EMPLOYMENT TRIBUNALS

Claimant: **Mr D Russell**

Respondent: **RLK Solicitors Limited**

Heard at: **Birmingham**

On: **4, 5 & 6 December 2019**

Before: **Employment Judge Flood**

Mrs Ray

Mr Kennedy

Representation

Claimant: Mr Islam-Choudhury (Counsel)

Respondent: Miss White (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's complaint of direct disability discrimination is dismissed upon withdrawal.

2. The respondent dismissed the claimant on 16 October 2017 because of two matters arising in consequence of his disability: namely (a) the claimant's sickness absence (from 16 September 2017 and informing the respondent on 11 October 2017 that he would be absent for a further 6 weeks); and (b) the claimant's underperformance/errors at work. The claimant's complaint of discrimination arising from disability (section 15 Equality Act 2010 ("EqA")) is well founded and succeeds.

3. The respondent failed to comply with a duty to make reasonable adjustments (section 20 & 21 EqA) from 11 November 2017 onwards by not allowing the claimant to appeal against his dismissal.

REASONS

The Complaints and preliminary matters

1. The claimant was employed by the respondent, from 10 July 2017 until 20 October 2017. By a claim form presented on 12 February 2018 following an unsuccessful period of early conciliation from 30 November 2017 until 13 January 2018 he brought complaints of direct disability discrimination, disability related discrimination and a failure to make reasonable adjustments.

2. The claimant confirmed that his complaint of direct disability discrimination was no longer pursued so this was dismissed upon withdrawal.

3. There was an agreed list of issues, which was amended during the proceedings as the issues narrowed and which we referred to throughout the hearing, which is shown below.

4. At the outset of the hearing, Mr Islam-Choudhury made an application for specific disclosure in respect of two items – the relevant extract from the daily note book of Mr Satish Jakhu ("SJ"), a solicitor and the Managing Partner of the respondent, for 13 September 2017 and the metadata information (or something showing when the document was first created) for the attendance note made by SJ of the meetings held on this day (note shown at page 124 of the agreed bundle of documents ("Bundle")). Mr Islam-Choudhury contended that this meeting was important as the claimant and the respondent had a different account of what was discussed, and the contents of the attendance note were in dispute. Therefore, contemporaneous notes by SJ of what was discussed were highly relevant, as was the date when the typed attendance note was created. Miss White objected to the lateness of the application. She accepted that the daily notebook could be relevant and would take steps to see if this could be disclosed. She said that the metadata was not so relevant or necessary as it was not disputed by SJ that the typed attendance note was produced some time after 13 September 2017 when the meeting was held.

5. We made the Order as requested. The respondent produced the daily notebook extract on the afternoon of the first day of the hearing (together with handwritten notes of the meeting made by Jane Jones ("JJ"), one of the Practice Managers at the respondent, and some relevant e mails. These documents were added at pages 276 to 279. The metadata document was produced later and added at page 280.

The Issues

6. **Discrimination arising from disability**

   6.1. Did the following thing(s) arise in consequence of the claimant's disability:

      a. the claimant's absence;

b. the claimant's alleged underperformance;

c. the claimant's alleged errors in his work;

d. the need for regular toilet breaks?

6.2. Did the respondent treat the claimant unfavourably by:

a. dismissing him;

b. failing to allow an appeal;

because of any of the things at 6.1 a-d above?

6.3. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability at the date of the alleged unfavourable treatment?

7. **Duty to make reasonable adjustments**

7.1. Did the respondent not know, and could not reasonably have been expected to know that the claimant had the disability at the date when the duty to make adjustments is said to arise?

7.2. Did the respondent apply a provision, criteria or practice ("PCP") which placed the claimant at a substantial disadvantage in comparison with persons who are not disabled? - did the respondent have the following PCPS:

a. not allowing an appeal against termination under the probationary period;

b. the requirement to carry out full time duties of a paralegal and/or regular attendance at work;

c. requirement to meet a level of competence/standard of performance to pass the probationary period?

7.3. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that the claimant suffered a substantial disadvantage by reason of:

a. the impact on the claimant's cognitive functioning, concentration levels and performance levels and/or his attendance levels. C was made to demonstrate full potential and/or was prone to greater risk of errors or mistakes being made;

b. his inability to attend work regularly, sleep deprivation, fatigue, malnutrition and anaemia affecting his concentration, cognitive functioning and ability to perform at an optimum level in addition to the need for very frequent visits to the toilet.

7.4. If so, did the respondent know or could it reasonably have been expected

to know the claimant was likely to be placed at any such disadvantage?

7.5. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

a. not to dismiss the claimant;

b. to allow an appeal during the probationary period;

c. to reinstate the claimant;

d. to extend the probationary period to enable the claimant time to demonstrate ability;

e. allow a phased return to work.

7.6. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Findings of Fact

8. The claimant attended to give evidence and the claimant's mother, Mrs Anne Russell ("AR"), also gave evidence on behalf of the claimant. Mr Ian Shepherd ("IS"), Mr Christopher Gupta ("CG") (both solicitors employed by the respondent) and SJ gave evidence on behalf of the respondent. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to us in the Bundle.

9. We have made findings not only on allegations made as specific discrimination complaints but on other relevant matters raised as background as there may have been relevance to drawing inferences and conclusions.

10. The Tribunal resolved conflicts of evidence as arose on the balance of probabilities and assessed the credibility of the witnesses and the consistency of their evidence with surrounding facts.

11. We made the following findings of fact:

11.1. The claimant was employed by the respondent from 15 July 2017 until 16 October 2017. The respondent is as a small firm of solicitors based in Birmingham. Its areas of practice specialism are commercial litigation, private client and conveyancing. At the time of the claimant's employment, the respondent employed six solicitors, two paralegals, two part time practice managers (one of which was JJ and the other was Emma Price ("EP") who was also SJ's wife) and three support staff. The

commercial litigation department had three fee earners IS, CG SJ at the time the claimant joined.

11.2. The claimant joined shortly after SJ that decided the commercial litigation department needed more support and decided to recruit two trainee solicitors. In previous years the respondent had recruited paralegals who had already completed their legal practice course with the aim of progressing their role from paralegal to trainee solicitor. The respondent found this method useful, as the paralegals could be assessed whilst working to see whether they reached the standard required during their probationary period, before being offered a training contract. Not all paralegals recruited had gone on to be awarded training contracts after the probationary period. Some stayed on as paralegals and some left the respondent because no training contract had been awarded. There was no automatic progression from the role of paralegal to trainee solicitor. Out of 10 paralegals recruited since the respondent started training, 5 had been taken on as a trainee solicitor. CG joined the respondent initially as a paralegal in July 2012 and was subsequently taken on as a trainee solicitor and qualified as a solicitor within the firm.

11.3. The respondent advertised for the role the claimant applied for (page 99) describing it as "*a paralegal position*" stating in the advertisement "*this is a great opportunity which could lead to an offer of a training contract for the right candidate*". The claimant's application for the role is at page 193. He was invited for interview with JJ and SJ which took place on 8 May 2017 and took 2 tests as part of the recruitment process on 12 May 2017. We were referred to pages 200 to 201 which was the test completed by the claimant and we noted that this had been annotated at page 205 with the words "*Missed out points of law & therefore poor understanding of the law*". He scored well in his IQ test receiving 24/30 (pages 195-199). The respondent had also received a personal recommendation of the claimant before he applied from Mrs M Kapur (one of SJ's ex-colleagues who was a part-time lecturer at the University of Law where the claimant had studied) (page 99b). SJ had reservations about employing the claimant because of his test results but he put these aside due to the claimant's performance in the recruitment process and the personal recommendation from Mrs Kapur.

11.4. On 23 May 2017 the claimant was offered the position of paralegal by e mail (page 104). He received an offer later dated 24 May 2017 (page 60) followed by another letter dated 9 June 2017 (page 61) at containing a copy of a contract of employment; letter regarding compliance obligations; disciplinary and grievance procedure and confidentiality agreement to return and sign. The contract of employment is shown at pages 65-71. The claimant was employed as a "Paralegal" (clause 1.1, page 65). Clause 12 set out the provisions on Notice as follows:

"*12.2 Your employment shall be subject to a probationary period of three calendar months, during or at the end of which your employment shall be terminable by the Employer subject to one week's notice in writing."*

11.5. The disciplinary and grievance procedure that applied to the claimant's employment was at pages 83-90. This contains the following relevant provisions:

1. *However, in the event of an employee failing to fulfil firm policies, standards of performance or rules of conduct, the following principles and procedures will be adopted by the firm.*

2. *These principles and procedures are designed to clarify the rights and responsibility of management and all employees in respect of disciplinary action. The aim is to combine consistency in the overall procedure with justice for the individual. The procedure applies to all employees and will normally be followed where a breach of discipline occurs but the procedure is not contractually binding upon the firm and is for guidance only.*

and

6. Before a decision is made, the individual employee will be interviewed and given the opportunity to state his case to the appropriate supervisor.

and

7. Should the employee feel that he has been unfairly disciplined, he has the right to appeal to the Principal. Appeals must be submitted within 7 days of the decision being notified to the employee. Such appeals must be in writing and state the grounds on which the appeal is made.

and

Stage 4 – Dismissal

If conduct or performance is still unsatisfactory and the employee still fails to reach the prescribed standards, dismissal will normally result. The employee will be provided with written reasons for dismissal, the date on which employment will terminate and the right of appeal.

11.6. The claimant understood he had been employed as a paralegal and that there was no guarantee that he would be given a training contract, although the role was offered with a view to him being awarded a training contract if he did well as a paralegal. He started work at the respondent's Birmingham office on 10 July 2017 in the commercial

litigation department assisting SJ, IS and SG. His duties included legal research, preparation of reports telephoning clients, preparing costings, attending court, drafting letters and emails and procuring non-legal services such as debt collection agents to assist clients. He also worked on billing and archiving. The office the commercial litigation team worked in was a small open plan area and the 3 solicitors and the claimant worked in close proximity. They generally communicated verbally and did not, as a rule, send e mails to each other about work matters, as they could easily discuss things in person.

The claimant's first sickness absence

11.7. On or around 24 July 2017 claimant began to suffer from severe stomach pain. He had been diagnosed with irritable bowel syndrome in November 2016 when he suffered similar symptoms including abdominal pain and bloating bloody diarrhoea and the need to visit the bathroom every 30 minutes or so. The claimant initially tried to cope with his condition whilst remaining at work. His condition did not improve and on 3 August 2017 he had his first day of sickness absence. He sent a text to JJ at 07.15 informing her he was unwell and would not be at work (page 111). SG was informed of the claimant's absence at this time although he was on annual leave.

11.8. The claimant attended his GP and was diagnosed with viral gastroenteritis and prescribed a course of antibiotics. He remained off sick and communicated with EP on 9 and 10 August 2017 by text (pages 112 and 113) updating her of his condition and when he might be back to work and apologising for any inconvenience caused. The claimant returned to work on 14 August 2017 and submitted a GP fitness to work note to cover the period after his self-certification (page 266). The claimant still did not feel well but was anxious not to miss any more work and so returned. He gave convincing evidence about how difficult it was for him to do his job from the time he returned to work on 14 August 2017 onwards. As he had assumed it was a flare up of his IBS and that he had gastroenteritis, he expected that he would soon recover and start to feel better. He became increasingly concerned when his condition did not then improve. He described having crippling abdominal pain as his stomach muscles contracted. He was constantly tired as he was not sleeping well and as he was at the time suffering from a deficiency in iron levels he was fatigued whilst at work. He described being uncomfortable and embarrassed about his constant need to visit the bathroom. He said it was difficult for him to concentrate on his work for any sustained period. He was concerned about taking at time off work so attempted to manage his condition with over the counter diarrhoea medication from the pharmacist rather than visiting the GP again. He mentioned that it was a very stressful time as his was in pain all the time but knew that he had to

try and impress the respondent if he wanted to be awarded a training contract. He mentioned to IS that he was feeling unwell but never said to any of the solicitors that his illness was affecting his work. We were satisfied that the claimant was suffering greatly from the symptoms of his condition at this time.

<u>Issues with the claimant's performance</u>

11.9. The respondent's witnesses gave evidence that they all noticed that there were issues with the claimant's performance from shortly after he started to work at the respondent.

<u>IS comments on the claimant's performance</u>

11.10. IS said that the claimant came across as confident but said his "*confidence was misplaced and he was not as good as he appeared to think he was*". IS said the claimant was "*dismissive of any mistakes*" that it was "*challenging to work with him and assist him*" and that "*his work was nothing more than average*".

11.11. We were shown an e mail that IS sent to SJ on 14 May 2018 at page 139 which set out the concerns IS said he had with the claimant. We note that this is some time after the claimant had been dismissed and indeed after the claimant has issued proceedings in February 2018. We think it is likely that this e mail was produced following a request by JJ to summarise issues with the claimant's work for the purposes of preparing for the claimant's Employment Tribunal claim. IS never said to the claimant that he had these concerns or mentioned any of these issues with performance directly to the claimant whilst he was employed.

11.12. In this email IS made general comments about the concerns he had with the claimant's performance which are like those referred to at paragraph 11.10 above. IS mentioned two specific matters where he said he had concerns with the claimant's performance; a letter to a client, Mr Lane and the MMBS matter. On the Lane matter IS said he asked the claimant to draft a letter and referred to the draft the claimant produced was at page 143-144 which is dated 13 September 2017. IS said that this was "*unclear, incomplete and would not have provided helpful or sufficient advice to the client*" and that IS had to "*substantively amend*" the letter before it was sent to the client. The version subsequently produced by IS was at page 144a-144c (dated 15 September 2017). IS did not say to the claimant that his draft was poor or given any specific feedback on the letter. IS said he was unaware that the claimant was ill at the time of him producing this letter but felt that this had no impact on the quality of the claimant's work generally. On the MMBS matter he said that when the claimant oversaw the file when IS was on leave that little progress was made. He acknowledged that this was not necessarily the

claimant's fault but "*could have used his initiative and progressed matters further*".

11.13. IS stated that there were other examples of poor performance that he could have mentioned but did not but was not able to recall any further specifics. He also said that he met on more than one occasion with SJ to discuss the claimant's performance but could not remember when these meetings took place and did not take any notes of any such meetings. Our view of the evidence of IS was that he could not recall many specific concerns with the claimant other than a general feeling that the claimant was arrogant and was producing average work at best. It did not appear to us that IS had any issue with the claimant's work until at least 13 September 2017. We did not find his evidence to be particularly instructive to the issues we had to determine.

CG comments on the claimant's performance

11.14. CG said his main concern was the length of time it took for the claimant to complete tasks. His recollection of the detail of matters he had worked on with the claimant was also not good. He referred to 2 specific matters which were discussed during the hearing. Firstly the Evoco matter. CG asked the claimant to compile a costs accounting form for the legal expenses insurers of several of the respondent's clients setting out what professional costs had been incurred. CG recalls this as one of the first tasks that he gave the claimant shortly after he began working. He acknowledged that this was a large task at involving 30 at lever arch files and with documents contained in different file around the respondent's office. CG said he felt inadequate progress of their being made and told us he spoke to the claimant "*on various occasions*" saying that there was an urgency to the task as the respondent client was waiting to recover its costs which he could not do until the form was submitted. CG said that when another paralegal took over the task after the claimant had left employment, she was able to carry out the task in an appreciably more efficient manner, taking her just 3 weeks. CG admitted that a specific deadline had not been provided to the claimant as to when he should finish the work. CG did not give the claimant any negative feedback about the length of time the work was taking other than asking for updates from him. We accept that CG was under pressure to get this work completed but he did not communicate any particular urgency to the claimant.

11.15. Secondly CG mentioned the Addleshaw Goddard matter. The claimant was asked by CG on 4 September 2017 to collate copies of correspondence between the respondent and another party in respect of ongoing proceedings. CG said he told the claimant he needed this done urgently. We were referred to an email from CG to the costs draftsmen (which copied in the claimant) at 15.25 on 4 September 2017 saying that

the claimant would carry out the task (page 122-123). CG was sent a chasing e mail by the costs draftsmen on 6 September 2017 (which did not copy in the claimant) asking when the task would be completed (page 122). CG forwarded the chasing e mail to the claimant with the remark "*Can we speed this up please*". CG said it was unusual for him to send such an e mail and this indicated that he was irritated that the work had not been done. It appears that the claimant did the task after this e mail and there was no follow up or further issues with this matter. We do not find that the claimant would have concluded from this that this indicated a problem with his performance generally.

11.16. CG did not know that the claimant was feeling unwell during this period and the claimant did not inform him of this. However, he accepted that in hindsight and with knowledge of the medical situation, that the claimant's health could have been affecting his performance.

SJ comments on the claimant's performance

11.17. SJ gave evidence that the claimant's performance was not up to the appropriate standard during his employment and therefore he did not successfully pass his probation period. In August SJ gave the claimant a piece of work which was to draft some instructions to counsel. This took place in the week commencing 13 August 2017 when the claimant returned from his first period of sickness absence, as this was the only week the claimant and SJ were in the office at the same time during August. He met with the claimant in advance to give him direction and guidance and asked the claimant to read the file. He also pointed the claimant to previous instructions to counsel that were on the respondent's system that he could look at to familiarise himself with the format and terminology. The claimant produced a first draft which was shown at page 206-210. SJ reviewed the draft and noticed that it had several name errors, semantic and grammatical errors and incorrect legal jargon. He marked up the document and gave some feedback to the claimant on the legal substance and matters of fact but did not mark up every point and told the claimant to produce a further draft considering his feedback.

11.18. The claimant produced a second draft (pages 211 to 215) and SJ reviewed this when he came back from holiday on 4 September 2017. There were still errors and SJ was not impressed. He did not discuss this second draft with the claimant or provide him with any feedback.

11.19. SJ was not aware that the claimant was feeling unwell at this time and the claimant never informed him that his illness was affecting his performance. SJ said that in hindsight, although he was not medically qualified, "*it was a fair assumption to make*" to say that the claimant's performance was affected by his sickness.

11.20. We find that at this point SJ became concerned about the overall quality of the claimant's work and whether he would be suitable to be taken on as a trainee solicitor. He contacted JJ and we were shown an e mail sent by JJ to SJ on 6 September 2017 (page 278) where she informs SJ that

"9 October would be the end of his 3 month probationary period.

"There is no time limit specified in his contract on when (or if) we offer a training contract just our usual 3 month probationary period"

SJ replied on 7 September 2017 (page 279) informing JJ that they would discuss at the forthcoming COLP meeting (which was scheduled for 13 December 2017.

<u>Meetings on 13 September 2017</u>

11.21. SJ spoke to both IS and CG on 13 September 2017 and asked them whether they had any concerns regarding the claimant's work. All 3 agreed that there were concerns about the claimant's work relating to a lack of precision and clarity; no urgency; that he could not reach satisfactory solution and forgot about deadlines. SJ also attended the firms COLP meeting that day. We saw the redacted minutes of that meeting at page 126. The following item was noted:

"6. Daniel

Three month review on 9 October. SJ to speak to him as his work isn't up to standard and to encourage him to improve. May not continue his employment after three months."

We also saw the handwritten note from JJ from that meeting at page 277 which is consistent with these minutes.

11.22. SJ then met with the claimant on 13 September. SJ explained that he had

"decided to have a meeting with the Claimant to discuss my, Mr Christopher Gupta and Mr Ian Sheppard's concerns regarding the Claimant's work and also to provided him with some feedback to help him in the hope that he may improve"

A typed attendance note was shown at page 124. SJ said that it was reflective of the notes he made in his daily notebook and from his memory and from speaking to IS and CG. We also saw the redacted notes from SJ's notebook on 13 September 2017 (page 276). The following list was shown in manuscript notes:

- *"precision/clarity*
- *good- interest*
- *more urgency*
- *commercial*
- *takes more time*
- *slipped – chase"*

11.23. There is no description of the various meetings held in the daybook and we also note that there is no reference to a "*vast improvement*" being required by the claimant or that a decision would be made if this was not achieved.

11.24. The typed attendance note was not made immediately after the meeting but was created on 14 November 2017. SJ explained that it was after receiving legal advice on the matter that this typed document was created based on the written notes above and his recollection of the meetings. The typed note is consistent in that it referred to each of the matters written in the notebook at paragraph 11.22 above.

11.25. The typed attendance note summarised a discussion that SJ said he had with CG and IS noting that:

"I informed them I was proposing to have a chat with Daniel as he was within his probation period and I would rather inform him of the concerns that we had so that he had the opportunity to put things right within the probationary period and if he did not we could make a decision."

It then went on to record the matters SJ said were discussed between SJ, IS and CG (reflecting the list above). Again we find this is broadly consistent with what the notebook entry says and is supported by the evidence of IS and CG about this meeting.

11.26. The attendance went on to describe the meeting SJ said he had with the claimant that day where SJ recorded:

"I had a meeting with Daniel and I informed him that the purpose of the meeting was to give some feedback as to his work.

I went through all the above points informing him that I had spoken to both Chris and Ian and that I needed vast improvement in the above areas.

I informed him that we had concerns about the quality of his work again detailing the issues above and we needed to see a vast improvement. I said I was informing him now so that he had the opportunity to improve as he was still within his probationary period."

11.27. The claimant's recollection of that meeting is different. He says that the meeting was an impromptu conversation lasting about 10 minutes which SJ proposed "*as a quick meeting to help me improve in a few areas ahead of a still to be arranged formal meeting towards the end of the probationary period.*" The claimant agreed that SJ told him that improvement was needed ahead of his probationary period review in September but says that there was no suggestion that his performance was that bad that there was a risk that he would not pass his probationary period. He denies that a requirement for a "*vast improvement*" was communicated to him. The claimant says that the attendance note at page 124 does not reflect his recollection of his discussion with SJ.

11.28. We find that what happened at the meeting was that the matters mentioned in terms of the feedback on the claimant's work as are set out in the attendance note were discussed with the claimant in broadly these terms. We also accept that the claimant was informed that he was required to improve in advance of his probationary period review. To that extent much of what is mentioned in the attendance note is accurate. However we do not accept that the claimant was told that a vast improvement in his work was required nor that if he did not improve that the firm could "*make a decision*". This was not the tone of the meeting between the claimant and SJ. Whilst he was told of concerns and of the need to improve, he was not informed that he was in danger of not passing his probationary period. The typed attendance note is not inaccurate in terms of its general description of the meeting but it overstates the seriousness of what was discussed at the meeting. This is supported by the fact that the attendance note was only done after proceedings had been issued. There is no contemporaneous evidence which suggests that the claimant was told that his continued employment was at risk.

11.29. SJ stated in evidence that he "*had already made the decision on 13 September 2017 that the Claimant's employment would not in all likelihood continue after 3 months*". Given that the claimant was given the opportunity to put things right during the probationary period, and to improve, we find that SJ had not <u>made the decision</u> on 13 September that the claimant's employment <u>would be terminated</u>. If this had been the case, SJ would have dismissed the claimant on this date. He may have had doubts about whether it would continue but we find that the decision then is not to terminate employment but give the claimant the opportunity to improve and review the position again at the end of the probationary period. This is supported by SJ stating in evidence that at this time he had hoped the claimant would improve. There was nothing that took place on 14 or 15 September 2017 which added to any concerns that the respondent had with the claimant's performance.

11.30. The claimant's condition deteriorated and on 16 September 2017 he collapsed at home and became violently sick in response to any food or water. He attended hospital on 18 September but was sent back to his GP. Having attended his GP surgery on 18 September and notifying the respondent that he would not be in work that day (page 814) he was then referred for an urgent appointment with a specialist gastroenterologist. The claimant informed the respondent that his doctor believed his condition might be serious and that he had been referred to a specialist (page 114 to 115). The claimant saw his specialist Dr Helen Steed on 20 September 2017 and he was diagnosed with inflammatory bowel disease – a far more serious condition than irritable bowel syndrome or viral gastroenteritis. The claimant remained in hospital until 26 September 2017. The claimant sent a text message to EP from hospital on 21 September 2017 informing her that he was still in hospital and indicating that the problem could be serious (page 116). He updated the respondent on 25 September and gave the information received from hospital at that time which was that an operation was "*unlikely to be required at the moment*". He had been told at this stage that he needed 2 weeks recovery time and he informed the respondent of this. He said that the problem was linked to the issue he had in August

11.31. Following his discharge from hospital on 26 September 2017 the claimant updated at the respondent by text message (page 118) saying that he might be back on 16 October. EP texted the claimant that day thanking him for letting her know and to inform him that he would be sent a letter regarding the extension of his probationary period and requested that he put a sicknote in the post (page 119). The respondent subsequently sent the claimant a letter (page 127) extending his probationary period until 9 November 2017 stating as follows:

"As you know your three month probationary period ends on the 9 October 2017. However, due to circumstances, we will be extending this for one month to 9 November 2017"

As at 26 September 2017 SJ had not made the final decision to terminate the claimant's employment. The letter is very clear that his probationary period would be extended and so his period of employment would therefore continue. SJ was pushed on why the probationary period was extended at this stage and it was suggested that this was in order to give the claimant a fair chance to demonstrate his capability. SJ said he did not know if this is the case but also suggested that it might have been that he wanted to ensure that the claimant remained under his probationary period, as his understanding was that if he was outside his probationary period, he would acquire different rights e.g. in terms of the length of notice required.

11.32. The claimant emailed JJ on 27 September (page 128) and sent his discharge notification (page 221) which confirmed the diagnosis as IBD – Acute colitis. The respondent admits that at this time, it was aware that the claimant had a serious condition. The claimant became very ill again on 28 September 2017 with symptoms including diarrhoea bloating and even more severe stomach pain. He was readmitted to hospital and the medical team decided that emergency surgery at was required as medication was proving ineffective. He was told that at this stage did not operate urgently there was a risk to his life. The claimant was in surgery for 7 hours on 30 September 2017.

11.33. AR telephoned the respondent on 2 October 2017 because the claimant was too ill to update the respondent himself following his operation. She spoke to JJ and told her that the claimant's inflammatory bowel disease/acute colitis condition was extremely serious and that he had to undergo emergency surgery over the weekend to remove part of his bowel and for an ileostomy to take place. JJ updated SJ of this conversation by e mail (page 128a). AR telephoned the respondent again on Friday, 6 October and spoke again to JJ. She told her that the claimant remained seriously ill in hospital following his operation and that it was anticipated that he would remain there for at least another week. SJ confirmed that the respondent was clear at this stage that the claimant was very seriously ill.

11.34. The claimant was discharged from hospital on 10 October 2017. He telephoned the respondent on 11 October 2017 to update them on his condition. He spoke to JJ and confirmed that he had been discharged and would continue to be assessed and that his recovery period was expected to be six weeks. JJ e mailed SJ on 11 October to inform him of this conversation (page 128).

11.35. On either 14 or 15 October 2017, the respondent decided to dismiss the claimant and SJ accepted that this was solely his decision. There were no written notes documenting the decision to dismiss. SJ said that he made the decision for reasons relating to the claimant's performance which he said had come to light prior to 13 September 2017. He said that the claimant's "*skills referred to in his job application were not living up to what the Respondent expected and therefore. I had to make this decision due to the needs of the firm going forward".* He explained that the decision was made based on the needs of the business which included *"additional support in the litigation department and candidates that could progress in the firm, preferably as solicitors"*. SJ confirmed that the dismissal occurred within the probationary period as he did not believe the claimant met the standards required to pass his probation and he did not believe it was reasonable to extend the claimant's probationary period indefinitely. He said that he was terminating the

claimant's employment under clause 12.2 of his contract (see paragraph 11.4 above)

11.36. SJ said that the claimant's absence did not play a part in his decision making, stating that the fact that the claimant would be off work for 6 weeks would not have impacted massively on the respondent in the scheme of things (although it would have some impact). He said that the cost of the claimant being off sick was broadly cost neutral and any impact was not significant enough for the respondent not to tolerate the claimant being off sick. He said that the needs of the firm required that employees who were working for the firm and who would be charged out to clients were could do the work required in a timely manner and accurately. SJ was asked by the Tribunal what had changed between 13 September 2017 when he decided not to dismiss the claimant and 15/16 October when the decision was taken to dismiss him. He confirmed that he had reflected on what had happened and done a reassessment of whether the claimant could improve. He said that he had reached the view on 13 September that the claimant probably wasn't someone that the firm was going to keep on indefinitely. He explained that it was a busy time for the firm as the year end reviews are done at the end of September/beginning of October and as the end of the claimant's probationary period (9 November) was approaching, it was on his mind.

11.37. He instructed JJ to write a letter on 16 October 2017 (which was approved by him) and this was sent to the claimant by e mail this day. This letter is shown at page 129. The relevant parts of this letter are

"I am very sorry to advise that we will be terminating your contract here with us. This has been a difficult decision but has had to be based on the needs of the firm and the employees we already have".

and

"I appreciate that the events that have happened are beyond your control and we are very sorry to add any further distress to you."

SJ said he expressed the letter in this way rather than specifically mentioning issues of performance because he "*did not want to further distress the Claimant by setting out that the Respondent did not believe he was meeting the standards required for the role*" and that as the claimant "*had been informed previously on numerous occasions about his performance and in that regard I did not think it would come as a surprise to him.*" We are not sure this provides a full explanation for the choice of words at the time it was written, rather than SJ setting out in hindsight why he now thinks it was written that way.

11.38. The claimant received the dismissal letter on 18 October 2017. The claimant sent an email on 19 October (page 131) requesting copies of his contract and the employee handbook. These documents were provided to him on 20 October 2017. The claimant sent a letter to the respondent on 1 November 2017 (page 133) stating that he wished to appeal against his dismissal and stating believed he had been dismissed because of his disability and that the respondent had failed in its duty to make reasonable adjustments. The e mail also stated:

"Please would you reconsider the decision. I am happy to come and meet with you or any of the Partners to discuss how I may be reintegrated back into the team and I can confirm that my condition is now being managed so I will be able to perform my duties better than was the case in the lead up to my being hospitalised."

11.39. The claimant did not receive a response so sent a further chasing e mail on 8 November, receiving a holding response from JJ the same day (page 133). The claimant wrote again on 17 November 2017 at seeking an appeal date and requesting a copy of the respondents' diversity and exclusion policy (page 135).

11.40. The claimant received a response from the respondent on 23 November (page 136). This letter stated:

"*There is no right of appeal against termination of employment within the probationary period for decisions made on performance. However, Satish will meet with you to explain to you the reasons why your employment was brought to an end.*

As I have previously advised we did not take the decision lightly to terminate your employment and ongoing assessment had been made by Satish of your overall performance culminating as you know, in a meeting with him on the 13th September in which he advised you that he had concerns about the quality of your work.

We do not consider that we discriminated against you due to your absence but that we made a decision based on your performance to date."

11.41. SJ said his reason why the claimant was not given the right to appeal is "*because the Respondent does not offer the right to appeal to those dismissed during or at the end of their probation period*". He stated that there was an investigation into the concerns raised by the claimant and although there are no written notes of any investigation, it was carried out. No external advisers were involved, and the investigation was carried out by SJ.

11.42. The claimant did not take up the opportunity to meet with SJ stating that "*there was little point in meeting with them. I had no confidence that I would be treated fairly*".

The Law

12. The relevant sections of the EqA applicable to this claim are as follows:

4 The protected characteristics

*The following characteristics are protected characteristics: …
disability"*

6 Disability

*(1) A person (P) has a disability if -
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

15 Discrimination arising from disability

"(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".

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

21 Failure to comply with duty

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

108 Relationships that have ended

(1) A person (A) must not discriminate against another (B) if—

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act….

..(4) A duty to make reasonable adjustments applies to A [if B is]1 placed at a substantial disadvantage as mentioned in section 20.

(5) For the purposes of subsection (4), sections 20, 21 and 22 and the applicable Schedules are to be construed as if the relationship had not ended.

136 Burden of proof

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

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Section 212(1) EqA defines substantial as being "*more than minor or trivial*".

Paragraph 20 (1) (b) of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

13. In relation to section 15 EqA, the case of Pnaiser v NHS England and Coventry City Council EAT /0137/15 confirmed as follows:

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

    (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or

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

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant ......

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

(e) ..... However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(g) .....

(h) Moreover, the statutory language of section 15(2) makes clear .... that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so."

14. *City of York Council v Grosset [2018] WLR(D) 296* also confirmed that section 15 (1) (a):
"requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability". This case also established that there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test

15. The case of *South Warwickshire NHS Foundation Trust v Mrs S Lee and Others: UKEAT/0287/17/DA* was also referred to illustrate how the question of

causation is approached in terms of the decision in Pnaiser above and the application of the burden of proof provisions in s 36 EqA.

16. In relation to a claim for failure to make reasonable adjustments under sections 20 and 21 EqA, the importance of a Tribunal going through each of the parts of that provision was emphasised by the EAT in *Environment Agency –v- Rowan [2008] IRLR 20*.

17. The Equality and Human Rights Commission Code of Practice on Employment ("the Code") paragraph 6.10 says the phrase "provision, criterion or practice" ("PCP") is not defined by EqA 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*".

18. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is considered in the Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case.

19. The duty to make reasonable adjustments arises when a disabled person is placed at a substantial disadvantage by the application of a PCP etc. *Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA*, -the duty to comply with the reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.

20. *Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA* **-** The nature of the comparison exercise under s.20 was to ask whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they were treated equally, and might both be subject to the same disadvantage when absent for the same period of time did not eliminate the disadvantage if the had a more substantial effect on disabled employees than on their non-disabled colleagues. In addition, in relation to whether an adjustment is effective the Court of Appeal said '*So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.'*

21. Tribunals must consider the essential question whether a particular adjustment would or could have removed the disadvantage experienced by the claimant *Romec Ltd v Rudham EAT 0069/07.*

Conclusion

22. It is conceded by the respondent that at all material times, the claimant was a disabled person under s6 EqA as a result of acute colitis/inflammatory bowel

disease having been treated by means of a stoma.

Discrimination arising from disability

23. We firstly considered the s15 EqA claim of discrimination arising from disability. We started by identifying what was the something arising from disability that the claimant relied upon as being the reason for unfavourable treatment. The claimant contended three matters:

    23.1. his sickness absence;

    23.2. underperformance and errors in his work; and

    23.3. the need for regular toilet breaks

24. The respondent conceded that 23.1 and 23.3 were both matters arising from his disability so we did not need to consider this point further. It did not concede that 23.2 (the underperformance and errors in the claimant's work) arose from the claimant's disability. It points to the fact that the claimant has not adduced any medical evidence to show that his performance was affected by his illness. It also says that he admits that he did not tell anyone in the workplace that his ill health was affecting his work. Considering this, Miss White says that the claimant has not satisfied the burden of proof on this matter. Mr Islam-Choudhury points out that the evidence of the claimant about his symptoms and how this made it difficult for him to work and concentrate was clear and was unchallenged. He also points to the fact that both CG and SJ conceded that they could not say the claimant's ill health did not affect his performance at work (even though they did not know this may have been the case at the time).

25. We conclude that the claimant was seriously impacted by his illness whilst working at the respondent. He claimant was unwell for most of his employment, albeit that the seriousness of his illness was not appreciated by either the claimant or the respondent for all that time. He first became ill in July 2017 (paragraph 11.7 above) only two weeks after he started work. We accept his evidence that when he returned to work on 14 August 2017 he was not feeling any better and our detailed findings of fact at paragraph 11.8 above lead us to conclude that the quality of the claimant's work during this period was bound to have been detrimentally affected by his disability. We do not consider the fact that no medical evidence stating that the claimant's ill health affected his performance is particularly conclusive. There is no doubt of the claimant's medical condition and given the seriousness of what took place after his hospitalisation and the claimant's clear evidence on how he was feeling at work and its impact on his ability to carry out his duties (paragraph 11.8), we are entirely satisfied that his performance was adversely affected.

26. The suggestion that as there was no change in the level of performance of the claimant over the span of his employment, his ill health cannot have been the

cause of the underperformance does not stand up to scrutiny or particularly assist. The claimant was suffering from his condition almost throughout his employment and this got worse as the weeks went on. The specific matters that the respondent points to as demonstrating the claimant's underperformance and errors (paragraphs 11.12, 11.15, 11.17 and 11.18) all took place after the claimant had been off sick and misdiagnosed as having gastroenteritis and then returned to work with his condition continuing untreated. The Evoco matter that CG refers to (11.14) was the only matter that appears to have started early on and this too was ongoing through the claimant's employment when he was suffering from the effects of his illness.

27. We heard the evidence of SJ that the claimant had not demonstrated that he was up to the standard he expected in order to be kept on, an indeed offered a training contract, and he did not attribute this to the claimant's ill health. It was clearly the case that the claimant did not meet the standards set by SJ in the work he prepared for him. We are firmly of the view that a significant contributor to him not being able to meet those standards was the claimant's disability. We are satisfied that his underperformance and the various errors picked up by the respondent in his work were matters that were arising from his disability.

28. Having found that all three matters relied upon were matters arising from the claimant's disability, the next stage was to consider whether the unfavourable treatment was caused by these matters. We firstly looked at dismissal on 16 October 2017. This is clearly unfavourable treatment so the question must arise as to the reason for it – was this because of his absence. The respondent stated that the reason for the claimant's dismissal was his performance. It relied on various problems with the claimant's work (paragraphs 11.14-11.18 above) and said that any absence from work was not the cause. Miss White submits that the claimant has not been able to show that absence of itself had a significant influence on the decision to dismiss (as she says is required by *Pnaiser* above) or that anything other than performance had any more than just a trivial influence on any unfavourable treatment. Mr Islam-Choudhury suggested in oral submissions that SJ had accepted that sickness absence did have some impact on the decision to dismiss (although it did not have a massive impact). Following discussion on this point and upon carefully examining our notes, we concluded that this was not the evidence given by SJ (see our findings at paragraph 11.36 confirming that this particular evidence given by SJ was about the impact of absence on the firm, not the impact of absence on the dismissal decision). However in any event, he says, the timing of the various decisions spelled out in his written submissions shows that the only significant change in circumstances between extending probation on 26 September 2017 and dismissal on 16 October 2017 was that the respondent found out that the claimant had major surgery and would need six weeks to recover. He relies on the fact that the dismissal letter does not refer to performance concerns at all but does obliquely refer to the claimant's illness (see paragraph 11.37 above).

29. We have reached the conclusion that absence did play a part in the decision to dismiss and certainly absence was more than a trivial reason for dismissal. We have applied the case of Pnaiser above and note the provisions on the burden of proof at section 136 EqA. We conclude that the burden of proof to explain the reason for dismissal had passed to the respondent. It was notable that the letter of dismissal itself suggests the claimant's current situation (the implication is clearly to his health problems) was a factor and this evidence alone would be sufficient to shift the burden of proof to the respondent.

30. This burden having been shifted; the respondent has not been able to show that absence had nothing whatsoever to do with the dismissal. We are particularly persuaded by the timings of the various decisions (which Mr Islam-Choudhury describes as ominous) and we expressly refer to our findings of fact above (paragraphs 11.29, 11.31, 11.32, 11.33, 11.34, 11.35, 11.36 and 11.37). In particular, we found that on 13 September 2017 SJ decided not to dismiss the claimant; on 26 September 2017 (on becoming aware of the claimant's stay in hospital) SJ extended his probationary period but after 11 October 2017 on becoming aware that the claimant would be off for 6 weeks; that SJ decided to dismiss and did dismiss. There was no other change in circumstances; nothing else had come to light to change the position as to the claimant's performance between 13 and 26 September 2017. We accept that SJ already had concerns about the long-term future of the claimant at the respondent as evidenced by the meetings on 13 September (11.21-11.29 above). However, the decision to dismiss was not at this stage fully formed. This did not happen until 14/15 October 2017 (paragraph 11.35 above). We concluded on these facts that the decision to dismiss was at least in part influenced by the fact that the claimant had been off and was going to be absent for a further 6 week period. Even if the issue around absence in SJ's mind was the fact that this period of absence would push the claimant over the end of his probationary period, and so give him additional rights, absence played an active part in the decision. It is not possible to say that absence had nothing whatsoever to do with the decision to dismiss.

31. The next issue is whether the respondent dismissed the claimant because of underperformance and errors. This is a more straightforward issue. It is the respondent's case that it dismissed the claimant because of underperformance. There is no need to explore this further. This element of the complaint is therefore made out.

32. The claimant also relies upon the unfavourable treatment of not being allowed to appeal against his dismissal and says that this is because of either underperformance and errors or his absence. We refer to our findings of fact at paragraphs 11.41. This is supported by the evidence he has provided throughout about his understanding that different rights applied to employees during their probationary period (11.35). As it turns out the respondent's written policy does not exclude employees on probationary period from

pursuing an appeal against dismissal under the disciplinary procedure. However it is clear to us that SJ and the respondent were operating on the assumption that this was the case. There is no evidence to suggest that the claimant's absence or indeed the specific issues of underperformance/errors taking place played any part in the decision not to allow him to pursue an appeal. The burden of proof does not pass to the respondent to explain the decision (and even if it had the explanation has been clear) so this part of the complaint does not succeed.

33. The claimant did not pursue his argument that the decision to dismiss him/not allow appeal was because of the need for regular toilet breaks so we have not considered this further.

34. The remaining issue is therefore whether the respondent knew of the claimant's disability when it dismissed him on 16 October 2017 or if it did not, could it reasonably have been expected to know the claimant was disabled at this date. We refer to our findings of fact at paragraphs 11.30 to 11.34. Given the information that had been provided to the respondent at this time, particularly on 2 October 2017, it is clear that the respondent either was expressly aware that the claimant had a disability or could reasonably have been expected to know, given the information in its possession. The respondent had been informed that the claimant had part his bowel removed and required an ileostomy. That alone would have been enough for the respondent to have reasonably concluded that the claimant had an impairment which had a substantial and long-term adverse effect on his ability to carry out day to day activities on 2 October 2017.

35. As the respondent does not advance a justification defence under section 15 (1) (b) EqA, then we conclude that the claimant succeeds in his complaint that he has been subject to discrimination arising from his disability in that he was dismissed on 16 October 2017 because of two matters arising as a consequence of his disability (namely (a) his absence from 16 September and him informing the respondent on 11 October 2017 that he would be absent for a further 6 weeks and (b) his underperformance/errors at work. The claim made under section 15EqA therefore succeeds.

Reasonable Adjustments Claim

36. When looking at the claimant's complaint under sections 20 and 21 EqA, we firstly conclude that the claimant was aware that the claimant was a disabled person from 2 October 2017 (see conclusions at paragraph 33 above). Whilst the respondent was aware that the claimant had a serious illness before this, that it is when the respondent was informed of the removal of the claimant's bowel and the ileostomy and had either actual or was fixed with constructive knowledge of the claimant having a disability under Paragraph 20(1) (b) of Schedule 8 to the EqA.

37. We were required to look at whether any of the PCPs identified and relied on by the claimant were applied to him and, if so, when this took place. We then

had to consider whether any such PCP applied put him at a substantial disadvantage compared to non-disabled people (and what that disadvantage was), considering the appropriate comparator. We then looked at the whether the respondent knew that the claimant was placed at this disadvantage at the relevant time. We finally had to consider what adjustments would have been reasonable to make to avoid any relevant disadvantage.

38. The respondent conceded that it applied the PCP at paragraph 7.2 a above of not allowing an appeal against termination during the probationary period to the claimant on 22 November 2017 ("PCP 1"). Even though there is no mention of this in the contract or disciplinary policy (see paragraphs 11.4 and 11.5) we accepted the evidence of SJ that this was the policy the respondent was operating and that it applied this to the claimant when writing to him on 22 November 2017. The respondent also accepted that it evidently applied the PCP at paragraph 7.2c namely the requirement that the claimant meet a level of competence/standard of performance to pass the probationary period ("PCP3") (because it dismissed the claimant on 16 October on the basis it says of unsatisfactory performance during the probationary period).

39. The respondent did not accept that it applied the PCP at paragraph 7.2b above of requiring the claimant to carry out the full time duties of a paralegal and regularly attend at work ("PCP2"). Miss White contends that the claimant's attendance at work or carrying out his role full time was never mentioned or taken into consideration by the respondent. She says that it was his capability to do the work properly rather than attendance that was the problem. We acknowledge that absence was not something that was raised with the claimant and the claimant did have two periods of absence whilst at work. However we refer to our conclusions at 28 to 30 above on the s15 EqA claim that the absence and in particular the respondent finding out on 10 October 2017 that the claimant would be absent for a further 6 weeks at least in part caused the decision to dismiss. Therefore, we conclude that this PCP was applied to the claimant when the decision was taken to dismiss him on 16 October 2017.

40. Having found that the PCPS were applied to the claimant, the next issue we considered was whether any of the PCPs put the claimant at a substantial disadvantage compared to non-disabled people. Mr Islam-Choudhury referred to the case of _Griffiths_ above and suggests that we need to consider whether the PCP "*bites harder*" on disabled people or a category of them than non-disabled people.

41. We firstly considered whether PCP1 put the claimant at a substantial disadvantage compared to non-disabled people. Mr Islam-Choudhury says the substantial disadvantage here is that the claimant was dismissed without any process and had an appeal been allowed he would have been able to explain that his disability affected his performance and that there was a need to take account of it. We accept that this is correct as a factual statement. However, this does not explain how it impacts disabled people more than

non-disabled people. We do not accept that a policy that employees on probationary periods were not allowed to appeal against their dismissal in this regard "*bites harder*" on people with the claimant's disability than those without. There may be other matters at play that non-disabled people dismissed during probation may be able to raise in an appeal just as the disabled may wish to raise disability and its impact. The lack of an appeal against dismissal which is applied to all, we find has the same level of disadvantage to disabled and non-disabled people who are in their probationary period. This element of the complaint fails.

42. We then considered whether PCP2 put the claimant at a substantial disadvantage compared to non-disabled people? We are satisfied that the claimant was at a substantial disadvantage in this regard. He was off work from 15 September 2017 (and indeed before this from 3-14 August 2017) as a result of the illness caused by his disability. We have already concluded that disability related absence played a part in the decision to dismiss him (paragraphs 28-30). As a disabled person with significant disability related absence, he was clearly at a substantial disadvantage compared to non-disabled people without that absence, in being able to comply with a requirement to carry out the full time duties of a paralegal and regularly attend at work. He was not able to do this. We also conclude that PCP3 also put the claimant at a substantial disadvantage compared to non-disabled people. We refer to our conclusions that the claimant's disability affected his performance whilst at work (paragraphs 25-27). His performance was not to the standard required (which arose from his disability) and this led to his dismissal (paragraph 31). He was therefore at a substantial disadvantage compared to someone who did not have the same disability causing these performance issues.

43. We then need to consider whether the respondent knew that the claimant was at the relevant disadvantage when it applied the PCPs. On 16 October 2017 the respondent did not actually know that by dismissing and applying the PCPs requiring the claimant to carry out full time duties/regularly attend at work and requiring him to meet a level of competence/standard of performance would cause him a substantial disadvantage as compared to a non-disabled person. The respondent's view then was that the claimant's performance was not related to his illness. The respondent knew that the claimant was going to be off work for 6 weeks and this played a part in its decision making on dismissal (see above). There was not quite enough information though, for a reasonable employer to have reached the conclusion that PCPs were being applied that would have the effect of biting harder on someone with this particular disability, rather than a non-disabled employee, which would require them to consider making adjustments at this point.

44. However, the position changed on 11 November 2017 in relation to PCP3 only. By this time, the respondent could reasonably have been expected to

know that requiring the claimant to meet a level of competence/standard of performance may have impacted harder on someone with the claimant's disability once it received his e mail of appeal on 1 November 2017. This is an important e mail as the claimant specifically identifies at this date that in his view he is a disabled person, he mentions that he believes he has been discriminated against; he asks about reintegration into the team and also links the performance of his duties in the lead up to him being hospitalised being affected by his condition. At this stage, we conclude that the respondent should have realised that perhaps some of the performance issues they were experiencing which they rely on as the reason for dismissal were related to the claimant having a disability and that perhaps they should look again at this decision to dismiss.

45. Having concluded that the respondent was under a duty to make reasonable adjustments to avoid the disadvantages caused by the application of PCP3 from 1 November 2017 onwards, the next question was whether there were steps that were not taken that could have been taken to avoid the disadvantage. The claimant identifies several steps. He contends that the respondent should have not dismissed him on 16 October or reinstated his employment after receiving his letter of appeal on 1 November 2017 when he made a complaint about disability discrimination. He also says that the respondent should have allowed him to have an appeal hearing and extended his probationary period. We have looked at these and considered whether any other adjustments would have been reasonable to make.

46. On 1 November 2017 the claimant had already been dismissed and was no longer in his probationary period, so not dismissing/extending his probationary period was not possible as employment had already ended. In order to even try and comply with PCP3 - the requirement to meet a level of competence/standard of performance to pass the probationary period - he had to be working for the respondent. Reinstating him immediately at this point could have removed the disadvantage experienced by the claimant by as he would then have been able return to work and demonstrate his competence. Nevertheless, we do not find that reinstating the claimant immediately on receipt of the appeal letter was a reasonable adjustment to have made, without at least meeting the claimant first to explore the issues. However, holding a meeting where the claimant had opportunity to explain how his performance was affected by his illness and discuss a way forward (an appeal meeting) could have gone some way to alleviate or remove the disadvantage of the PCP, depending on the outcome of that meeting. That meeting was of course never held. Simply offering the claimant a meeting so that SJ could explain to him the reasons for his dismissal (see findings of fact at 11.40-11.42 above) was not an offer of an appeal hearing. An appeal had already been turned down explicitly in writing (paragraph 11.40).

47. We therefore conclude that it was a reasonable adjustment upon receipt of the appeal on 1 November 2017, for the respondent to have allowed and

organised an appeal meeting to consider whether the claimant's performance might have been affected by his condition and whether the dismissal decision should be changed. A proper appeal meeting might have resulted in a reinstatement and further extension of the claimant's probationary period which could have alleviated the disadvantage of the PCP. We take note of section 108 EqA and conclude that such matters arose out of and were closely connected to the employment relationship that used to exist so are clearly covered by section 20 EqA. We therefore conclude that allowing the claimant to attend an appeal hearing was clearly a reasonable step for the respondent to have taken on 1 November 2017. In not doing so, we find that the respondent was in breach of its duty to make reasonable adjustments in this regard.

48. The remedy for the successful claims will be determined at a further hearing, if necessary. The parties will apply to the Tribunal within 28 days of receiving this judgment and written reasons if they are unable to reach agreement and require a remedy hearing to be listed.

Employment Judge Flood

Date: 23 January 2020