments at pages 169B and 169C. These were expected to be likely to follow a pattern identified in the action plan of 12 October 2017 and the *'keeping in touch'* meeting of 20 April 2018.

44. The return to work interview with Sarah McLellan of 20 September 2018 was about the claimant's absence between 16 August and 11 September 2018 attributable to a bipolar episode. Colleen Mitchell then held a return to work interview with her on 24 September 2018 relating to the one day of absence on 13 September 2018 with a cold. Ms Mitchell calculated that the claimant had had 31 working days of absence over a 12 months' rolling period from the date of that interview. These absences are identified at page 335. The claimant repeated her request (made on 20 September 2018) for a phone and second screen to be made available in the hot-desk space in Owen 1024. Ms Mitchell said that she would follow the matter up with Head of Service. She appears to have done this because, as the claimant fairly accepted, these provisions were made very shortly after this meeting.

45. Ms Mitchell referred the claimant to occupational health for a further review. The absence history was set out upon the first page of the referral form dated 28 September 2018 (at page 170). Ms Mitchell was concerned that the adjustment of allowing the claimant to be away from the telephones for half of the working day may not be sustainable due to ongoing business need. She raised this issue in the referral.

46. Ms Walker-Jackson prepared the occupational health report dated 19 October 2018 which is in the bundle at pages 174 and 175.

47. Ms Walker-Jackson opined that the claimant was fit for work but that *"she should remain mindful about her stress levels at home and work and be pro-active about managing this work to reduce any exacerbations in her condition".* She saw no reason why the claimant could not carry out her substantive role with the adjustments mentioned in the action plan and the support and adjustments referred to in Ms Mitchell's referral of 28 September 2019. (The support and adjustments referred to in Ms Mitchell's referral consisted of a reference to Emily Marsh's action plan of 12 October 2017, coupled with fortnightly reviews). In addition to those, Ms Walker-Jackson recommended that the claimant be allowed to work on the telephones on a rota in order to enable her to undertake her *'back office work'* without distraction. Ms Walker-Jackson recognised that this would be subject to change in order to meet business needs. Ms Walker-Jackson said that he claimant's condition was unpredictable in nature and that *"exacerbations are likely".* She went on to say:

> *"If [the claimant's] triggers are managed, this should alleviate her flare ups. Anna does still have personal stressors and she is working hard to manage these."*

48. Finally, Ms Walker-Jackson said that:

"*It is possible that due to the unpredictable nature of her condition, that her future attendance will mirror past attendance and other than supporting Anna to reduce her stress levels I am unable to identify any other particular intervention that would change this."*

49. Between the date of the referral to occupational health and the preparation of the occupational health report, the claimant had a further day of absence. This occurred on 4 October 2018. According to the return to work interview form (at pages 341 to 343) dated 5 October 2018 the claimant's general practitioner had certified her as unfit for work because of '*work related stress and asthma'*. It was noted that the claimant's GP has written a back-dated certificate for work place adjustments for 3 October to 4 October 2018, *'with the provision of half a day working in a quiet area, regular breaks in the morning and afternoon, and the de-brief facility to be made available to the claimant after difficult conversations with colleagues and students'.* Confusingly, it was recorded that the claimant had worked on 3 and 4 October 2018 with these adjustments. (This seems at odds with the records showing that she had worked on 3 October but not on 4 October). The record shows that the claimant's bipolar was affecting her mental health and that on '*3 October 2018, the union rep advised HR that during a meeting with Anna on 2/10/18, Anna had talked about having thoughts of taking her own life'.* It was also noted that *'Anna had also advised Colleen that she had been in tears twice [on 3 October 2018] and did not feel well enough to be at work and was only at work because she was in sickness procedures'.*

50. The record also shows that Ms Mitchell was concerned that the claimant was trying to take on the work of others in an effort to resolve the students' issues, rather than passing the matters on to the appropriate staff members to resolve. Ms Mitchell encouraged the claimant not to become involved in matters being dealt with by others and to retain focus upon her own work. A strategy to achieve this was for the claimant to make use of headphones to listen to music to help her focus and stay out of the conversations of others.

The stage 2 warning of 31 October 2018 and the claimant's appeal

51. On 22 October 2018, Ms Mitchell wrote to the claimant (pages 176 and 177). She wrote to inform the claimant that she was required to attend a stage two sickness absence meeting to be held on 31 October 2018. Ms Mitchell said that the meeting was to be held in accordance with the respondent's sickness absence procedure. The letter contained a link to the procedure. This corroborates our earlier finding that the respondent was operating to the sickness absence procedure (at pages 75 to 83) throughout.

52. In her latter (at page 176) Ms Mitchell informed the claimant that:

"At the meeting we will discuss your absences, consider the likelihood of further absences, review medical advice and determine and agree a way forward. You will be given the opportunity to discuss your sickness absence and have the opportunity to offer any other information, evidence or mitigation which you consider relevant. You should be aware that this

meeting may result in a warning (and if you continue to have further absence from work, a possible escalation to stage three)."

53. The notes of the meeting on 31 October 2018 are at pages 182 to 197. The meeting was attended by Ms Mitchell and the claimant. Ms Mitchell was accompanied a Human Resources representative. The claimant was accompanied by a trade union representative. Ms Mitchell opened the meeting by going through the claimant's sickness absence record (in particular that she had had 32 ½ days of absence from 31 October 2017) and the review meeting that had taken place. It was noted that the stage 1 verbal warning issued to the claimant on 3 October 2017 had been extended to 31 October 2018. The extension had been notified to the claimant on 28 September 2018; (confirmation of this was in a letter of that date addressed to the claimant by Ms Mitchell and which is in the bundle at page 173A).

54. Ms Mitchell's decision was to issue the claimant with a warning under stage two of the sickness absence procedure. Her decision was confirmed in a letter that was sent to the claimant on 5 November 2018 (pages 198 to 200). The letter confirmed that the claimant was to be issued with a warning under stage two of the respondent's sickness absence procedure. The claimant was told that should she not maintain acceptable future levels of attendance the matter may be escalated to stage three bringing with it a risk of dismissal. Ms Mitchell went on to say that:

"I recognise the importance of ensuring that the university supports you to maintain your attendance at work, I will therefore arrange to meet with you to complete a WRAP plan and a disability passport."

55. The suggestion of a WRAP (a *'well recovery action plan'*) was a recommendation contained in a report prepared by Sheffield Occupational Health Advisory Service dated 29 October 2018 (pages 180 and 181). The report was prepared by Emma Radcliffe who is an Improving Access to Psychological Therapies Employment Adviser. Emma Radcliffe's report was prepared at the request of the claimant.

56. Ms Radcliffe opined that the claimant's impairments of bipolar disorder and asthma were *"conditions covered by the Equality Act 2010".* She suggested the following adjustments:

- clear guidance about how the sickness policy is to be applied to the claimant;
- adjusted triggers or discretion applied to sickness absence related to disability;
- clarity regarding the process being followed;
- a wellness action plan ('*WAP'*) or reasonable adjustments agreement that is up to date and that may be shared with managers with the claimant's consent;
- for the WAP to be regularly reviewed.

57. The terms 'WAP' and 'WRAP' were used by the parties interchangeably. The Tribunal understands this to be a document recording reasonable adjustments

made for an employee and which may then be shared with managers within the organisation. The advantage of this is that it follows the employee and saves the employee having to bring each separate manager up to date with the situation. In paragraph 23 of her witness statement, Ms Mitchell acknowledged having read Ms Radcliffe's report. She considered it before making her decision to issue a stage two formal warning to the claimant.

58. In her witness statement Ms Mitchell justified her decision to issue the claimant with a stage two warning as follows (in paragraphs 32 and 33):

> *"I believe that in the time that I was Anna's line manager, I did all I could to support her and to help her improve her attendance at work. Whilst she was at work I did whatever was in my remit to ensure that she had a safe and supportive working environment, which involved temporary measures such as hot-desking and being allowed to break-out into quiet offices. I also think that I showed Anna leniency in July 2018 when I decided not to issue a stage two warning at that time, despite it being in accordance with university policy to do so. I considered the August, September and October 2018 absences to be of a different nature to that which Anna had experienced in June 2018, and also of such an extent that further action was warranted. I felt that if I had ignored these absences in their entirety and not issued a stage two warning, that Anna would have felt less encouraged to improve her attendance. I understand that since the warning was issued in October 2018, Anna has experienced excellent attendance, which I am very pleased to hear as that was the ultimate object in issuing the warning in the first instance."*

59. On 11 November 2018, the claimant appealed against the issue of the stage two warnings. The appeal letter is at page 201.

60. Her grounds of appeal (at page 201) were, in summary:

- The mitigating circumstances presented by her had not been sufficiently taken into account;
- That her bipolar and asthma were unpredictable conditions which may result in further absence leaving it open to the respondent to invoke stage three of the sickness absence procedure, bringing with it the possibility of dismissal.
- That her disability related absence should be discounted from her absence record. The claimant contended that this would be a reasonable adjustment.
- She should be returned to stage one in the sickness absence procedure.

61. The appeal hearing took place on 14 December 2018. Mr Parkin was the officer charged with the conduct of the appeal. He was accompanied by Miss Palfreyman. The claimant was again accompanied at the appeal by her trade union representative.

62. The notes of the appeal hearing are at pages 204 to 209. The claimant reiterated that the grounds of appeal set out in the written document at page 201 and in particular and that her sickness absence between August and 11 September 2018 and 4 October 2018 were disability related. The claimant was

very concerned about the possibility of having another bipolar episode and facing the prospect of dismissal.

63. On 2 January 2019, Mr Parkin wrote to the claimant with the appeal outcome. His letter is at pages 210 to 212. Mr Parkin decided to refuse the claimant's appeal.

64. Mr Parkin took into account the claimant's absence record between 2009 and 2018 inclusive. At page 211 he set out a table of the number of days which the claimant had taken each year by way of sick leave and the number of occasions upon which she was absent from work through ill-health. He calculated that the claimant had been absent throughout this ten-year period for 11% of the time. Upon the basis of the claimant's record, Mr Parkin expressed concern that the claimant may not be able to limit her absences to those within the triggers required by the respondent over the next 12 months. He said,

> *"I am clear that had the university not used discretion in its application of the sickness absence procedure in relation to your disability, given your attendance pattern above, there is no doubt that you would potentially have been escalated to a higher stage of the process prior to this, and that within this your continued employment may have been considered"*

65. Mr Parkin therefore concluded that the respondent had exercised leniency. This was, of course, a point advanced by Ms Mitchell about her dealings with the claimant on 18 July 2018 following the claimant being absent from work between 31 May and 18 June 2018.

Witnesses' evidence under cross examination

66. The following emerged in evidence during the cross examination of the claimant:

66.1 The other two members of her team effectively worked part time on something akin to a job share. The claimant accepted therefore that the absence of one member of the team would have a significant impact upon the workload of the others. Their absence would also have a negative impact upon the respondent's ability to deal with student queries. The claimant said that management may be able to assist the team in the case of the absence of one member of it but fairly accepted that this was an imperfect solution as it would impact upon the manager's substantive role.

66.2 The claimant fairly accepts that Ms Mitchell could have proceeded under stage 2 of the sickness absence procedure in July 2018, following the absences in May and June of that year.

66.3 The claimant was taken to the occupational health referral prepared by Ms Mitchell on 28 September 2018 (pages 170 to 172). Ms Mitchell referred to the claimant having had a trip to Turkey which had a negative impact upon her mental health. The claimant said in evidence that "*I*

went abroad to meet my husband's family. We stayed in one room. The medication sedates and zombifies you. There was an expectation to be up and about and socialising and being polite. I started smoking again at that time." The claimant had also said (in paragraph 58 of her witness statement which is in the bundle at pages 232 to 240) that she had taken it upon herself to sort out all of the communications to the team before she went to Turkey. That the claimant was involving herself in matters that she should not was a point that was picked up by Colin Mitchell, at the keeping in touch meeting on 5 October 2018 to which we have already referred. The claimant accepted that she was taking on too much work at around this time. That, coupled with *"personal things"* affected her mental health.

66.4 Upon the issue of the recommendations made by Emma Radcliffe (pages 180 and 181 of the bundle), the claimant accepted that she had access to the sickness absence procedure pursuant to which the respondent was operating in October 2018 as this was available upon the respondent's intranet. She also accepted that she was clear about the sickness absence triggers. However, she maintained that there was an ambiguity in the sickness absence policy as her understanding was that it vested the responsibility with the respondent with a discretion to issue a stage two warning and that such was not mandated; but she feared that if taken to stage three, dismissal would be the inevitable outcome.

66.5 It was suggested to her that at stage two there was a possibility of a warning and if taken to stage three, a dismissal was a possible but not inevitable outcome. The claimant said that she did not understand this to be the position *"given my state of mind".*

66.6 The claimant said that she was asking for all disability related absence to be discounted from her sickness absence record. It was then suggested to her that that would not be a reasonable adjustment for the respondent to make because it would prevent them from effectively managing disability related absences. The claimant then said as an alternative that the trigger points should be increased.

66.7 She maintained that the action plan devised by Emily Marsh was not the same thing as the action plan being referred to by Emma Radcliffe. The latter was a portable plan (known as a WRAP) which was personal to the claimant. The advantage of this it could then be shown to different managers and would obviate the need for the claimant to continually explain her position. In contrast, the action plan devised by Emily Marsh and supplemented by Colleen Mitchell was bespoke to those two managers and not portable. The claimant maintained that the action plan devised by Emily Marsh was *"punitive".* This evidence was upon the basis that it planned for the claimant not to exceed the trigger points, a feature which the claimant said would be absent from a WRAP. The claimant accepted that she had not made this point to management. She also fairly accepted that the keeping in touch meetings undertaken by Colleen Mitchell were not regarded by her as punitive.

66.8 A WRAP was devised in December 2018. This is at pages 349 to 352. Ms Mitchell had said in the letter of 5 November 2018 (pages 198 to 200) that she would meet with the claimant in order to draft the WRAP. The claimant said that she had had input into the devising of the WRAP. The WRAP made reference to a further move from the Owen building to the Stoddart building. This took place in March 2019. It was recognised that no quiet space was available as the claimant had enjoyed at Owen. It was noted that a restroom would be available in Stoddart and that the claimant was to assess other ways to manage her stress levels in the new office space. The claimant fairly accepted that the respondent had no choice but to move the professional services teams to the Stoddart building (including the team in which the claimant worked). She also accepted that Mr Parkin had attempted to replicate the working environment at Owen by making the claimant's working area (in an open working space) as private as possible. She said that she didn't know the whereabouts of the restroom.

67. As we said at the start of these reasons, the respondent accepts the claimant to be a disabled person by reason of the mental impairment of bipolar disorder. The claimant provided Sarah McLellan and Colleen Mitchell with additional information about this condition in an e-mail dated 2 January 2019 (at page 348). The claimant's bipolar disorder is more specifically known as cyclothymia. This is described in the e-mail (which the claimant copied and pasted from the NHS website) as a '*relatively mild mood disorder'* in which *'moods swing between short periods of mild depression and hypomania, an elevated mood. The low and high mood swings never reach the severity or duration of a major depressive or full mania episodes'.* The claimant went on to say in the same email that, "*what this means for me is I have a tendency to over think things and emotionally I get really upset. I find it very difficult to focus on one thing when my mind races with my mind flitting between different thoughts. As the above states, this is short term and doesn't affect my life in the long term".*

68. When taken to this document in cross-examination and asked about her bipolar condition, the claimant said, *"I lose a night's sleep with erratic thoughts and putting me at stage two, put me under external pressure".* She says in her impact witness statement at page 232 (in particular in paragraphs 75 and 76) that, *"I am really tired at the moment of my mind but I enjoy the highs as I get a boost and I am a bubbly, funny, happy person. On the flip side, when low I am angry, frustrated, rude".* The claimant fairly accepted that her condition may account for her adopting an inappropriate tone at times (as was identified by Colleen Mitchell at the keeping in touch meeting of 5 October 2018: see in particular pages 342 and 343).

69. As has been said, the respondent does not accept that the claimant is a disabled person by reason of the physical impairments of asthma. The claimant produced an additional impact statement giving further evidence about that condition additional to that in the first impact statement. The additional statement is at pages 240A and 240B. She says that she was first diagnosed with the condition when she was eight years of age. The evidence

in her impact statement is that she takes "*Ventolin and Seretide changed from Salbutamol."* She said that she takes the Ventolin inhaler when she feels wheezy. She also takes *"the preventer regularly, morning and night".* She described in the first impact statement (at page 233) a need *"to go on steroids and need to rest"* when her asthma is extreme.

70. She says that the condition is managed by the use of the medication but if it does not work then she *"experiences shortness of breath, wheezing, tightness in the chest, coughing and feeling that she might stop breathing".* The condition causes her to have pain in her lungs/chest and leave her feeling disorientated and needs complete bed rest for a couple of days.

71. At paragraph 5 of her witness statement (at page 240B) she refers to an incident during 2018 when she had an asthma attack and unfortunately did not have her medication with her. Ms Mitchell took her to the medical centre on campus who was able to provide her with an inhaler. Ms Mitchell accepted that this incident had occurred as described by the claimant.

72. The claimant said at paragraph 7 of her impact statement (in paragraph 7) that *"even with the medication, an exacerbation can be caused if the claimant is anxious or through allergies",* she also went on to say, "*that deterioration in her mental health can trigger an asthma attack".* The absence from work in May and June 2018 was attributable to her asthma.

73. The claimant naturally accepted that smoking can exacerbate an asthmatic event. Hence, she can to some degree control her symptoms. In paragraph 9 of her impact statement, commencing at page 232, she says that she has *"found a way to keep my asthma at bay by having fennel and ajwan seeds boiled in water drinks. I have found this really helps me and keeps my asthma away".* With the aid of this self-help, she said that she had not experienced an asthma attack since that leading to her absences in May and June 2018.

74. The following emerged from the evidence given by the claimant in cross-examination upon the issue of her asthma:

    74.1 She fairly accepts that she had not told Colleen Mitchell that she considered her asthma to be a disability. She therefore did not take issue with this assertion at paragraph 6 of Ms Mitchell's witness statement. However, she took issue with Ms Mitchell's evidence that she (Ms Mitchell) had never seen the claimant with an inhaler. The claimant said that it was Ms Mitchell who took her to the medical centre to get the inhaler but at the time this isn't referred to above. Ms Mitchell did not demur about this when she gave evidence.

    74.2 She accepted that she had not told Mr Parkin that she considered her asthma to be a disability. She asked rhetorically, *"why would I tell him?"*

    74.3 She agreed that she had not contended that her asthma was a disability until the appeal hearing took place and that before that her issue had entirely been about her mental health. *(We observe that this appears to*

have been a concession wrongly made by the claimant: see paragraph 76.12).

74.4 The claimant was taken by Mr Campion to the entry of her General Practitioners notes dated 16 August 2018 (page 256). The GP entry refers to the claimant as *"chain smoking".* The claimant disputed that she was chain smoking and said that were that to be the case, by now she would have expected to have developed Chronic Obstructive Pulmonary Disease. She denied any connection between smoking and the asthmatic episode of May 2018. She said that she had ceased smoking for a period of nine months prior to that date. She attributed the asthma attack of May 2018 to the stress of fasting during Ramadan (which took place between 16 May and 14 June that year) exacerbated by stress at home by being expected to cook iftaris for family and friends. The claimant was not sure why the requirement to cook for family and friends would exacerbate the asthma attack. She said that she was "*not being kind to myself at the time"* and was attending *"too many dinner parties".* She said that she had felt *"tired and drained because of Ramadan".* She accepted that Ms Mitchell had summarised her position fairly in the disciplinary review outcome letter of 19 July 2018 (at pages 168 and 169) in which she said that the claimant had felt *"activity around Ramadan had resulted in you feeling fatigued, which had contributed to your recent period of absence".* In summary, the claimant stopped smoking at around the time of Ramadan in 2017, started again in August 2017 but then stopped for a period of around 9 months before starting again after Ramadan in June 2018.

75. The following evidence emerged from the cross examination of Colleen Mitchell:

75.1 She said that she had experience of equality and diversity issues and of managing individuals with bipolar and cyclothymia.

75.2 She did not entirely accept the proposition that it was out of the individual's control as to when a bipolar episode may occur. She said that there were strategies that could be put in place (by way of medication) and behavioural strategies (such as reducing stress). She did accept that external stressors may occur.

75.3 Ms Mitchell confirmed that during the time that she was managing the claimant's sickness absence, she was working towards the sickness absence procedure in the bundle, commencing at page 75. It was suggested to Ms Mitchell by Mr Healey that this was not an appropriate policy to be used when managing an individual with a long- term condition, such as bipolar. Ms Mitchell said that she could see no reason not to use the policy that she was utilising.

75.4 She conceded that the policy commencing at page 75 contained no guidance about dealing with an individual who has a disability under the 2010 Act. Ms Mitchell said that in that case and in the absence of policy guidelines she would follow the requirements of the legislation.

75.5 She accepted there to be options other than moving the claimant to stage two when she considered the matter, following the commissioning of the occupational health report of 19 October 2018. Ms Mitchell said that she discussed these options "*with HR".* One option would have been to allow the claimant to stay at stage one. She discounted the second option which was the possibility of increasing the trigger points because even a significant increase in those would have been to no avail given the amount of the claimant's absence. Ms Mitchell reached a similar conclusion when considering the possibility of allowing the claimant to take disability leave to cover the absences in August and September 2018.

75.6 Ms Mitchell said that she had exercised leniency in July 2018 because of the progress that had been made by the claimant. It was put to Ms Mitchell that those absences occurred during the time when she (the claimant) was on annual leave in Turkey and therefore strategies such as removing herself from the stress of the workplace had been to no avail on that occasion. It was suggested that Ms Mitchell had a fundamental lack of understanding of the claimants' condition. Ms Mitchell conceded that she was *"not sure"* if the claimant could have completely avoided all of the disability related absences that occurred in August and September 2018.

75.7 Ms Mitchell was taken to the notes of the hearing of 3 October 2017 (pages 148 to 154). She was not of course the claimant's line manager at this stage, but said that when reviewing matters, she had familiarised herself with progress and the meetings before she took over. She accepted that the claimant had mentioned in this meeting (which was chaired by Callum Dixon) that she had suffered an asthma attack and that such attacks are random and uncontrolled. She also accepted that the claimant's representative had suggested making an adjustment by increasing the trigger points (by reference to the fourth paragraph on page 152). She also accepted that Mr Dixon had acknowledged that the claimant's absences leading to the stage one hearing were not attributable to the claimant's mental impairment. That being the case, different considerations arose for Ms Mitchell given that both the claimants asthmatic impairment and the bipolar condition were in play when she came to consider matters.

75.8 Ms Mitchell fairly accepts that the action plan devised by Emily Marsh (and implemented by Ms Mitchell), was a different concept to the WRAP which was devised by Ms Mitchell in conjunction with the claimant in December 2018. Ms Mitchell did not accept that the claimant's description of the action plan as *"punitive".* She said that the action plan had been prepared with the claimant's input and was meant to be a *"positive document".* She accepted that the WRAP was a portable document. Ms Mitchell said that she had not prepared the WRAP until December 2018 because the claimant had not been pressing her for it until around that time. She saw no reason not to move the matter on to

stage two in the absence of the WRAP, taking the view that the action plan devised by Emily Marsh covered much the same ground anyway.

75.9 Ms Mitchell was challenged upon the question of the impact upon colleague of the claimant absences in May and June 2018. Whilst she agreed with Mr Healey that September and October of any academic year were the busiest time, she said that there was still a significant impact in May and June as the team were very busy during the summer. Ms Mitchell accepted that the working pattern devised for the claimant (to give her half a day away from replying to e-mails and the telephones) was not always possible to adhere to because of business needs. She fairly accepted this to be the case (as for example had been noted at the keeping in touch meeting of 23 July 2018, (commencing at page 327) and in particular at page 329).

75.10 Ms Mitchell readily acknowledged that the claimant had been helping herself and adopting coping strategies. This is recorded in the keeping in touch meeting of 21 June 2018 at page 324 (in particular at page 326). Ms Mitchell said that it was this improvement and the claimant's self-help which inclined her to leniency when she considered the matter on 18 and 19 July 2018.

75.11 It was suggested to Ms Mitchell by Mr Healey that at the return to work interview following the August and September 2018 absence for bipolar (on 20 September 2018) the claimant told Ms Mitchell that she considered the sickness absence procedure was making matters worse and she greatly feared for her job. Indeed, a note to this effect was made at page 169B. Ms Mitchell acknowledged this to be the claimant's concern and that she took the view that it was a matter which could be discussed during the course of the sickness absence procedure.

75.12 She accepted that she had not specifically referred the matter in paragraph 75.11 (in essence, that the claimant considered matters to be a self-fulfilling prophecy) to occupational health in the referral of 28 September 2018. Ms Mitchell conceded that in her return to work interview of 20 September 2018 the claimant had notified her that she considered both the asthma and the bipolar condition to be disabilities (at pages 169 C and D). However, Ms Mitchell herself did not consider that to be the case (by reference to the return to work interview form dated 24 September 2018) at page 335. She said that the occupational health reports before her made no such suggestion. That said, Ms Mitchell acknowledged that she had not asked occupational health whether asthma should be treated as a disability for the purposes of the 2010 Act.

75.13 Ms Mitchell was asked why she did not make the adjustment of taking out of account the sickness absence attributable to the bipolar condition. It was clear from her answer that Ms Mitchell took the view that the proper approach was to look at the totality of the sickness absence regardless of whether it was or was not disability related.

76. The following emerged from the cross examination of Mr Parkin:

76.1 Mr Parkin accepted that it was within his power to overturn Ms Mitchell's decision that the claimant be issued with a stage two warning. However, he seemed less certain as to his powers to increase the trigger points before the claimant was moved to stage three (or for that matter if she was moved back to stage one coupled with an adjustment to the trigger to move her again to stage two). He did not consider that he had the authority to change the terms of the sickness absence policy. Therefore, Mr Parkin's view was that his decision was confined to either over-turning or upholding Ms Mitchell's decision. He took the view that any alteration to the trigger points was a matter for discussion between management and the trade unions. As Mr Healey put it therefore, Mr Parkin's view was that this was a black and white issue and that either Ms Mitchell had reached the correct decision, or she had not.

76.2 Mr Parkin said that this was the first time that he had conducted a sickness absence appeal. He accepted that Ms Mitchell had more experience than him in dealing with sickness absence for individuals with bipolar. However, he rejected Mr Healey's suggestion that this mean that he was unlikely to overturn Ms Mitchell's decision.

76.3 Mr Parkin said that he did not accept that the claimant could not take mitigating steps in order to control the bipolar and asthma. However, he did fairly acknowledge that the claimant would have no control over external factors which may trigger absence attributable to either.

76.4 Mr Parkin accepted that he had not told the claimant that he would take into account the entirety of her absence record going back to 2009. It was suggested that this was unfair to the claimant. Mr Parkin said that he wanted to understand the history of the matter and felt it fair to take this into account.

76.5 Mr Parkin accepted the proposition put to him by Mr Healey that in reality (in particular by reference to the conclusions set out in the appeal letter in the first paragraph on the final page, copied at page 212), the claimant could consider herself fortunate still to be in post. Mr Parkin said in the letter:

> *"I am clear that had the university not used discretion in its application of the sickness absence procedure in relation to your disability, given your attendance shown above, there is no doubt that you would potentially have been escalated to a higher stage of the process prior to this, and that within this your continued employment may have been considered".*

76.6 Mr Parkin considered that the decision to reject the appeal was the correct one in order to provide motivation for the claimant to improve

her attendance record (and which he noted had turned out to be the case).

77. The following emerged from the cross examination of Mrs Palfreyman:

77.1 She rejected the notion that the sickness absence procedure which the respondent was utilising was more appropriate for persistent absence, rather than disability related absence. Ms Palfreyman said that the procedure was *"there as a supportive mechanism".* She accepted that the sickness absence policy being utilised made no reference to disability and the issue of reasonable adjustments by increasing the trigger points. Ms Palfreyman said *"not specifically".*

77.2 Mrs Palfreyman said that it was not an option to extend further the period of the stage one warning. She said that the appeal being conducted by Mr Parkin was limited to the issue of reviewing Colleen Mitchell's decision and whether it was one that was "*fair and transparent to uphold".* Mr Healey asked whether or not the appeal was a *"fresh look".* Confusingly, in the light of the previous answer Mrs Palfreyman said that it was but then went onto say that the respondent would review *"all of the case".* She confirmed Mr Parkin's view that the options were limited to accepting the appeal which would result in the claimant going back to stage one or rejecting it, in which case she was at stage two of the procedure. It was not within Mr Parkin's remit therefore to discount the bipolar absence.

77.3 Mrs Palfreyman accepted that the claimant had *"not specifically"* been told that the sickness absence going back to 2009 was going to be considered as part of Mr Parkin's decision-making process.

77.4 Mrs Palfreyman accepted that thee to be a distinction between the reasons for the absence was leading to the stage one and two warnings. In particular, the former was attributable to the claimant's asthma and the latter to her bipolar condition.

Relevant law

78. We now turn to a consideration of the relevant law. As was said in paragraph 3, the complaints of disability discrimination brought by the claimant are that:

78.1 The respondent failed to comply with the duty upon it to make reasonable adjustments; and

78.2 That the claimant was unfavourably treated for something arising in consequence of disability.

79. This prohibited conduct is made unlawful in the workplace pursuant to the provisions set out in part 5 of the 2010 Act. The complaint of unfavourable treatment for something arising in consequence of disability is unlawful in the workplace pursuant to section 39(2) of the 2010 Act. A failure to make reasonable adjustments is made unlawful in the workplace pursuant to section 39(5) of the 2010 Act.

80. By section 136 of the 2010 Act the initial burden of making out a *prima facie* case of discrimination rests with the claimant. If she succeeds in so doing then the burden shifts to the respondent to prove that the matters complained of are in no way tainted by discrimination. It is for the claimant to prove that she suffered the treatment complained of and not merely to assert it. It is only after hearing all of the evidence, including the respondent's explanations, that the Tribunal can decide whether the claimant has shown primary facts that could give rise to an inference of discrimination. If she does so then it is for the respondent to show that the matters complained of are in no way tainted by discrimination. If the Tribunal does not accept the reasons put forward by the respondent then the Tribunal must find that the claimant was discriminated against unlawfully.

81. We shall deal firstly with the reasonable adjustments claim. An employer's duty to make reasonable adjustments arises where a *"provision, criterion or practice"* ('*PCP"*) (meaning broadly any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions) put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with those who are not disabled. The employer must then take such steps as it is reasonable to have to take to avoid the disadvantage.

82. This matter benefited from a case management preliminary hearing which came before Employment Judge Cox on 10 May 2019. The relevant PCPs are set out at paragraph 3 of the annex to her minute (copied into the bundle at page 43). These are:

    82.1 The practice of applying a trigger for a review of sickness absence (agreed to be 10 working days' absence or four separate periods of absence in a rolling 12 months' period).

    82.2 The practice of issuing a warning for an unsatisfactory level of sickness absence.

    82.3 From early September 2018 the practice of requiring administrators to work in an open plan office. It was recorded that the claimant alleges that that put her at a substantial disadvantage in relation to her bipolar disorder as her work involves dealing with challenging telephone calls relating to student funding and she needs a quiet space in which to recover from them.

83. Having identified the relevant PCPs, the Tribunal must then go on to consider the nature and extent of the substantial disadvantage suffered by the claimant in comparison with non-disabled comparators. *"Substantial"* in this context means *"more than minor or trivial".* There must be evidence of apparently reasonable adjustments which could be made. The claimant must therefore identify in broad terms the nature of the adjustment that would ameliorate the substantial disadvantage and having done so the burden will then shift to the employer to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

84. The duty to make adjustments only arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The test of reasonableness in this context is an objective

one. As the reasonable adjustment provisions are concerned with practical outcomes rather than procedures the focus must be on whether the adjustment itself can be considered reasonable rather than on the reasonableness of the process by which the employer reached the decision about a proposed adjustment.

85. It is unlikely to be reasonable for an employer to have to make an adjustment that involves little benefit for the disabled person. However, there does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one. It is sufficient for a Tribunal to find simply that there would have been a prospect of it being alleviated.

86. A significant change brought about by the 2010 Act is the omission of specific factors to be considered when determining reasonableness. The Disability Discrimination Act 1995 (when it was in force) stipulated that in determining whether it was reasonable for an employer to have to take a particular step in order to comply with the duty, regard should be had to a number of factors. Those factors are not mentioned in the 2010 Act. However, paragraph 6.28 of the Equality and Human Rights Commission's *Employment Code* gives examples of matters that a Tribunal might take into account. The Code stipulates that what is a reasonable step for an employer to take will depend on all of the circumstances of each individual case. The factors to have in mind include for example the extent to which taking the step prevent the effect in relation to which the duty was imposed, the practicality of such step, the cost that would be incurred by the employer in taking that step and the extent to which it would disrupt any of its activities. Other factors that need to be taken into account include the extent of the employer's financial and other resources, the nature of the employer's activities and the size of its undertaking.

87. Paragraph 6.33 of the Code lists a number of adjustments that might be reasonable for an employer to make. These include allowing a disabled worker to be absent during working hours for rehabilitation, assessment or treatment and allowing a period of disability leave.

88. In his helpful written submissions, Mr Healey said that the reasonable adjustments contended for by the claimant fall into two categories:

    88.1 Those connected with the respondent's sickness absence procedure; and

    88.2 Those connected with day-to-day work.

89. In respect of the reasonable adjustments contended for and connected with the sickness absence procedure it was submitted that there were four proposed reasonable adjustments to consider:

    89.1 The adjustment of the standard trigger for the issue of a stage 2 warning.

    89.2 For the respondent to exercise discretion to discount disability related absence when considering the claimant's overall sickness/attendance.

    89.3 The giving of clearer guidance for the claimant about how the sickness policy would be applied to the claimant's individual circumstances.

    89.4 An adjustment to the trigger for the issue of a stage 3 warning.

90. The question arises therefore as to whether adjustments to an employer's sickness policy are reasonable in the circumstances. This matter was considered by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions*** [2007] ICR 160. In that case, the complainant was diagnosed with post viral fatigue and fibromyalgia. It was accepted by the DWP that she was a disabled person for the purposes of the 2010 Act. She had a 66 days' period of absence from work, 62 days of which were disability related. She received a written warning in accordance with the DWP's attendance management policy. She claimed that the DWP should have disregarded the 62 days of disability related absence on the basis that it was a *"one off"* at the time of her initial diagnosis and so withdrawn the written warning and that the DWP should have modified the consideration point for the start of any disciplinary proceedings by allowing her 12 days of disability related absence on top of the usual permitted eight days sickness absence before the consideration point would be reached.

91. The Court of Appeal upheld the decisions of the Employment Tribunal and the Employments Appeal Tribunal in rejecting the complainant's case. The medical evidence indicated that the complainant's condition was not a one off and that further potentially lengthy absences were likely. In those circumstances the fact that the relevant period of absence arose at the time of her initial diagnosis did not make it reasonable to expect her employer to disregard it. Further, where further lengthy absences are likely the period by which the consideration point should be extended becomes arbitrary and any short extension is of limited value as it may not in practice remove the disadvantage. If it is probable that a disabled person will require only limited and occasional absences then it may be possible to extend the consideration point in a principled and rational way and it may be unreasonable to not to do so. However, that was not the situation in ***Griffiths.***

92. It is worth setting out the following passages from the lead Judgment of Lord Justice Elias (as he then was) in full:

"(*69) The claimant submits, as she did before the appeal tribunal, that in the discussion of reasonableness (see para. 35 above) the majority in the employment tribunal simply failed to discuss the two adjustments which she was seeking. It did not engage with the way in which the case had been advanced. Mr Ford, counsel for the claimant, submits that the employment tribunal appear to have understood the claimant's case to be that any disability-related absence should be ignored when applying the attendance policy, however long it may be, whereas the proposed adjustment was more limited. It did no more than seek to have the policy adjusted in precisely the way the policy itself envisaged, namely by allowing a longer period of absence before the consideration point was reached - in this case an extension of 12 days. Furthermore, when considering whether to ignore the first lengthy absence altogether, the tribunal had failed to have regard to the reason why that was said to be exceptional, namely that it was only during that absence that the nature of the disability had been diagnosed and appropriate treatment put in place so that the claimant could thereafter better manage her condition.*

(70) I agree that the majority does not in terms refer to the argument as advanced by counsel on the claimant's behalf. Nonetheless, I do not accept that the Tribunal failed to appreciate the way in which the case had been advanced. As to the first proposed adjustment, I read the Tribunal as saying that the medical

evidence did not support the inference that the original 66-day absence was simply a "one-off" absence, given the likelihood of continuing and potentially lengthy disability absences. We have seen the evidence. The most recent report from an occupational health advisor confirms that the problems are likely to recur and future absences are to be expected, although their frequency and pattern is difficult to predict. Nor was it suggested that this absence was unusually lengthy because of the need to diagnose the illness. This is why the majority said that it could not properly be considered as an "exceptional" absence within the meaning of the policy, notwithstanding that the illness was only diagnosed then. It was not objectively reasonable to expect the employer simply to ignore such a lengthy absence. In my judgment, the majority would have been well aware that this was an important element in the argument being advanced, not least because it was the reason why the minority member dissented. It is inconceivable that the members would not have explored this issue in discussion.

(75) The Tribunal does give relatively clear reasons why it did not consider it reasonable to expect the employer to ignore the original 62-day disability-related absence and revoke the written warning. The majority notes that this is not a one-off condition and that further periods of potentially lengthy absence would, on the medical evidence, be likely to arise. In that context, the majority of the Tribunal did not consider that it was reasonable to expect the employer to write off an extended period of absence. As I have said, although the majority did not in terms address the argument that the absence was exceptional because it was the period when the illness was diagnosed and the treatment plan adopted, it would have had this in mind. It was in my judgment entitled to take the view that this was not a material reason for simply ignoring this lengthy absence. It was after all some eight times longer than the permitted annual absence before the consideration point is reached. In my judgment, the conclusion was plainly open to it.

(76) In this context I would observe that it is unfortunate that absence policies often use the language of warnings and sanctions which makes them sound disciplinary in nature. This suggests that the employee has in some sense been culpable. That is manifestly not the situation here, and will generally not be the case, at least where the absence is genuine, as no doubt it usually will be. But an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision. As I mention below, the fact that some of the absence is disability-related is still highly relevant to the question whether disciplinary action is appropriate.

(77) As to the second proposed adjustment, the reasoning of the majority is in my opinion more opaque. But I think implicit in its analysis is the belief that there is no obvious period by which the consideration point should be extended. If the worry and stress of being at risk of dismissal is to be eliminated altogether, then all disability-related illness must be excluded. But if that step is not taken - and no-one was suggesting that it should be - then in a case like this when lengthy further periods of absence are anticipated, the period by which the consideration point should be extended becomes arbitrary. As the majority point out in paragraph 49 when drawing an analogy with the **O'Hanlon** ***v Revenue and Customs Commissioners*** *[2017] ICR 1359, in so far as the alleged*

disadvantage is with the stress and anxiety caused to a particular disabled employee, it would be invidious to assess the appropriate extension period by such subjective criteria.

(78) Also, where the future absences are likely to be long, a relatively short extension of the consideration point is of limited, if any, value. It will not in practice remove the disadvantage if the absences remain over 20 days. No doubt there will be cases where it will be clear that a disabled employee is likely to be subject to limited and only occasional absences. In such a situation, it may be possible to extend the consideration point, as the policy envisages, in a principled and rational way and it may be unreasonable not to do so. But in my view the majority has taken the view that this is not appropriate in a case of this nature. In my judgment, the majority was entitled to reach that conclusion.

(79) However, it is important to add this. As I have already discussed, the positive duty to make reasonable adjustments is only a part of the protection afforded to disabled employees. The fact that the employer may be under no duty to make positive adjustments for a disabled employee in any particular context does not mean that he can thereafter dismiss an employee, or indeed impose any other sanction, in the same way as he could with respect to a non-disabled employee. The employer is under the related duty under section 15 [of the 2010 Act] to make allowances for a disabled employee. It would be open to a tribunal to find that the dismissal for disability-related absences constituted discrimination arising out of disability contrary to section 15. This would be so if, for example, the absences were the result of the disability and it was not proportionate in all the circumstances to effect the dismissal.

(80) This is particularly relevant to the first proposed adjustment. In substance the complaint is that it was disproportionate to impose the disciplinary sanction given that the absence giving rise to it was disability-related. It is that treatment which lies at the heart of the complaint, not the failure to make an adjustment. The section 20 duty is normally relevant when looking into the future; it is designed to help prevent treatment which might give rise to a section 15 claim from arising. But that is not the purpose of the section 20 complaint here. It is really a staging post in challenging - in order to invalidate the written warning - treatment which has already arisen. In my view there is a certain artificiality in arguing the case in that way. I respectfully agree with some observations of HH Judge Richardson in **General Dynamics Information Technology Ltd v Carranza** *[2015] ICR 169 para. 34 when he said that dismissal - and I would add any other disciplinary sanction - for poor attendance can be quite difficult to analyse in terms of the reasonable adjustments duty, and that:*

"Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play or whether the case is best considered and analysed under the new, robust, section 15."

(81) The same artificiality does not, however, relate to the second proposed adjustment. That is designed to look into the future and to limit the risk of future disciplinary treatment being meted out for absence from work which would be disproportionate. But even where there are no relevant reasonable adjustments of this nature to be made, the question would still arise, at the time of dismissal, whether the dismissal is a proportionate response to the pattern of absences having regard to all the circumstances, including the important fact that they may be wholly or in part disability-related."

93. The duty to make reasonable adjustments only arises where the employer knows or ought to know that the employee is disabled and that the employee would be placed at a substantial disadvantage by reason of the application to him or her of the PCP in question. The issue therefore is whether the employer knew or ought to have known both of the disability and the likelihood of the disability placing the employee at a disadvantage by reason of the application of the PCP. (The latter concept is known as constructive knowledge).

94. The question therefore is what objectively the employer could reasonably have known following reasonable enquiry. There is however no remit for a requirement for employers to make every possible enquiry where there is little or no basis for so doing.

95. The 2010 Act does not require an employer to have actual or constructive knowledge of the precise diagnosis of the disability in question. Rather, it requires actual or constructive knowledge of the facts constituting the disability, that is to say that the individual is suffering from (in this case) the mental impairment of bipolar disorder and the physical impairment of asthma. To constitute actual or constructive knowledge requires the employer to know of the relevant impairment and that it has a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities. We shall consider the law upon the question of disability in further detail below.

96. The EHRC Code states that "*an employer must do all it reasonably can be expected to do to find out whether a person has a disability*". The Code suggests at paragraph 5.14 that "*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*".

97. Paragraph 5.15 says that what is a reasonable enquiry will depend on the circumstances. This is an objective assessment.

98. We next turn to the complaint of discrimination for something arising in consequence of disability. This is a complaint which may be raised where an employer treats an employee unfavourably because of something arising in consequence of the employee's disability which the employer cannot show to be a proportionate means of achieving a legitimate aim. An employer facing a complaint of discrimination arising from disability has a defence of lack of knowledge: that is to say, there will not be discrimination if the employer shows that the employer did not and could not reasonably have been expected to know that the employee had the disability.

99. In this case, the unfavourable treatment in question is issuing the claimant with a stage 2 warning. The issue is whether the giving of the stage 2 warning amounts to unfavourable treatment. If so, then the question for the Tribunal is what was the reason (or the *"something"* to use the statutory language) for the unfavourable treatment and did that "*something"* arise in consequence of the claimant's disability. In identifying what caused the treatment or (what was the reason for it) it is sufficient for the disability to be a more than a minor or trivial influence. However, disability does not have to be the main or sole reason for the unfavourable treatment.

100. Upon the consideration of unfavourable treatment, there is no need to compare a disabled person's treatment with that of another person. Unfavourable

treatment means in this context putting the employee at a disadvantage. The consequences of the disability which gives rise to that disadvantage includes anything which is the result, effect or outcome of a disabled person's disability.

101. The EHRC Code provides guidance upon the objective justification defence available to employers. The legitimate aim in question must be legal and should not be discriminatory in itself. It must also present a real objective consideration. Where an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it will be very difficult for them to show that the treatment was objectively justified. Even where an employer has complied with the duty to make reasonable adjustments in relation to the disabled person, the employer may still subject a disabled person to unlawful discrimination arising from disability. This can arise where the adjustment is unrelated to the particular treatment complained of.

102. To be proportionate, the measure has to be both an appropriate means of achieving the aim and reasonably necessary in order to do so. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. This is an objective test. It is not enough that a reasonable employer might think that the action is a proportionate means of achieving the legitimate aim. The Tribunal has to weigh the real needs of the undertaking against the discriminatory effects of the requirements. It is necessary to consider the particular treatment of the employee in question in order to consider whether that treatment was a proportionate means of achieving a legitimate aim.

103. We also need to consider the law as it relates to the definition of disability in the 2010 Act. As we said in paragraph 4 of these reasons, the respondent accepts that the claimant is a disabled person for the purposes of the 2010 Act because of the mental impairment of bipolar disorder. Further, no issue of knowledge arises in relation to that impairment.

104. Issue is however taken by the respondent in relation to the physical impairment of asthma. For the purposes of the 2010 Act, a person has a disability if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day to day activities. This means that in general the person must have an impairment that is either physical or mental, the impairment must have adverse effects which are substantial, the substantial adverse effects must be long-term and the long-term substantial effects must be effects on normal day to day activities.

105. The term *"mental or physical impairment"* should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. Whether a person is disabled for the purposes of the act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day to day activities. It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded (such as nicotine addiction). What is important to consider is the effect of an impairment and not its cause, provided that it is not an excluded condition.

106. The requirement that an adverse effect on normal day to day activities should be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than minor or trivial. Account should be

taken of how far a person can reasonably be expected to modify his or her behaviour by the use of a coping or avoidance strategy to prevent or reduce the effects of an impairment on normal day to day activities. According to paragraph B7 of the '*Guidance on the definition of disability* (2011)', "*in some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day to day activities".*

107. Where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, *"likely"* should be interpreted as meaning *"could well happen".* The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question.

108. For the purposes of deciding whether a person is disabled, a long-term effect of the impairment is one: which has lasted at least 12 months; or where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or which is likely to last for the rest of the life of the person affected. "*Likely*" in this context should have been interpreted as meaning that it "*could well happen*".

109. The adverse effect of the person's impairment must have a substantial impairment upon the person's ability to carry out normal day to day activities. The 2010 Act does not define what is regarded as *"normal day to day activity".* In general, day to day activities are things that people do on a regular or daily basis. Where a person is receiving treatment or correction measures for an impairment, the effect of the impairment on day to day activities is to be taken as that which the person would experience without the treatment or measures.

Conclusions

110. We now turn to our conclusions.

111. We hold that the claimant's asthma is a disability for the purposes of the 2010 Act. On any view, an ability to breathe is a day to day activity. The claimant's asthma has a substantial adverse effect upon her ability to breathe normally. It is a limitation going beyond the normal differences in ability which may exist among people. Without the use of her medication (and even on occasions when she does use it) she experiences shortness of breath, wheezing, tightness in the chest, coughing and feeling that she might stop breathing. We refer to paragraphs 69 and 70. These symptoms affect day to day activities to the extent that she has to take *"complete bed rest for a couple of days."* There was no evidence from the respondent to gainsay the claimant's account of how asthma affects her day to day activities (nor realistically could there be). Indeed, Ms Mitchell acknowledged that on one occasion she had to take the claimant to the medical centre on campus when she found herself without her inhaler. This is corroborative of the claimant's account that she has asthma and that her condition has a substantial adverse effect upon her.

112. The respondent sought to argue that the claimant may reasonably be expected to modify her behaviour to prevent or reduce the effects of asthma on normal day to day activities. In particular, the respondent argued that the claimant's

smoking exacerbated the asthma. The suggestion from the respondent appear to be that by refraining from smoking the claimant might alter the effects of the impairment to the extent that it was no longer substantial.

113. Firstly, a difficulty with that submission is that the claimant has had asthma from childhood. Upon that basis, therefore the condition is plainly long-term (having lasted for more than 12 months). Secondly, as set out in paragraph 74.4, the claimant in any event had asthma attacks during periods when she refrained from smoking. The evidence accordingly is that even without smoking the physical impairment of asthma has a substantial adverse effect upon the claimant. She has had asthma from childhood. It affects her even when she goes for significant periods of time without smoking. It would of course be reasonable for her to modify her behaviour to refrain from smoking. The Tribunal takes judicial notice of the fact that such is hardly conducive to the well-being of somebody who is asthmatic. However, the fact is that even with the avoidance strategy (of refraining from smoking) there is still an adverse effect upon the claimant carrying out the normal day to day activity of breathing comfortably.

114. The Tribunal finds that the respondent did have knowledge of the claimant's asthma. We refer to the finding of fact at paragraph 71 where we recorded that Colleen Mitchell had had to take the claimant to the medical centre on campus when she had an asthma attack and found herself without her medication. The claimant's absence in May and June 2018 over a period of 13 working days was attributable to asthma (paragraph 36). Ms Radcliffe had opined that the claimant's asthma was covered by the Equality Act 2010 in her report of 29 October 2018 (paragraphs 55 and 56). On 20 September 2018 the claimant had informed Colleen Mitchell that she considered the asthma (as well as the bipolar impairment) to be disabilities (paragraph 75.12).

115. All of these features combined persuade the Tribunal that the respondent was on actual (or if not actual then constructive) notice that the claimant was a disabled person by reason of asthma. Ms Mitchell had had to take the claimant to the medical centre when she had an asthma attack. The claimant had had to have a significant period of time off work in May and June 2018 because of asthma. A person holding medical qualifications (Emma Radcliffe) had opined that the claimant's condition was a disability for the purposes of the 2010 Act. The claimant herself took that view in September 2018 and notified Ms Mitchell of that opinion. In the circumstances, the respondent was in our judgment upon sufficient notice of the impairment itself and that it had a substantial (that is to say, a more than minor or trivial) impact upon the claimant. The respondent was also on notice that the asthma was long-term, the claimant having had absences because of the asthma prior to May and June 2018 (as can be seen from the table set out at paragraph 16 of these reasons). We hold therefore that the respondent had actual knowledge (and if not constructive knowledge) of the physical impairment in question. We shall come on to the issue of the second limb of the knowledge test for purposes of the reasonable adjustments complaint in due course. However, for the purposes of the complaint of unfavourable treatment for something arising in consequence of disability the Tribunal finds that the respondent was fixed with knowledge of the claimant's physical disability.

116. We now turn to look at the complaint of the alleged failure upon the part of the respondent to make reasonable adjustments. The Tribunal finds that the

impugned PCP of the application of a trigger for a review of sickness absence within the respondent's sickness absence policy and the practice of issuing a warning for an unsatisfactory level of sickness absence are disadvantaging practices. The claimant is disabled by reason of both mental and physical impairment. She is therefore liable to have significant periods of absence from work due to ill health and to have more time off than non-disabled comparators. In comparison with non-disabled comparators, the claimant was therefore disadvantaged by reason of the application to her of the sickness absence policy and that disadvantage was consequent upon her disabilities.

117. The Tribunal determines that the respondent had knowledge not only of both disabilities (indeed, the respondent concedes knowledge of the mental impairment) but also knowledge that the claimant was disadvantaged as she alleges because of the application to her of the sickness absence policy. Indeed, the respondent can hardly be said not to have actual knowledge of this disadvantage in circumstances where it managed the claimant through the sickness absence procedure itself and issued the claimant with a formal verbal warning under stages 1 and 2 of that procedure.

118. The real issue in the case, therefore, is whether or not the adjustments contended for by the claimant are reasonable. In this context, it is significant that the claimant's absence in May and June 2018 was for a disability related reason (relating to the claimant's asthma). As we recorded in paragraph 38 of these reasons, the claimant's absence was in excess of the respondent's trigger points (together with the half days taken in June and December 2017). It was therefore open to the respondent to move the matter on to stage 2 at that point pursuant to the sickness absence policy. As we know (from paragraphs 38 to 40) Colleen Mitchell was inclined to leniency. She made an adjustment to the respondent's sickness absence policy by refraining from moving the claimant on to the next stage and extending the stage 1 twelve months' verbal warning issued to the claimant on 3 October 2017 to 31 October 2018. The Tribunal is concerned with objective outcomes rather than the process by which an adjustment is made. We find therefore that the respondent made an adjustment to its sickness absence policy to accommodate disability related absence.

119. Unfortunately for the claimant, there was a further significant period of disability related absence in August and September 2018. This was attributable to the claimant's bipolar condition. In the light of this further significant period of absence Ms Mitchell decided to move the matter on to a stage 2 sickness absence meeting to be held on 31 October 2018. The justification for Ms Mitchell's decision is set out at paragraph 58 above.

120. On behalf of the claimant, Mr Healey said that it would be a reasonable adjustment for the respondent to discount the disability related absences when considering the claimant's overall sickness and attendance. A difficulty with that submission is that the respondent had disregarded disability related absence attributable to asthma when Colleen Mitchell decided not to move the claimant on to stage 2 of the process following the absence in May and June 2018. Had the claimant not had any further sickness absence between 18 July 2018 (the date of the nine months' review meeting with Coleen Mitchell) and the end of October 2018 then effectively the asthma related absence would have been ignored. However, the further significant period of absence in August and September 2018 caused Ms Mitchell to act as she did.

121. Effectively, the claimant's case is that it would be a reasonable adjustment for the respondent to disregard disability-related absence after 4 October 2017 significantly in excess of the trigger points in the sickness absence policy. Mr Healey says that this would have been a reasonable adjustment because: there is an obvious importance of keeping all disabled employees in the workplace; that the onset of the claimant's illness was unpredictable; that the claimant had been making good process hence Colleen Mitchell's decisions during the first half of 2018; that continuation of the sickness absence procedure was disadvantageous to the claimant's health because in and of itself it caused anxiety and stress; that discounting disability-related absence would not prevent the respondent with dealing with concerns about overall attendance for non-disability reasons; and the existence of other outstanding reasonable adjustments (in particular the need for an updated WRAP). We shall now consider each of these points.

122. Mr Healey is correct to note the principle of the importance of keeping disabled employees in the workplace. Indeed, as was observed in paragraph 60 of **Griffiths**, the whole premise of the reasonable adjustment provisions in the Equality Act is that disabled employees may be disadvantaged by the application of common rules and the employer may be obliged to take positive steps which involved treating the disabled employee more favourably than others are treated to remove or alleviate the consequences of the disability. The question of reasonableness may, as Mr Healey has submitted, extend to giving particular consideration to longstanding and dedicated employees such as the claimant.

123. In **Griffiths**, the complainant's case was not advanced upon the basis that it would be a reasonable adjustment for the employer to disregard all disability-related absence. Indeed, it will rarely, if ever, be a reasonable adjustment to require an employer to disapply the terms of such policies to disabled employees by discounting all sickness related absence. An employer is entitled to manage the issue of ill health and absence within the workplace and a disabled employee cannot reasonably expect to be removed from the scope of a policy that is put in place as a management tool for that purpose.

124. In **Griffiths**, the Court of Appeal noted that the complainant's problems were likely to recur and future absences were to be expected (albeit the frequency and pattern was difficult to predict). We refer to paragraph 70 of the Court of Appeal's Judgment in **Griffiths** cited above. In the instant case, the claimant was absent in May and June 2018 and then in August and September 2018 with disability related absences: for asthma and bipolar respectively. Significantly, this was not the first time upon which the claimant had been absent for those conditions. We refer to the table at paragraph 16. In addition, the occupational health report of 19 October 2018 said that it was possible that due to the unpredictable nature of the mental impairment the claimant's future attendance will mirror past attendance. We refer to paragraph 48 above. Ms Mitchell recognised (in evidence before us) that external stressors may occur which are outside of the claimant's control and which may precipitate a recurrence of a bipolar episode.

125. In **Griffiths**, the claimant's condition was difficult to predict. That is also the case here. In **Griffiths**, the illness in question was not exceptional notwithstanding that it had only been diagnosed during the currency of the complainant's ill health absence of in excess of 60 days. In the instant case,

there were repeat absences attributable to both the physical and mental impairments which caused the respondent ultimately to invoke the sickness absence policy procedure and move the claimant on to stage 2.

126. In our judgment, there is nothing unreasonable in the respondent having regard to the whole of the claimant's absence record after 3 October 2017 when it made the decision to move the claimant on to stage 2. There is also nothing unreasonable in our judgment in Mr Parkin having regard to the whole of the claimant's sickness absence record going back to 2009. Had this been an unfair dismissal complaint then there would have been merit in the claimant's contention that Mr Parkin acted unfairly in having regard to the entirety of her sickness absence record when she was unaware that he was going to do so. However, this is a discrimination claim and it is for the Tribunal to assess objectively whether or not the employer was in breach of the duty to make reasonable adjustments with the focus being upon the outcome (as opposed to the procedural fairness or otherwise by which that outcome was reached).

127. In our judgment, it goes too far for the claimant to say that the respondent was in breach of the duty to make reasonable adjustments by failing to disregard the disability related absences that occurred in 2018. Mr Healey's point that the respondent could still have managed the claimant's sickness absence by reference to non-disability related illness has the effect of emasculating the respondent's ability to properly manage the claimant and is tantamount to a contention that disability related absence ought to be disregarded.

128. The claimant also contended that it would be a reasonable adjustment for the respondent to adjust the standard trigger for the issue of a stage 2 warning to something higher than the trigger points that we describe in paragraph 14 above. The difficulty with that submission is that the claimant had had 32.5 days of absence from 31 October 2017. Her sickness absence was therefore way in excess of the trigger of 10 days absence in a rolling 12 months' period. This suggested adjustment therefore runs into the difficulty highlighted by the Court of Appeal in **Griffiths** at paragraph 77 (cited above). The period by which the consideration point should be extended becomes arbitrary upon this analysis. Only if it could be considered a reasonable adjustment to more than triple the trigger point can such a claim succeed. Plainly, this goes beyond what is reasonable and would not in practice have removed the disadvantage to the claimant as she would still have fallen foul of the trigger points even if an unreasonably high and arbitrary increase (such as doubling or tripling the trigger points) were to have been made.

129. The fourth suggested reasonable adjustment of increasing the trigger point going on from a stage 2 warning is held not to be a reasonable adjustment for very much the same reason. In the event, happily, it appears that the claimant is on target not to trigger the stage 3 process in any event. Were it to have been triggered (and we proceed upon the basis that she is now out of the sickness absence procedure having had no further periods of absence after the issue of the stage 2 warning) and she were to have exceeded the trigger points by only a small amount then a relatively short extension of the consideration points may have been considered reasonable, all the more so given the claimant's length of service and her exemplary service record. However, that is not the situation that we are dealing with upon the facts. Given the claimant's record between October 2017 and October 2018 it is difficult to see how it could have been a reasonable adjustment for the respondent to have extended the

trigger points when moving the claimant on to stage 2 and giving her a stage 2 warning. Effectively, the claimant is contending that, as a reasonable adjustment, the respondent should have effectively picked a number of days of absence or a number of occurrences of absence arbitrarily over and above that in the sickness absence policy. That cannot be a reasonable adjustment in circumstances where the claimant was presenting in October 2018 with periods of absence way in excess of the trigger points.

130. We accept that such a step may have helped alleviate the stress and worry of being at stage 2 but, *per* **Griffiths** *(paragraph 77),* the removal of such stress and worry for a disabled person would only be removed were all disability related absence to be excluded which is a step too far. Were the claimant, for example, to have had only 10 or 11 days of absence after the issue of the stage 2 warning and the respondent were to proceed to dismiss then the claimant may well have had a meritorious reasonable adjustments complaint. However, that is a hypothetical scenario with which the Tribunal is not faced. The Tribunal has to determine objectively what was a reasonable adjustment for the respondent to make in the circumstances in which it found itself in October 2018. In our judgment, given the context of significant absences (albeit disability related) in May and June 2018 and August and September 2018 and given the whole history of the claimant's absence record, coupled with occupational health opinion that future absence could not be ruled out, in our judgment the respondent was not in breach of the duty to make reasonable adjustments by removing disability related absence altogether from consideration or arbitrarily increasing the trigger or consideration points.

131. The third reasonable adjustment advanced by the claimant was for clearer guidance for her about how the sickness policy would be applied to her individual circumstances. This was a difficult contention to understand given the evidence given by the claimant under cross-examination recorded at paragraphs 66.4 to 66.6 above. Further, on 19 July 2018, Ms Mitchell had written to the claimant following the nine months' review. She spelled out very clearly that the stage 1 warning remained on file until 3 October 2018 (which was later adjusted to 31 October 2018). She also said that should there be any further absence then further action would be considered. It is difficult to see how much clearer Ms Mitchell could have been when communicating with the claimant. Further, the claimant had access to the respondent's intranet enabling her to read the policy for herself. Ms Mitchell, her line manager, was someone with whom she got on well and who was sympathetic to her (as evidenced by Ms Mitchell's willingness to disregard the asthma related absence in May and June 2018 until the onset of the bipolar episode later on the same year). It was not clear (upon the claimant's case) exactly how clearer guidance could have been given to her by the respondent than was in fact given.

132. We therefore hold that there was no failure to make reasonable adjustments upon this issue and that in any event clearer guidance (if such could be made) would not have alleviated the substantial disadvantage anyway. The claimant could not, unfortunately, have avoided the bipolar episode that befell her in August and September 2018. It is unpredictable in nature and very much out of her control. The clearest of guidance would not have prevented the claimant from a further disability related absence due to mental impairment in August and September 2018 and the respondent moving on to stage 2 of the sickness absence procedure.

133. It is not clear how the availability of a WRAP which was portable and available to all managers was an adjustment which would have prevented the disadvantage to the claimant caused by the application to her of the relevant PCPs. There was no significant difference between the portable WRAP devised by Colleen Mitchell in December 2018 and the action plans devised by Emily Marsh and Coleen Mitchell prior to that date. The latter had not prevented the claimant's disability-related absences. It is difficult to see upon that basis how the failure by the respondent provide a WRAP until December 2018 would have done so either. There was simply no evidence that such absence was the result in the delay in drafting the WRAP. Therefore, even if the respondent was in breach of the duty to make reasonable adjustments by failing to draft a WRAP until December 2018 it was not an adjustment which came with a reasonable prospect of alleviating the disadvantage caused to the claimant by the application to her of the sickness absence policy anyway. The evidence is that with or without the WRAP the claimant would have undergone the disability related absences in any event and the disadvantage caused her by the application of the sickness absence policy to her would not have been avoided or alleviated.

134. At paragraph 3.7 of his submissions, Mr Healey points to a number of aspects of the claimant's day to day work at 3.7 in Mr Healey's submissions. These are described as *"reasonable adjustments in terms of the claimant's day to day work"* but appear to be more in the nature of disadvantaging practices in respect of which adjustments should have been made. These are as follows:

134.1 The "churn" of managers.

134.2 The move to the Owen building.

134.3 The failure upon the part of the respondent to provide a breakout space for the claimant while working in the Owen building.

134.4 A failure to provide a breakout space furnished with the necessary equipment to enable her to do her work.

134.5 A failure to adhere to the agreed working pattern including time off incoming calls in the afternoons.

135. We find that there was no "churn" of managers. We can accept in principle that requiring the claimant to work with a succession of managers is capable of being a practice and that such may in an appropriate case disadvantage a disabled employee in circumstances where perceived instability may impact that employee more than it would non-disabled colleagues. However, in this case there was no suggestion that the change of managers impacted to the claimant's disadvantage. On the contrary, she gave evidence that she had got on well with Ms Mitchell. There was no evidence from her that managerial changes acted to her disadvantage because of her disability. That being the case, no obligation to make reasonable adjustments arises.

136. The issue following the move to the Owen building appears to centre upon the need for a breakout space for the claimant. It was fairly acknowledged by Mr Healey on her behalf that she did not need the breakout space all the time. The evidence is that in fact it was not required until August or September 2018. We refer to paragraphs 34 and 41 above. Therefore, insofar as the claimant was disadvantaged by the respondent's requirement for her to work in the Owen building because a breakout space was not provided, this did not

materially disadvantage her until around September 2018. In our judgment, there was no substantial disadvantage because steps were taken by Ms Mitchell to install the necessary equipment in the breakout room to enable the claimant to work in the room very quickly after the claimant had lodged a request for it. Therefore, there was no substantial disadvantage to the claimant by reason of the requirement of the respondent for her to work in the Owen building in and of itself because the need for a quiet working space had reduced, the new office arrangements in the Owen building affording a large and less noisy work environment anyway. When the claimant raised a wish to use the breakout space and for the breakout space to be fitted with the necessary equipment the respondent acted quickly to accommodate her request. Accordingly, the need for the respondent to make reasonable adjustments only arose in September 2018 and reasonable adjustments were made by the prompt provision of a satisfactory space for the claimant to work which had a prospect of alleviating the disadvantage caused.

137. The Tribunal accepts that the respondent's requirement for her to deal with emails and telephone calls throughout the day was a requirement which caused the claimant a substantial disadvantage by reason of her disability. The respondent, in our judgment, made reasonable adjustments to accommodate this. Emily Marsh devised an action plan which focused upon the rota and the need for the claimant to take breaks from the email and telephone work. We refer in particular to paragraph 18 above. The claimant accepted that the action plan prepared by Emily Marsh had been implemented and was working quite well. The claimant said that the working pattern had been adhered to until around the time of the move to the Owen building and the change of management from Colleen Mitchell. The claimant said that the working pattern fell down when others were on annual leave and business need required her to step in to deal with the telephone calls and emails. Indeed, this is something which Ms Mitchell herself acknowledged as having happened when she managed the claimant (as noted at paragraph 75.9 above).

138. We hold that the respondent was not in breach of the duty to make reasonable adjustments in respect of the working pattern. The claimant fairly acknowledged that by and large the respondent had made the reasonable adjustment and adhered to it. It had fallen down on occasions where business need dictated that the claimant step in to relieve absent colleagues. Paragraph 6.28 of the *EHRC Code* sets out some of the factors that might be taken into account when deciding what is a reasonable step for an employer to have to take. One of these is the practicability of any step. Another is the extent of the employer's financial or other resources. There was no suggestion made by the claimant that it would have been practicable for the respondent to have recruited somebody else into the team. It was not suggested that the respondent had the financial resources so to do. In our judgment, the respondent did what it reasonably could to accommodate the work pattern recommended by Emily Marsh. On occasions, the work pattern could not be adhered to. The Tribunal is adjudicating upon the steps that it was objectively reasonable for the respondent to undertake. In our judgment, the respondent made reasonable adjustments to the claimant's working pattern. That, on occasions, this had to be departed from does not equate to a failure upon the respondent's part to make reasonable adjustments.

139. We now turn to the complaint of unfavourable treatment for something arising in consequence of disability. We agree with Mr Healey that the claimant was subjected to unfavourable treatment. On any view, the service of a stage 2 warning upon an employee (leaving only a third and final stage) is unfavourable treatment as it is something which places the disabled person at a disadvantage. The reason for the service of the stage 2 warning was the claimant's absence record. This was the *"something"* which is connected to the unfavourable treatment. That *"something"* arose in consequence of disability because it was the claimant's disability related absences which led to the service of the stage 2 warning.

140. We have already determined that the respondent had knowledge of both of the claimant's impairments which constitute disabilities for the purposes of the 2010 Act. Mr Healey is therefore correct when he submits that, "*this is in truth a complaint that will fail/succeed depending on the ET's conclusions in respect of the "justification" defence under section 15(1)(b) EA 2010, which is in turn connected to whether there were any outstanding reasonable adjustments (eg altering the trigger or discounting disability related absences), since if there were, then justification is not open to [the respondent]."*

141. The Tribunal has held that there were no outstanding reasonable adjustments. It follows therefore that the justification defence remains open to the respondent upon the claimant's complaint brought under section 15 of the 2010 Act.

142. The respondent was acting throughout this matter pursuant to its sickness absence procedure at pages 75 to 83. In the introduction section, the policy says that the respondent is committed to supporting the well-being of its employees. It then goes on to say that, "*Employees are the university's most important asset in service delivery, and sickness absence can have a major impact on its operational effectiveness. It is therefore desirable that sickness absence is kept to a minimum through the proactive application of a consistent and standard approach throughout the university, which also provides for the fair, reasonable and sensitive treatment of individuals*".

143. The sickness absence procedure therefore sets out the legitimate aim which is that of service delivery. In this context, the respondent established a team to deal with the student funding issues that we have described. On any view, the provision of a team to deal with that matter was a legitimate aim as it was in pursuit of the objective of dealing with student funding issues which is an important service provided to student body by the university.

144. The crucial issue therefore is whether it was proportionate for the respondent to issue the claimant with a stage 2 warning in pursuit of that aim. This involves a balancing exercise and weighing objectively the impact upon the employee of the measure in question against the employer's reasons for taking the measure, whether the measure was appropriate to the employer's objectives and reasonably necessary. This is an objective test. It is not sufficient for an employer to argue that the response fell within the range of reasonable managerial prerogative to the circumstances with which the employer was presented.

145. The Tribunal holds that it was proportionate for the respondent to issue a stage 2 warning on 31 October 2018. Plainly, the employer had a reasonable need to ensure that the small team was functioning effectively. The employer was faced here with a situation of an employee with a significant and lengthy

absence and medical evidence that further absence could reasonably be apprehended. The Tribunal accepts that the claimant was not choosing to take time off work and that she had limited control over her need so to do. In **Griffiths** (at paragraph 70 cited above) it was held that it would not be a reasonable adjustment to discount lengthy disability related absence merely because the frequency and pattern of such absence is difficult to predict. It is difficult to see how it can logically follow that it is disproportionate to issue a stage 2 warning to an employee with a view to furthering the legitimate aim in question when it comes to the question of objective justification for the purposes of the complaint brought under section 15 of the 2010 Act.

146. Pursuant to paragraph 4.3.1 of the *EHRC Code*, it will be sufficient for the employer to show that the same aim could not have been achieved by a less discriminatory means. In this connection, Mr Healey submitted (at paragraph 2.6 of his written submissions) that other steps could have been taken to ensure the claimant's continued attendance at work besides a stage 2 warning. He says, *"this included options such as: informal advice, line management action, a longer period of assessment, asking the claimant what steps she needed to be taken, extending the reasonable adjustment of reviewing and updating the claimant's WRAP and disability passport."*

147. The latter has been held by the Tribunal not to be a reasonable adjustment in any case. The claimant had had the benefit of informal advice and line management action and longer period of assessment in any event. Colleen Mitchell had refrained from moving the claimant to stage 2 because of the asthma related absence in May and June 2018. That informal measure, giving a longer period of assessment of the claimant's absences after the stage 1 warning, would have been effective had the claimant then had no further absence after 18 June 2018. Unfortunately for the claimant (and we accept that this was entirely outside her control) she then had further disability related absence in August and September 2019 because of the bipolar condition. The less discriminatory means of dealing with the matter advocated by Mr Healey had effectively been done by the respondent (through Coleen Mitchell) between October 2017 and 18 June 2018. The respondent was then faced with a further significant period of disability related absence. In our judgment, it is going too far to say, when balancing the needs of the parties, that the employer could reasonably and objectively have been expected to put up with further significant absence and deal with it only by the way of informal action. The step that the employer took to issue the stage 2 warning was therefore objectively reasonable and justified in pursuit of the legitimate aim.

148. We do not accept the claimant's point that the evidence advanced by the respondent in support of justification is vague and generalised. We agree with Mr Campion that Ms Mitchell and Mr Parkin both gave clear evidence of the impact of significant periods of absence upon the small team of three. Indeed, this was accepted by the claimant (as recorded in paragraph 66.1 above).

149. In the circumstances, the justification defence advanced by the respondent is made out.

150. In conclusion therefore, the claimant's complaint brought out of the 2010 Act fail and stand dismissed.

Employment Judge Brain

Date: 24 December 2019