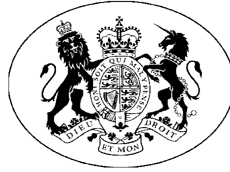
**Case No: 2401907/2019**



# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs S Pemberton**

**Respondent:** **The Commissioners for Her Majesty's Revenue and Customs**

**Heard at:** Manchester Employment Tribunal (sitting at Manchester Crown Court)

**On:** **14th-17th October 2019**
**19th October 2019 (In Chambers)**

**Before:** Employment Judge Dunlop
Members: Mrs C Ensell
Mrs SJ Linney

**Representation**

**Claimant:** In person
**Respondent:** Ms C Knowles (Counsel)

# RESERVED JUDGMENT

1. The claimant's claim under section 15 Equality Act 2010 (discrimination arising from disability) being the treatment set out at paragraph 1.b. of the list of issues succeeds.

2. All other claims under section 15 Equality Act 2010 (discrimination arising from disability) fail and are dismissed.

3. The claimant's claim under s19 Equality Act 2010 (indirect discrimination) fails and is dismissed.

4. The claimant's claim under ss20-21 Equality Act 2010 (failure to make reasonable adjustments) fails and is dismissed.

5. The claimant's claim under s26 Equality Act 2010 (harassment on grounds of disability) succeeds.

6. The appropriate remedy in respect of the claimant's successful claims will be determined at a remedy hearing to take place on 16th January 2020 at

10.00am with a time estimate of one day. Further directions in respect of the remedy hearing are set out at paragraphs 124-126 below.

# REASONS

## Introduction

(1) This is a claim of disability discrimination brought by the claimant, Mrs Pemberton, in relation to her employment with the respondent ("HMRC"). Mrs Pemberton's employment was continuing at the time she brought her claim. It has since ended, but the circumstances surrounding that play no part in her claim.

(2) Mrs Pemberton's claims were clarified at a case management hearing on 24th May 2019. A list of issues was produced, which was subsequently amended following the provision of further and better particulars of claim by Mrs Pemberton and an amended response by HMRC. An agreed list of issues was finalised and the parties confirmed at the outset of the hearing that this list (at 62A-F of the bundle) properly reflected the matters to be determined by the tribunal. The issues in relation to liability therefore were:

**<u>S15 EQA – Discrimination because of something arising in consequence of disability</u>**

1. **Did the Respondent ('R') treat C as follows:**

   a. **Requiring her to attend a formal sickness meeting in October 2018;**
   b. **Referring to C (through Mr Humphrys) as 'lively' during flare-ups, and Mr Humphrys suggesting she had behavioural problems, in a referral to RAST in April 2018;**
   c. **Setting up one to one telephony training (by Ms Walsh) in July 2018;**
   d. **Requiring her to attend an unscheduled meeting with Mr Humphrys after C's hospital contact in October 2017 and April 2018.**
   e. **Failing, by Katy Kane, to progress grievance lodged in May 2018 against Mr Humphrys (paragraphs 29/31 GOC).**
   f. **Refusing, by Gill Walsh on 15 May 2018, to seek an occupational health report in response to the claimant's request (paragraphs 29/31 GOC)**

2. **If so, did that amount to unfavourable treatment?**
   a. **C will say it was unfavourable to require her to attend a formal meeting because it exposed her to formal action**
   b. **C will say it was unfavourable to refer to her as lively and as having behavioural problems because it adversely influenced the referral.**
   c. **C will say it was unfavourable to set up one to one training because it was too intense for the claimant compared to how others were trained.**
   d. **C will say it was unfavourable to require her to attend unscheduled meetings because it affected the claimant adversely.**
   e. **C will say it was unfavourable to fail to progress her grievance because it left it outstanding.**
   f. **C will say refusal to seek occupational health referral resulted in the respondent having incomplete information.**

3. **Was the reason for that unfavourable treatment something arising in consequence of C's disability? The something relied upon is:**
   a. **The absence was due to disability**

b. **The comment about being lively related to the claimant screaming in pain; the comment about behavioural problems related to the how the claimant acted at work because of her disability**
c. **The one to one training was arranged because the claimant was unable to go above the second floor to the classroom because of her disability**
d. **The claimant was invited to unscheduled meetings that related to performance, where performance was linked to the claimant's disability;**
e. **The failure to progress the grievance which was related to her disability;**
f. **The occupational health referral which was related to her disability.**

4. **Has R shown that the above treatment was a proportionate means of achieving a legitimate aim? R says it had legitimate aims including: the monitoring of attendance of employees; the provision of training to all employees; ensuring the operational effectiveness and efficiency of R's operation; ensuring R's ability to meet customer demands; and ensuring a sufficient and reliable workforce.**

5. **Has the Respondent shown that it did not know, and could not reasonably have been expected to know that the Claimant had the disability?**

**S19 EQA – Indirect discrimination**

6. **Did R operate a provision, criteria or practice ("PCP") of a requirement to attend one to one training?**

7. **Did the PCP place C at a particular disadvantage in comparison to someone without her disability?**

8. **Did the PCP place people with the disability of rheumatoid arthritis at a particular disadvantage compared to people without that disability?**

9. **Has R shown that the PCP was a proportionate means of achieving a legitimate aim?**

**Ss20 &21 EQA – Failure to make reasonable adjustments**

10. **Did the Respondent apply the alleged PCPs, and were they PCPs within the meaning of Section 20 of the Equality Act 2010?**
    a. **Determining the KPI for Quality, Quantity and Adviser Utilisation at the start of the assessment year and applying the same performance criteria to the Claimant as to non-disabled colleagues between March 2017 and May 2018.**
    b. **Adopting a centralised work steer determined by span which necessitated alternating between post and telephony according to demand.**
    c. **Requiring the Claimant to undertake all work on site.**
    d. **(Until July 2018) applying non personalised targets to the Claimant.**
    e. **Taking formal action when absence reached trigger points.**
    f. **Treating hospital treatment and recuperation for new medication as sickness absence.**
    g. **Applying a formal absence policy from July 2018 onwards?**

11. **Did the PCP place the Claimant at a substantial disadvantage as alleged? The claimant alleges substantial disadvantage as follows (the letters correspond to the relevant PCP listed above):**
    a. **The symptoms of the Claimant's condition and the side effects of her medication made it extremely difficult for her to function at the required level, leading to stress and anxiety.**
    b. **The Claimant was frequently required to undertake telephony work when she was not well enough to deal with the public.**
    c. **The Claimant's condition affected her mobility and made it more difficult for her to work on site than someone without her disability / there were**

**days when she was fit to work from home but not to attend the office and she then had to use flexi or annual leave to cover the absence.**

d. **The Claimant had to work much harder to achieve the targets than someone without her disability, which further impacted on her physical and mental well-being.**
e. **At the time of formal action the Claimant was suffering from work-related stress and worsening symptoms whilst awaiting hospital infusions so it was difficult for her to maintain attendance, even in the short term.**
f. **The Claimant had to use annual leave / flexi for recuperation, reducing the amount of leave she had available to spend at her leisure.**
g. **The Claimant was at a substantial disadvantage because it was more difficult for her to maintain attendance because it would take approximately 16 weeks for her to feel any benefit from treatment and she had chronic symptoms from her condition and medication and this placed her under tremendous pressure. The meeting on 9 October caused distress and the Claimant was already extremely fatigued from her hospital infusion and 2 hours monitoring that had taken place four days earlier.**

12. **Did the Respondent know, or ought it reasonably to have known that the Claimant was placed at that substantial disadvantage?**

13. **Did the Respondent take such steps as it was reasonable for it to have to take to avoid that disadvantage? The Claimant says the following adjustments should have been made:**
    a. **additional breaks throughout employment (C says this was only done from 1 October 2018).**
    b. **change of work steer -allowing the claimant to vary her day to day tasks (C says this was recommended in OHR in August 2018).**
    c. **Change of work location including to home (C says this was recommended in OHR August 2018 – agreed trial April 2019).**
    d. **Reducing targets (C says this was only done in July 2018).**
    e. **Adjusting or extend trigger points for absence, (C says this hasn't been done adequately even until the date of the claim – she alleges an increase in September 2018 was not sufficient).**
    f. **Treating absence for hospital treatment and recuperations from new medication as Disability Adjustment Leave (C says this should have been put in place in October 2016 to date).**
    g. **Using discretion under attendance management to not apply the formal absence policy (C says there is an ongoing failure).**

**<u>S26 EQA - Harassment</u>**

14. **Did Mr Humphrys refer to C as 'lively' during flare-ups in a referral to RAST in April 2018 and in so doing did he subject C to unwanted conduct?**

15. **Did that conduct have the purpose of violating C's dignity and / or creating an intimidating, hostile, degrading or offensive environment for C?**

16. **If not, did it nevertheless have that effect, having regards to C's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?**

17. **Was the unwanted conduct related to C's disability?**

**<u>Time Limits</u>**

18. **Were any of C's claims brought outside the relevant time limit set out in S.123 and S.140B of the Equality Act 2010?**

**(Notification for the purposes of early conciliation took place on 18 December 2018; the early conciliation certificate was issued on 15 January 2019; the ET1 was presented on 13 February 2019).**

19. **Do any of C's claims form part of a continuing act which serves to bring earlier claims within the relevant time limit?**

(3) In places, the list of issues deals with matters out of chronological order. This judgment deals with the same issues in chronological order rather than, necessarily, the order set out in the list.

(4) The tribunal heard evidence over four days, 14th-17th October, and sat for deliberation on 19th October. We were provided with a bundle of documents in excess of 750 pages and read those pages to which we were referred by the parties. The bundle included a number of late-disclosed documents inserted after page 675. This included some documents from each party and it was agreed by both parties that we could and should have regard to these documents, although Mrs Pemberton disputed the genuineness of some documents disclosed by HMRC, which we will come to below. During the course of the hearing we added to the bundle (62H) an extract from a witness statement which had been served by the Respondent but later amended (again we will come to this below) and a copy of a prescription sticker on a Qvar 100 Autohaler which Mrs Pemberton wanted to introduce and which HMRC did not object to (382a).

(5) We were provided with witness statements from Mrs Pemberton and, on behalf of the Respondent, Mr Humphreys (Customer Service Manager), Ms Kane (Senior Officer), Ms Walsh (Higher Officer) and Mr Hall (Band O Executive Officer (now retired)). Except for Ms Kane, HMRC's witnesses were successive line managers of Mrs Pemberton. Ms Kane was a more senior manager, who had some involvement in certain of the matters Mrs Pemberton complains about. All the witnesses attended and gave evidence before the tribunal. At the conclusion of the hearing we received written submissions from Ms Knowles, on behalf of HMRC and oral submissions from both Ms Knowles and Mrs Pemberton.

## Disability

(6) Mrs Pemberton suffers from rheumatoid arthritis. This is a long-standing condition and HMRC accepts that Mrs Pemberton was disabled, and that it has knowledge of the disability, at all material times. Mrs Pemberton has been prescribed various types of medication and treatment for her condition, some of which have side effects. Her condition affects her mobility causing her to use a mobility scooter; it causes physical difficulty with typing and similar operations; it causes variable amounts of pain, and often severe pain. Mrs Pemberton also experiences problems with fatigue, concentration and what she describes as 'brain fog' which she attributes to her condition and the medication she takes.

## Adjustments for the Hearing

(7) The case management hearing had noted that Mrs Pemberton may need additional breaks throughout the full hearing and the time allocated to the case accounted for this. The tribunal took slightly longer breaks than might be usual in the middle of the morning and afternoon sessions. Further additional breaks were offered to Mrs Pemberton but (save on one occasion) she indicated she was content to carry on.

(8) Unfortunately, the hearing had to be relocated to a court room in Manchester Crown Court due to a flood at Manchester Employment Tribunal. The allocated court room was not ideally suited for the purposes of an Employment Tribunal and the tribunal is grateful to all those attending for their forbearance. Mrs Pemberton was asked whether she required any additional adjustments with regard to accessing the building or the room and she indicated she did not. For much of the hearing, Ms Knowles, counsel for HMRC, sat in a row behind Mrs Pemberton as there was insufficient room for her, Mrs Pemberton and Mrs Pemberton's husband (who was assisting her) to sit on the same advocates' bench with adequate room for their papers. We considered that Ms Knowles would be less disadvantaged than Mrs Pemberton by sitting further back and are grateful to her for accommodating this.

## Findings of Fact

### *Background Facts*

(9) Mrs Pemberton had worked for HMRC since 2008 as a Customer Service Advisor. This involved dealing with taxpayer queries received via the telephone ("phone work") and in writing ("post work").

(10) In this role, a number of measurements were generated in relation to her performance, and that of other employees. These included a KPI metric (which referred to average time taken to deal with post work) a call-handling time (CHT) metric (which referred to average time on calls) and a utilisation metric (referring to overall time on a productive task). The call-handling measurement was inclusive of a separate measurement for 'wrap' which was time taken at the end of a call to complete the associated administration.

(11) At the end of the financial year, each employee was invited to an end of year review. We were told that the outcome of the review is that employees are graded as "Not Achieved" (also described in some documents as "Development Needed") "Achieved" or "Exceeded". The tribunal were not told the precise consequences of obtaining a "Not Achieved" grade, although it was clear from Mrs Pemberton and from several of HMRC's witnesses that Mrs Pemberton was very concerned to ensure that she was graded as "Achieved" and very worried about receiving, or being on track for, a "Not Achieved" rating. An employee's performance against the statistical measures would be an important factor in setting their grading, although this was ultimately a decision for the line manager.

(12) At first glance, it appeared to the tribunal that this system of measurement and targets might be a somewhat draconian regime and, indeed, we accept it was perceived in that way by Mrs Pemberton. However, it was clear from the HMRC witnesses, and supported by the documents in the case, that the statistics were used primarily to increase understanding on the part of the managers as to performance levels across the team and where and how efficiency may be being gained or lost. No one was seeking to penalise Mrs Pemberton for not reaching any particular target.

(13) Mrs Pemberton experienced an extended sickness absence in 2016 and following her return to work she was issued with a document called a "Workplace Adjustment Passport". HMRC used this template to record all requirements and adjustments related to a particular employee's disability in order that they could be easily referenced, for example in the case of a change of team or a new manager. Initially, Mrs Pemberton's passport simply recorded assistance provided by Access to Work to enable her to physically attend work. This passport was reviewed on a six-monthly basis.

(14) An issue arose in January 2017 where Mrs Pemberton put herself forward to do overtime but this request was not accepted by Elaine Crosby, her then line manager, on the basis of her health. Mrs Pemberton escalated this to a senior manager, Susan Cummings, and her evidence is that she was then allowed to do overtime. Although this is not part of her claim, Mrs Pemberton's view is that certain managers, specifically Ms Kane, took against her as a result of her challenge in respect of overtime and Ms Cummings' support of it.

(15) It is relevant that in her email of 25th January 2017 to Ms Cummings (234), Mrs Pemberton stated:

> *"My attendance since coming back from long term sick on 24/10/2016 has been 100%. Likewise I have not asked for disability breaks or a lower KPI to accommodate my illness."*

The tribunal finds, therefore, that as at this early date Mrs Pemberton was well aware of the possibility of requesting additional breaks and lowered targets to accommodate disability, and did not feel that she required them at that point.

***Line Management by Mr Humphreys October 2017-March 2018***

(16) A one-to-one mid-year review meeting took place between Mrs Pemberton and Mr Humphreys (by now her line manager) in early October 2017. The notes of this meeting have been lost, although the bundle contains notes of a follow up meeting, which are dated 16th October 2017 (262-263). Mrs Pemberton states that no meeting happened on 16th October 2017. She asserts that an "impromptu" performance meeting was held on the 10th October and that it occurred shortly after a worrying call from her hospital, at a time when she had been feeling unusually unwell for some weeks.

(17) In its late-disclosed evidence, HMRC has produced copies of several Outlook meeting invites and Outlook diary entries. These include documents relating to a mid-year review meeting on 3rd October 2017 (675(5) and 675(5)(a)). There is no evidence of meeting arrangements for the 10th, the 16th or any other date around this period. Mrs Pemberton invited the tribunal to conclude that these meeting entries may not be genuine. Whilst acknowledging that it is possible to tamper with electronic calendar entries to produce such records which are not, in fact, contemporaneous, the tribunal does not accept that this has been done in this case. Aside from Mrs Pemberton's speculation, there was no evidence to suggest that these documents had been tampered with, and there was nothing in the case to indicate that Mr Humphreys or any of HMRC's other witnesses would be prepared to participate in directly deceiving the tribunal in the way suggested.

(18) It was in relation to this dispute that Mrs Pemberton wished to draw attention to the fact that paragraph 11 of Mr Humphreys' witness statement as originally served had stated that the one to one mid-year performance review was held on 16th October. The signed statement later served on Mrs Pemberton, and relied on before the tribunal, referred to the one-to-one mid-year performance review being held on the 3rd, and to a follow-up being held on the 16th. It also made reference to the Outlook documents referred to above. Upon questioning, Mr Humphreys' evidence was that he had put together the witness statement to the best of his ability using the documentary evidence. Upon further consideration, and particularly when the Outlook documents came to light, he realised that the meeting on the 16th had been a follow up to one on the 3rd.

(19) It is obviously difficult after this elapse of time to determine with any certainty the details of these meetings. Mrs Pemberton was at one stage insistent that the only meeting which took place was on the 10th and that the notes of the 16th were essentially a fabrication. However, she later seemed to acknowledge that the comments recorded in those notes had (or mostly had) actually been said. She then described the notes as being a 'mish mash' of different conversations around this time. We preferred the evidence of Mr Humphreys, as supported to a large extent by the documents, that there was a planned one-to-one mid-year review meeting on the 3rd October with at least one follow up discussion on the 16th. We accept it is possible there may have been other conversations around this time touching on the same matters. Mrs Pemberton has a clear recollection of one of these conversations taking place unexpectedly, shortly after a call from the hospital. We accept that her recollection is probably accurate to that extent, and it is not material whether that occurred on the 10th or whether she has confused the date.

(20) We find that it was reasonable for Mr Humphreys to have those follow-up conversation(s) and to assume that, being at work, Mrs Pemberton was fit to participate in such a conversation. We do not accept Mrs Pemberton's evidence that Mr Humphreys said words to the effect of "even if you have a condition, I still have to manage you" and accept Mr Humphreys evidence that Mrs Pemberton did not suggest that she was unfit or unable to participate in a meeting at this time.

(21) We also accept that the notes at 262-263 are an accurate summary of the matters discussed between Mr Humphreys and Mrs Pemberton at the follow up meeting(s). This included a record that Mrs Pemberton had asked to be given additional breaks when she has a flare up of her condition and that Mr Humphreys indicated that would not be an issue and her would look to incorporate this (i.e. incorporate it into the workplace adjustment passport). There is a handwritten addendum to the notes which records that after discussion with Ms Kane (his own manager), My Humphreys decided a referral should be made to Occupational Health ("OH").

(22) It is a central part of Mrs Pemberton's case now that her condition was a chronic one and that she needed additional breaks on an on-going basis, not simply at times of flare-ups. She was concerned that without such breaks her performance against the various metrics described above would fall. HMRC's witnesses gave evidence, which we accept, that breaks would not have a direct impact on the KPI or CHT metrics because those were derived from the average time taken on each call or post item, rather than the number of calls or post items an individual dealt with in total, although we also find that Mrs Pemberton did not have a solid understanding of this and that her concern was genuine. HMRC also gave evidence that the utilisation metric (which involved the proportion of time spent actively dealing with calls/post, as opposed to other activities, would be negatively affected by time spent having additional breaks) did not directly impact on an individual's end of year rating. Whilst we accept this, we also accept Mrs Pemberton's evidence that having a low utilisation figure would be a matter requiring explanation and which might, absent explanation, be frowned on.

(23) A further meeting took place on 30 October 2017. In a follow up email of the same date Mr Humphreys, recorded the points covered (291). The first point was that the scheduled OH Assist appointment was to be cancelled. Mrs Pemberton's evidence was that the outstanding issue related to her ability to take breaks and that that breaks were a matter for management rather than OH, and therefore a further appointment would be a waste of money for HMRC. Mr Humphrey's evidence was that Mrs Pemberton was happy with the proposed adjustments and considered an appointment a waste of time on all sides. This is a nuanced difference in recollection about a meeting which took place two years ago. A file note made by Mr Humphreys and dated 8 November 2017 also records that the referral had been cancelled because Mrs Pemberton feels the adjustments in place are sufficient at present. The tribunal considers it unfortunate that that referral was cancelled, but finds that it was done so with Mrs Pemberton's active agreement.

(24) The email of 30th October outlined the various adjustments which had been agreed, and the Workplace Adjustment Passport ('WAP') dated 27th July 2017 was amended on 30th October 2017 and includes the adjustments set out in the 30th October email, including the provision of particular equipment such as a specialist chair, leg support stool and computer equipment. The updated passport also included the following entries (236-238):

> *"Posture change – recommended to get up from desk for 2/3 minutes every 25/30 minutes"*; and

*"Extra time allowed for breaks during periods of flare up of Rheumatoid Arthritis condition."*

(25) Looking forward from this point, we find that Mrs Pemberton continued to have a genuine and pronounced anxiety about allowing herself to take breaks during her normal working day. However, we also find that Mrs Pemberton's understanding of the performance assessment process was confused and that she did not clearly communicate her worries to Mr Humphreys. We accept his evidence that if she ever asked for breaks she was permitted to take them. He reasonably understood the requirement to be at times of flare up, and, from this point on, he reasonably assumed that if she was not taking additional breaks (or asking to take them) it was because she was able to work as normal.

(26) A review meeting took place between Mrs Pemberton and Mr Humphreys on 6 February 2018, following which Mr Humphreys produced an email to Mrs Pemberton recording "*all Reasonable Adjustments (as covered in reasonable Adjustment Passport and the meeting 30 October 2017 which have been put in place are, at present, meeting Stephanie's needs. Stephanie will let me know should any other areas where adjustments or support could be considered*." (294)

(27) There was no documented response from Mrs Pemberton to the 30th October email, the updated passport, or this 6th February email. Despite those opportunities, she did not inform Mr Humphreys that the adjustments, particularly in respect of breaks, were not meeting her needs. She states that she was struggling severely at this time, having had a drug withdrawn and waiting a new one, and that there was no point in asking for further adjustments or a referral because the provision of additional breaks and/or a reduction in KPI target were "off the table". We do not accept her evidence on this point and note, in particular, that it is clear from her email from January 2017 regarding overtime (234) that she knew that reductions to the KPI target was an adjustment which could be offered in appropriate cases. Whilst we accept that Mrs Pemberton may well have been struggling with her health at this time, her evidence has been given with the benefit of hindsight. There was nothing to alert Mr Humphreys that the adjustments he had put in place were inadequate or that there was any further need that HMRC should be addressing.

***April 2018 End of Year Review***

(28) The next significant event was an end of year review meeting between Mr Humphreys and Mrs Pemberton on 16th April 2018. Again, there is a dispute between them to whether this was unscheduled. No calendar invite or diary entry was produced for this date. C gave a detailed account of the fact that she had been suffering from a chest infection which had severely impacted her health alongside her on-going symptoms. She had called her Rheumatology Department for advice and had asked to have her personal phone on her desk to take their call. The tribunal finds that this meeting was not formally scheduled on the basis of the lack of any Outlook documentation and the fact that Mrs Pemberton first complained about it being unscheduled at a very early point (in a draft grievance written

approximately May 2018). However, the tribunal also finds that the timing of the meeting did not present a particular difficulty to Mrs Pemberton, that she knew end of year review meetings were due to take place in this period and did not object to meeting Mr Humphreys at that time. Mrs Pemberton's objections to this meeting arose afterwards, and were triggered by her anger that Mr Humphreys had raised a contentious issue at the conclusion of the meeting, discussed further below.

(29) The End of Year Review documentation appears at 675(19)-(20).Mr Humphreys gave Mrs Pemberton a grading of "Achieved" and there are many positive comments in the document. It is noted that there was a "dip" in her quality of work (assessed as a percentage via spot checks on employee's work) "*but that this was at a period when Stephanie's health was affecting her with the consequently knock-on effect*." There is also a note that "*On Post Stephanie is slightly below target though this is not a concern and I am sure this will continue on an upwards trend over the next few months*." The document concludes "*This has been a good year for Stephanie and achievement has been seen. As such I have no problem in marking Stephanie with an "Achieved" marking*."

(30) Mrs Pemberton complains that in this meeting Mr Humphreys asked what medication she was taking and when she mentioned that she was taking Naproxen Mr Humphreys commented that his wife had been prescribed Naproxen in the past and that Mrs Pemberton shouldn't be taking it every day as it could cause kidney damage. Mrs Pemberton was offended by this comment which she took to be an unwarranted and inappropriate attempt to criticise her or her doctors and to offer medical advice. The tribunal prefers Mr Humphreys' interpretation, which was that he could not, and would not, offer medical advice to an employee and had merely stated, conversationally, that his wife had taken the drug but been warned against long term use in her case. This is an example of where Mrs Pemberton appeared very ready to take offence and/or feel she was being criticised where that was not a reasonable interpretation of events.

(31) In addition to discussing her performance, Mr Humphreys used the end of year review to raise an issue about Mrs Pemberton's behaviour. He noted that one or more colleagues had approached him to complain about Mrs Pemberton having an argument with her husband on the phone at her desk. Mrs Pemberton said, at the time and to us, that she was having a "fraught" i.e. loud and emotional call with her husband in relation to a mix-up over collection of her medication but that it was not an argument. She was very concerned as to whether he had said it was one colleague or several colleagues that had made the complaint. The tribunal considers that to be irrelevant. We accept that the concern had been genuinely raised that that it was appropriate for Mr Humphreys to raise it with Mrs Pemberton as her manager. This private meeting was an appropriate opportunity to do so.

(32) We find that Mrs Pemberton reacted badly to this. In her own witness statement she says she told Mr Humphreys the complainants were "A load of cunts". Under cross-examination she was asked if she pressed for the

identity of the complainants and said "no" but then said that she had suggested a list of suspects. Mrs Pemberton's evidence is that she was "hurting both mentally and emotionally" at this time, which we accept. This excuse might have been relevant if Mr Humphreys had sought to discipline Mrs Pemberton over either the original phone call or her reaction, or sought to lower her performance grade as a result of it, but he did not. Mr Humphreys did no more than raise the matter and ask her to refrain from such conduct in the future, which we find was proportionate and reasonable.

***RAST Referral***

(33) Shortly after the End of Year Review Mr Humphreys made a referral to HMRC's Reasonable Adjustments Support Team ("RAST") – seemingly on his own initiative. Page 297-298 is the template referral as filled in by GH. The wording of template states "*Referrals must be made by a manager rather than Jobholder*". It invites the manager to include details of "*barriers and issues*" faced by the jobholder and of the "*specific advice and support you need*". Some examples are then given, which suggest that RAST is well-placed to help with the technical and logistical challenges of putting reasonable adjustments in place (and particularly obtaining specialist equipment), rather than making the sort of medical or quasi-medical assessments of need that an occupational health practitioner may often make.

(34) Mr Humphreys' referral was brief. He noted that the condition was rheumatoid arthritis and that it was not going to improve. However, he provided no information on the symptoms or difficulties which C was experiencing. He notes that "*The jobholder worries her condition could affect her employment position (as present there are no concerns in this area other than behaviour which at times can be unprofessional). I would like advice on any other adjustments, outside of those in place, which may be considered. Stephanie suffers from flare ups in her condition which can result in giving rise to behavioural concerns*."

(35) Mrs Pemberton complains that a referral in these terms was never going to result in changes to targets or additional on-going breaks. We agree. In evidence, Mr Humphreys accepted he had not asked Mrs Pemberton about her symptoms and/or the difficulties she experienced in order to complete the form and had limited understanding of them, He accepted, with hindsight, that such enquiries would have been useful. It was suggested by Mrs Pemberton in closing that this was a deliberate ploy on the part of Mr Humphreys to elicit a response of no further adjustments. We do not accept that. He had other priorities and had not taken the time to fully understand the "barriers and issues" faced by an employee whom he regarded as difficult. This referral was therefore a missed opportunity to communicate between Mrs Pemberton and those who could help the difficulties she was experiencing and effect of her condition.

(36) The referral resulted in a telephone call from a member of the RAST to GH. The RAST notes of the call appear at 299 and record Mr Humphreys as having stated "*JH can become lively when there is a flare up*". The use of the word 'lively' is central to Mrs Pemberton's claim. Mr Humphreys denies that he used the word at all, and believes that it is a paraphrase adopted by the RAST team member noting the call. Obviously, Mrs Pemberton was not present during that call, and became aware of the note only when the document was sent to her in January 2019 as a result of a subject access request. Nonetheless, she invited us to find it more likely that not that the word was used. She gave evidence that Mr Humphreys used this description to her face. She was challenged about the fact that she had not complained about that usage as part of her claim. Her evidence was that she found it more offensive and serious when she realised it had been communicated to a third party and "written down" as part of a formal document which would appear on her file and possibly influence others in their view of her.

(37) The tribunal finds, on the balance of probability, that Mr Humphreys did describe Mrs Pemberton to the RAST team as "lively" and that the note is an accurate record of the call in that respect. We note that the word is used to summarise particular behavior on the part of Mrs Pemberton, and that it is to some extent euphemistic. It seems unlikely that it is a choice of word that would have been made by the other person on the call who had no knowledge of the Mrs Pemberton. We accepted Mrs Pemberton's evidence that she had heard him use this term in the past, and her explanation as to why she had not complained about that usage at an earlier stage. We find that the term "lively" was a shorthand developed by Mr Humphreys to describe Mrs Pemberton's sometimes argumentative demeanor, as well as vocalisation of her pain (described by Mrs Pemberton as "yelping") from time to time.

(38) The notes of the call also recall that Mr Humphreys asked RAST about adjusting targets but advised that there were "*no impacts at the moment and no performance issues*". He was advised that targets should not be adjusted if there were no impacts but that this could be reviewed. Mr Humphreys own notes of the call (300) record that allowance should be made with regard to statistics if there is a dip in performance which is health related. It further records that, in the event of sickness absence, disability trigger points should be reviewed at that time. The conclusion, therefore, was that there were no adjustments or actions to be taken at that point. These points were communicated to Mrs Pemberton in an email of 11th May 2018 (303), although this unhelpfully conflates the possibility of making allowances in statistics with the possibility of adjusting trigger points in the event of absence.

***May 2018 'grievance'***

(39) On 9th May 2018 Mrs Pemberton emailed Colin Stanton, who we are told is a union representative, with a draft grievance document (631-632)

setting out a grievance she wishes to raise against Mr Humphreys. The thrust of this complaint was about the holding of unscheduled meetings and GH's decision to raise with her the complaints from colleagues at the end of year meeting rather than when they had occurred. There is no complaint about failing to make reasonable adjustments or anything similar.

(40) One of Mrs Pemberton's claims is that Ms Kane failed to progress this grievance. Ms Kane, who holds the job title Senior Officer, was a manager senior to Mr Humphreys. Her evidence was that she was aware there was an issue relating to the end of year meeting because Mr Humphreys had told her that Mrs Pemberton had been very upset and angry and may complain. She had then received a call from Mr Stanton asking to discuss Mrs Pemberton and met with him at some time in May. Ms Kane outlined to Mr Stanton her own concerns about Mrs Pemberton's conduct and professionalism – some relating to her personal observations and some relating to matters reported by Mr Humphreys. Ms Kane's evidence is that Mr Stanton did not say that Mrs Pemberton wished to raise a grievance, nor even that she was considering it. In a later grievance dated 23rd October 2018 (458) Mrs Pemberton stated, in relation to this meeting, that she was advised not to pursue the grievance at that point as she could make matters worse for her herself, and that she took Mr Stanton's advice and asked for an occupational health referral instead. This is consistent with Ms Kane's account that Mr Stanton did not pass on the written grievance to her, nor tell her that Mrs Pemberton wished to raise a grievance. In the circumstances, we accept Ms Kane's evidence and find that no formal grievance was raised by Mrs Pemberton via Mr Stanton, nor was there any complaint or concern raised which ought to have been treated as a grievance. Instead, Mrs Pemberton formulated a complaint which was not put forward on the advice of Mr Stanton.

***Line Management by Ms Walsh***

(41) On 15th May 2018 Gail Walsh became Mrs Pemberton's line manager. She met Mrs Pemberton on her first day in the role when Mrs Pemberton raised a question about disability absence leave ("DAL" - whereby absences for disability related medical appointments etc are not counted for the purpose of absence trigger points under HMRC's sickness procedure) and about occupational health. Ms Walsh said she would look into the matter and revert to Mrs Pemberton, which she did on the same day. She made a note of both parts of the meeting (304). Ms Walsh's evidence, supported by her notes, was that Mrs Pemberton explained she had been taking annual leave when ill and wanted to take DAL. Mrs Walsh explained that DAL was not designed to cover sickness absence and that she should be taking sickness absence if she was too ill to work, with trigger points being adjusted if necessary in due course. Ms Walsh pointed out that occupational health would not support the use of DAL instead of sickness absence as that was a matter of policy and management. She asked Mrs Pemberton to let her know if she still wanted a referral to occupational health. Mrs Pemberton asserts that Mrs Walsh 'refused' or 'denied' her an

Occupational Health referral. We find that this is an example of Mrs Pemberton negatively misconstruing what she has been told. We accept Ms Walsh's evidence that Mrs Pemberton was to confirm whether she wanted to proceed with the referral in view of their conversation about different types of absence and that Mrs Pemberton never did so.

(42) We find that Ms Walsh showed an active interest in promoting Mrs Pemberton's well-being – for instance she encouraged Mrs Pemberton to use her adapted equipment even if this meant taking extra time – and would have been readily prepared to make an occupational health referral if asked. Following her conversations with Mrs Pemberton, Ms Walsh also made updates to the workplace adjustments passport (536). This now included a reduction of the KPI target by 15% and and increase in CHT by 15% "*to allow for extra time taken due to Rheumatoid Arthritis condition*". The document was not itself updated until 11th July 2018 but we accept Ms Walsh's evidence that this was to reflect the conversation that she had had with Mrs Pemberton on 15th May and that in practice the adjustments were in place from that date.

***Training issue***

(43) At the end of June Ms Walsh held a one to one with Mrs Pemberton and Mrs Pemberton asked for training on a particular aspect of advice relating to self-assessment tax returns. Ms Walsh established that this training was not currently available due to the time of year when the majority of those calls were received. However, there was a more general workshop on self-assessment telephony which Ms Walsh thought might be helpful to Mrs Pemberton.

(44) The tribunal heard that this workshop, along with other training workshops, was held in a training academy facility on the 7th floor of the building. Mrs Pemberton was unable to go beyond the 2nd floor of the building due to her mobility issues and the difficulty of safely evacuating her in the case of an emergency. The tribunal assumes that similar constraints would apply in respect of other mobility-impaired employees and notes that being unable to access the dedicated training academy may well be disadvantageous. However, Mrs Pemberton did not seek to criticise this underlying set up as part of her claim, rather she criticises Ms Walsh's response, which was to offer Mrs Pemberton one-to-one training at her desk. Although Mrs Pemberton initially agreed to this, she was very concerned about the prospect of "looking stupid" by having a trainer sitting next to her. When this was communicated to Ms Walsh, she told Mrs Pemberton that she would explore options for training to be provided away from her desk or by video. However, before matters progressed Mrs Pemberton commenced a sickness absence on Monday 23rd July 2018 which lasted for seven days. Her GP recommended a phased return and, following some discussion, this was implemented. The training did not, ultimately, take place.

***Line management by Mr Hall***

(45) During that absence Ms Walsh was moved on to a different post and Dave Hall became Mrs Pemberton's line manager. He met with her on 8th August 2018 and his notes appear at 341. With a view to making an occupational health referral, Mr Hall asked Mrs Pemberton to provide details of her symptoms and medication, which she did at 675(14). In this document she outlines problems faced due to her condition but does not say that the adjustments currently in place are inadequate or need to be improved. Mr Hall drafted an occupational health referral and the information he was providing and the specific questions asked appear at 360-362. The referral document is full and carefully-considered and contrasts sharply with Mr Humphreys' RAST referral from April. Question 5 was a specific question about the potential impact of formal administrative action on Mrs Pemberton's health and well-being.

(46) The resulting report is dated 16th August 2018 (364-368). In relation to question 5, the response was "*Any stressful situation is likely to impact on her symptoms and should be introduced with support. Any formal administrative action is a HMRC decision."* This report also raised for the first time the possibility of working from home periodically as a potential reasonable adjustment.

(47) Mrs Pemberton and Mr Hall met on 22nd August 2018 to discuss the report. It appears that this conversation involved a suggestion of reducing Mrs Pemberton's telephony work in favour of post work, although that was not specifically contemplated by the OH report. Mrs Pemberton asserts that DH was dismissive of this, stating "if you can't do telephony, you'll have to find another job". DH also recalled this conversation, although his recollection was somewhat different. He explained that there was a prospect in the medium term of the post work undertaken in the office where Mrs Pemberton worked being diverted to another office elsewhere in the country. He was concerned that staff who only undertook this work would face the stress and uncertainty of a redeployment process in that event and had explained that the Mrs Pemberton during this meeting. We accept Mr Hall's account.

(48) Mr Hall's evidence was that he had approached Joan Richardson, a very senior manager, and asked whether it would be possible to put in place home working arrangements for Mrs Pemberton in view of her disability and been told that home working was not possible in the role that she performed. He did not pursue this further. Subsequently, and following the issuing of a particular type of portable tablet computer across this part of HMRC, a homeworking trial commenced in April 2019 and Mrs Pemberton was invited to be part of this trial before the termination of her employment. Her point before the tribunal is that those subsequent events illustrate that it would have been reasonable for the respondent to put in place homeworking arrangements at an earlier date.

(49) The occupational health report also recommended a work place assessment. Mr Hall felt it was appropriate to wait until the phased return was completed before referring Mrs Pemberton for this.

(50) Following a further three-day absence, Mrs Pemberton was invited to a formal attendance management meeting to take place on 26th September 2018. Mrs Pemberton's union representative contended that the trigger points for this meeting had not been met having regard to Mrs Pemberton's part time hours and the trigger point adjustments already in place for her disability. (Effectively, she had the benefit of an extra three days' grace before trigger points were reached compared to a non-disabled employee). Mrs Pemberton's union rep disagreed that trigger points had been reached and the meeting was adjourned.

(51) Mr Hall received confirmation on the trigger point calculation from HR and reconvened the formal meeting for 9th October. His conclusion at the end of that meeting was that no formal action should be taken. His evidence, which we accept, was that he had not reached that conclusion in advance of the meeting. He wished to discuss the absence with Mrs Pemberton and hear what she had to say. Mrs Pemberton strongly objected to this meeting being held at all. She pointed to the occupational health reports stating that formal administrative action would be stressful and said that she had found it very difficult to cope with. She also pointed to paragraph 56 of HMRC's absence procedure which provided that a manager could "*exceptionally*" decide not to hold a meeting if he or she had already determined no warning would be given. Mr Hall's evidence when questioned was that it would invariably be his practice to hold a meeting. In his view the meeting was for the employee's protection – the decision not to give a warning and the reasoning would be formally documented and this would be useful to the employee e.g. in case of a change of manager. He was of the view that the meeting was procedural and was not itself an "action". The appropriate adjustment might be to decide not to give a warning, as in this case, but would not be to abandon the procedure itself.

(52) Subsequent events around the Mrs Pemberton's grievance, later employment and eventual termination of employment are not relevant to the matters we have to determine.

## Relevant legal principles

### Burden of proof

(53) In respect of each of the elements of the claimant's disability discrimination claim s.136 of the Equality Aact 2010 ("EqA") sets out how the burden of proof is to be applied, codifying the position established in **Igen Ltd v Wong [2005] IRLR 258** and approved by the Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054**:

**(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**

**(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

(54) For the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in race and a difference in treatment. In general terms 'something more' than that would be required before the respondent is required to provide a non-discriminatory explanation. This principle applies equally to discrimination because of any of the protected characteristics.

(55) Further, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36**. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different relevant characteristic would have been treated reasonably. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

**Section 15 – discrimination arising from disability**

(56) Section 15 Equality Act 2010 ("EQA") provides:

**"(1) A person (A) discriminates against a disabled person (B) if—**

**(a) A treats B unfavourably because of something arising in consequence of B's disability, and**

**(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**

**(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

(57) The elements of discrimination arising from disability can be broken down as follows:

a) Unfavourable treatment causing a detriment
b) Because of "something"
c) Which arises in consequence of the claimant's disability

The respondent will have a defence if it can show:

a) The unfavourable treatment is a proportionate means of achieving a legitimate aim – "objective justification"; or
b) It did not know, and could not reasonably have been expected to have known, that the claimant had the disability – the "knowledge defence".

(58) "Unfavourably" is not defined in the EQA. The Code of Practice at paragraph 5.7 states that it means that the disabled person "must have been put at a disadvantage". The Code notes that: "*Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably*."

(59) The Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] ICR 230** considered the issue of whether Mr Williams had been treated unfavourably. Mr Williams made a successful application for ill-health retirement under the terms of the University's pension scheme and was, therefore, entitled to a full final-salary pension without actuarial reduction. The dispute related to the enhanced element of the pension. Mr Williams contended that the reduced figure, resulting from its calculation by reference to his part-time rather than full-time salary, constituted "unfavourable" treatment because of "something arising in consequence of his disabilities", that is, his inability to work full time. The employment tribunal had found in Mr Williams' favour, but the EAT allowed an appeal. The Court of Appeal and Supreme Court found against Mr Williams.

(60) In giving judgment with which the other members of the Court agreed, Lord Carnwath agreed with the reasoning of the Court of Appeal and held that treatment which is advantageous (the granting of the pension) does not become unfavourable because the claimant wished for more advantageous treatment, or because someone else with a different medical history would have received more advantageous treatment.

(61) The nature of the two-step test to be applied in considering a s.15 claim (identifying the "something arising" and separately identifying whether that "something" was the reason for the unfavourable treatment) is explained and discussed in **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305** and **Pnaiser v NHS England and anor [2016] IRLR 170 EAT**.

(62) There may be more than one link in the chain of causation between the "something arising" and the unfavourable treatment. The case of **Sheikholeslami v University of Edinburgh [2018] IRLR 1090**, referred to by Ms Knowles in her written submissions is an example of such a case.

(63) It is no defence if the respondent did not know that the 'something' leading to the unfavourable treatment was a consequence of the disability (**City of York Council v Grosset [2018] ICR 1492**).

(64) The respondent will successfully defend the claim if it can prove that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

(65) This is the same test as for indirect discrimination – whether the respondent can show the treatment was a proportionate means of achieving a legitimate aim.

(66) In many cases, the aim may be agreed to be legitimate but the argument will be about proportionality. This will involve an objective balancing exercise between the reasonable needs of the respondent and the discriminatory effect on the claimant: a test established in the context of indirect discrimination in **Hampson v Department of Education and Science [1989] ICR 179 CA**. In conducting this

balancing exercise, any failure to comply with the duty to make reasonable adjustments will be relevant. Para 5.21 of The Code states "*If 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.*"

(67) Cost alone will not provide a justification for discriminatory treatment: **Woodcock v Cumbria Primary Care Trust [2012] ICR 1126, CA**.

**Section 19 – Indirect discrimination on grounds of disability**

(68) Section 19 EqA states:

**19 Indirect discrimination**

**(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**

**(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**

**(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**

**(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**

**(c) it puts, or would put, B at that disadvantage, and**

**(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

(69) Disability is a relevant protected characteristic, as identified in s.19(3). S.6(3)(b) EqA clarifies that reference to persons who share a protected characteristic means, in the context of disability, persons who have the same disability.

(70) The concept of indirect discrimination generally has a limited role to play in disability cases, as many complaints which might be expressed in this way are more conveniently expressed as s.15 claims.

**Section 20-21 – Failure to make reasonable adjustments**

**Introduction**

(71) The duty to make reasonable adjustments is found primarily in sections 20 and 21 EqA, the key statutory language for the purposes of the present case, being set out in s.20(3):

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

(72) The duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20).

(73) The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT **in Environment Agency v Rowan [2008] ICR 218** and reinforced in **The Royal Bank of Scotland v Ashton [2011] ICR 632.**

(74) As to whether a 'provision, criterion or practice' ('PCP') can be identified, the Commission Code of practice paragraph 6.10 says the phrase is not defined by the Act but 'should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions'.

(75) The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be considered appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

(76) As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being 'more than minor or trivial'.

(77) Chapter 6 of the Code deals with reasonable adjustments, although the provisions about knowledge in paragraphs 5.13-5.19 may also be relevant.

(78) There was controversy for some time as to whether the application of absence management policies which applied equally to disabled and non-disabled employees could give rise to a substantial disadvantage within section 20.

(79) The position was resolved by the decision of the Court of Appeal in **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216**. A requirement for an employee to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions can be a PCP which places a disabled employee at a substantial disadvantage if the disability makes it more likely that the employee will have absence from work. The reasonable adjustments may include disregarding disability related absence and/or altering the trigger points at which action under the policy is taken.

***Harassment***

(80) The definition of harassment appears in section 26 Equality Act 2010 as follows:

> **"(1) A person (A) harasses another (B) if -**
> **(a) A engages in unwanted conduct related to a relevant protected characteristic** [in this case disability]**, and**
> **(b) the conduct has the purpose or effect of**
> **(i) violating B's dignity, or**
> **(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(2) A also harasses B if –**
> **(a) A engages in unwanted conduct of a sexual nature, and**
> **(b) the conduct has the purpose of effect referred to in subsection (1)(b)**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**

(81) The leading case on harassment, which was identified in Ms Knowles' submissions is **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**. In particular, the tribunal's attention was drawn to the valuable guidance set out in paragraphs 13-16 of that decision.

## Discussion and Conclusions

(82) The tribunal structured its discussion around the List of Issues (62A-F) although we dealt with the issues in chronological order, which represented, in some cases, a departure from the ordering which they were presented in the list of issues.

### *Section 15 - discrimination because of something arising in consequence of disability*

(83) In respect of each alleged act of discrimination in this category, the list of issues raised four questions (following the ***Rowan*** case):

1. Did the respondent treat the claimant as described?
2. Did that amount to unfavourable treatment?
3. Was the reason for the unfavourable treatment something arising in consequence of the claimant's disability?
4. Had the respondent shown the treatment was a proportionate means of achieving a legitimate aim?

### *The unscheduled meetings – Issue 1.d.*

(84) Mrs Pemberton alleged that HMRC had discriminated against her by requiring her to attend unscheduled meetings in October 2017 and April 2018. As set out in the findings of fact, we found that Mrs Pemberton had been required to attend meetings and that those meetings (save for one on 3rd October) had been

unscheduled, so the treatment alleged in the list of issues had been made out. In all the circumstances, we had some difficulty in viewing the requirement to attend meetings as being unfavourable treatment. In any event, however, we found that this allegation failed on points 3 and 4. Neither the reason for having the meetings, nor the timings of the meetings, were the result of something arising from Mrs Pemberton disability. If we were wrong in relation to that, we accepted the respondent's aims of monitoring performance of employees and communicating with them about that performance, and ensuring appropriate behavior in the workplace, were legitimate and that the meetings were a proportionate means of pursuing that legitimate aim.

***The RAST referral – Issue 1.b.***

(85) As will be clear from our findings of fact, we accept that that treatment complained of occurred. We also accept that it was unfavourable both because it may have negatively influenced the view of Mrs Pemberton held by the person receiving the referral, and also because it was hurtful and unpleasant for Mrs Pemberton to read those comments, in the context of the referral documentation as a whole, when she received the documentation in January 2019.

(86) Mr Humphrey's comments in the referral, supplemented by the use of the word 'lively' in the follow-up phone call demeaned the severity of Mrr Pemberton's symptoms and condition. The reason for these comments was Mrs Pemberton's behavior as observed by Mr Humphreys and we are content that that behavior was "something arising" from her disability. Mr Humphreys himself makes the link in the referral between "flare ups" and "behavioural concerns" (298) and the word "lively" is used specifically in the context of "flare ups" in the record of his telephone conversation.

(87) Turning to the fourth question, justification, HMRC sought to rely on a legitimate aim of communicating relevant information to RAST. It is accepted that that could be a legitimate aim, but not that the comments represent a proportionate means of achieving that aim, particularly when taken in the context of the dearth of other information in GH's referral. It was neither necessary nor proportionate to refer to Mrs Pemberton's behavior in those terms, nor to make her behavior the almost exclusive subject of that referral without attempting to identify (as the referral template requested) the barriers and issues she was facing.

(88) In terms of s136 EqA, we find that Mrs Pemberton has proven facts from which we could decide that a contravention of the Act has occurred, and that, the burden of proof having shifted to the respondent, it has not shown that it did not discriminate against Mrs Pemberton in the way described. For these reasons, and subject to the limitation points addressed below, we find that this aspect of the claim succeeds.

***The 'grievance' – Issue 1.e.***

(89) This fails at point 1. For the reasons set out in our findings of fact, we do not find that there was any grievance lodged and therefore there was no failure by Ms Kane to progress it.

***The occupational health complaint – Issue 1.f.***

(90) Again, this fails at point 1. We do not find that there was a 'refusal' by Ms Walsh to seek an occupational health report. Ms Walsh discussed the situation with Mrs Pemberton and it was left to Mrs Pemberton to confirm if she wanted to proceed with the referral which she did not do. For completeness, even if Ms Walsh's actions are to be interpreted as a 'refusal' we do not believe, on the basis of the findings of fact set out above, that that treatment was unfavourable in the circumstances, nor that the reason for the treatment was something arising from Mrs Pemberton's disability.

***The training complaint – Issue 1.c.***

(91) The fifth allegation is "setting up one to one telephony training (by Ms Walsh) in July 2018". The respondent accepts that Ms Walsh did set up this training (albeit it did not ultimately take place). However, the respondent denies that this was unfavourable treatment – the offer of training was made in response to Mrs Pemberton's identification of a training need and was modified when she set out her objections. We agree with the respondent that this was not unfavourable treatment.

(92) If we are wrong, we find that this treatment was a proportionate means of achieving a legitimate aim, namely, ensuring provision of training to employees, ensuring operational effectiveness and efficiency and ensuring HMRC's ability to meet customer demands.

***Holding a formal sickness meeting – Issue 1.a.***

(93) There is no dispute that this treatment occurred. The respondent contends that the holding of the meeting did not amount to unfavourable treatment as it did not necessarily mean that a warning would be applied (as, indeed, it was not in this case). Further, Mrs Pemberton had already had the benefit of an increase in trigger days and the meeting allowed employees to discuss problems and access support.

(94) The tribunal considers that requiring an employee to attend a formal meeting such as this *may* be unfavourable treatment even where no formal action arises from the meeting. However, balancing all the circumstances of this case, we do not consider that *this* meeting constituted unfavourable treatment.

(95) It was the first occasion such a meeting was scheduled since 2016 and followed Mrs Pemberton's first substantial absence since 2016. Further, she was now being managed by Mr Hall who had not dealt with her previous absence. The fact that her lengthy 2016 absence had not resulted in dismissal under the respondent's processes should have been a reassurance to her that the use of the process did not inevitably mean any formal consequence would result, particularly in view of her disability.

(96) If we are wrong, and this meeting is properly regarded as unfavourable treatment, then the reason for the meeting was Mrs Pemberton's sickness absence, which we accept arises from her disability. However, we find that the meeting was objectively justified. It represented a proportionate means of achieving the legitimate aim of monitoring and managing attendance.

**Indirect discrimination**

***Telephony training***

(97) This is the only complaint pursued as an allegation of indirect discrimination. The tribunal must identify whether the respondent has applied a provision, criterion or practice ("PCP") and the PCP relied upon is "a requirement to attend one to one training". The PCP being complained of must be one which the respondent applies, or would apply, equally to persons with and without the disability relied upon.

(98) The respondent's case is that it did not apply the PCP. Mrs Pemberton was not required to undertake the one to one training, she was merely offered it as a potential adjustment. Furthermore, the PCP contended for was not applied equally to other people, it was offered specifically to her to address her circumstances.

(99) The tribunal accepts this argument and further accepts the related arguments that, in the circumstances of the case, the PCP (if it was one) did not put Mrs Pemberton at a disadvantage and was, if necessary, objectively justified. There are therefore no fact shown from which the tribunal could conclude that an act of indirect discrimination had taken place.

**Failure to make reasonable adjustments**

(100) In respect of each allegation of failure to make reasonable adjustments the list of issues asks:

1. Did the respondent apply the alleged PCP, and was it a PCP within the meaning of s20 Equality Act 2010?
2. Did the PCP place the claimant at a substantial disadvantage as alleged?
3. Did the respondent know, or ought it reasonably to have known, that the claimant was placed at that substantial disadvantage?
4. Did the respondent take such steps as it was reasonable for it to have taken to avoid that disadvantage?

***The PCP relating to targets – Issue 10.a, 11.a., 12, 13.a***

(101) The first allegation relates to a PCP of "determining the KPI for Quality, Quantity and Advisor utilization at the start of the assessment year and applying the same performance criteria to the claimant as to non-disabled colleagues between March 2017 and May 2018." We find that this was a PCP within the legislation.

(102) We find that the application of performance targets was not placing Mrs Pemberton at a disadvantage during January 2017 when she wrote her email to Sue Cummings 234 regarding overtime (234). Based on My Humphrey's notes about her "dip" in performance and the figures set out at page 675(24) we find that these targets were potentially placing her at a disadvantage, in that she was falling below them in the months September, November and December 2017. We find that the September figures could have been a 'blip' and therefore not concerning to Mrs Pemberton or the respondent, but that by the end of November 2017 it was evident that her health may be impacting on her ability to meet the targets. It appears that Mrs Pemberton's performance recovered after December 2018, although we were no taken to specific figures on this. Nonetheless, we consider that after that initial period she continued to struggle with her health and that the knowledge that she may slip below a target was itself an on-going disadvantage.

We find that this disadvantage was limited – it did not, for example, trigger the application of a performance management process. Nonetheless, it did cause concern to Mrs Pemberton and, to her, it was not minor or trivial.

(103) For similar reasons, we find that Mr Humphreys either knew or ought to have known that Mrs Pemberton was underperforming against performance targets from November 2017. However, we do not accept that he knew, or reasonable ought to have known, that this was a substantial disadvantage to her as he was not aware of the extent of her concerns about this, despite her having opportunities to raise them. Matters might have taken a different course if the claimant had been able to express more directly to Mr Humphreys the anxiety she was experiencing in relation to targets. Unfortunately, she did not do so, and instead indicated that the occupational health referral in autumn 2017 should not go ahead before repeatedly accepting that the adjustments made by Mr Humphreys were meeting her needs.

(104) Even if My Humphreys was (or ought to have been) aware of the disadvantage, we find that the respondent did take such steps as were reasonable to avoid the disadvantage. We appreciate that Mrs Pemberton, with the benefit of hindsight, may advocate different steps, but, objectively we find that reasonable steps were taken. Mr Humphreys did maintain appropriate contact with Mrs Pemberton and did ensure that the "dip" in her health that he had perceived did not negatively affect her end of year rating. This was a different approach to Ms Walsh, who made a 15% adjustment to target figures as discussed above, but both were valid ways of addressing the concern.

(105) Mrs Pemberton contends that appropriate adjustment would have been to allow additional breaks (see 13.a. list of issues). However, we have rejected the claimant's case that she was only permitted additional breaks from October 2018 and, in any event, we accept the respondent's evidence that these breaks would not have impacted on her KPI and CHT figures. In respect of utilisation, there was no disadvantage to Mrs Pemberton as this figure did not play a role in determining her end of year grading.

***The PCP relating to centralised work steer – Issue 10.b., 11.b., 12, 13.b.***

(106) The second allegation under this heading contends for a PCP of "adopting a centralised work steer determined by span which necessitated working between post and telephony according to demand". Broadly, this relates to whether Mrs Pemberton was asked to work on telephony work or post work at any given point. However, she put forward very little evidence in relation to this, either as to the actual working practices or how they ought to have been adjusted. We did hear that she wished to continue working on both post and telephony and enjoyed both aspects of the work. She told us that adjustments which were in place for other employees, of not doing telephony or of doing restricted amounts of telephony, would not have been appropriate for her. We therefore find that she has failed to establish a PCP and/or to establish that it placed her at any substantial disadvantage.

***The home-working question – Issue 10.c, 11.c, 12, 13.c***

(107) The third allegation under this heading relies on a PCP that HMRC required Mrs Pemberton to undertake all work on site. As noted above, HMRC's evidence

was that homeworking was simply not available for those working in Mrs Pemberton's role, regardless of any disability. We accept, therefore, that the PCP applied.

(108) It is less clear-cut that this placed the claimant at a disadvantage. Mrs Pemberton never raised the matter herself and issues around transport or the accessibility of the workplace did not really feature in the case. The occupational health report of 16th August 2018 recommended "giving consideration" to the possibility of working from home "periodically" which would be supportive of Mrs Pemberton's ability to manage her symptoms. There is a sense that this is part of a collection of common helpful recommendations rather than one which is specifically or urgently recommended in the claimant's case. We heard no evidence that she would be well enough to work from home on days when she is not well enough to work in the office, or that it is significantly more difficult for her to work in the office than at home.

(109) We therefore find that there are no facts from which we could conclude that this PCP caused substantial disadvantage to Mrs Pemberton. We find that when the suggestion of working from home was raised by occupational health it was understandably appealing to Mrs Pemberton, but that is not the same as showing a substantial disadvantage.

(110) The Tribunal do note that if we had found such disadvantage then we did not consider Mr Hall's evidence – which amounted to no more than senior management saying homeworking would be feasible to be compelling. In the absence of any specific evidence from the respondent as to the difficulties with providing IT equipment to Mrs Pemberton in advance of the wider roll-out, we accept that it would have taken a few weeks before the respondent would have been able to realistically set up home-working but would have found a failure to make reasonable adjustments from mid-October 2019 onwards.

***The PCP of applying non-personalised targets – Issues 10.d., 11.d., 12., 13.d.***

(111) The fourth allegation under this heading relates to an alleged PCP of "(until July 2018) applying non personalised targets to the claimant." We find that this is really an alternative framing of the first PCP – the same performance criteria were applied to the claimant as other employees until 15% adjustments were made by Ms Walsh in May 2018 (recorded on the passport in July 2019). For the reasons set out in relation to the first PCP, we find that there was no breach of the duty to make reasonable adjustments.

***The use of the formal absence management process – Issues 10.e., 11.e., 12., 13.e. and Issues 10.g., 11.g., 12, 13.g.***

(112) The fifth allegation relates to an alleged PCP of "taking formal action when absence reached trigger points". (We accept that by "formal action" Mrs Pemberton refers to the holding a formal meeting under the policy and not to the application of a warning.) The seventh alleged PCP is "applying a formal absence policy from July 2018 onward" and we consider that these amount essentially to the same complaint.

(113) We accept that Mr Hall's practice of invariably holding such a meeting could amount to a PCP (and note **Griffiths** in this respect) and we find that there was

such a PCP and that it was applied to Mrs Pemberton. We further accept that this practice placed Mrs Pemberton at a substantial disadvantage, both because her disability-related absence meant she was more likely to be invited to such a meeting, and also because of the stress and anxiety it caused her. However, we do not find that the adjustments contended for – of further amending the applicable trigger points or using discretion to decline to hold a formal absence management meeting would be reasonable. Our conclusion is based on the respondent's legitimate need to review and monitor absence, and the fact that it could (and did) decline to issue any warning, even when absence trigger points had been met. Nor do we consider it would have been a reasonable adjustment for Mr Hall simply to decide not to have the meeting as we accepted his evidence that he had not decided prior to the meeting whether or not a warning would be appropriate and his evidence as to the good reasons for going ahead with the meeting in any event.

***Labelling of sickness absence – Issue 10.f., 11.f., 12, 13.f.***

(114) The sixth PCP contended for is "treating hospital treatment and recuperation for new medication as sickness absence". HMRC disputes that it applies a PCP as contended for, pointing out that its Attendance Management Policy permits employees to take time for hospital appointments and hospital treatment as disability absence leave ("DAL") which Mrs Pemberton took on occasions. The tribunal accepts this. We do find (and it was not disputed) that recuperation periods for new medication would be treated as sickness absence rather than DAL. It is not clear to the tribunal that this adds anything to the PCP of "applying a formal absence policy" as outlined above. To the extent that it does, we find that it would not be practicable, and therefore would not be reasonable, to make specific adjustments to the policy to reflect recuperation from hospital treatment as opposed to other types of sickness absence. On the facts of this case, the respondent operated a policy which included enough discretion and flexibility to appropriately recognise and respond to disability-related absence without this additional adjustment.

**Harassment**

(115) The only act of harassment contended for by Mrs Pemberton is that Mr Humphrey referred to her as "lively" during flare-ups in the RAST referral of April 2018. As stated above, this allegation was disputed but we have found that the comment was made in the terms recording in the RAST note and that it related to her protected characteristic i.e. her disability.

(116) Turning to the test for harassment, we do not believe that the conduct had the *purpose* of violating Mrs Pemberton dignity and/or creating an intimidating, hostile, degrading or offensive environment for her. We believe it was a throw-away remark which was not malicious or ill-intentioned.

(117) We then turn to the question of whether it had the *effect* of violating Mrs Pemberton's dignity or creating such an environment having regard to the claimant's perception, the circumstances of the case and reasonableness. We do conclude that it had that effect. Mrs Pemberton gave compelling evidence that she was mortified when she received the documents as part of her subject access request and saw that description, in writing, given to a team whose purpose was to assist her as a disabled employee. We consider the language is reasonably

viewed as demeaning and belittling of her and her condition, particularly (as noted above) given the sparseness of the referral and the fact that there is no wider context of carefully setting out the claimant's symptoms and difficulties.

(118) On that basis, Mrs Pemberton's claim of harassment succeeds, subject to the time limit point set out below.

## Time Limits

(119) Subject to the respondent's limitation argument, Mrs Pemberton has succeeded in her claim only in respect of one allegation of discrimination arising from disability (s15) and one allegation of unlawful harassment on grounds of disability. Both of these arise from Mr Humphreys' referral to RAST in April 2018.

(120) In submissions, the matter was discussed on the basis that, Mrs Pemberton is out of time in bringing a claim in respect of those matters. Having regard to s123 EqA and the dates of early conciliation, any act which took place before 19th September 2018 is out of time.

(121) On reflection, it may be arguable that the act of harassment did not crystalise until the claimant was made aware of the content of the written referral and telephone call in January 2019, giving rise to the 'effect' required (absent any finding of 'purpose') to satisfy s.26(1)(b). If this was the case, then the harassment claim would be in time without any need to consider an extension. Without having heard argument on the matter, this decision proceeds on the basis that the claim is out of time if no extension is granted.

(122) Turning to that question of extension, Mrs Pemberton confirmed in her evidence that she did not know until she received the documents in January 2019 what the terms of the referral made by Mr Humphreys had been. On the basis of that evidence, was find that the claimant was unaware that she had a claim in relation to this matter until after the date for presenting that claim in a timely manner had passed. The respondent fairly accepted that this was a highly material factor to take into account in relation to the discretion to extend time. In the circumstances, considers that it is just and equitable to extend time for the presentation of the claim in respect of the RAST referral.

## Summary and Remedy

(123) The claimant's claim of discrimination arising from disability succeeds in respect of the treatment set out at paragraph 1.b. of the list of issues only. The claimant's claim of disability-related harassment succeeds. The remainder of the claimant's claims fail and are dismissed.

(124) As discussed with the parties at the conclusion of the hearing the matter was listed (on a provisional basis at that point) for a one-day remedy hearing on 16th January 2020.

(125) As already directed verbally, the claimant should serve on the respondent a short witness statement in respect of her injury to feelings sustained as a result of the discrimination found by the tribunal by 6th January 2020 and shall bring five copies of that statement to the tribunal. At the same time, each party shall serve

on the other any additional evidence (including medical evidence) which is relevant for the purposes of the remedy hearing.

(126) The respondent is directed to liaise with the claimant to prepare and agree a remedy bundle (if required) and to bring five additional copies of that bundle to the hearing for the use of the tribunal.

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**Employment Judge Dunlop**

Date: 20.11.2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

6 January 2020

FOR EMPLOYMENT TRIBUNALS