EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4102215/2019

Held in Glasgow on 26, 27, 28 and 29 August 2019 and Members' Meetings on 12 November 2019 and 23 January 2020

Employment Judge: R Gall
Tribunal Members: Mr E Borowski
Mr P O'Hagan

Miss L Boyle	**Claimant** **Represented by:** **Mr S Healy – Solicitor**
Ministry of Justice	**Respondent** **Represented by:** **Dr A Gibson – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is as follows: –

(1) The respondents failed to make reasonable adjustments to a Provision Criterion or Practice (PCP) they applied which caused substantial disadvantage to the claimant as a disabled person compared to non-disabled persons. That PCP applied in relation to a relevant matter. The PCP was that the period of probation of an employee could only be extended once. A reasonable adjustment would have been to extend the probation period for a second time. That failure was an act of discrimination in terms of Section 21 of the Equality Act 2010. The claimant is awarded £4,000, together with interest, in respect of injury to feelings caused by that failure. Interest totals £480. The respondents are ordered to pay £4,480 to the claimant.

(2) The respondents engaged on 29 August 2018 in unwanted conduct related to the disability of the claimant which resulted in violation of her dignity and creation of a humiliating environment for her. It therefore constituted discrimination by way of harassment in terms of Section 26 of the Equality Act 2010. The claimant is awarded £4,500, together with interest, in respect of the injury to feelings. Interest totals £519.23. The respondents are ordered to pay £5,019.23 to the claimant.

(3) Dismissal of the claimant by the respondents was unfavourable treatment of her because of something arising in consequence of her disability. It was in breach of Section 15 of the Equality Act 2010. The respondents have not shown that dismissal was a proportionate means of achieving a legitimate aim. Compensation is therefore awarded to the claimant in respect of that discriminatory act as follows:-

(a) In respect of injury to feelings, the claimant is awarded £10,000, together with interest. Interest totals £1,076.92. The respondents are ordered to pay £11,076.92 to the claimant.

(b) In respect of past loss, being loss of earnings for the period to date of this Judgment, the claimant is awarded £10,239.12. Interest is added, as detailed in the Judgment, in the sum of £506.74. The respondents are ordered to pay £10,799.86 to the claimant.

(c) In respect of future loss, being loss for the remaining period claimed, the respondents are ordered to pay £459.24 to the claimant.

REASONS

1 This case called for hearing at Glasgow on 26 to 29 August 2019 inclusive. Those were the dates set down for hearing. At the conclusion of those days, evidence had been completed. Submissions however had not been made. It was agreed that written submissions would be tendered. Each representative was given the opportunity to comment on the submissions of the other. Submissions were received on 19 September 2019.

2 Due to other commitments it was not possible to schedule members' meeting for a date prior to 10 October 2019. Unfortunately, the members' meeting scheduled for that date could not proceed due to the death of a close family member of one of the members. The members' meeting was rescheduled for 12 November 2019 and took place on that date. A further members' meeting was required. Due to other commitments there was unfortunately a further period which passed before that second members' meeting was possible. It was held on 23 January 2020. The forbearance and understanding of parties and their representatives is appreciated.

3 During the hearing, the claimant was represented by Mr Healy, solicitor. The respondents were represented by Dr Gibson, solicitor. A joint bundle of productions was submitted. Evidence was heard from the following parties: –

- The claimant.
- Sharon King, union representative who attended the dismissal meeting and also the appeal.
- Ruth Whyte, line manager of the claimant.
- Gerry Parker, operations manager with the respondents and the dismissing officer.
- Ann Russell, head of customer service development with the respondents and the person who heard the appeal.

4 The following are the relevant and essential facts as admitted or proved.

Background

5 The claimant was born on 6 July 1988. She was employed by the respondents between 4 December 2017 and 8 November 2018. The claimant's role with the respondents was as an administrative officer, being a customer services advisor. She worked in the Criminal Injuries Compensation Authority ("CICA"). At date of termination of employment, she was 30. In course of her employment with the respondents she earned £19,246 per annum. That was a weekly net amount of £303.

6 A copy of the summary of the main terms and conditions of employment of the claimant appeared at pages 45 to 50 of the bundle. The claimant was employed on a fixed term contract. The term of contract was set out as being between 4 December 2017 and 29 March 2019. The claimant's manager was Ruth Whyte.

7 The claimant went through a period of training and then commenced work in the customer service centre. Her job was, in part, to deal with an element of email correspondence. In the main however it was to deal with calls from applicants who wished to discuss either potential or new applications in some cases or existing applications in others.

8 The claimant is affected by epilepsy. She is also affected by anxiety and depression. Her epilepsy is successfully managed. The respondents were aware that epilepsy affected the claimant at commencement of employment. Around January 2018 the claimant informed them of the fact that she was affected by depression and anxiety.

Probation.

9 A clause in the summary of main terms and conditions of employment of the claimant related to probation. It confirmed that the claimant's appointment was subject to a 6 month probation period. It stated that her appointment would be confirmed providing that she had shown that she could meet the normal requirements of the grade and her attendance and conduct had been satisfactory. It went on to state that the claimant's manager "*may extend the length of your probationary period, in wholly exceptional circumstances, where you have been prevented from attaining the required standards of performance, attendance or conduct.*"

10 These provisions also referred the claimant to the probation policy on the Intranet. A copy of that policy appeared at pages 167 to 198 of the bundle.

11 In relation to extension of probation, the policy stated at pages 175 and 176 of the bundle: –

"*Only in exceptional circumstances will the manager in consultation with the HR Contact Centre and countersigner extend the employees probation period, if they have been prevented from attaining the required standards of performance, attendance or conduct. This could include a family crisis or could be work-related.*

The extension should be for the shortest possible time as possible (sic)*, but the probation period should never exceed 10 months, if they are subject to an initial 6 months' probation period. If they are subject to a probation period of less than 6 months then any extension would be proportionate.*

In these circumstances the manager will:

Only allow one extension, which will be granted at the end of the probation review…"

12 Notwithstanding this, the policy could potentially have been varied or adjusted to permit a further extension of probation.

13 At page 196 of the bundle the provisions in the probation policy referring to appeals appear. They state that an appeal is a review of the decision reached and the basis for that decision and that an appeal is not a re-investigation.

Attendance Management policy

14 The attendance management policy appeared at pages 199 to 233 of the bundle. In a passage which appeared at page 203 of the bundle, it was stated that employees in the probation period should refer to the guidance on the MoJ probation pages, however the principles of the attendance management policy were stated as applying.

15 Clause 102 of the attendance management procedure at page 223 of the bundle states that a decision to dismiss should be taken if "*all of the following apply*". One of the elements then specified is that Occupational Health ("OH") advice has been received within the last 3 months.

Probation performance plan ("PPP")

16 Details of the performance required of the claimant in her role were set out in the probation performance plan which appeared at pages 51 to 64 of the bundle.

17 That document set out requirements for answering calls and for dealing with calls. It also set out requirements in dealing with emails. The claimant was to contribute to answering 90% of calls promptly and courteously, ensuring that data security rules were complied with. Time on existing claim calls was to be 4.25 minutes. Post call wrap time, when any notes were completed, was to be 1.5 minutes for existing claims. The time for new application calls was 9 minutes. The time for wrap of new application calls was 1.2 minutes. An average of 8 emails per hour were to be dealt with.

Probation period, December 2017 to May 2018

18 The claimant performed the role well in the initial 5 or so months of her probation period. She had no absences. Her good performance is reflected in the notes of the interim review meeting which appeared at pages 57 and 58 of the bundle. Those notes reflected a meeting between the claimant and Ms Whyte which took place on 5 April 2018.

May 2018

19 Unfortunately, the claimant was affected by a health issue during May 2018. She experienced being very confused and disorientated. She required to leave work. It was considered that she may have had a stroke. That however was subsequently ruled out during hospitalisation. The claimant was absent from work for 3½ days at this point. A note of a return to work interview between the claimant and Ms Whyte appeared at page 65 of the bundle. Restricted duties were put in place to allow the claimant to work at her own pace. The claimant was taken off telephone work. She was encouraged to take frequent comfort breaks. Her desk was to be moved to a quieter part of the area within which the team sat, as she believed that would assist. The

position was to be reviewed following a further appointment between the claimant and her GP.

20 At a catch-up meeting between Ms Whyte and the claimant, notes of which appeared at page 66 of the bundle, the claimant confirmed that she continued to struggle with concentration and that she was still affected by confusion. It was agreed that the claimant would continue not to be involved in telephony work.

21 A further catch up meeting took place between Ms Whyte and the claimant or on 21 May 2018. It was agreed that the claimant would continue not to be involved in telephone work as she did not feel any better.

22 Unfortunately, the claimant had a further episode and required to be absent from 22 May until 25 May, returning to work on 29 May after the bank holiday weekend. The symptoms she experienced were the same as at time of the earlier episode in that she became very confused and disorientated. She was again detained in hospital for investigation.

23 Ms Whyte had sought an OH report. Ms Whyte was conscious that the 6 month probation period of the claimant was due to end at the beginning of June 2018. She wrote to the claimant on 25 May regarding that. A copy of that letter appeared at pages 73 and 74 of the bundle. In that letter, Ms Whyte proposed a meeting with the claimant on 1 June 2018 at which she would consider extending probation. That meeting was rearranged for 6 June.

24 In the interim the claimant met with Mr McMahon in absence on leave of Ms Whyte on 29 May 2018 and then with Ms Whyte on 30 May 2018. Notes of those meetings appeared at pages 75 and 76 of the bundle. It was agreed at those meetings that the claimant would work only on emails and not on telephones.

25 Ms Whyte and the claimant met again on 4 June by way of a health catch up meeting. The claimant said that she was still regularly feeling hazy. She explained that she had a GP appointment the following Friday. Phasing back in of telephony work for the claimant was discussed. The claimant confirmed

that she was willing so to proceed. Discussion took place as to the claimant handling new applications in one particular context where a specific script could be agreed. This was as online consent would be the purpose of the calls. The claimant was uneasy about that however and said that she would prefer to work on incoming existing application calls. That was agreed with her. The claimant also said that her GP had recommended later starts. Ms Whyte agreed to an amended start time of 10 AM for a week to see if that helped.

26 From time to time around this point, the claimant sent emails to Ms Whyte regarding health issues. A copy of those emails dated 21 May, 31 May and 1 June appeared at pages 85, 86 and 87 of the bundle. They reflected the claimant feeling tired and confused. The claimant was experiencing those symptoms almost every day.

OH report

27 The OH report prepared following a conversation between OH and the claimant on 6 June 2018 appeared at pages 88-90 of the bundle. The OH report reflected what Ms Boyle had been saying to Ms Whyte and also reflected, in large measure, adjustments which at that stage Ms Whyte had agreed with her to the claimant's job role. It made other proposals by way of adjustment which were not considered to be of particular relevance by the claimant.

Probation meeting 7 June

28 On 7 June, the claimant met with Ms Whyte. Mr Turnbull, a trade union representative, was also present. Notes of that meeting appear at pages 91 to 93 of the bundle.

29 The purpose of the meeting was said to be to discussion of the possibility of extending the probation period, crossing over into attendance. The history of the claimant's working with the respondents was set out. The claimant's performance had been good during the period up to April. The illness which had affected the claimant in May was noted. Ms Whyte proposed extending

probation by 2 months. This was said to be on the basis that it would allow time for additional support and to "*create stability*". It was said that this would "*give a chance for LB to build up to partial telephony work. This will also allow time for assessment of LB's condition and determine whether long-term treatment is required. RW stated she would not expect LB to be at 100% by the end of the 2 months and they would work together over this time*". Probation was now therefore to end on 2 August 2018. The claimant was to start on 15 minute blocks of telephony work. She expressed a preference to work on incoming telephone calls. Ms Whyte is noted as stating that "*it was important to note that LB's condition fluctuates and she felt it was not a good idea to put an arbitrary date or target in place.*" This was a very positive meeting from the claimant's point of view with understanding being shown to her by Ms Whyte.

30 On 8 June, in a letter which appeared at page 94 of the bundle, Ms Whyte wrote to the claimant. The letter contained the following paragraphs–

> "*You are expected to demonstrate that you can carry out the full range of duties within the Customer Service Adviser role during your extended probation period. The plan will involve a gradual increase to telephone activity over a period of 8 weeks.*
>
> *You are only entitled to one extension of probation in accordance with the enclosed probation policy. To be confirmed in post at the end of your extension, you must have met and maintained the required standards of performance, conduct or attendance. Failure to be confirmed in post will result in your dismissal.*"

31 By 25 June, the claimant had not yet started call work due to scheduling conflicts. A note of a health catch-up meeting between the claimant and Ms Whyte appeared at page 99. That meeting was held on 25 June. It recorded that the claimant was keen to trial some time on the telephone the following afternoon.

32 The claimant continued to experience feelings of dizziness and confusion. Those are recorded in her emails to Ms Whyte of 27 June, 28 June, 3 July, 9 July, 11 July and 16 July. Copies of those appeared at pages 102 to 108 of the bundle. The claimant had however been involved in training. The trainer, Ms McSorley commented very favourably on the claimant's participation in training by emails of 27 June and 5 July, copies of which appeared at pages 100 and 101 of the bundle.

33 The claimant requested a catch-up meeting with Ms Whyte as she was concerned about what would happen at the end of her probation period in terms of passing probation or not and specifically in relation to working on the full range of tasks and working on the telephone. That meeting took place on 19 July. A note of the discussion appeared at page 109 of the bundle.

34 When asked by the claimant whether she could work towards a target, Ms Whyte said, as is confirmed by the note, that she "*didn't want to put pressure on her and risk her health by giving a specific number for her to attempt to reach but as a starting point I would be looking for her to work on the telephone each day in the peak periods between 1130 and 1400 and to increase on this period as she felt fit depending on her daily ongoing symptoms.*" This was a relaxed informal chat.

End of probation meeting

35 A meeting then took place on 2 August involving Ms Whyte, the claimant, Sharon King, union representative of the claimant, and Gordon Murray, notetaker. Notes relative to that meeting appear at pages 110 to 114 of the bundle.

36 In course of narrating the history, Ms Whyte referred to the claimant having been given the extension to probation to show that she had recovered and to demonstrate that she was able to do the job. It was noted that OH had not been able to establish if the claimant was able to render a reliable service and that they had given recommendations for reasonable adjustments. Those recommendations had been followed. In addition, the claimant had been

moved next to Ms Whyte so that Ms Whyte could assist the claimant and help her if she was feeling ill or disorientated.

37 To the claimant's surprise, Ms Whyte went on to state that she had "*numerous significant concerns regarding eight-month probation.*" She confirmed she was not questioning the claimant's attitude or conduct. Her concern was in relation to the longer-term continuing capability of the claimant to do the job.

38 Ms Whyte referred to statistics relating to the calls taken by the claimant and emails handled by her. She said that in the first 4 months the claimant handled 3.5 to 4 calls per hour, rising to 4 to 5 an hour. The target was 6 to 7 per hour. In the second half of the probation period of 8 months the claimant had not been on the telephone although Ms Whyte acknowledged that the claimant had wished to do this on occasion, with Ms Whyte not permitting that due to the claimant's health. In relation to emails, the target was 10 per hour, it was said, although the KPIs stated that an average of 8 per hour was required. Ms Whyte referred to 6 June when the claimant handled two emails in a day and to 7 June when the claimant handled 5. Ms Whyte's conclusion was that the claimant was not able to cover the amount of tasks required and was struggling with her health. Continuing long-term might have a detrimental effect on her health. No supplementary OH report had however been obtained or requested. Ms Whyte referred to the claimant coming to her with questions and that she seemed to ask questions too many times. Those questions meant that other staff members were taken away from their role to help. There were times when the claimant was fine but times when she seemed extremely confused. Management had concerns about that.

39 As the statistics had not been known to the claimant prior to the meeting, the claimant and her union rep requested an adjournment to consider the position. That adjournment was granted.

40 On return, the claimant said that her statistics over a five-week period had been improving in all ways. She had been uncertain as to what would be an acceptable level of performance. She referred to the meeting which had taken place on 19 July and to Ms Whyte's statement that an initial aim would have

been for her to cover the peak phone hours, lunchtimes between 11:30 AM and 2 PM. The claimant stated that if the statistics were adjusted for her medical condition then this would have looked better. They may have been reasonable. She highlighted the reports which she had in relation to training as mentioned above, those reports being favourable. Adjustments made were acknowledged and appreciated. There had however been a consistent trend of improvement and what was sought were adjusted individual targets which would be reasonable to achieve. It was said that an OH referral should be conducted after neurological investigations were complete as the triggers had not yet been identified.

41 Ms Whyte adjourned and took 20 minutes to consider the position and to take advice.

42 On resumption, Ms Whyte said that she accepted that there were increases in the statistics but could not agree on the significance of those increases. They occurred over a 1 ½ to 2 week period and not a five week period. There might be disagreement on the level of increase. She disagreed with Ms King's view that the stats showed a consistent increase. In relation to targets, Ms Whyte said that she did not put numerical targets in place after reviewing the nature of the claimant's condition. The claimant herself had said that the doctors had not completed a diagnosis so a representative target could not be fixed, said Ms Whyte. She had, instead of a target, left it open for the claimant to demonstrate working to the maximum of her ability. She accepted that the claimant had been able to cover the phones during lunches but still had concerns as to her ability on long-term phone cover. She said that any other reasonable requests which the claimant wished to make could be discussed at any stage.

43 Ms Whyte concluded by stating that she did not doubt the claimant's commitment or attitude but felt "*there is not enough mitigation against her concerns to confidently confirm her in post – spoke to HR about extending probation again which has been refused so it will now be referred to band B to make decision. Will need to discuss who band B will be with a manager. Best that band B make decision.*" She said that she was not comfortable to

confirm the claimant in post and could not extend probation so could only now recommend dismissal. She wanted a band B, however, to look over the whole case and to consider her recommendation.

44 Statistics relative to the calls handled/not handled by the claimant appeared at pages 78 to 82 of the bundle. She dealt with emails, handling an average of 20 per day. As mentioned, the KPIs stated that the average expected level was 8 per hour. The statistics confirm that the claimant did not handle calls on existing applications between 8 May and 22 June. She had handled existing claims calls in the weeks commencing 24 June, 1 July, 8 July, 15 July and 22 July. The number of calls handled by her in those weeks was, chronologically, 7, 19, 25, 13 and 83. Page 82 of the bundle showed the timing of login by the claimant when calls were handled by her. On 19 July at the meeting with Ms Whyte, Ms Whyte had said that she wished the claimant as a starting point to work on the telephone each day between 1130 and 2 PM. She is shown as covering those hours on 24, 25 and 26 July. On 20 July she worked on telephones between 11.22 and 12.59 and again between 13.02 and 13.11. On 30 July she worked on the telephones between 11.01 and 11.43 and again between 12.23 and 14.24. On 31 July she worked on the telephones between 11.41 and 14.17. On 1 August she worked on the telephones between 10.05 and 11.33 and between 12.28 and 14.02. In addition to those times she worked on the telephone at other points on those days.

45 The claimant did not work on calls regarding new applications between 8 May and termination of her employment. Such calls were more complex than calls relating to existing applications. They required greater concentration and ability to recall the detail of the scheme.

46 Ms Whyte wrote to the claimant on 6 August following the meeting on 2 August. A copy of that letter appeared at page 116 to 117 of the bundle. That letter stated that Ms Whyte had expressed concerns at the meeting about the capability of the claimant to provide a sustained and effective service due to ongoing health concerns. It recorded adjustments made. It said that since May 2018 ongoing confusion and memory issues had meant that the claimant had

been unable to demonstrate a consistent and sustained performance within the role. It stated that since July 2018, although the claimant had begun to increase the number of tasks completed, that was with a high level of one-to-one support. It said that "*the prognosis for your condition has indicated a full diagnosis is likely to take a significant amount of time and that your symptoms are likely to be ongoing; with this in mind the level of support required to avoid errors isn't sustainable long-term*".

47 Ms Whyte concluded by stating: –

> *"I have considered all the facts and evidence and have decided to refer your case to a decision maker, Gerry Parker who will decide whether you should be dismissed, or whether he feels there is sufficient evidence to confirm you in post.*"

48 The letter of 6 August was accepted by the claimant as being a warning of possible dismissal. Mr Parker then became involved, as detailed below.

Possible alternative job

49 By email of 3 August, the claimant requested to move to another department which would remove her from the telephone environment. She sought this as a potential reasonable adjustment. A copy of her email appeared at page 119 of the bundle. It was accompanied by a letter from the claimant's GP, a copy of which appeared at page 115 of the bundle. That letter said that the GP wondered if a role which did not currently involve phone call interaction might be of benefit to the claimant.

50 The claimant's email was forwarded by Ms Whyte to Ms Patterson. Ms Patterson discussed the position with Ms Russell, director of operations.

51 Ms Russell considered the application as a request for a reasonable adjustment. She considered the employment situation of the claimant which was that she had not been confirmed in post on expiry of her probation. She had regard to the nature of the alternative job potentially available as a case worker. She was conscious that this would involve a 13 week intensive training period and that the nature of the workload of a case worker demanded

concentration and focus. It was a role which involved handling a large number of tasks, some of which were very complex. The job required the employee to understand guidance in relation to the scheme and how that was to be applied. Ms Russell was conscious that the claimant herself recognised that she had at this point difficulty retaining information. She was aware that the claimant had good reports in relation to short periods of training. Her concern was that the claimant would have significant difficulty, particularly with a 13 week period of intensive training being involved. Ultimately, the intention was that the role of customer service adviser (the role filled by the claimant) became interchangeable with that of a caseworker. It would be sometime however until that was achieved. In addition, decisions required to be taken on possible retention of staff who were on fixed term contracts. Proof of concept was being undertaken in relation to additional training on call handling and elements of case working.

52 All of these matters led to the decision on the part of Ms Russell being that it was not a reasonable adjustment for the claimant to move into an alternative post. She communicated this decision to Ms Patterson. Ms Patterson sent an email to the claimant on 9 August. A copy of that appeared at page 118 of the bundle. That email focused upon the proof of concept and pending determination of staff being offered permanent contracts. The decision reached however resulted from consideration by Ms Russell, the decision maker, of a reasonable adjustments request.

53 The claimant was a Band E, as stated. The possibility of a job at Band F was not an option open as Band F posts were being phased out.

August 2018

54 The claimant was present at work in August 2018. During that month she was engaged on telephony work. She dealt with existing applications only rather than any new applications. A copy of her statistics for that month appeared at page 243 of the bundle. The claimant was shown as dealing with 6.95 calls per hour. Her existing application average talk time was 5.31 minutes. Her existing application average wrap time was 1.34 minutes. She dealt with 682

existing application calls during the month. The claimant's time on "hold" on calls is higher than might be anticipated given that she was dealing with existing applications with there being less likely need to place a caller on hold. Details of the expected "hold time" were not however a subject of evidence.

55 In August Ms Whyte was not consistently at her desk adjacent to the claimant. Ms Whyte had a period of leave in that month. When at work she was engaged in other work and in meetings. She was not in frequent contact with the claimant that month. There was far less assistance given by Ms Whyte to the claimant during August due to this. Nothing was said to the claimant in August about her performance, whether by Ms Whyte or by anyone else.

Meeting 29 August

56 Prior to Mr Parker arranging a meeting with the claimant in relation to the outcome of her probationary period, a meeting took place on 29 August. Before the meeting, the claimant was taken aside by Ms Patterson. She was taken to a private room. Ms Patterson said that any news which was going to be given about fixed term or permanent contracts did not apply to her as she was still in her probation period and could not be confirmed in post as yet.

57 The claimant then went into the meeting. Ms Russell was addressing the meeting. There were around 30 employees present in the meeting. They were standing in an open plan area in the office. Ms Russell stopped for a moment as the claimant joined the meeting. It was announced then by Ms Russell that those on fixed term contracts were becoming permanent employees, apart from those who remained in the probationary process.

58 The claimant felt that other employees were looking at her. She felt humiliated and degraded and did not know where to look. She subsequently sent a text to her partner. A copy of that appeared at page 260 of the bundle. It read:-

> *"I got pulled in for a meeting this morning and saying* (sic) *any fixed term contract news coming out doesn't apply to me.*
>
> *And then 20 minutes later it was announced that all people were getting made permanent.*

Apart from me because I've not completed the probation process."

The claimant was absent from work from 30 August 2019 until her dismissal confirmed to her by letter from Mr Parker of 8 October 2018.

During the claimant's time off work through illness between 29 August and dismissal the respondents did not make contact with her. She was upset by this, feeling that absence of contact and enquiry as to her health was "*chipping away at her dignity".*

End of probation process – decision by Gerry Parker

59 By letter of 29 August Mr Parker sent to the claimant an invitation to an end of probation interview. A copy of that letter appeared at page 123 of the bundle.

60 That letter stated that the claimant's manager had expressed concerns at a meeting with the claimant about her performance and that Mr Parker was the band B manager asked to consider these issues. It said that the purpose of the interview was to discuss concerns about the level of performance of the claimant in relation to the objectives agreed with her at the end of the initial probation period. It went on to say that at the end of the previous probation meeting the claimant's manager had explained that she believed that the claimant had not met the required performance levels for her post and that dismissal was recommended. It said that because this was a potential outcome of the meeting an HR case manager would be present throughout. The meeting was scheduled to take place on Tuesday 18 September.

61 Ultimately this meeting took place on 25 September 2018. Prior to Mr Parker reaching a decision, there was an exchange between Mr Parker and HR adviser Donna Pickering. A copy of that appeared at pages 236 to 242 of the bundle.

62 Miss Pickering noted in an email of 5 September at page 237, that the OH report was 3 months old on the following day. She said that it still should provide Mr Parker with information required to make a decision. She said she noted that Mr Parker had concerns over the claimant's absence, that there

was a warning in place due to this and that he had concerns over the claimant's performance. She also said that her understanding was that reasonable adjustments were in place as suggested. She went on to say: –

> "*At the adjourned meeting you may wish to consider all the information and dismissal as an option. The benefit of this option would be that, if dismissed, MoJ would be able to recruit to replace Lisa, therefore supporting the MoJ management and corporate planning. It would also remove the burden of her current absence upon the business and remaining staff.*"

63 These points were not further explored in that exchange. Although there was reference to possible recruitment of a replacement for the claimant, in fact until the start of the new financial year no such recruitment was possible.

64 An earlier email of 28 August from Ms Pickering had said that if dismissal was being considered then an up-to-date OHP (OH physician) report was required.

65 The claimant was unable to appear in person at the meeting on 25 September in light of her health at that point. Ms King appeared on her behalf. The meeting was with Mr Parker. Ms Taylor was there as a trade union observer. Mr Paton took notes. Ms Pickering of the respondents' HR Department was present on the telephone.

66 Notes of the meeting were adjusted by Ms King. That adjusted version was accepted as accurate for the purposes of this hearing. A copy of those adjusted notes appeared at pages 132 to 139 of the bundle.

67 At the meeting Ms King disputed that there had been performance issues and that there was no evidence of improvement in performance. She said that there was no record of discussions about ways to improve and that there were no clear objectives for the claimant to work towards. It was highlighted by her that the claimant had provided informal lunch cover as she had been requested. The email statistics were disputed. Performance had been improving and Ms King disagreed with the view of the manager that

improvement was not significant. Information from the claimant's "sent box" was given to Mr Parker.

68 Mr Parker said that the statistics did not meet the requirements and that managers were doing everything they could to support the claimant. The support required however was not sustainable he said, especially in view of the time that the claimant had been with the respondents. When asked for examples of support given, Mr Parker said he had no specific examples and had taken managers at their word. He said that the claimant could not function without consistent input.

69 Ms King said that the claimant was not far away from meeting adjusted targets although there was no clarity as to those adjusted targets. She also made points as to application of the probation policy and absence of additional training. She said the claimant had been treated in the same way as any other member of staff would have been treated. The claimant had been expected to carry out the full range of duties notwithstanding her disability. She said that there was no evidence of commitment to reasonable adjustments for the claimant. The OH report had referred to structured and repetitive tasks but these had not been put in place.

70 Ms Pickering said a structured role was not necessarily suitable for epilepsy and that there was no evidence that this would have helped. Any reasonable adjustment required to be reasonable from a business perspective.

71 Mr Parker adjourned the meeting and on reconvening confirmed that he wished to address the points that were made and would arrange a date for an outcome meeting.

Outcome meeting

72 The outcome meeting was held on 4 October 2018. The notes from that meeting appeared at page 140 of the bundle.

73 Mr Parker said that he required to consider whether the claimant had demonstrated an ability to perform in post. He had concluded that she had not. He said that "*she isn't able to fully demonstrate capability of working*

without an unsustainable level of support." He confirmed that he had taken into account performance statistics, the assessment of the claimant's progress by her managers, the input she required on a daily basis and the lack of impact that adjustments had had. He said that all of those combined indicated that the claimant was not able to perform at an acceptable level in the role at band E.

74 Mr Parker went on to say that he believed the probation policy had been properly applied. Concerns had been addressed by managers who, he said, were "*strong and persuasive*" on this when spoken to by him. It was acknowledged by them that the PPP could have been better constructed, but their intention was not to put pressure on the claimant.

75 He identified reasonable adjustments as having been made comprising

- moving desks away from harsh lighting
- accommodating need for reduction in noise levels
- providing support from the manager
- late starts
- set lunch hours specific to the claimant
- structured day with set hours and tasks which were recorded on the resource planner

76 Mr Parker said he had explored whether a move to an admin role was possible as had been suggested on behalf of the claimant. He said that there was no scope in the business model to recruit at that grade across the respondents' organisation.

77 On that basis was Mr Parker concluded that he was unable to offer the claimant continued employment within CICA.

78 By letter of 8 October 2018 Mr Parker wrote to the claimant confirming the outcome of the probation interview as being dismissal. A copy of that letter appeared at pages 141 to 143 of the bundle.

79 In this letter, Mr Parker said that he had considered that at the time of investigation the claimant had started a third period of sick leave. He had considered evidence from the managers which indicated that, despite an extended probationary period, the claimant was unable to carry out all the duties of her post without significant support beyond a sustainable level. He had had regard to statistical information as well as records of conversations between the claimant and her manager, he said. He recorded the points which the claimant had made at the meeting on 25 September. He said that he had subsequently met the managers and discussed those in more detail. Mr Parker referred to the medical condition which affected the claimant and to an OH report which had been commissioned. (That was a reference to the OH report at the beginning of June 2018 referred to above). The report commented that it was not possible to establish when the claimant would be able to provide a reliable service. He said that adjustments had been made and that the claimant's manager had explained that even when the claimant was working to specific tasks, such as emails, the range of content and required responses was such that she still required constant support.

80 Mr Parker stated in his letter that managers accepted that the PPP could have been better structured. He said however that he was satisfied that the content was acceptable and the support following implementation was significant and continuous. His conclusion read: –

"*Unfortunately, despite the continued support and tailored adjustments, the evidence demonstrated that you didn't manage to reach the level of performance that would justify a permanent contract at Band E. I have explored whether a post at Band F can be awarded, but there is no scope within the current MoJ business model to recruit at that grade. However, I'm not satisfied you would be able to perform in that role without significant and unsustainable support.*

Your absences are another factor I have considered. I have concluded that your attendance is not of a level that the department can support. I understand that you believe the most recent absence was avoidable and was caused by the manner of the probation process was handled by managers. I have seen

no evidence that supports that view or that departmental policy wasn't followed.

I am sorry to tell you that as you have failed to reach the standards of performance and level of attendance expected within your probationary period, you will be dismissed."

81 The claimant received 5 weeks paid notice and outstanding holiday pay.

82 On receipt of the letter of dismissal the claimant was very upset. She was unable to read it in full for around 48 hours. She was very concerned that she would never be able to work again as she had been dismissed for not being able to do this job. She felt incompetent.

Appeal

83 The claimant submitted an appeal notification form, a copy of which appeared at pages 152 and 153 of the bundle. She stated that she considered the decision to be unreasonable as it did not adhere to the civil service values of integrity, honesty, objectivity and impartiality. This was on the basis that her view was that the decision was not made on the evidence and was heavily influenced and weighted by verbal follow-up given by the line management chain. She also stated that the decision letter did not address breaches which she said had occurred in the probation, poor performance and disability policy. She set out her view that no evidence had been provided to support the decision in that there was no evidence that adjustments made were deemed effective. There was also no evidence to support the claim of excessive support and unsustainable impact of the support. Objectives had not been reasonably adjusted, she said. She expressed the view that she believed she was dismissed due to her disability.

84 The claimant set out her submission to the appeal meeting as she was unable to attend in person. A copy of her submission appeared at pages 147 and 148 of the bundle.

85 In her submission, the claimant said that she was of the view that her dismissal related to her disability and not her capability. She said that she was

capable of undertaking her duties, no concerns in that regard having been expressed to her. Her submission noted that her probation period was extended however she said that she believed a reasonable adjustment should have been discussed. She had been given the continued impression by her line manager that there were no concerns and that she would pass probation. She also set out that there were no reasonable adjustments implemented to support her work duties. She said the decision to dismiss was based solely on disability rather than capability.

86 The appeal meeting took place on 11 December 2018. Notes of the meeting appeared at pages 149 and 150 of the bundle. Ms Russell was present as were Carol Grant, notetaker and Sharon King to represent the claimant.

87 Ms Russell records her understanding of the appeal as being on the following grounds: –

- Unfair process which was not applied correctly regarding probation and attendance
- The decision letter does not address the points
- Dismissed due to her disability
- Civil service values were not adhered to

88 Ms King expanded upon those grounds on behalf of the claimant. She said that the PPP was generic with no clear objectives being given and no review being set. The problems had commenced in the 6th month, when the claimant's health deteriorated. No reasonable adjustments had been put in place to support her disability. There had been inconsistencies within the OH report. A face-to-face meeting with OH may have been beneficial. There was no evidence that the claimant's work lacked quality. Concentration problems may have prevented her from recording the stats accurately. A move was denied to the claimant. The business could have tried to accommodate a move with another repetitive task and it would have been good to test this theory. The claimant had been back on the phones for the last 4 weeks of her

attendance at work with very little input. No evidence appeared to be held of that input.

89 Ms Russell said that the claimant was pleasant however had been taken off the phones for health reasons and there had been concern about her capability to perform to an acceptable level. She had been assigned clerical and email work with the expectation of clearing 8/10 emails per hour. Her performance however had been well below that standard and she did not appear to be coping. She had been permitted late starts so that she could be accompanied to the office, she had late, longer lunches to accommodate her and was moved to sit next to Ms Whyte for better communication. Those were the reasonable adjustments put in place. In relation to a possible move to a different department, there were concerns about the claimant's ability to retain information and as to capability so it was not an option. Ms Russell confirmed that the issue was one of performance/capability and not disability.

Appeal outcome

90 By letter of 19 December Ms Russell communicated the appeal outcome to the claimant. A copy of that letter and the attached form appeared at pages 151 to 160 of the bundle. The decision is set out at pages 156 to 158 of the bundle.

91 Ms Russell confirmed that at the probation review meeting in June the claimant's absence levels were above the normal trigger level on probation. It was recognised however that those were disability-related absences and would therefore "*be tolerated*" as a reasonable adjustment. Ms Russell goes on to state: –

> "*Follow-up actions on your performance plan were agreed by you. This included a phased return to telephony work. No specific adjusted targets were agreed, again as a supportive measure to avoid putting additional pressure on you. No warning was issued at this time, however as you were unable to complete the full duties of the role an extension to probation until 2nd August was authorised to give you time to demonstrate that you could perform to the required standards of the role consistently.*

A letter was issued to you on 8th June confirming this. Notes from the meeting confirm you felt comforted that this was a supportive measure and provided the flexibility you required."

92 Reasonable adjustments indicated as being in place were then set out. Ms Russell stated that the support and tailored adjustments were in place to help the claimant achieve the required level of performance to justify being offered a permanent contract at Band E in CICA.

93 Ms Russell said that from the notes she could see that the claimant's line manager had been supportive throughout. She then said: –

"*You moved again to sit next to your line manager to facilitate observation for health purposes and to provide you with any support required. It is evident that this involved a significant time commitment for your line manager. Observation identified that you continued to struggle to complete tasks and had to ask lots of questions, impacting on the work of your colleagues. Records show that in some days you completed fewer than 10 tasks (standard productivity measure for 1 day is 50 – 60), with the expected level of performance being achieved on only 2 days.*

Despite this extended probationary period you remained unable to carry out all of the duties of a CSC Band E team member without significant support beyond a sustainable level. The evidence I have examined includes statistical information relating to productivity as well as records of conversations between you and your line manager.…

Although no new Occupational Health advice was sought prior to your final probation meeting, HR have confirmed that the information was current.…

I have considered whether a move to a case working role would have allowed you to provide an acceptable level of performance, with adjusted targets. I have to consider the impact on resourcing of sustained support requirements. I can find no indication that an improvement to an

acceptable level of performance, even with adjustments, would have been achieved.

It is my determination therefore that the process was applied correctly regarding probation and attendance and the decision letter explains the reasons for your dismissal. Your disability was acknowledged throughout your employment by your line manager and significant reasonable adjustments were in place. Your dismissal was not related to your disability, it was based on capability to perform the role even with reasonable adjustments adopted."

94 The appeal against dismissal was therefore not upheld.

The claimant's position since dismissal

95 The claimant has not been seeking work since she was dismissed. She has not obtained alternative employment. Her health has prevented her seeking alternative employment. In a letter from the claimant's GP dated 29 July 2019, which appeared at pages 165 and 166 of the bundle, her GP confirmed that the claimant had a severe depressive illness which was "*at present resolving*". The GP said that the claimant's symptoms seemed to worsen after her dismissal, with her mental health deteriorating further. The GP set out the treatment which the claimant was receiving.

96 The claimant has obtained employment support allowance. From 17 November 2018 employment support allowance was £73.10 per week. It increased to £110.75 per week from 15 February 2019 and to £111.65 per week from 13 April 2019.

97 Prior to dismissal and since dismissal the claimant has received personal independence payment. That was at the rate £117.05 per week until 8 April 2019. At that date it increased to £119.90 per week.

98 Had the claimant continued in her role, with reasonable adjustments being made, it is very likely that she would have been confirmed as a permanent employee. Other fixed term employees had been confirmed as permanent.

99 The claimant had a significant mental health episode in 2016 and 2017. She had a pre-existing mental health issue when she commenced employment with the respondents. The nature and extent of that pre-existing condition is not known save for it being accepted that the claimant was disabled in terms of the Equality Act 2010 by reason of being affected by epilepsy and depression and anxiety at the time when she commenced employment with the respondents.

The Issues

100 Was there a provision, criterion or practice ("PCP") of the respondents which put the claimant as a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled and therefore resulted in a requirement for the respondents to take such steps as were reasonable to avoid that disadvantage?

101 What was any such PCP?

102 Did the respondents fail to comply with any duty incumbent upon them under the terms of the Equality Act 2010 ("the 2010 Act") to make reasonable adjustments?

103 If there was such a failure by the respondents, what compensation was to be awarded to the claimant?

104 By dismissing the claimant, did the respondents treat the claimant unfavourably because of something arising in consequence of her disability, resulting in discrimination in terms of Section 15 of the 2010 Act?

105 If discrimination in terms of Section 15 of the 2010 Act did occur, were the respondents able to show that the treatment was a proportionate means of achieving a legitimate aim?

106 If the respondents were not able to show that any such discriminatory treatment was a proportionate means of achieving a legitimate aim, what compensation was payable to the claimant?

107 On 29 August 2018, did the respondents harass the claimant by engaging in unwanted conduct related to her disability which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, this in terms of Section 26 of the 2010 Act?

108 If such harassment had occurred, what compensation was payable to the claimant?

Applicable law

109 The 2010 Act and relevant cases are appropriately considered. The EHRC Code of Practice on Employment of 2011 is also relevant. That Code states that Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

110 Section 20 of the 2010 Act imposes a requirement on, in this case, the respondents, to make a reasonable adjustment where a PCP of theirs puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the reasonable adjustment being the taking of such steps as it is reasonable to have to take to avoid that disadvantage.

Failure to make reasonable adjustments

111 The first requirement in terms of Section 20 of the 2010 Act is to determine the PCP which has been applied.

112 In considering this, a Tribunal has to keep in mind the protective nature of the legislation and is therefore to adopt a more liberal rather than an overtly technical approach. It can be difficult correctly to frame the PCP. The PCP which has been applied can be determined on the basis of the facts found as to what the respondents have done. In terms of the EHRC's Employment Code, PCP is to be "*construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions*." It is appropriate when considering what is a PCP to keep in mind that the purpose of the legislation is to eliminate

discrimination against those who suffer disadvantage from disability. That is confirmed in the case of *Lamb v Business Academy Bexley* EAT 0226/15.

113 The Tribunal must consider the impact of the PCP on persons who are not disabled as well as upon someone who is disabled, carrying out a comparison in that regard. It must identify the nature and extent of the substantial disadvantage suffered by a claimant. It is also then to go on to identify the step(s) which an employer has failed to take in its view by way of reasonable adjustment. In the first instance, it is for the claimant to identify, in broad terms, the type of step which would avoid the substantial disadvantage. It is then for a respondent to try to show that the substantial disadvantage would not have been avoided by this adjustment or to try to persuade the Tribunal that the adjustment was not reasonable in the circumstances. In this regard, the case of *Griffiths v Secretary of State for Work and Pensions* 2017 ICR 160 *("Griffiths")* makes clear that any modification of qualification to the PCP which would or which might remove the substantial disadvantage caused by it is, in principle, something which could be a relevant step.

114 A Tribunal should, if appropriate, confirm the timetable within which adjustments should have been made.

115 The potential effectiveness of adjustments proposed is also something which Tribunal should consider. It is not necessary to establish that any adjustments which are regarded as being appropriate reasonable adjustments would definitely have avoided the substantial disadvantage. It is a sufficient if the substantial disadvantage might have been removed or reduced for a step which would have achieved that to be regarded as a reasonable adjustment.

Section 15 of the 2010 Act

116 This section provides that a person discriminates against a disabled person if that person treats the disabled person unfavourably because of something arising in consequence of that person's disability and cannot show that the treatment is a proportionate means of achieving a legitimate aim.

117 The EHRC Employment Code provides guidance in this area. The aim should be one which is legal, is not in itself discriminatory and which represent a real, objective consideration. A business need is a potential legitimate aim. Paragraph 4.31 of the Code states

> "*Although not defined by the Act, the term "proportionate" is taken from EU Directives and its meaning has been clarified by decisions of the CJEU. EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the provision criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means*".

118 The case of *Homer v Chief Constable of West Yorkshire Police* 2012 IRLR 601 *("Homer")* confirms that, to be proportionate, a measure has to be both an appropriate means of achieving what is regarded as being the relevant legitimate aim and must also be reasonably necessary in order to achieve that aim. It is possible that a measure might be appropriate in achieving an aim but might go further than is reasonably necessary to do that and therefore be disproportionate.

119 The decision of the EAT in *Ali v Torrosian and others (T/A Bedford Hill Family Practice)* EAT 0029/18 is an example of the above principle. In that case the claimant had been dismissed. The Tribunal had found that it was possible for the respondents to accommodate part-time working. The EAT concluded that the Tribunal had erred in failing to consider the possibility of part-time working as a less discriminatory means of achieving the legitimate aim. The case was remitted to the Tribunal to reconsider the question of proportionality given that part-time working was a possibility.

120 Where business need is argued by a respondent to be the legitimate aim, it is for the respondent to persuade the Tribunal, if unfavourable and therefore discriminatory treatment has occurred, that this course is a proportionate means of pursuing a real need of the business. This is confirmed in the case of *ICTS Group Limited v Visram* EAT 0344/15.

121 There is interplay between the issue of discrimination in terms of Section 15 of the 2010 Act, where a respondent has treated a claimant unfavourably because of something arising in consequence of the disability of that claimant, and that in terms of Section 21 of that Act involving a failure to comply with a duty to make reasonable adjustments.

122 This is of particular relevance if there is been a failure to make a reasonable adjustment and where objective justification is said to exist in terms of Section 15 of the 2010 Act.

123 In *Dominique v Toll Global Forwarding Limited* EAT 0308/13 *("Dominique"),* it was said by the EAT that any failure to comply with a duty to make reasonable adjustments must be considered as part of the balancing exercise in considering questions of justification. In the view of the EAT it was difficult to see how a disadvantage, that could have been prevented by a reasonable adjustment that had not been made, could in fact be justified.

124 The case of *Griffiths* sees the following comment being made in the Court of Appeal by Lord Justice Elias: –

> "*An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment – say allowing him to work part-time – will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified*."

125 The EHRC Employment Code also states at paragraph 5.21: –

> "*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."*

126 If reasonable adjustments are made, it does not follow that unfavourable treatment is objectively justified. A Tribunal requires to consider the nature and effect of the reasonable adjustment. In the context of a claim under Section 15 of the 2010 Act and an argument by the respondent that, in this case, dismissal was a proportionate means of achieving a legitimate aim, the Tribunal requires to consider any reasonable adjustment made in looking at the unfavourable treatment.

Harassment

127 Section 26 of the 2010 Act states that a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating the other person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. It goes on to state that in deciding whether conduct has the effect just mentioned, each of the following must be taken into account –

(a) the perception of the person involved who has been potentially subjected to harassment

(b) the other circumstances of the case

(c) whether it is reasonable for the conduct to have that effect.

128 In addition therefore to considering evidence from the claimant as to the effect of conduct alleged to have been harassment upon such a party, the Tribunal also requires to consider whether it was reasonable for the claimant to claim that the conduct had that effect. When applying the objective standard, the Tribunal must consider the position keeping in mind the particular claimant in the case. That is confirmed, for example, in *Reed and another v Stedman* 1999 IRLR 299.

129 In terms of the EHRC Code, relevant circumstances are mentioned as including those of a claimant, for example his or her health including mental health. The environment in which the conduct said to have occurred can also be relevant as one of the circumstances of the case.

Compensation

130 An award in respect of injury to feelings is to be compensatory and not punitive. An award should not be so low as to diminish respect for the anti-discrimination provisions and legislation. It should not be so excessive as to give unmerited and untaxed benefits. The subjective nature of injury to feelings makes it hard to measure. The case of *Vento v Chief Constable of West Yorkshire* 2003 ICR 318 *("Vento")* lays down principles in respect of compensation and bands which apply. The amount of compensation which a Tribunal may award is to be set with regard to the cases of *Vento* and *Da'Bell v NSPCC* 2010 IRLR 19. The Tribunal should also keep in mind the Presidential Guidance issued on 23 March 2018, the guidance relevant to this case, where the claim was presented on 11 February 2019. That guidance reflects the position in respect of claims presented on or after 6 April 2018 as involving a lower band of compensation of £900-£8600 for less serious cases. Those figures are said to include the 10% uplift detailed in *Simmons v Castle* 2012 EWCA Civ 1039. A Tribunal is to set out reasons why the 10% uplift referred to in *Simmons* does not apply if, in its view, it is not applicable in any particular case.

131 Interest is payable on awards made in respect of injury to feelings. The relevant provisions are contained in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.

132 In an injury to feelings award, the relevant date from which interest is to run is, in normal terms, to be the date on which the act of discrimination complained of occurs. Interest ceases to be applicable on the day when the Employment Tribunal calculates the amount of interest. This is in terms of Regulation 6 (1) (a). Regulation 6 (3) authorises an Employment Tribunal to use a different period for calculation of interest if there would be "*serious injustice*" if other dates were not used.

133 For all other awards in respect of discrimination interest is awarded for the period beginning on the mid-point date and ending on the day of calculation.

The mid-point date is the date halfway between the act of discrimination and the date of calculation of the award.

134 Any losses relating to the period after calculation, awards in respect of future loss in other words, do not have interest added to them.

135 In the case *of Al Jumard v Clywd Leisure Ltd and others* 2008 IRLR 343 the EAT commented that it was not necessary or, in that case desirable, to fix separate sums for injury to feelings which flowed from direct disability discrimination and the failure to make reasonable adjustments respectively although it would not necessarily be wrong for a Tribunal to do that in an appropriate case. A Tribunal should keep firmly in mind that there were different forms of disability discrimination and that they may contribute in different measure to any injury to feelings because the extent which feelings are injured is not necessarily the same for each category of discriminatory act. The EAT went on to say that it did not accept that there should be some artificial attempt to assess loss by reference to each and every alleged incident of discrimination. It described that as “wholly unreal” and something which “would be an impossible exercise”.

136 The discriminator must take the victim as he finds her. Even if the victim is unusually sensitive or susceptible and a higher level of damage is sustained than otherwise might be the case, the discriminator is liable for the full extent of the loss or injury if it flows from the act of discrimination.

137 In calculating compensation in a case of unfair dismissal, recoupment provisions apply. The effect of those provisions is that any compensation payable is paid by the respondent to the government to the extent required to repay any benefits received by a claimant. Any remaining balance is then paid by the respondent to the claimant. That is not the procedure in discrimination cases. The list in Regulation 3 and Schedule 1 to the Employment Protection (Recoupment of Benefits) Regulations 1996 SI 1996/2349 details the Tribunal payments in proceedings to which those Regulations apply. That list does not include the 2010 Act. In this case, therefore, the relevant sum received by the claimant as government benefits is not repaid by a respondent to the

government. It is still, however, deducted from money paid by the respondent to the claimant. Applying that, employment support allowance received by the claimant is deducted from any compensation awarded in respect of loss of earnings due to a discriminatory dismissal.

138 In assessing the period of time over which any loss of income is to be awarded, a Tribunal has to consider whether, but for what in that circumstance would have been established as a discriminatory dismissal, the claimant would have at some point in dismissed for non-discriminatory reasons.

139 This is not the same principle as applied in *Polkey v AE Dayton Services Ltd* 1988 ICR 142. It is however similar principle. It is expressed in the context of discrimination in the case of *Abbey National plc and another v Chagger* 2010 ICR 397. That case confirmed that if the conclusion of the Tribunal was that, apart from on a discriminatory basis, a claimant would have been dismissed, that possibility had to be reflected in the measure of loss.

PCPs identified by the claimant

140 In providing further and better particulars, and in relation to the claim of failure to make reasonable adjustments, the claimant identified four PCPs. Those were: –

1 "*The requirement that the probationary period be passed within a 6 month period*". This is said to have disadvantaged the claimant because she was more likely to be absent and to have performance issues than non-disabled colleagues, therefore being less likely to pass probation and to be dismissed. The reasonable adjustment contended for was a further extension of probation until the respondents could be satisfied that attendance and performance would not improve, or could see that it did improve, and that probation could be passed.

2 *"Application of attendance management policy".* This was departed from in submission. The claimant confirmed that it was accepted

that the attendance management policy did not place the claimant at a substantial disadvantage.

3 "*The requirement that the claimant as a band E employee work on the telephone*." This appears to amount to the PCP of the requirement to meet the targets in the PPP, which included telephone work targets. That is how the submissions from both the claimant and respondents dealt with this point. It is said that the claimant was placed at a disadvantage as she struggled to work on the phone, thereby being less likely to pass her probation. It is said to have been a reasonable adjustment for the assessment of the claimant to take account of her decreased phone time.

4 There is said to have been a failure to make reasonable adjustments in that the request of the claimant to move to a different department was not granted. Although not specifically set out, the PCP which was the basis for this proposed reasonable adjustment and which formed the basis of submission and counter submission for the claimant and respondents was the requirement to remain in the role originally taken up by the claimant. The disadvantage is said to have been that this required the claimant to meet the targets for that role, including telephony work.

141 A further PCP was contended for in submission for the claimant. It was said that there was a requirement that the claimant work unsupervised which had placed her at a disadvantage. That was not however pled by the claimant as being a PCP. The respondents therefore had no fair notice of this claim. In the view of the Tribunal, it is not therefore appropriate to regard that as part of the case against the respondents.

Legitimate aim

142 The legitimate aim was set out by the respondents as being the employment of employees who were able to perform to the expected performance standards, including standards of volume and speed of calls handled and work carried out, as well as the ability to carry out the full range of duties which

they are employed to do and to do so independently without significant management support. Employment of employees who were able to meet the standards of attendance expected was also said to have been a legitimate aim.

Discrimination – unfavourable treatment because of something arising from disability

143 In course of the submissions and responses to submissions, the claimant agreed that her level of performance during and after May 2019 was as a result of her disability. The respondents accepted that the claimant had been treated unfavourably by being dismissed, that the dismissal was due to poor performance and that poor performance was something which had arisen in consequence of her disability.

Submissions

144 Both Mr Healy and Dr Gibson tendered written submissions. Each commented upon the submission of the other. A copy of the submissions for each party is attached. The submissions for the claimant are attached as appendix one. The submissions for the respondents are attached as appendix two. A brief summary of the submissions is now set out.

Submissions for the claimant

145 Mr Healy submitted that the claimant and her witness were credible and reliable. He said however that Ms Whyte, Mr Parker and Ms Russell lacked credibility and reliability. He highlighted some points which he said supported that position.

146 In respect of the claim under Section 15 of the 2010 Act Mr Healy said that there was no evidence as to what the legitimate aims of the respondents were. He accepted however that having staff at work and capable of performing their duties was a legitimate aim. He maintained that the proportionality of dismissal required to be assessed in light of the duty to make reasonable adjustments. He referred to *Homer*. Treatment must be no more than was necessary. Balance was required between the business need of a respondent

and the effect of discriminatory treatment on the claimant. Waiting and allowing for improvement would be one means of achieving the aim and standard. In this case the claimant would have been able to render effective service if not dismissed. She had been on target to pass probation prior to becoming unwell.

147 Mr Healy pointed to the improvement in the claimant's performance during August. He highlighted the fact that performance during August had broadly met the target set by the respondents. There had been a failure by the respondents to make reasonable adjustments, including not moving the claimant to another role. Mr Healy said that dismissal was said to be appropriate on the basis that the level of support to the claimant was unsustainable. There was, however, no documentation as to that level of support. Reassurance had also been given to the claimant that she would be "*okay*".

148 The claimant's performance had improved in August. She had been asked to be on the telephone between 4 and 5 hours per day and had achieved that. Mr Parker's approach had involved reviewing the period of employment of the claimant, including the time after 6 May when the claimant was, by agreement, not performing telephone work. There been reference by HR to the report from an occupational health practitioner. That had not however been updated prior to dismissal. Dismissal without ascertaining the true nature and extent of the medical situation was not a proportionate means of achieving a legitimate aim. The case analysis by HR had been weighted towards dismissal. It could not be proportionate to dismiss an employee when there been a failure by the employer in its duty to make reasonable adjustments. A move away from a telephony role was such a reasonable adjustment. Dismissal was not therefore doing "*no more than was necessary*".

149 Although it had been said that the claimant was in receipt of much support, there was no documentary evidence to back that up. In August the evidence from Ms Whyte was that she was not often around and could not say to what extent the claimant had been supported. By the time therefore that Mr Parker

decided to dismiss the claimant, her performance had improved and the support necessary had been reduced.

150 No issue had been raised regarding performance of the claimant after 5 April. The meeting on 19 July had not set targets and had been reassuring to the claimant as to what was required as a starting point namely covering the telephones between 11:30 AM and 2 PM.

151 The claimant had been a capable employee prior to May 2018. That was accepted by the respondents. Whilst there might have been some short-term operational difficulties which arose due to the claimant's health and ability to perform fully, dismissal was not a proportionate means of achieving the legitimate aims of the respondents.

152 Mr Healy set out why it was that he regarded there as having been a failure to make reasonable adjustments. He referred to the standards set out in the probation policy and to the fact that probation could only be extended once. He referred to the requirement that the claimant work on the telephone. He also made reference to the possibility of the claimant moving to a different department. The PCPs had cause substantial disadvantage to the claimant and reasonable adjustments were possible but were not made.

153 Turning to harassment, Mr Healy said that the Tribunal should prefer the evidence of the claimant as to what had happened. She had been told that others were to become permanent employees but that she was not. This was said to be as she had not at that point passed probation. She had then to witness her colleagues being told that their jobs were being made permanent. She had described the impact of that upon her.

154 The conduct related to the claimant's disability because she had failed probation due to struggling with the effects of her medical conditions.

155 In relation to remedy, the claimant had been off work as a reaction to harassment. Depression had worsened as a result of dismissal, confirmed by the letter from her medical practitioner at pages 165 and 166 of the bundle.

156 Mr Healy urged the Tribunal to find that the dismissal was discriminatory. The claimant had taken all reasonable steps to mitigate her loss. It was for the respondents to prove that there been a failure to mitigate. He referred to the case of *Wilding v British Telecommunications plc* 2002 IRLR 524.

157 The other employees engaged on fixed term contracts had become permanent employees. If the claimant had not been dismissed she would have been moved onto a permanent contract. She should be awarded financial compensation to put her in the position she would have been had discrimination not taken place. That was the position, said Mr Healy, as set out in *Ministry of Defence v Cannock and others* 1994 ICR 918.

158 With reference to *Vento,* Mr Healy urged the Tribunal to award £20,000 in respect of injury to feelings relative to the discriminatory dismissal and £4500 in respect of the harassment claim. Financial loss relative to dismissal was calculated on the basis of there being 41 weeks between dismissal and the hearing date and a further future loss claim extended to 26 weeks. Those elements comprised £12,423 and £7870 respectively.

Submissions for the respondents

159 Dr Gibson said that there was in fact little dispute on the facts save for the events of 29 August. He acknowledged that the claimant believed herself to have been wronged. That however did not result in a remedy unless the legal tests were met. Dr Gibson said that the Tribunal should accept Mr Parker's evidence. He had taken his role seriously and had weighed up all options open to him, acting proportionately in every respect.

160 It was conceded by the respondents that dismissal was unfavourable treatment. Given the concession by the claimant that poor performance was due to disability and, keeping in mind that dismissal was due to poor performance, the unfavourable treatment was because of something arising from the claimant's disability. It was, however, a proportionate means of achieving a legitimate aim, Dr Gibson said.

161 The respondents had set out their legitimate aims. There was a fundamental need for the organisation to employ people able to perform to expected standards. It was accepted that the claimant had performed well prior to her illness in May. The principles of *Homer* and of *Land Registry v Haughton and others* UKEAT/0149/14 were referred to by Dr Gibson. A fair and detailed assessment of the employer's business needs and working practices was required as confirmed in *Hensmen v Ministry of Defence* UKEAT/0067/14. Although the claimant had said there was very little evidence in relation to business need, and that a detailed assessment would be difficult, the Tribunal had the necessary evidence.

162 The claimant had not been able to meet the legitimate aim and dismissal was a proportionate means of achieving that aim as it promoted better customer experience and business efficacy. It enabled a replacement employee to be recruited the following year who could then perform to the appropriate standards.

163 The fair conclusion to be drawn by the Tribunal, submitted Dr Gibson, was that the respondents had met the test under Section 15. The Tribunal should keep in mind the PPP for the claimant and the customer charter requiring 90% of calls to be answered within 4 minutes.

164 The fact was that the claimant did not do any work on new applications at all between 8 May and 4 October. For 5 months therefore, she had not carried out a significant part of the duties she was employed to do. The reason she did not do work on new applications was because of her disability. She had not got close to the level required for existing applications and therefore could not be considered for the more complex new application work.

165 The claimant had also done no existing application work between 8 May 2018 and 22 June 2018. She then did a small handful existing claim calls each week between 22 June and 3 August. She had required significant support. She was doing an average of 30 existing application calls per week with her best week scoring at 83. An employee doing existing applications 7 hours a day would be expected to handle between 280 and 315 calls per week. In

assessing the performance with regard to passing her probation, it was appropriate to consider these statistics for her actual performance and her inability to resume work on new applications.

166 In the period between 3 August and 30 August the claimant did existing call work and no other work. In that time her average call number was 32 per day. The expected level would have been between 56 and 63 per day.

167 Between 8 May and 22 June the claimant did email work alone. On average she handled 20 emails per day. She had had good days and bad days at this time. The KPI was 8 emails per hour.

168 Between 26 June and 3 August the claimant handled existing calls and also emails. Her average daily level was 11 emails per day. She started on the telephone at 15 minutes for a period and then built that up to 2.5 hours. The claimant had highlighted that this was as part of an agreement with Ms Whyte.

169 At the time the dismissal applied, the critical time said Dr Gibson, the claimant had been off sick. Her sickness absence had commenced on 30 August. Dismissal was determined on 4 October. If the respondents required to take into account the claimant's performance from 3 August to 30 August, they could also appropriately take account of the performance, or lack of it due to illness, between 30 August and 4 October.

170 Dr Gibson urged the Tribunal to have regard to the performance of the claimant and the KPIs setting out what was expected from employees. Adjusting her KPI figures would not have affected the amount of work that she did. It would have masked her performance. The team still required to meet the customer charter. A greater burden was therefore placed upon them. Mr Healy said, in his counter submission on this point, that a reasonable adjustment to lower targets would, if those targets were met, not be seen as a poor performance. Dr Gibson's position was that the adjustment proposed was not a reasonable one.

171 In addition to the statistics, the evidence was that Mr Parker had fully considered all the relevant factors and had spoken with managers. The

decision which he took to dismiss was proportionate. No lesser measure could have achieved the respondents' legitimate aim, said Dr Gibson. The claimant was employed to do telephony customer service adviser work. Having her do non-telephony work would not achieve the legitimate aim of the respondents. Moving her to another role was not possible. Band F positions were being phased out. The claimant was not regarded as being able to carry out the role she had sought that Ms Russell move her to.

172 Dr Gibson said that unfortunately the claimant could not meet the required standards of the job. The bulk of her role involved telephony work. At time of dismissal she had been in post for 10 months. She had been completely unable to work at the standards expected at that stage. She could not attend the disciplinary meeting or appeal meeting. It was therefore unclear as to how she would have been able to carry out her full duties to a satisfactory level. What she had achieved whilst at work was, after illness, significantly below targets. The respondents could not take the claimant off telephony work for any measure of time. Even when the claimant did solely email responses, she did not achieve the required standards.

173 In relation to reasonable adjustments, Dr Gibson dealt with those founded upon by the claimant.

174 The first of those was to the PCP applied of there being one extension to probation. It was conceded that the respondents had a duty to take such steps as it was reasonable to have to take to try to avoid the claimant not passing her probation and any extension to it. Any such failure meant having to face the prospect of being dismissed.

175 In relation to the second area of potential adjustment, the respondents conceded that there was a duty to take such steps as it was reasonable to have to take to avoid the claimant not passing her probation as a result of being required to work on the phones.

176 Dr Gibson addressed both of those matters together on the basis of the position for the claimant being that an extension to probation ought to have been granted until the respondents were satisfied that the claimant's

attendance and performance would not improve, or potentially until those did improve enabling probation to be passed. Reference had been made by the claimant to the improving position in relation to August 2018.

177 Dr Gibson reminded the Tribunal that the respondents had extended probation. That was something that could only be done in exceptional circumstances and for the shortest time possible. The probation period should never exceed 10 months. It was important to remember that at time of dismissal the claimant had been in post for 10 months. That was the maximum probationary period permitted. The claimant was not, at the end of September and into October 2018, demonstrating an ability to perform at an acceptable level.

178 The response of the claimant was that the maximum period of 10 months for probation and the prohibition of more than one extension were self-imposed and could be departed from as a reasonable adjustment.

179 Dr Gibson highlighted that the claimant's position had been reviewed on 2 August. Her performance in August was therefore unknown at that point. To this, Mr Healy said that probation could have been continued once more on 2 August.

180 It was not however reasonable to extend probation further, said Dr Gibson. By August, the claimant's probationary period had lasted 8 months. She was at that point nowhere near achieving satisfactory performance. It was not reasonable therefore to extend probation given the requirement to meet business efficacy. A two-month extension had been granted. The claimant was nowhere near the required standard of performance after extended probation. Probation could be extended in exceptional circumstances. It was only to be extended once, he emphasised.

181 The claimant's position was that disability -related absences should be discounted. The respondents had however discounted such absences in May. It was appropriate for Mr Parker to take account of the fact that the claimant was absent on sick leave from 30 August to 25 September, that being the position at the time the hearing before him commenced. There had been no

indication of a potential return to work at the latter date. Mr Healy responded saying that this underlined the need for a medical report at that point.

182 For an adjustment to be reasonable it required to be effective, said Dr Gibson. Discounting disability related absences would not have removed the substantial disadvantage at which the claimant was being placed, he said.

183 The claimant appeared to be saying that targets for her should have been increased (i.e. softened) so that not as much was expected of her. The reality was however that pre-and post-May 2018 the claimant's stats for existing application calls and wraps after them were substantially the same. Increasing KPIs would not therefore have made any difference. It was not an appropriate reasonable adjustment, said Dr Gibson. The real performance issues were the small number of calls which the claimant could handle and the fact that she was not capable of taking any new application calls. The respondents could not ignore this as a reasonable adjustment. That appeared to be what the claimant was seeking. The respondents required to have regard to her performance.

184 As to potentially moving the claimant to a different role, Ms Russell's evidence should be accepted by the Tribunal, said Dr Gibson. The alternative role would have required even greater levels of concentration and memory retention when that was a problem for the claimant. Ms Russell had been clear that the application had been considered as a reasonable adjustment.

185 In relation to the claim of harassment, Dr Gibson urged that the Tribunal should accept the evidence from the respondents' witnesses. That was that the claimant had not attended the group meeting.

186 Dr Gibson accepted that the claimant would find it upsetting that her job would not become permanent when others had had that confirmed in relation to their own position. The respondents had handled the situation sensitively however.

187 If the Tribunal regarded the evidence as supporting the claimant having been in the group meeting, the conduct involved was not unwanted conduct related to the disability of the claimant which met the terms of Section 26 of the 2010

Act. If the claimant had been present at the meeting, that might have been insensitive. It was not however conduct which could be properly viewed as harassment under that Section.

188 As to remedy, the respondents had set out separately an alternative schedule of loss. Dr Gibson commended that to the Tribunal. That proceeded on the basis that the claimant had not been fit to work since September 2018. No jobs had been applied for. Had the claimant not been dismissed she would have continued to receive sick pay. Her entitlement was to one month at full pay and one month at half pay. On 8 November 2018 the claimant therefore exhausted her right to sick pay. She had received full pay for her entire period of notice. She in fact had no loss of earnings.

189 The claimant accepted in cross examination that she had had a very significant mental health episode in an earlier time. Anxiety and depression were pre-existing conditions. Injury to feelings in this case related to dismissal and one allegation of harassment. Dismissal should attract an award of £1000 if successful. Harassment, if successful, should attract an award of £500, submitted Dr Gibson.

Discussion and decision

190 This was a very unfortunate case. The claimant was accepted by the respondents as having performed her role well for the first 5 months of her probationary period. She then had 2 unfortunate episodes of illness which left her with difficulties in concentration and recollection. The respondents were sympathetic both in the initial aftermath of the episodes and in restricting the claimant's duties in June and July.

191 The respondents also extended the probation period being undertaken by the claimant. It is unclear why the extension was for a period of 2 months when confirmed at the beginning of June. Under the policy an extension might have been granted for a period of 4 months. There is of course the issue of whether the stipulations that one extension only was permitted and that providing a maximum period of probation of 10 months were PCPs under the 2010 Act placing the claimant at a substantial disadvantage such that making a

reasonable adjustment was required of the respondents under the 2010 Act. That 10 month limit on probation was not however pled by the claimant as a PCP in this case.

192 There was no particular issue as to the facts on the vast majority of the matters relevant to this claim and response. The major evidential dispute between the parties related to the question of whether the claimant was or was not present when the announcement was made on 29 August that those on fixed term contracts were becoming permanent employees, save for those whose probation period continued.

193 Different positions were adopted by the parties in relation to the application of the law to the facts.

Dismissal – Section 15 Claim

194 In relation to dismissal of the claimant, there were concessions by both parties. The claimant accepted that her poor performance was due to her disability. The respondents conceded that they had, in dismissing her because of her performance, treated her unfavourably because of something arising in consequence of her disability. The point for determination by the Tribunal was therefore whether dismissal was a proportionate means of achieving a legitimate aim.

Reasonable adjustments

195 It is appropriate however to deal firstly with the question of reasonable adjustments. The PCPs were set out by the claimant. It was appropriate from the point of view of the Tribunal to consider reasonable adjustments on the basis of the PCPs pled. That is so in general terms, however certainly in cases where a party is professionally represented and the solicitor has set out the PCPs which are said to have applied. It is not for the Tribunal to rewrite those or to regard the evidence as establishing a different PCP. Equally, consistent with the overriding objective and fair notice, it is not appropriate that PCPs other than those which have been pled are then found to have existed. That said, applying general principles in this area and looking both to the evidence

and submissions of both parties, the Tribunal has proceeded on the basis that the PCP involved was the requirement to pass probation within six months or such other period (resulting in a total probation period of 10 months or less) as might be set by extension, only one extension being possible.

196 One of the reasons that it is appropriate to commence by looking at the PCPs and reasonable adjustments is that if the Tribunal takes the view that reasonable adjustments ought to have been made in relation to a PCP, it is relevant for that Tribunal to consider the issue of dismissal on the basis of the reasonable adjustment which ought to have been in place. The case of *Griffiths* is in point here.

Extension to probation

197 The respondents adopted what, in the view of the Tribunal, was a fairly strict approach to the provisions of the probation policy. They used it as their template in deciding that an extension to probation would be granted to the claimant and that, when that period then expired, there were only two alternatives. Firstly the claimant could be confirmed in post. Secondly the claimant could be recommended for dismissal on the basis of not having met the terms of her probation. The possibility of seeking variation to the policy or relaxation of it in the slightly unusual circumstances of the claimant was not something contemplated at the time by Mr Parker or Ms Russell. It was unclear why HR had rejected this possibility when Ms Whyte had raised it with them.

198 At the time when the initial probation of the claimant was coming to an end (start of June 2018) the claimant was back at work, doing restricted duties. It is appreciated that that meant that her colleagues were having to do more than they otherwise would have. An extension to probation of 2 months was granted. It was entirely unclear to the Tribunal why a two-month period was chosen for this extension.

199 The PCP was said to have been the requirement that a band E employee passed probation within 6 months, the claimant's attendance and performance being relevant to passing or otherwise. What was contended for

as a reasonable adjustment was a further extension of the probation period. As the respondents recognised in addressing this argument, the PCP required to include provision for one extension of the probationary period. What was being pointed to was, in reality, a PCP requiring probation to be passed as just indicated however within 6 months or such extended period (only one extension being possible) as was granted.

200 There was evidence before the Tribunal that this PCP did cause substantial disadvantage to this claimant as compared to a non-disabled employee. With her concentration and recollection issues, she was less likely to be able to pass the probation criteria within the probation period as extended than was a non-disabled employee.

201 The issue which then arises is whether there was a failure in the duty to take reasonable steps to avoid the disadvantage. The test is whether there was a step which would or which might ameliorate the substantial disadvantage. It does not require to be an adjustment which would, with certainty, avoid the disadvantage.

202 In this case, the claimant had been told by her manager Ruth Whyte at the time when the extension of probation was granted that Ms Whyte was looking for the claimant to work on the telephone each day in the peak periods between 11:30 and 14:00, increasing as she felt fit so to do (the meeting on 19 July 2018 documented at page 109 of the bundle). That itself followed the probation meeting of 7 June documented at pages 91 to 93 of the bundle. That recorded Ms Whyte as proposing an extension to probation of 2 months to give the claimant a chance to build up to partial telephony work. Ms Whyte stated at that point that she would not expect the claimant to be at 100% by the end of the 2 month period. She could start on 15 minutes of telephony work.

203 There was therefore a recognition that the claimant would not be expected to be operating to the fullest extent by the end of the two-month extension granted to probation.

204 In fact at the end of the 2 month period, progress had been made by the claimant. That is reflected in the statistics. The claimant had worked on the telephone in the peak periods. On some days she had covered the full peak period. On others she had covered the bulk of that time.

205 As mentioned, there was no particular reason advanced as to why the extension to the probation period had been set at 2 months. This was not a situation where the concern was possible lack of application or diligence on the part of the claimant. The difficulty with performance arose from her disability. The circumstances of the episodes in May and their aftermath were matters known to the respondents. There was no suggestion either at the time or at the Tribunal hearing that an extension for a period beyond 2 months was impossible or not recommended because of particular factors. There was no medical evidence to support an extension of 2 months as opposed to, for example, an extension of 4 months.

206 Having granted an extension of 2 months, it appeared that the respondents then looked at the policy at the expiry of that 2 month period and regarded themselves as being precluded from granting a further extension. It would have ultimately come to the same thing as granting a further extension, however it might have been possible to revisit the length of the extension and to increase the period from 2 months to perhaps 4 months given the improvements in performance recognised as having been seen in the two-month period.

207 The Tribunal was of the view that a further extension being granted was a reasonable adjustment. The PCP requiring that only one extension be permitted caused substantial disadvantage to the claimant. It was less likely that someone with her disability would be able to achieve the necessary targets during one extension than would a person who was not disabled. That proved to be the case. There was some support for this from the letter from the claimant's GP at page 115 of the bundle. That substantial disadvantage could have been avoided by extending the period of probation for a second time. Extending it through until the beginning of October for instance, and thereby remaining within the 10 month period referred to in the policy as the

maximum extension of probation permitted, would have been an option open to the respondents as a reasonable adjustment.

208 As mentioned, there was no explanation as to why this adjustment was not reasonable or feasible. It is interesting to note that the possibility of an extension beyond 2 August was a matter which had obviously occurred to Ms Whyte as being an option to be explored. The notes of the meeting of 2 August at page 114 of the bundle refer to Ms Whyte having spoken to HR "*about extending probation again which has been refused so it will now be referred to band B to make decision*." There is no explanation as to why HR had refused that possibility. In evidence Ms Whyte suggested a manager above her as being someone who might decide upon a second extension to probation. When Mr Parker was giving evidence in this area, he said that the rationale for there only being one extension was not something he had ever discussed. He said it was not unreasonable in his view to make the decision in relation to the claimant at the end of 2 months. He went on to say that he had never seen a second extension to probation. When asked whether that was a possibility his response was that he could not say and had never known it. He was then asked whether it was theoretically possible that there be a second extension. He said that he did not know the answer to that question. He had not asked and therefore did not know what HR might have said. He went on to add however that if he thought it was appropriate for there to be a second extension he would have asked. The evidence from Ms Russell was that it was theoretically possible for there to be a further extension to probation if that was felt to be reasonable.

209 The context is important in assessing the position. As at 2 August the claimant's performance had improved. Specifically she was, on a reasonably regular basis by that time, meeting the target referred to by Ms Whyte when they met on 19 July of covering the peak lunchtime periods on the telephone. Given her emails to Ms Whyte, the claimant was clearly still experiencing health issues at this time. Improvement in her performance had been achieved however. Her performance in training events was commented upon very favourably. The claimant's improvement in performance in being able to

carry out more tasks within her role was not such that she was performing the role for which she was employed to the full extent. Ms Whyte had however stated on 7 June that she did not expect the claimant to be at 100% after two months. On 19 July, Ms Whyte had set out the "*starting point"* of the claimant being on the telephone in peak periods, over lunch-times, and increasing this as she felt fit, depending on her ongoing symptoms. There was also no medical evidence sought or obtained after the OH report prepared after the telephone interview, that report being submitted soon after 6 June when the telephone call took place. It had not been updated by the respondents in any fashion.

210 The Tribunal considered the evidence. The Tribunal considered it to be the case that it was a reasonable adjustment to extend the probation period for a second time for a further 2 months. It considered on the evidence that such an adjustment either would be, or might well have been, effective in removing or reducing the substantial disadvantage at which the PCP placed the claimant as a disabled person as compared to someone who was not disabled. As it transpired, the claimant's performance in August improved after Ms Whyte had decided not to confirm the claimant in post at the end of the probation period

Requirement to meet target

211 As the Tribunal understood it, the position of the claimant in this regard was associated with her position in relation to potential extension of probation for a second time. She said that the PCP applied was a requirement to work on the phone and to meet targets for that during the probation period. She was less likely to be able to manage this during that time due to her disability. It therefore made her less likely to pass probation. Adjustments should have been made to take account of her decreased phone time. There was however no specific reduction proposed as being a reasonable adjustment. The language adopted by the claimant talked of increasing targets. By that what was meant was a softening or easing of targets by providing greater time for the claimant to complete calls and to do the wrap work.

212 In the further and better particulars, it is said that "*it would have been reasonable for the respondent to adjust their assessment of the claimant to take account of the claimant's decreased phone time.*" In submission, Mr Healy said that the respondents in reviewing the claimant's performance had taken account of her whole history of employment and taken into account all of her call stats. That, he said, placed her at a disadvantage because she was not working on the telephone for a large period of time. He went on to say that it would have been reasonable for the respondents to require the claimant to work less on the phone and that, having made this adjustment, the claimant would not have been dismissed.

213 The respondents did of course make some adjustments for the claimant in the period after her illness in May. For a time she did no telephony work whatsoever. She was then gradually reintroduced to telephony work, working on existing applications and not new applications. She built up her time on the telephone. The respondents had had regard to times when the claimant was not working on the telephone. They had not simply taken the whole period of her employment and averaged the calls she had actually made over that time.

214 The view of the Tribunal was that it was extremely difficult to fix upon what might be viewed as a reasonable adjustment by way of softened or reduced targets for the claimant in order that she might be viewed as passing probation. Extending the probation period and obtaining further medical advice might have resulted in a position where there was more information as to what her capability was and what therefore, in effect, her performance levels were at the time any assessment was made. That would have allowed consideration as to whether, for example, less time on the telephones but dealing with all manner of calls was appropriate or whether the claimant was not able to handle new application calls given their increased level of demand as compared to existing application calls. Any improvements seen in length of time on the telephone and ability to deal with more complicated issues could then have been considered, together with any view on whether further improvements were likely within a reasonable time. The respondents might have concluded that that picture did not warrant probation being passed. The

claimant might have maintained that softening or reducing targets in line with her ability to perform was a reasonable adjustment. That might have been something upon which the Tribunal could then take a view.

215 The Tribunal did not however regard "the softening of or increase in targets" as being an appropriate reasonable adjustment. That provided no specification of the proposed reasonable adjustment. It did not detail in any way what would have been those targets as reasonably adjusted. The Tribunal could see that it might have been appropriate to put in place softened or increased targets. That had, in effect been done informally in the discussion between the claimant and Ms Whyte when working on the telephones over lunchtimes had been set out as being the goal for the claimant. For it to have found that there was a failure to make a reasonable adjustment in this area, however, far more evidence would have been required to enable consideration to be given to a specific proposed adjustment and to determine whether a reasonable adjustment had been set out, with a failure by the respondents to meet their statutory duty having occurred.

Alternative job

216 The Tribunal considered the request made by the claimant on 3 August, responded to by Ms Russell on 9 August. It had regard to Ms Russell's evidence as tested in cross examination. Her email of 9 August was not as full as was her evidence at Tribunal as to the reasons for not granting a change of post to the claimant. There was certainly, in the conclusion of the Tribunal, a degree of unwillingness on the part of the respondents to grant moves within the teams at this point. Nevertheless, the Tribunal was satisfied, having considered Ms Russell's evidence in detail, that she had looked at the matter from the standpoint of whether it would be a reasonable adjustment to move the claimant to this alternative role.

217 Ms Russell was conscious of the demands of the possible alternative post and of the acceptance by the claimant at this point that she had difficulty retaining information. The claimant had not been confirmed in post. A lengthy training period of 13 weeks was involved if any transfer was to take place. Whilst Ms

Russell was aware of the favourable reports as to the training undertaken by the claimant during her then role, those related to short training periods rather than a 13 week intensive training period. Whilst the ultimate aim was to have those working within the customer service centre (as was the claimant), interchangeable with case workers (the possible alternative role being assessed as a reasonable adjustment by Ms Russell) it was potentially going to take some time for that to be the reality. The proof of concept being undertaken was of significance. Given the requirement for a lengthy period of intensive training, the claimant's health issues at this point and the demanding role involved as a caseworker the Tribunal accepted that moving the claimant into the role of a caseworker was not a reasonable adjustment. There had been no failure by the respondents in that regard.

Dismissal – proportionate means of achieving a legitimate aim?

218 The Tribunal accepted that it was a legitimate aim for, broadly put, standards of customer service to be met, with those in turn being met by employees performing in accordance with the KPIs. There was no evidence that those KPIs were set at unreasonably high levels for example. The claimant in fact was performing satisfactorily against those KPIs in the period prior to her episodes of illness.

219 The legitimate aim contended for by the respondents was that of being able to employ people who were able to perform to the expected performance standards, incorporating the standards of volume and speed with which the work should be carried out, as well as the ability to carry out the full range of duties they were employed to do and to do so independently without significant management support. It was also said to be a legitimate aim that the respondents were able to employ people who were able to meet the standards of attendance expected by them.

220 It was said by the respondents that if an employee was not able to meet those legitimate aims then dismissal was a proportionate means of achieving those aims as it promoted a better customer experience and business efficacy. In the next budget year, replacement of an employee who had been dismissed,

the replacement employee performing to the expected performance and attendance standards, could then take place, the respondents said.

221 In its assessment the Tribunal kept in mind that the respondents bore the burden of showing that what was, in this case, admitted as discriminatory behaviour under Section 15 of the 2010 Act pursued a real need on the part of the business and was a proportionate means of achieving a legitimate aim. It also kept in mind the principle confirmed in *Homer* and accepted by both parties in their submission that it is appropriate to consider whether a lesser step would have achieved the legitimate aim, *Homer* stating that the unfavourable treatment requires to be a reasonably necessary means of achieving the legitimate aim.

222 At time of dismissal the claimant had been absent for almost 2 months. As found in terms of this Judgment however that absence followed upon a discriminatory act of harassment by the respondents on 29 August. Prior to that act, the claimant had been performing part of her role and had been increasing the elements of the role which she carried out.

223 It is relevant for the Tribunal to include in its examination of the position the duty to make reasonable adjustments. As indicated above, the cases of *Dominique* and *Griffiths* are helpful. They saw both the EAT and Court of Appeal express the view that, in a situation where reasonable adjustments had not been made then, if the reasonable adjustments could have prevented the disadvantage involved, it was difficult to see, if not more strongly put than that, that the discriminatory unfavourable treatment could be justified as a proportionate means of achieving a legitimate aim.

224 In this case, as detailed above and for the reasons set out above, the Tribunal concluded that there been a failure to make reasonable adjustments. That failure consisted of the absence of time being given to the claimant by way of an extension to probation beyond the extension actually given to her. Had an extension been granted, it was a reasonable conclusion on the evidence that the claimant's performance, judged against the KPIs would have improved. It had improved towards the end of July and also through August. It might have

been that some softening of the targets for the claimant could have been introduced. The claimant would have been able to perform in that circumstance and able to help her team. She was absent during September and October following the discriminatory act of harassment by the respondents. Again, it is relevant in considering dismissal to have regard to the fact that her absence was triggered by a discriminatory act.

225 The situation which faced the respondents was that of having an employee with a disability who had performed well until the 2 episodes in May. She therefore had a "*track record*" of some 5 months of good performance. She was then building up her ability to perform and increasing her workload. Providing her with softer targets but retaining her as an employee through firstly an extended probation period and secondly potentially as an employee confirmed in post would have assisted the team in meeting the legitimate aim. It would have been a lesser measure which would have assisted with achievement of the legitimate aim. Although Mr Parker said that during August the claimant was still requiring unsustainable levels of support, there was very little evidence to back that up. Mr Parker referred to the claimant's manager as having said this to him. Ms Whyte, the claimant's manager, said however that she was on leave during August and had other commitments and was not at her desk a great deal. Ms Russell at the appeal outcome meeting, when talking of significant support given to the claimant, that support being beyond a sustainable level, made a significant comment. This appears at page 157 of the bundle. Ms Russell says that she has "*examined*" "*records of conversations between you and your manager*". No such records were produced. There was no such documentation before the Tribunal, although it was said to be have been examined by Ms Russell and to show support to an unsustainable level. Mr Parker did not refer to there being any such documentation. He spoke in evidence of a conversation with the claimant's manager. The claimant's figures for calls on hold were higher than those normally involved. That was not however explored with the claimant or with her manager to ascertain what it was that was causing this statistic and whether anything could be done by way of training or confidence building with the claimant that might have reduced the time spent on hold.

226 There was therefore no proper evidence before the Tribunal as to the extent and impact of any support to help substantiate a basis for it being viewed as unsustainable. This was so despite records apparently existing of conversations between the claimant and her manager backing this up.

227 In addition, there was no evidence before the Tribunal as to the "benefits" of the claimant not been present at all in terms of any efficiencies or increases in levels of customer service against the KPIs. It had to be borne in mind that there was no prospect of an immediate replacement for the claimant as Ms Russell's evidence was that it would be the following financial year before recruitment was possible.

228 In providing advice to Mr Parker, HR concentrated on dismissal and potential benefits of that, without examining less Draconian steps in a properly balanced way. This added to the view of the Tribunal that the respondents had not considered other lesser alternatives to dismissal. That element weighed against dismissal being able to be supported as a necessary means of achieving the legitimate aim of the respondents.

229 Dismissal is of course the ultimate measure that might be taken. It was taken in the situation without any up-to-date medical information being obtained and without consideration of possible other solutions. It is appreciated that when the decision was taken to dismiss in October the earlier failure to make reasonable adjustments and discriminatory act of harassment were not matters focused in the respondents' mind. It is also appreciated by the Tribunal that it is not considering an unfair dismissal. The Tribunal therefore kept in mind that it was considering proportionality and weighing the dismissal on that basis.

230 For the reasons detailed however, in the particular circumstances of this case, the Tribunal concluded that dismissal was not a proportionate means of achieving a legitimate aim.

Harassment

231 As set out above, it was common ground that the claimant had been informed of the decision by the respondents to confirm in post the fixed term employees apart from those whose probationary period had not been completed. The claimant was in the latter category. The dispute between the parties was whether the claimant had joined the group meeting in the open plan area and had then heard the announcement in person.

232 The claimant was able to describe coming into the meeting and was clear that Ms Russell had stopped when she saw her joining the meeting before continuing and making the announcement as to those on fixed term contracts becoming permanent employees, save for those still going through the probation process. Ms Whyte confirmed that it was plausible that the claimant had come to the meeting area. Ms Russell, fairly, accepted that it was also plausible. She said that to the best of our knowledge however the claimant was not present. She said that there was a chance that the claimant had been in the crowd but that she viewed it as being highly unlikely. Ms Russell had been addressing a crowd of perhaps 30 or so employees. Ms Russell confirmed that if she had seen the claimant arrive in the meeting she would have stopped talking before continuing. That was what the claimant said had happened.

233 In general terms the claimant was regarded by the Tribunal as being credible and reliable. She did not strike the Tribunal as having flawed recall or as having any “agenda” in giving her evidence. She appeared to the Tribunal to give evidence to the best of her recall. Her manner was calm. She did not strike the Tribunal as being prone to exaggeration. She was quite clear in her evidence as to what had happened on 29 August.

234 Ms Russell was, understandably, less able to be precise about whether the claimant was in the meeting. Firstly, there was a reasonably large grouping of people. Secondly, being present in the meeting would be something which would have “stuck with” the claimant more than it would with Ms Russell in the view of the Tribunal.

235 The Tribunal weighed up the evidence from the claimant, Ms Whyte and Ms Russell. There was no clear contradiction in that evidence. Insofar as the evidence of Ms Russell was that it was distinctly unlikely that the claimant had been present in the meeting, the Tribunal preferred the evidence of the claimant that she had been there to hear the announcement.

236 The claimant was clear in her description of the impact of this announcement being made. What lay behind the reason for the claimant being treated differently than the others and not having her fixed term contract made permanent was that her performance had been such as to mean that probation had not been successfully completed. That level of performance was due to her disability.

237 The claimant's evidence was of upset caused by others looking at her when the announcement was being made. She spoke of feeling humiliated and of all the managers knowing the situation in her view. She said that she felt pathetic, humiliated and degraded. She was absent from work after that point.

238 Ms Russell said under cross examination when asked whether, on the premise that she had been in the meeting, the claimant was justified in feeling as she did, "*yes, but to the best of my knowledge she was not present*".

239 The incident was undoubtedly perceived by the claimant as having the effect detailed in Section 26 of the 2010 Act. The Tribunal required to weigh up whether it was reasonable for the conduct to have that effect. It required therefore to consider the objective position, including the other circumstances of the case.

240 The circumstances were those of the claimant having performed well, having had episodes of illness with probation then be extended due to the impact of that upon her performance, with the claimant knowing at this point that she was not being confirmed in post with the matter being referred for consideration by a band B manager for possible dismissal. The announcement being made in a general meeting at which the claimant was in attendance was in the view of the Tribunal, applying the objective standard, conduct which met the test in Section 26 of the 2010 Act.

Compensation

241 The heads of compensation involved were injury to feelings and loss of earnings. The injury to feelings related to the failure to make reasonable adjustments, discriminatory dismissal and harassment. The loss of earnings arose through the discriminatory dismissal.

Injury to feelings

242 In relation to harassment, the claimant accepted that she had pre-existing anxiety and depression. Her evidence was that she was absent from work after 29 August when the harassment occurred due to work-related stress in line with her anxiety and depression. The only relevant medical evidence available relating to this time was that from the claimant's GP in the letter of 29 July at pages 165 and 166 of the bundle.

243 The claimant had been in attendance at work. Her performance had been improving. She gave evidence that the respondents "chipped away at" her dignity when she was off by not phoning her to see if she was all right and to check on her symptoms. She thought of going in to work after a four-week period but then took the view that she could not go in to the workplace then as the respondents knew her position but had not been in touch with her. A meeting scheduled for 18 September did not go ahead. Ms King represented the claimant at the meeting on 25 September.

244 The impact of harassment was relatively significant. The immediate impact is detailed in paragraph 58 of this Judgment. The claimant was also absent from work from the subsequent day until termination of her employment with the respondents.

245 The view of the Tribunal was that an appropriate award of compensation in respect of injury to feelings associated with the harassment was £4,500. It was a "*one off*" act. It was viewed by the Tribunal as warranting compensation in the lower *Vento* band. Interest is appropriately calculated on that amount.

Failure to make reasonable adjustments

246 The failure in this regard was that of failing to extend the period of probation more than once. Whilst no doubt upsetting to the claimant, she coped with this and managed to improve her performance during August, after no extension had been granted beyond the two-month extension granted at the beginning of June. The Tribunal came to the view that an appropriate award of compensation in respect of injury to feelings associated with this discriminatory conduct lay within the lower *Vento* band. It assessed the value of the award at £4,000. Interest has accrued on that amount.

Dismissal

247 When the claimant got the dismissal letter, she described being very upset. She said that she had never felt this way. She could not read it through fully for a couple of days. It made her feel that she could not do something and so it was unlikely she would never get a job ever again. It made her feel incompetent.

248 The claimant's evidence was also that she was doing well until she was recommended for dismissal. She had not been able to look for a job due to ill-health from time of dismissal onwards. That ill-health was caused in part by the act of harassment and then by the decision to dismiss. The claimant also confirmed that she had a pre-existing condition of anxiety and depression.

249 There was limited medical information available as stated. The GP did say in the report of 29 July at page 165 of the bundle that the most significant and severe aspect of the episode was experienced during the time following dismissal.

250 The Tribunal recognised that dismissal had had a real and negative impact upon the claimant. That dismissal was discriminatory. It is difficult however to put a financial figure on the injury to feelings element. The Tribunal, as best it could however, did that. It regarded the figure appropriate as being one within the mid *Vento* band. It awards the sum of £10,000. Interest accrues on that amount.

Financial loss – dismissal

251 The claimant sought her net weekly wage of £303 for the period from 8 November 2018 to date of Tribunal and for 26 weeks thereafter. That is a total of 67 weeks. The total sum claimed in this regard was therefore £20,301. It is appropriate to deduct the sum received by the claimant for that length of time by way of employment support allowance. On the basis of the figures that comprises £950.30 in respect of the period 17 November 2018 to 14 February 2019, £886 in respect of the period 15 February 2019 to 12 April 2019, £2121.35 in respect of the period from 13 April 2019 to date of Tribunal hearing and then £2902.90 in relation to the period 26 weeks from date of the Tribunal hearing. For the period in question therefore the amount of employment support allowance received by the claimant is £6860.55. Deducting that amount from the loss of income claimant, £20,301, resulted in a net amount of £13,440.45.

252 The respondents submitted that no award should be made. Their position was that the claimant had been off sick prior to her dismissal. Had she not been dismissed she would have received sick pay. She had exhausted sick pay at date of her dismissal.

253 There is always an element of speculation when a Tribunal considers and makes an award in relation to future loss. It is sometimes the case that it is impossible to speculate. A Tribunal should however do what it can to try to compensate a claimant appropriately if it takes the view that discrimination has occurred by the act of dismissal.

254 There is a complication in this case. There had been, on the findings of the Tribunal, discriminatory conduct by the respondents towards the claimant prior to 29 August 2018. A further discriminatory act then occurred on 29 August. The claimant was absent from 29 August until her dismissal. The dismissal was effective on 8 November 2018, although the decision was taken and communicated to the claimant on 4 October 2018.

255 It is the case that the claimant has not worked since 29 August 2018. She has not been well enough so to do. Had her probation period not come to an end

on 2 August 2018, the position might have been different. Extending probation was a reasonable adjustment in the view of the Tribunal. Other fixed term contract employees would still have had their contracts confirmed as having been made permanent on 29 August. If a further extension to probation had been granted as a reasonable adjustment, the claimant would not however have been in the position where she knew that her probation period was not being extended and that she had been referred to the decision maker on the basis of potential dismissal. She may not therefore have reacted in the same way to the incident on 29 August 2018. She may either not have gone absent on sick leave or may have been able to return to work prior to any review on expiry of any extended period of probation.

256 The Tribunal recognised that there was however a risk of continuing ill-health on the part of the claimant and an inability to meet targets, even potentially as adjusted. The view of the Tribunal was that there was therefore a risk of the claimant's employment coming to an end on the basis of capability, with her employment being ended in a non-discriminatory manner. It might have been the case, for example, that medical evidence established that there was no reasonable prospect of the claimant returning to fitness for work in the foreseeable future due to ongoing health issues. In that circumstance and for the purposes of assessment of risk of employment ending, there would be far less likelihood of there being discriminatory conduct by a failure to make a reasonable adjustment by extension of probation, through an incident of harassment and through dismissal occurring.

257 The claimant's health had improved, enabling her to increase the levels of her performance towards the end of July and into August 2018. Nevertheless, she was not performing at the levels set out in the KPIs. She had, however, been performing at a satisfactory level prior to being affected by illness in May 2018. The Tribunal considered this point carefully. It was of the view that the claimant might well return to satisfactory performance levels. There was remained however the risk of a non-discriminatory dismissal. It regarded the percentage risk of that occurring as being 20%. Given the view of the Tribunal as just expressed, compensation therefore properly is reduced by 20%.

258 The resultant sum by way of loss of earnings awarded by the Tribunal, which prior to any such deduction amounted to £13,440.45, therefore became £10,752.36. That is the sum in this regard under this head of claim which the respondents are ordered to pay to the claimant.

259 By way of clarity, the loss of income for the period to Tribunal is, on a net basis, £8465.35, of which the claimant receives 80%, given the deduction of 20% mentioned. That results in a loss to date of Tribunal of £6,772.28.

260 Weekly loss thereafter was sought for a period of 26 weeks. Without any reductions the sum sought was therefore £7878. Deduction of benefits received results in a net loss for that time of £4975.10. 80% of that sum is £3,980.08.

Interest

261 Interest is payable at 8% per annum on injury to feelings award and also in respect of the discriminatory dismissal and loss flowing from that.

262 Interest in respect of the injury to feelings award is awarded from the date of the discrimination. In this case that is 2 August in respect of the failure to extend probation for a second time. It is 29 August in respect of harassment. 4 October 2018 was the date of the discriminatory dismissal. Interest runs on past loss from the mid-point between dismissal and the date of decision.

263 The date to which interest is calculated is the date of decision. That is 3 February 2020.

The figure work is –

- Failure to make reasonable adjustments, £4,000. Interest from 2 August 2018 to 3 February 2020, one year and 26 weeks, £480.
- Harassment - £4,500. Interest from 29 August 2018 to 3 February 2020, one year 23 weeks, £519.23.
- Dismissal - £10,000. Interest from 4 October 2018 to 3 February 2020, one year 18 weeks, £1,076.92.

- Loss of income - calculated at time of the decision being made, 3 February 2020, results in the period of weeks of actual loss being 41 to date of Tribunal. That loss is £6772.28. There is a further period of 23 weeks to 3 February 2020. The loss for that period is £3520.84.

- Past loss is therefore £6,772.28 + £3,520.84. That totals £10,293.12. Interest is added at 8% from the midpoint between dismissal and decision. From 8 November 2018 to 3 February 2020 is 64 weeks. Interest is therefore added for 32 weeks. That results in interest of £506.74.

- Future loss - a 67 week period for compensation in total is claimed, Taking account of it being 41 weeks to date of hearing and 23 weeks thereafter to date of Judgment, being a period for past loss of 64 weeks, this results in the claim for future loss being for 3 weeks The sum awarded in that regard is £459.24. No interest is paid on future loss.

Employment Judge : R Gall
Date of Judgment : 03 February 2020
Date sent to parties : 04 February 2020