EMPLOYMENT TRIBUNALS

Claimant: Mr I Sadiq

Respondent: National Audit Office

Heard at: London Central Employment Tribunal

On: **4, 5, 6, 7, 8 (and chambers on 22) November 2019**

Before: Employment Judge Quill; Ms H Craik; Mr J Carroll

Appearances
For the claimant: In person
For the respondent: Mr L Dilaimi, counsel

RESERVED JUDGMENT

(1) The claims of direct disability discrimination under s13 Equality Act 2010 ("EA 2010") fail and are dismissed.

(2) The claims of failure to make reasonable adjustments under s.20 EA 2010 fail and are dismissed.

(3) The claim of discrimination arising from something in consequence of disability under s.15 EA 2010 succeeds

(4) The claim of unfair dismissal under s.95 and s.98 Employment Rights Act 1996 ("ERA") succeeds.

(5) There will be a remedy hearing.

REASONS

Introduction

1. The Claimant is a former employee of the Respondent who issued this claim on 21 April 2018, following a period of early conciliation from 21 February 2018 to 21 March 2018.

The Claims

2. The Claimant brought claims of:
   2.1 direct disability discrimination under s13 Equality Act 2010("EA 2010");
   2.2 failure to make reasonable adjustments under s.20 EA 2010;
   2.3 discrimination arising from something in consequence of disability under s.15 EA 2010;
   2.4 unfair dismissal under s.95 and s.98 Employment Rights Act 1996 ("ERA").

The Issues

3. A list of issues had been drawn up by the Respondent, agreed by the Claimant, and approved by Employment Judge Grewal at a preliminary hearing dated 14 May 2019. It appeared in our hearing bundle and is replicated below. The words in bold are the additions that were agreed during the hearing. For ease of reference, we have retained the headings and numbering of the original.

2. JURISDICTION

2.1 Was the Claimant's claim presented to the Tribunal before the end of the period of three months beginning when the act complained of was done?

2.2 In so far as the Claimant is complaining that the Respondent omitted to act, when did the Respondent make the decision not to act?

2.3 Did the matters complained of amount to conduct extending over a period ending within the period of three months prior to the presentation of the claim?

2.4 To the extent that any of the Claimant's complaints under the Equality Act 2010 are out of time, would it be just and equitable for the Tribunal to extend time for the bringing of the complaint

3. UNFAIR DISMISSAL

3.1 Was the Claimant dismissed for a potentially fair reason under section 98 ERA?

3.2 Was the Claimant's dismissal fair?

3.3 Was the Respondent's decision to dismiss the Claimant one which was reasonable in all the circumstances?

4. DISABILITY

Was the Claimant disabled at all relevant times (section 6 EqA)? The Claimant relies on severe depression and anxiety as his disability. **The Respondent concedes that the Claimant was disabled from December 2016 onwards by reason of depression and anxiety**.

5. DIRECT DISABILITY DISCRIMINATION

5.1 The Claimant relies upon a hypothetical comparator, being an Assistant Auditor, employed on a fixed-term training contract in exactly the same material circumstances as himself, other than they do not suffer from severe depression and anxiety.

5.2 Was the Claimant treated less favourably by the Respondent? The Claimant relies on the following as alleged less favourable treatment:

5.2.1 Corrine Tanner neglected to address the concerns the Claimant raised with her about work-related factors exacerbating his disability, despite GP advice making it clear that management should seek to communicate with the Claimant regarding the triggers that exacerbated his disability. In particular, on 27 March 2017, the Claimant met with Corrine Tanner and described how his negative perceptions of his relationship with her and Nikki Measures were causing him anxiety. He stated that a reset of these relationships with new people would reduce his levels of anxiety and depression. No further action was taken following this discussion.

5.2.2 Corrine Tanner made her own medical judgments about the Claimant's health, which she was not qualified to make. This meant that significant triggers for the Claimant's disability were ignored and his health worsened due to work-related factors. In particular:

i On 27 March 2017, when the Claimant asked to move line managers and HR representative, Corrine Tanner concluded that this was not required as the issues the Claimant had were not with the individuals but the fact that such individuals were holding him to account when he considered issues should be overlooked.

ii On 2 February 2017, Corrine Tanner asked the Claimant to delay seeing his GP until the next week, when he was unallocated.

5.2.3 Corrine Tanner made inappropriate, biased and pejorative comments about the Claimant in the Capability Case Summary. In particular:

i At paragraph 48, Corrine Tanner presented a biased view of the medical facts, by stating that the Claimant had exercised poor judgment by going hiking over the weekend, given that he had been suffering from low energy levels during the preceding days.

ii At paragraph 49, Corrine Tanner implicated that she doubted the seriousness or genuineness of the Claimant's disability because whilst he

had periods of sick leave in July 2017, he was able to participate in the DCMS summer team-day on 20 July 2017.

iii At paragraph 47, Corrine Tanner quoted those parts of the Respondent's Code of Conduct referring to the need to avoid overindulgence or addiction, which when coupled with paragraphs 48 and 49, intended to illustrate that the Claimant did not comply with this specific requirement of the code of conduct. This was highly inappropriate.

5.2.4 On 4 May 2017, Corrine Tanner sent an email to Nikki Measures in which she inappropriately raised concerns about his ability to make audit judgments by inappropriately applying one instance of purported poor judgment to make generalised judgments about the Claimant in unrelated situations.

5.2.5 On ~~10~~ **13** March 2017, Corrine Tanner sent an email to HR in which she made inappropriate judgments that the Claimant did not seem to be ill at the time she had seen him. In doing so, she indicated that she doubted the genuineness of the Claimant's disability.

5.3 Did the Respondent treat the Claimant less favourably because of his disability than it would have treated others (section 13(1) EqA) and if so, was this because of the Claimant's disability?

6. DISCRIMINATION ARISING FROM DISABILITY

6.1 Was the Respondent aware, or ought reasonably to have been aware, that the Claimant had the particular condition(s) in question? **The Respondent concedes that it was aware, or ought reasonably to have been aware, that the Claimant was a disabled person on either 25 July 2016 or on the date the Claimant became disabled, whichever is later.**

6.2 Did the Respondent commit the following acts?

6.2.1 On 8 September 2017, Corrine Tanner initiated a capability process.

6.2.2 On 23 October 2017, Hilary Lower made a decision to terminate the Claimant’s employment.

6.2.3 On 15 March 2018, John McCann dismissed the Claimant's appeal against his dismissal and formal complaints.

6.2.4 The acts set out at paragraphs 5.2.1 — 5.2.5 above.

6.3 If so, did the acts amount to unfavourable treatment by the Respondent because of something arising in consequence of the Claimant’s disability, namely his sickness absence, reduced productivity at work and instances of mistakes made in his work? **The Respondent concedes that the Claimant's sickness absence recorded (at Bundle pp.527-529) as sickness absence for anxiety/depression was something arising in consequence of the Claimant's disability, but the Respondent does not concede that any sickness absence not recorded as sickness absence**

for anxiety/depression was something arising in consequence of the Claimant's disability. The Respondent concedes that reduced productivity at work was something arising in consequence of the Claimant's disability as of either 18 April 2016 or the date on which the Claimant became disabled, whichever is the later. The Respondent does not concede that instances of mistakes made in his work were something arising in consequence of the Claimant's disability while he was in the employment of the Respondent.

6.4 If so, was the treatment a proportionate means of achieving a legitimate aim? **The Respondent relies on the efficient operation of the business as a legitimate aim.**

7. FAILURE TO MAKE REASONABLE ADJUSTMENTS

7.1 Further and in the alternative and pursuant to section 20 & 21 of the Equality Act 2010 did the Respondent apply the following PCPs:

7.1.1 Not changing line managers when there are difficulties in the relationships between line managers and those that they manage.

7.1.2 Not providing effective mediation when there are difficulties in relationships between staff

7.1.3 Not allowing trainees to attend college courses for professional exams from the beginning, where trainees had previously attended but had not been able to engage productively due to ill health.

7.1.4 Not considering or initiating the Access to Work mental health support service, provided by the organisation Remploy, for staff with mental health difficulties.

7.2 Did the PCPs put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant says that the substantial disadvantage was:

7.2.1 In relation to the PCP at 7.1.1, his anxiety and depression which related to the difficulties with his line manager were not alleviated, causing his conditions to be exacerbated, making him unfit to work and struggle hugely when he attempted to engage with work

7.2.2 In relation to the PCP at 7.1.2, his anxiety and depression which related to difficulties with some office relationships were not alleviated, causing his conditions to be exacerbated, making him unfit to work and struggle hugely when he attempted to engage with work.

7.2.3 In relation to the PCP at 7.1.3, he was unable to fully prepare for his exams, causing him to fail one exam and defer other exams and exacerbate his depression and anxiety.

7.2.4 In relation to the PCP at 7.1.4, he was not given an opportunity for his work-related disability triggers to be addressed through independent

mediation/discussion, which led to his employment being terminated and his appeal against dismissal being rejected.

7.3 If so, did the Respondent know, or ought it reasonably to have known, both that the Claimant was disabled and that he was likely to be placed at a substantial disadvantage because of the PCP(s) applied to him? **The Respondent concedes knowledge on the terms set out at Issue 6.1. The Respondent does not concede that the Claimant was likely to be placed at a substantial disadvantage because of the PCP(s) applied to him.**

7.4 If so, did the Respondent take all steps as were reasonable in the circumstances to prevent the PCP having that disadvantageous effect?

7.5 Would the adjustments suggested at paragraph 7.6 below have removed or overcome the above substantial disadvantages?

7.6 The Claimant asserts that the Respondent should have made the following reasonable adjustments under s.20 & s.21 of the Equality Act 2010, namely:

i. From February 2017 to March 2018, to change his line manager from Corrine Tanner to someone else.

ii. From October 2016 onwards, to allow him to attend college courses from the start. The Claimant says that he raised this in October 2016, that it was agreed to in April 2017 but it was never actually implemented.

iii. From February 2017 to March 2018, to provide him with effective mediation to resolve his difficulties at work. The Claimant says that he was continually raising this through all channels open to him.

iv. From September 2017 through to March 2018, to engage with Remploy Access to Work, to address the concerns with his attendance/performance.

7.7 If so, was it reasonable in all of the circumstances for the Respondent to make that adjustment(s)?

7.8 If so, did the Respondent, in fact, fail to make that adjustment(s)?

8. REMEDY

Unfair dismissal

8.1 The Claimant seeks reinstatement and alternatively compensation for unfair dismissal. The Respondent resists an order for reinstatement.

8.2 What remedy, if any, is the Claimant entitled to?

8.3 Should the remedy available to him be reduced because:

(a) His conduct makes it inequitable for compensation to be awarded to him;
(b) He would have been dismissed in any event; or,
(c) He has failed to adequately mitigate his loss?

Discrimination

8.4 Has the Claimant shown the extent of his injury to feelings? If so, what injury to feelings award should the Claimant receive?

4. The fair dismissal reasons that the Respondent relied on were capability or, in the alternative, some other substantial reason, being that there was no realistic possibility of the Claimant's completing his training programme within a reasonable time frame.

The Evidence and the Hearing

5. We had a bundle of documents contained in 3 tightly packed lever arch folders, totalling approximately 1300 pages.

6. We heard witness evidence from the Claimant, and he was cross-examined. The Claimant had not produced a written statement, and we gave permission for him to rely on several documents within the bundle (which had been prepared by him in the course of his internal dealings with the Respondent, and in the course of this litigation) to stand as his evidence-in-chief.

7. On behalf of the Respondent, we heard evidence from the following witnesses, each of whom had prepared a written statement which had been sent to the Claimant prior to the hearing: Paul Keane, Director; Hilary Lower, Director; John McCann, HR Director; Corrine Tanner, Audit Manager.

8. The case had originally been listed for 6 days, and had been due to start on Friday, 1 November 2019. In the event, a preliminary hearing (before Employment Judge Quill sitting alone) took place on that day. The time available for the full hearing was thus reduced to 5 days, and we placed limits on the amount of time available for cross-examination and submissions to enable us to complete the hearing within the shorter amount of time that was available. For the same reason, the tribunal and the parties agreed that this hearing should deal with liability only. By sitting late, we were able to complete the evidence and submissions within the allotted time, and we are grateful to both parties for that.

The findings of fact

<u>The agreements and policy documents</u>

9. The claimant commenced employment with the respondent on 2 September 2013. He was a school leaver at the time, and his job title was Student Chartered Accountant (Audit Technician Trainee) and was issued with a contract of employment dated 2 September 2013, which was stated that it was a 24 month fixed term contract.

10. At the same time, the claimant and respondent also entered a training agreement. The training agreement was not a contract of employment, but rather it related to approved training for completion of the Certificate in Finance, Business and Accounting (CCFAB) and subsequent membership of the ICAEW on completion of the ACA.

10.1 The training agreement began on 2 September 2013 and was to continue for 60 months of "Approved Training". The parties both treated this as an agreement that was due to last until December 2018.

10.2 The agreement could be terminated earlier in certain circumstances. These included mutual agreement or alternatively if the respondent formed the belief that the claimant lacked the capability to progress to membership of the ICAEW (for example, because of poor study performance and/or poor performance in assessments).

10.3 The training agreement would automatically terminate upon termination of the contract of employment.

10.4 If there was any conflict between the provisions of the training agreement and the contract of employment, then the contract of employment was to prevail.

11. In 2015, the parties entered into a new written employment contract, for the post of Student Charted Accountant (Assistant Auditor). This preserved continuity of employment. It was a fixed term contract due to terminate on 31 December 2017 unless terminated prior to that. The terms and conditions were similar to the 2013 contract, save that the new contract was not subject to a probationary period.

11.1 Normal hours of work were 41 hours per week, starting 9am each day, and finishing 5.30pm Monday and Tuesday, and 5.00pm on Wednesday to Friday (with one hour for lunch each day). Employees might sometimes have to work additional hours without additional remuneration for the proper performance of their duties. (Time of in lieu and paid overtime pay only being available in specific circumstances.)

11.2 Employees were contractually obliged to notify the respondent before 10am on the first day of any sickness absence. Paid sick leave was available subject to compliance with the rules of the scheme.

11.3 The termination and notice provisions were clause 8.

11.3.1 Clause 8.1 specified periods of notice (though not circumstances in which notice might be given).

11.3.2 Clause 8.2 described the circumstances in which an employee might be dismissed without notice.

11.3.3 Clause 8.4 stated that termination of the training agreement would result in the termination of the student's employment.

11.4 The disciplinary and complaints procedure, and the code of conduct, were separate written documents, which did not form part of the contract of employment. No collective agreement governed the terms and conditions, and the Respondent asserted the right, in the contract, to make reasonable changes to the terms of employment.

12. The Code of Conduct states, in the chapter entitled "Personal Conduct", at paragraph 7.1(b):

Individuals should adopt high standards of personal discipline and avoid any forms of overindulgence or addiction which may adversely affect their conduct, or impair the performance of their official duties.

13. The respondent has an HR manual. We were provided with Chapters Three (Equality and Diversity at the National Audit Office), Eleven (Managing Sickness Absence), Nineteen (Managing Misconduct), and Twenty (Managing Underperformance).

14. In Chapter Twenty:

14.1 The policy statement at the beginning includes reference to annex 5 which is something we will consider in more detail later on in our reasons.

14.2 Under the heading “How should you respond if you are the manager of an underperforming employee?”, the document states that:

14.2.1 Managers should establish the facts and gain an understanding of the factors affecting performance in order to take a fair and relevant course of action to support improvement.

14.2.2 Managers should discuss performance informally with the underperforming employee and consider all the relevant information, including appraisal documents and evidence gathered from other colleagues with whom the employee has worked.

14.2.3 Managers are required to consider whether any diversity-related issues may be impacting on performance. In particular, whether "disabilities and long-term health conditions, including mental health, may be contributing factors to underperformance”.

14.2.4 Health issues “can be complex and should be considered carefully and sensitively before deciding what, if any, action to take. In cases involving disability or ill health conditions, you may need to take medical advice and consider reasonable adjustments to the individual's work or working arrangements (discussed this with your relevant HR business Partner) as quickly as possible."

14.2.5 Managers should consider whether reasonable adjustments to work or working arrangements are required in cases involving a disability.

14.3 The document specifies that there are two options: informal action, and formal action. In relation to informal action, the document states that amongst it is important to consider options regarding appropriate support for mental health. Furthermore, that "*in cases of disability, following medical advice consider making reasonable adjustments to the individual's work or working arrangements and give appropriate time for these to take effect*."

14.4 In relation to formal action, this could potentially be taken without there having been previous informal action in cases in which “*the underperformance was more serious than a minor shortfall against the required standard*”. In other cases, formal action should be commenced after informal action has been

taken but the concerns remain and, in the case of an employee after reasonable adjustments have been implemented but the performance concerns remain.

14.5 The formal procedure includes the line manager preparing a case summary, supplying it to the employee. A review meeting then takes place chaired by someone not previously connected with the case.

14.6 Following the review meeting, if satisfied that the employee had underperformed, then the normal outcome would be a first written warning. In exceptional cases (where poor performance was having a serious effect on the business or where there had been gross negligence), then the chair of the meeting could consider issuing a final written warning or termination of employment with notice.

14.7 Where a first written warnings was issued, then that might potentially lead (after a further review meeting) to a final written warning if there was insufficient improvement. A final written warning might lead (after a further review meeting) to dismissal if there was insufficient improvement. The relevant timescales over which performance would be assessed following a warning would usually be no longer than 3 months. However, this could be longer in some circumstances. The document states that one reason for adopting a period longer than 3 months is "*if a particular timeframe is needed to implement fully any reasonable adjustments and to assess their impact*".

14.8 The employee has the right to appeal against a first written warning or final written warning or a decision to terminate employment.

15. Chapter Twenty also contains a section headed Annex 5: the capability procedure.

15.1 This states that the respondent has a "supportive approach to managing short-term or temporary illness and absence, as well as long-term absence" which is dealt with in Chapter Eleven of the HR Manual and "these are not the subject of this capability procedure".

15.2 The annex states "*in some, probably quite rare cases*", there may be "*clear and ongoing underperformance issues or [the employee] may be unable to perform the full role … we reasonably expect of them due to a medical condition or disability*". Full role was specified to mean "*the duties and responsibilities of his or her post and/or the requirements of his or her job description*".

15.3 The annex stated "*as a result, the employee may not be able to improve to meet the requirements of the role within a reasonable timeframe despite further training and support, and despite reasonable adjustments (where relevant) to their work or working arrangements*". It continued: "*in such cases, it may not be appropriate, or in the best interests of the individual or the NAO, to follow the standard procedure for managing underperformance (which requires a succession of warnings and review periods) if there is no realistic likelihood of the individual achieving the required improvement or job expectations within a reasonable timeframe despite support or training or*

reasonable adjustments "were relevant). In such circumstances, the NAO may therefore consider termination of employment on the grounds of capability".

15.4 The document states "*before taking such process forward*", it is essential that

15.4.1 the line manager consult with the relevant People Director and HR business partner;

15.4.2 full consideration is given to the likely benefit of further training and support, and whether reasonable adjustments should be implemented;

15.4.3 any relevant information from Occupational Health, or other medical evidence, is considered.

15.5 The Annex states that in "such cases", the Respondent would not follow the full procedure for managing underperformance but would "follow a fair process for considering termination of employment". That process is said to be to

15.5.1 Obtain up to date medical advice, and advice on reasonable adjustments;

15.5.2 Consider equality and diversity issues, including "the Equalities Act" (sic);

15.5.3 Produce a case summary setting out details of the underperformance, the medical advice, the likely benefit of further training and support, and the impact of the underperformance;

15.5.4 Supply the case summary to the employee, and ivite them to a meeting to discuss, and tell them that the outcome of the meeting might be dismissal;

15.5.5 Hold a meeting to consider whether any reasonable adjustments should be implemented and whether there are alternatives rto dismissal;

15.5.6 Consider all the evidence and make a decision and, if appropriate, write to the employee to inform them that they are being dismissed due to capability and giving details of rights to appeal. [Or, alternatively, to confirm any other outcome and next steps.]

<u>The Respondent's record of the Claimant's sickness absences</u>

16. During 2014, the claimant was off for a total of 11 days which was made up of 3 absences of one day and for absences of 2 days. The reasons given were a mixture of flu and headaches and nausea.

17. In 2015, the claimant had a total of 11.5 days absence. These were made up of 7 separate periods of absence of between one and 2 days each. One absence was due to allergy. The others were a mixture of upset stomach, migraine and nausea.

18. In 2016, the claimant's absences increased. He had approximately 60 days off, spread over approximately 19 different periods of absence. Approximately 9 of these periods were described as being due to anxiety, depression, stress. The respondent accepts that the reasons given by the claimant were genuine. In other words, it accepts that he was off due to anxiety, depression or stress on each of those 9 occasions. The earliest of these commenced 1 February 2016. The last one in 2016 was in November.

19. In 2017, the claimant had a total of approximately 100 days off, spread over approximately 15 separate periods of absence. Not all of these were stated to be due to anxiety, depression or stress, but many of them were. The respondent accepts that for each occasion were the claimant stated the absence was due to anxiety, depression or stress that was genuinely the reason for the absence. In 2017, the earliest such absence occurred in January and the latest such absence in the formal records submitted occurred in August 2017. (Though we also saw evidence that the Claimant had further such absences later on, especially after being informed of his dismissal).

Schedule for Exams

20. Completion of the training contract would have required the Claimant to pass 15 exams in total: 6 Certificate level, 6 Professional level; and 3 Advanced level. If he passed each one on schedule, he would complete the exams by November 2017. However, it was not a requirement of the training contract that he complete the exams by then. The training contract limited the number of re-sits, but did not forbid all re-sits.

21. Between September 2013 and February 2015, the claimant took and successfully passed each of his 6 certificate level exams. This was in accordance with the normal expected timeline for the training agreement.

22. He was then due to take 6 further exams at the professional level. These exam board provided sittings for these exams each March, June, September and December.

    22.1 The Claimant sat and successfully passed the first 2 of those exams in September 2015. This was in accordance with the expected schedule.

    22.2 He was due to take 2 further exams, in Financial Management (FM) and in Taxation Compliance (TC) respectively, in September 2016.

    22.3 He was then due to take 2 more: Business Strategy (BS) and Business Planning Tax (BPT) in December 2016

23. The claimant commenced his training at the same time as several other people. The witnesses referred to this group as a cohort. It was common ground that the claimant was not the only person in his cohort who did not keep to the original timescale for passing exams. The original timescale envisaged that it was possible that, for some of the cohort, there might be some need to retake some of the exams and/or to defer some of the exams.

2013 to 2016

24. There was a dispute between the parties as to whether the Claimant informed the Respondent before, or soon after, his employment commenced, that he had previously suffered from depression. Our finding is that he did not do so. The Claimant's belief that he did so is not supported by the contemporaneous documents, and he did not have a clear and unambiguous recollection of which of the Respondent's employees he spoke to, or of precisely what he said.

25. In July 2015, the claimant's line manager became Reshma Menon-Jones. She remained as his line manager until November 2016 when she commenced a period of maternity leave. The claimant considered that he had a good working relationship with Ms Menon-Jones. He believed that she was understanding about his sickness absences.

26. In February 2016, the claimant told Ms Menon-Jones that he was having some health problems. She suggested that he contact human resources and request an occupational health opinion. The human resources officer dealing with the matter at the time was Polly Akroyd.

    26.1 In response to the physical problems with his neck which the claimant had reported Ms Akroyd arranged for a workstation assessment to take place.

    26.2 The claimant had also mentioned to her that he had been referred for counselling for stress and depression. Ms Akroyd offered to meet him to discuss that further prior to arranging an occupational health referral and also reminded the claimant that if the adjustment which the claimant was seeking was to complete his usual full contractual hours, but to start later in the morning, then that was something that could be agreed locally by the line manager and did not require occupational health advice.

27. The claimant was due to have college tuition for the Tax Compliance and the Financial Management courses during the month of March 2016. The claimant did attend the first day which was Friday, 11 March 2016, but not for the remainder. He did not report this absence promptly to the Respondent.

28. On 23 March 2016, the claimant reported to Polly Akroyd that he was in a low mood and had been having trouble sleeping and concentrating. He informed her that he had not attended the training course and he was having counselling; he had had an initial assessment and was due to start cognitive behavioural therapy sessions shortly. The claimant informed Ms Akroyd that in his opinion, his depression and anxiety had got worse rather than better in the weeks since their previous meeting. He informed her that he regarded himself as having been on sick leave after 11 March 2016 and enquired as to whether he needed to obtain a medical certificate. Ms Akroyd said that the 2 weeks of missed college tuition could be treated as sick leave, but that the claimant did need to obtain a medical certificate from his GP. The claimant was informed that, in future, if he was too unwell to attend college, he must contact the respondent's human resources department on the first day of each such period. Ms Akroyd said that there would be an occupational health referral to see whether the claimant was currently well enough to study and whether there were any reasonable adjustments that the

respondent could put in place to help him study and/or any reasonable adjustments to support the claimant at work.

29. In the subsequent referral to Occupational Health, Ms Akroyd reported that the claimant had told her that he believed his low mood and anxiety affected him at both work and college and that his ability to concentrate and his productivity were affected. She reported that he had described that his motivation to get up to go to work or college were affect, and that he had stated that he had reduced enjoyment of work, difficulty falling asleep, and difficulty relaxing and loss of appetite. Ms Akroyd asked whether there were any reasonable adjustments which could be implemented to support the claimant at work and during tuition, and when the claimant might be well enough to resume tuition for his exams, and whether his performance was likely to be affected.

30. The claimant attended an appointment on 14 April 2016 and the occupational health physician, Dr Laura Crawford, issued her report dated 18 April 2016.

    30.1 The report stated that the main medical condition of relevance was that the claimant has a depressive illness. The report stated that the claimant had a previous history of symptoms several years ago, but that the claimant had been well for the last few years.

    30.2 The report stated that the claimant's concentration suffered and so did his energy levels, even when he slept well.

    30.3 A flexible pattern of work had previously been agreed - starting at 10am or 10:30am, and later starts did not need to be agreed for workdays. However, the claimant had had difficulties attending college, because the tuition began at 9am.

    30.4 The claimant had informed Dr Crawford that he believed he would still be able to sit his exams as scheduled in September 2016 and that he would be able to make up for the missed college tuition by studying at home.

    30.5 The report stated that the claimant would struggle to attend college sessions which started at 9am. The recommendation was that - if possible - the claimant should have tuition which started later in the day; if that was not possible, then it would potentially be sufficient for the claimant to be given the means of accessing the materials so that he could study at home.

    30.6 The report noted that the claimant should stick to working core hours only and not work extended days.

    30.7 The report anticipated that the claimant would be well enough to sit his exams in September 2016 and to do study/revision prior to those exams. It suggested that an application might be made to the exam body to allow the claimant extra time to complete each paper.

    30.8 It stated that the claimant's work performance would be reduced in comparison to "normal" and his productivity may be impacted. It recommended that he take short breaks from time to time (at least hourly) to get up and move around

the office and that this would assist both with his neck problem and with his concentration.

30.9 Dr Crawford offered the opinion that she did not think that the claimant currently met the definition of a disabled person within the Equality Act, but she pointed out that that was a legal, rather than a medical, question.

31. Ms Akroyd and the claimant met to discuss the contents of the report and it was Ms Akroyd's view that the claimant would not be fit to attend college before August 2016 at the earliest. However, the claimant's preference was to attempt to have face-to-face college tuition in July 2016. Ms Akroyd sought further advice from occupational health in relation to this issue, which was received in the letter dated 11 May 2016, from Dr Crawford.

31.1 Dr Crawford reported that it had not been her intention to state that the claimant was not medically fit - until to August 2016 - to attend college with a 9am start time. She said that she thought he might be fit to attend tuition with 9am starts in June or July 2016.

31.2 In relation to busy periods of work, Dr Crawford stated that he would be able to cope with that so long as his condition continued to improve as had been expected in April and so long as he did not work extended hours prior to the end of May.

31.3 Dr Crawford said that the decision about whether to release the claimant for tuition, or else to keep him as a lead audit, during July was one for management not for her.

32. At the end of May 2016, Ms Akroyd informed the claimant that the respondent had decided that he would still need to do a final audit, acting as lead, in June 2016 and that that would be beneficial both for him and for the respondent. As a result, the respondent decided that he would not be released to attend a college tuition course in relation to Financial Management, but instead would do that online with paid study leave. In relation to Tax Compliance, it was agreed that he could attend a college course for that between 11 and 18 July. It was up to the claimant and Ms Menon-Jones to agree the dates for the online training, which would then be booked via HR. In due course, it was agreed that the claimant would take 20-22 and 25-26 July for the Financial Management study leave.

33. The Claimant’s duties required that if he was working on an audit, he would not always attend the Respondent’s premises but might have to work – for example – at the premises of the organisation being audited. This might entail working outside London, and potentially being away from home for one or more nights. Each audit had a person in charge of it, the “lead”, and potentially had one or more of the Respondent’s other employees assisting. The allocation of work amongst the team members working in a particular audit was the responsibility of the lead. For this reason, the Claimant’s workload was not (all) directly controlled by his line manager (or by himself). The fact that the Claimant might need adjustments while out of the office working on an audit had been communicated to the respective employees leading on those audits. Nonetheless, the claimant was still reporting

himself as unable to attend the site from time to time, and stating that he would work at home instead.

34. When the 11 July 2016 tuition course (re Tax Compliance) was due to start, the claimant did not attend college on 11 or 12 July and did not contact the respondent to inform them of this. It was the course provider who informed the Respondent of his absence. The claimant did not report his absence either to Human Resources ("HR") (as he had previously been instructed to do) or to his then line manager, Ms Menon-Jones. On being asked about this by HR, Ms Menon-Jones emailed HR to say that the claimant "a bit rubbish at letting me know when he's not in".

35. Ms Akroyd therefore wrote to the claimant, reminding him of the requirement to notify the respondent by 10am if he felt too unwell to attend college in and reminded him that this was in accordance with the policy that had to be followed if he was absent from work. She supplied a link to the policy and informed him that a failure to comply with it might affect his sick pay.

36. The Claimant informed the Respondent that he did not plan to attend the Tax Compliance tuition course, at all, but proposed to study at home. Ms Akroyd stated that she was going to seek further advice in relation to whether the claimant was indeed fit enough to continue to study at home.

37. The claimant attended occupational health on 25 July 2016, and Dr Crawford provided a report the same day.

    37.1 Dr Crawford reported that the claimant's symptoms of low mood had not improved since she had last seen him on 14 April 2016. She reported on the medication that the claimant was taking at that time, and on the therapy which he had been undertaking.

    37.2 Dr Crawford recommended that the claimant continue to start work in the morning by 10:30am (ie later than the contractual start time) and that he not do extended hours (so core hours only) for a period of around 3 months. It was suggested that the respondent should continue to agree a workload commensurate with the claimant's work pattern and recognising that the claimant's focus and concentration were affected by his condition.

    37.3 At the time of this report, his exams were still due to take place in September 2016. Dr Crawford stated that when he returned to work after those exams, he should continue with the late start and work full contractual hours (but not extended hours), but that if the claimant situation did not improve, then that might have to be reviewed and the might have to be in agreement for reduced hours. She suggested that the review should take place 3 months later. She anticipated that if reduced hours were, in fact, deemed necessary, then it would only be for a relatively short period of time.

    37.4 Dr Crawford stated that she had taken the new information into account, and now believed that it was possible that the claimant did fall within the definition of a disabled person within the Equality Act 2010. She reminded the respondent that that was a legal issue, not a medical issue.

37.5 She believed that the claimant was unfit to attend college tuition commencing at 9am, but that he should be fit to undertake his exams in September 2016, and noted that they were due to be in the afternoon. She suggested that he be given (subject to the examination board's approval) an extra 25% time to complete his exams. She also sent a recommendation to the examination board to that effect.

38. On 2 August 2016, Peter Rothwell, an employee in the post of Audit Principal, emailed Ms Menon Jones in relation to to audits on which he had been the lead and on which the claimant had assisted.

38.1 In relation to the one of these, the claimant had recorded 65 hours of work done on the respondent's systems. Mr Rothwell stated that the amount of work was slightly less than might have been expected for 65 hours, but that it was in line with the reasonable adjustments needed for the claimant. The allocated work was of a high standard, but had been finished a number of weeks later than had been expected.

38.2 In relation to the other, Mr Rothwell could not see work that came anywhere near 74 hours worth of work which is what the claimant had recorded on the respondent's system. The claimant had had frequent absences during the period on site with the client.

39. In relation to revision for the September 2016 exams, it was agreed that the claimant could do this online rather than in person. The claimant was able to contact a tutor with any questions and was provided with materials, guidance and activities. This tuition was due to take place in August 2016. The respondent also agreed that the claimant's tuition and revision for the exams that he was still due to take place in December would also be done online.

40. On 2 September 2016, the claimant contacted the respondent supplying a note from his GP that he was unfit from 31 August to 10 September 2016. As a result, he was not able to take his September 2016 exams. He deferred those to the next sitting in December. The Claimant's decision to defer the September 2016 exams to December 2016 also meant that, in turn, the BS and BPT exams were deferred from December 2016 (with the plan being that he would take those in March 2017). The ICAEW was notified of the withdrawal from the September 2016 exams and agreed to make a refund of the fees.

41. During September 2016, the claimant met with Ms Akroyd in order to discuss the amount of work which he thought should be allocated to him, taking into account his health conditions.

42. On 14 October 2016, Mr Rothwell submitted his comments the Claimant's audit work to Ms Menon Jones, having first discussed them with the claimant. The claimant and Mr Rothwell were both aware that his comments would be taken into account in connection with the claimant's appraisal. Some strengths were noted; Mr Rothwell also raised some issues of work having not been completed, and that the work which was completed had been done slowly.

43. On 15 September 2016, the claimant sent a reasonable adjustments form to Ms Akroyd for her to approve. She replied on 14 October 2016 to say that, subject to one slight change, she approved it. She also reminded the claimant that, as he had previously been advised Nikki Measures would take over as his case manager in HR. Ms Akroyd stated an Occupational Health referral would be made.

44. The reasonable adjustments agreed and implemented were:
    44.1 Start time between 9:00am and 10:30am for three months until the end of October.
    44.2 Work core contracted hours until the end of October (36 per week).
    44.3 Agree workload with line manager or audit lead commensurate with work pattern and agree reasonable timeframes to allow reasonable extra time to complete tasks that takes into account the lower levels of focus and concentration. To last until the end of October.
    44.4 17% extra time for exams, as agreed with ICAEW.
    44.5 Occasional time off for medical appointments.

45. The Occupational Health referral was made in October 2016. It updated occupational health on developments since the last report, including the fact that the claimant had not sat his September 2016 exams and asked for advice about whether he would be fit to sit his exams in December. It also asked for advice on whether the claimant should be granted any additional study or revision time for the December exams, bearing in mind that he had in fact completed the study modules for those exams in July and August. It also asked for advice on any additional reasonable adjustments that might be put in place to maximise the claimant's attendance at work, given that he had been off work for several days following his return to the office in September 2016. It mentioned that the claimant was frequently reporting his absence later than he should have done, and asked for occupational health's comments on whether there needed to be any adjustments in that respect.

46. The claimant had been due to attend an appointment with occupational health on 2 November 2016 but was too ill to do so.

47. On 8 November 2016. The respondent confirmed to the claimant that he would be given 10 days study leave (5 for each exam) in preparation for the exams which he was due to be taking in December. The study leave was to run from 21 November until 2 December 2016.

48. The claimant was due to attend an occupational health on 15 November 2016, but cancelled that due to being unwell.

49. The occupational health appointment took place on 22 November 2016. The physician was Dr John McCaul. A report was sent to the respondent dated 28 November 2016, having previously been sent to the claimant.

    49.1 The report said that the claimant had recurrent depression, the current bout having begun early in 2016 and been triggered by a physical illness.

    49.2 Having reviewed the previous reports, Dr McCaul reported that the claimant's mental health deteriorated from July until September 2016, and that the

claimant's antidepressant medication had been increased by his GP during that period, with a further increase in October. Dr McCaul recorded a considerable improvement in the claimant's depression since that increase in medication.

49.3 Dr McCaul believed that the claimant was well enough to attend work at 9:30am each morning and that he would be fit to attend college in January or February 2017, in preparation for March 2017 exams, notwithstanding that the start time for that college tuition would be 9am.

49.4 Dr McCaul recommended that, for the time being, the claimant should continue to work core hours only and not extended hours.

49.5 He said that the claimant was fit to sit the 2 exams in December 2016. There was no suggestion that the claimant would be unfit to undertake the two-week period of study planned for the lead up to those exams.

49.6 The report stated there was no reason why the claimant would not be able to telephone his manager when unable to attend work, and that no adjustments to the policy that he must do so by 10am were recommended.

49.7 The report said that given the claimant's health appeared to be improving, then his work performance should also improve, but that the Claimant and his manager should agree a suitable workload.

49.8 Dr McCaul also suggested that the claimant should have extra time granted by the examination board for the exams and that he recommended a further review in 8 weeks' time.

Change of line manager

50. In November 2016, the claimant's line manager changed to Corrine Tanner. Ms Tanner's role was Audit Manager. It was reasonable and appropriate for the Respondent to select an Audit Manager to take over from Ms Menon-Jones (who was also an Audit Manager). The line-manager for both Ms Menon-Jones and Ms Tanner was Paul Keane, director of DCMS Financial Audit. He line managed 4 Audit managers in total. Ms Tanner was an appropriate choice of line manager for the Claimant, and she had line management experience of both fully-qualified individuals and trainees.

51. In December 2016, the Claimant decided not to show up to the FM exam. This was because he decided that his time that day would be better spent in preparation for the TC exam. He had previously decided not to revise for the Financial Management exam and to concentrate wholly on the Taxation Compliance exam. Therefore, he believed that he would fail the FM exam if he took it and that it was therefore a waste of time attending. He sat the TC exam and failed it. He received a mark of 26%, which was considered to be very low by the Respondent.

52. At the time of her appointment as the claimant's line manager Ms Tanner was abroad working for the Respondent on a short assignment. They had an introductory meeting on 12 December 2016, following her return. Ms Tanner was informed by the Claimant that he had not attended one of his exams.

53. After this meeting, the claimant consented to Ms Tanner having sight of Dr McCaul's report. This was therefore sent to her on 14 December 2016 by Nikki Measures.

54. On 14 December 2016, Ms Measures and Ms Tanner met the claimant to discuss the occupational health report.

    54.1 At this meeting, Ms Measures said it was unacceptable that the Claimant had not contacted the respondent to inform it that he was not going to attend the FM exam. She told him that it might constitute misconduct and later sent him a link to the managing misconduct policy.

    54.2 The claimant stated that his preference would be to retake the FM exam in March 2017, at the same time as the BPT and TS exams which were still scheduled for then. (At this time, it was not known that the claimant was also going to fail the TC exam which he had recently taken). Ms Measures informed the claimant that she could not necessarily agreed to that, until a further review had been carried out by the professional training team. This was because firstly, under the school leaver programme, exams were supposed to be taken no more than 2 at a time, and secondly because the claimant had not felt well enough to sit to exams in December 2016, and therefore 3 exams in March 2017, might be too much.

    54.3 It was discussed that occupational health would be asked to confirm that the claimant was going to be fit to attend college in January and February 2017. The Claimant's preference was to study at college, rather than online, in preparation for the March exams.

    54.4 It was reiterated that if the claimant was due to go to college but was not well enough to do so (or unable to start at 9am for any other reason) then he must inform the respondent on the same day.

    54.5 It was agreed that all of the recommendations in the Dr McCaul's report would be implemented.

    54.6 The claimant and Ms Tanner agreed to meet at least fortnightly, and weekly when necessary. It was agreed that there would be a further referral to occupational health in February 2017 unless matters changed in the meantime.

55. There was then a delay in replying to the claimant in relation to whether he would be approved for college courses in January and February for the BS and BPT exams in March. The claimant chased this up on 9 January 2017 as the college tuition was due to commence 16 January 2017. The respondent decided that it would not be appropriate for him to take all 3 exams in March. It suggested instead that he take just BS and FM in March. He was not to be given any further tuition in relation to FM on the basis that the respondent had previously provided all the tuition for that course for him.

56. On 20 January 2017, the claimant notified the respondent that he had failed his TC exam. Therefore, it was agreed that tuition for the BS exam would be cancelled. For the TC retake (which was now proposed for March 2017, alongside

the FM exam), the training team and HR agreed that the Claimant was to be given 5 study days for an online course plus one study day prior to the exam, but subject to agreeing the exact dates with his line-manager.

57. Subsequently, the Claimant booked – using the Respondent's HR system - study days of 20-24 February 2017 and also Monday, 27 February 2017 as the additional day. He did not obtain express approval from Ms Tanner prior to booking those days, which was contrary to the instructions he had been given.

58. Corinne Tanner was away from the office, on annual leave then medical leave, from 26 December 2016 to 31 January 2017. She kept in touch with the Claimant during her absence.

2017

59. On 2 February 2017, the Claimant messaged Ms Tanner to say that he proposed to see his GP the next day as "I have a few things I need to discuss". 3 February was a day for which the Claimant had scheduled tasks. Ms Tanner replied to say that if the appointment was not urgent, he should rearrange it for the following week. She stated that if the Claimant was unable to reschedule for any reason, he should let her know. The Claimant replied to say that he was having significant sleep problems which might require medication, and he did not think that he could wait until 9 February (the next available GP slot). Ms Tanner replied within the hour to say that he should therefore attend the appointment the following day, and seek confirmation from the GP that he was fit for work.

60. Dr McCaul saw the claimant on 7 February 2017.

    60.1 This report stated that the claimant continued to feel much better and that there had been a further improvement in his health since the previous November. However, his focus and concentration remain slightly impaired but impaired. Dr McCaul said that he would recommend that ICAEW give extra time (17%) for the claimant's March 2017 exams.

    60.2 Dr McCaul reported there was no reason why the claimant required any other adjustments other than to work just the 41 standard hours (with an hour for lunch each day, bringing that down to 36 working hours). The claimant was said to be well enough to work longer than that from time to time, but only infrequently.

    60.3 He was also well enough to sit the examinations in March. Dr McCaul recommended that the adjustments being be continued for a further 6 months and after that time claimant should be fit for all aspects of work and study with no need for any adjustments.

61. On 14 February 2017, Ms Tanner wrote to the claimant stating that he had not followed proper procedures by booking his study leave without consulting with her and by booking annual leave without consulting her. The claimant did not feel he done anything wrong and believed that he had complied with the relevant procedures. On 20 February 2017, Ms Tanner conducted an interview under the disciplinary procedure with the claimant in relation to these allegations, and also in relation to the allegations about not attending the exam in December.

62. On 20 February 2017, the claimant also had a meeting with Ms Tanner and her line manager, Paul Keane. During the meeting the claimant expressed the view that he did not wish Ms Tanner to line manage him and that he wanted somebody else to manage him instead. At that meeting, the claimant did not suggest that other adjustments were necessary, just that a new line manager should be appointed. Mr Keane formed the view that the reason that the claimant was objecting to Ms Tanner managing him was because Ms Tanner was seeking to enforce the rule that the claimant should report sickness absences by 10am, and because she had commenced a disciplinary investigation. He declined to appoint a different line manager for the claimant. However, he said to the claimant that he would be willing to look at the matter again in due course, but not before the disciplinary process, and the claimant's appraisal, were each completed.

63. The Claimant's union representative told the Claimant, on 20 February 2017, in the presence of Ms Tanner, to consider visiting a doctor to be signed off sick for exams due to take place in March.

64. The claimant was not performing work duties between 20 February 2017 and 10 March 2017. There was a pre-planned absence scheduled for this period which was study leave followed immediately by annual leave. During this period, the Claimant attended the Respondent's premises from time to time for study purposes and to socialise with colleagues. Ms Tanner saw him during this period.

65. On 10 March 2017, the claimant emailed the respondent to state that he had in fact been unfit for work since 20 February 2017 onwards. He stated that he had been to his GP that day (10 March) and the GP had agreed to supply a Fitness to Work certificate stating that he had been unfit for work from 20 February 2017 (and that the unfitness would continue until 24 March 2017). The claimant subsequently provided copy of that certificate to the respondent. The Claimant did not sit any exams in March 2017.

66. On 13 March 2017, Ms Tanner emailed Ms Measures to say that she was concerned about the implication of the Claimant's request to have his absence reclassified. One fact that she had in mind was that she had interviewed him under the disciplinary procedure on 20 February 2017, and needed to discuss the status of that investigation if 20 February 2017 was deemed to be a date on which the Claimant was unfit for work. Another fact was that she was worried about how she would ever know if the Claimant was actually unfit on a particular day if he seemed outwardly fine that day, and did not say that he was unfit, and was therefore given work to do, but later obtained a retrospective certificate to say that he had not been fit enough to have worked. Ms Tanner reported to Ms Measures that she had seen no indication that the Claimant had been unfit in the period of his study leave on the occasions on which he had attended the premises.

67. On 24 March 2017, the claimant sent an email to the respondent to say that he would be back the following Monday, and that his GP had signed him off as fit to return with adjustments.

68. Around 24 March 2017, the claimant sought to arrange a further meeting with Mr Keane. Mr Keane declined this meeting on the basis that, in his opinion, there had been no new developments since the previous meeting on 20 February (the

claimant having been absent from work throughout the period from 20 February to 24 March). Mr Keane sent an email to the claimant on 24 March 2017, stating that he would be willing to meet the claimant once the annual appraisal process had been completed. He also informed the claimant that he could make a formal complaint against Ms Tanner if he wished to do so. The Claimant did not do so (at that time).

69. The claimant wrote to Mr Keane on 28 March 2017, stating that he wanted another meeting with Mr Keane because he had had a discussion with his GP and he believed that he was now in a better position (than he had been on 20 February 2017) to say why, in his opinion, his line manager should be changed and why, according to the claimant, office-related issues were impacting his health. Mr Keane did not send any reply to that email. He did, however, send a copy of the claimant's 28 March email to Tim Phillips, People Director, who was, as Mr Keane, intending to meet the claimant to discuss these, and other, issues.

70. On 27 March 2017, the Claimant and Ms Tanner met. Ms Tanner discussed work issues and his health issues with him. The Claimant sought a change of line-manager and HR officer. Ms Tanner considered his request but did not support it. Her opinion was that a change of line-manager would not impact the Claimant's attendance or performance and that other managers and HR officers would also expect the Claimant to adhere to the Respondent's policies. The actual decision to change the Claimant's line-manager was not hers to make. Paul Keane (or above) would have had to make that decision on behalf of the Respondent.

71. The claimant had some further absences after his return on 24 March. He had 3 days starting on 29 March 2017, due to a throat infection. There were 2.5 days starting on 4 April 2017, due to a throat infection. He was off for 2 days starting on 18 April 2017, due to neck muscle pain. He was off for 3 days starting 24 April 2017, due to gastroenteritis. He was off for 2 days starting 10 May 2017, due to a throat infection. The absences between 29 March and 11 May, none of which were due to mental health condition directly (subject to the possibility that the mental health condition lowered immunity levels) were of 12.5 days. This meant that he reached a trigger point in the respondent's absence procedure, which was for 10 working days in 12 month period.

72. Ms Measures emailed the Claimant on 27 April 2017 to ask whether he believed he needed any further support or adjustments at work and also to suggest a further occupational health referral. The claimant replied to say that he could attend an occupational health appointment upon his return to London after an assignment which ended 12 May 2017, and that he did not believe that he needed any further support or adjustments other than those which were still in place, namely working core hours only and flexibility being given to him by the project leads.

73. On 28 April 2017, Ms Tanner wrote to the claimant following the conclusion of her investigation into the alleged misconduct. Her conclusion was that the allegations amounted to, potentially more than minor misconduct. However, taking into account the claimant's health, she had decided not to refer the matter for formal proceedings on this occasion. She reminded him of the need to contact the respondent at the earliest opportunity if he was not well enough to study and/or to sit an exam and/or to work. Furthermore, she pointed out that the HR manual

required that he must discuss his leave plans in advance with his line manager to ensure that his requests met the needs of the business and he must do this before booking leave on the computer system (Financial Force).

74. On 4 May 2017, Ms Tanner sent an email to Ms Measures reporting on the Claimant's response to the above decision. She stated that the Claimant had told her that he now (circa April 2017) believed that his judgment the previous December (re not attending the exam and not contacting the Respondent about that) had been clouded by anxiety. The Claimant had described his judgment as "irrational". Ms Tanner was concerned about whether the Claimant's judgment might be such that his work would be affected, and asked Ms Measures if Occupational Health advice on that point should be sought.

75. On 22 May 2017, at 10:50am the claimant emailed the respondent to say that because of his mental health. He was not able to attend work that day.

    75.1 This commenced a 19-day period of absence due to mental health.

    75.2 He was late providing a note from the GP covering this absence and – initially, at least – the GP declined to retrospectively certify the absence. The claimant provided a letter from his doctor dated 6 June 2017. The letter stated that she noted that the claimant had been, according to what he told her, absent from work from 20 May 2017, due to depression. She was not willing to supply a retrospective statement to say that he had not been fit during that period. She was also not willing to provide a certificate to say that he was now fit to resume work as that was a matter for the respondent to assess.

    75.3 During his sick leave, on 8 June 2017, the claimant visited a client's premises. This was despite the fact that Ms Tanner had informed the claimant that he should not return to work until the respondent was satisfied that he was fit to do so. [She later wrote to him on 28 June 2017, to state that this was potentially a disciplinary matter, but that she would await occupational health advice before deciding what to do.]

    75.4 The absence was interrupted on 12 June 2017 when the Claimant attended the office for half a day. He had a return work to work meeting with Ms Tanner. The claimant provided a note dated 12 June 2017, which certified that he was not fit for work between 22 May 2017 and 9 June 2017.

    75.5 He was on sick leave from 13 to 23 June 2017. This absence also related to mental health.

76. Ms Measures made a referral to Occupational Health. In it, she expressed the view that she did not think it would be appropriate for the Claimant to take exams place in September 2017. This was because the claimant had missed the exams in March 2017 and returning from mental health-related sickness absence on 26th of June 2017 might imply that it was to soon to start the college tuition (on 30 June 2017) to prepare for September exams. The Claimant was not entered onto the course, pending receipt of a reply from Occupational Health.

77. The occupational health advice was contained in a letter dated 3 July 2017, from Dr Crawford.

77.1 Dr Crawford reported that the claimant stated that he regarded the changes to his line manager and the HR officer has having been detrimental to his health.

77.2 Dr Crawford's view was that the claimant should potentially have a fresh start and the opportunity of a period of stability in work before recommencing study. She reported that the claimant was in agreement with the respondent's view that he should not start to study again until September 2017. In other words, he would not take exams in September 2017, but – in September – could commence preparations for the December 2017 sitting. Dr Crawford's provisional view was that he was likely to be able to start tuition in September, but it was more appropriate for him to be reviewed shortly before the planned tuition than for her to make a definitive statement that he would definitely be able to start in September.

77.3 Dr Crawford stated that the claimant's mood appeared to be stabilising, but that, given that his condition was a recurrent one, it was not possible to rule out the potential for further occurrences in the future.

77.4 In terms of actions to assist him, she recommended a transparent way of engaging with the claimant and noted that the respondent and the claimant had different perceptions in relation to some of his past actions.

77.5 She noted that to some extent, there appeared to be a communication breakdown. She mentioned that the respondent might wish to consider whether there were any relationships that needed to be repaired or revised, but that that was a matter for the respondent rather than a medical issue.

77.6 She stated that she did not anticipate any specific adjustments were needed at that time in regard to permitting late notification of sickness absence.

77.7 In relation to work performance, she recommended that the claimant perhaps have 20% longer to perform tasks than a fully fit individual. She expected there to be a gradual improvement, meaning that this adjustment would be phased out over time.

78. The claimant had some further sickness absence on the morning of Thursday 6 July 2017. He came into work that afternoon. The following day at 10:26am, he notified the respondent that he did not feel well enough to come into work due to low energy. On Monday, 10 July 2017, the Claimant was absent due to having heat exhaustion from being in the sun the previous day while hiking. He was off for the next two days.

79. The following week, the Claimant was absent from Monday to Wednesday returning on the Thursday, which was the day for the Respondent's staff to spend some recreational time to celebrate the end of a busy period. The Claimant joined in with those recreational activities and, afterwards, went to the pub with colleagues. The next day, Friday, 21 July 2017, Ms Tanner received a text message from the claimant at 10:18am to say that he was not feeling well. She replied to ask why he was unwell and, at 2:44pm, he replied to say that he was low on energy, tired and struggling to concentrate. On 24 July 2017, Ms Tanner sent an email to Ms Measures about this. She expressed the view to Ms Measures that

she had not observed the Claimant as having low energy levels when she saw him on the Thursday.

80. On 18 July 2017, Ms Tanner received feedback in relation to the claimant's work on an audit which he had worked on in May 2017. The feedback was that he had been allocated 41 tests to do, of which he had completed 13 and partially completed another 9. The remainder had not been completed. Furthermore, he had not informed the project lead that he was not carrying out the work to schedule. Furthermore, he had failed to obtain all the information that he had been supposed to obtain from the organisation being audited.

81. The claimant was absent for some periods in August. In September, he made enquiries with HR in relation to the dates for tuition for Tax Compliance and Financial Management. He was given the dates and told to agree them with Ms Tanner.

82. During her period managing the Claimant, Ms Tanner formed the opinion that his performance was poor. It was not that the Claimant often performed work that contained many mistakes, but rather the fact that the Claimant (in her opinion) was performing very little work at all. Colleagues sometimes had to restart tasks which the Claimant had been given, because the work which the Claimant had done on the task was so insubstantial. There was one audit in which – in Ms Tanner's opinion – there were several mistakes that ought not to have been made. In the light of these concerns, and also because of the Claimant's sickness absence, Ms Tanner decided that the Claimant might not be able to fulfil the contractual requirements of his role. She decided that it was appropriate to convene a review panel to consider whether his employment should be terminated on the grounds of capability. She informed the People Director that she was considering this course, and later HR told the People Director that the decision had been made to proceed. On 6 September 2017, Hilary Lower was asked to, and agreed to, chair a capability review meeting in relation to the claimant.

83. On 8 September 2017, Ms Tanner informed the claimant that he would be invited to a review meeting which would be chaired by an independent director and asked the claimant's permission to share the occupational health advice received to date with that director. The claimant declined (though subsequently agreed to Ms Lower seeing the reports). Later the same day, 8 September 2017, the respondent wrote to the claimant with a formal invitation to the capability review meeting (to take place Thursday 21 September 2017) and a copy of the case summary and a copy of annex 5 from chapter 20 of the HR manual. The text of the report itself was 28 pages of A4. There were 14 appendices totalling approximately 56 pages.

    83.1 One of the appendices to the report was the full Chapter Twenty of the HR Manual. The report asserted that the claimant had fallen short of the requirements of his role despite a number of adjustments having been made for him on account of (what the respondent accepted was) his genuine mental health condition. The report asserted that annex 5 was the appropriate procedure to follow.

    83.2 At paragraph 20 of the report, Ms Tanner itemised 7 things described in the managing underperformance policy as underperformance and she

suggested that there was evidence that the claimant was underperforming in each of those ways.

83.3 She produced a table in relation to various work assignments and commented on what she said were examples of failing to deliver work within a reasonable period of time, failing to deliver work to a reasonable quality, and delivering a poor service to the respondent. She said the work was not consistent with the reasonable expectations for his grade.

83.4 She also stated that the claimant had not demonstrated behaviours consistent with the respondent's framework of behaviours. As examples, she listed the alleged failures to inform the respondent of absences and produced a table of 15 alleged examples. One was of the claimant working from home without contacting the Respondent to say he would do so. The remainder were of him contacting the respondent later than 10am either to say that she was sick or to say that he would be late for a different reason or to ask to work from home that day.

83.5 Within the report, she referred to the claimant's non-attendance at the December 2016 exam under the heading of unauthorised absence. She also referred to his visit to the client in June, while regarded as being on a period of sickness.

83.6 Under the heading not taking responsibility for his well-being, Ms Tanner referred to the respondent's code of conduct and paragraphs 47 - 49 referred to his absence due to what he had described as heat exhaustion and also his absence on 21 July 2017, following the social day. Ms Tanner expressed the view that the claimant's behaviour indicated that he was taking insufficient responsibility for his well-being.

83.7 Under the heading “benefit of further training and support”, Ms Tanner produced a detailed table. In relation to attendance, she reported that the claimant had previously taken part in therapy and had regular occupational health assessments and that he had been granted 20% more time than others to complete work tasks, and 20% more study time than others, and that with the respondent's assistance, he had been granted 17% extra time for examinations. She reported that she did not think that it was appropriate to agree the claimant's request to start work at 12 noon and then to work later in the evenings, so as to complete his standard required hours. In relation to his request for change of line manager and HR representative, Ms Tanner’s view was that, based on her discussions with the Claimant, the issues he had were not with the individuals themselves, but the fact that the individuals were holding him to account in relation to matters which the claimant felt should be overlooked. Her view was that moving the claimant to another team would mean that the issues would recur. She mentioned that the claimant's sickness absence in 2016 when managed by Ms Menon-Jones were still very high.

83.8 She had not been able to identify any additional training that she thought would be of assistance.

83.9 In relation to underperformance, she noted that the respondent had agreed that the claimant would be permitted 20% extra time to complete tasks that are assigned to him. She had also provided him with coaching and had ensured that the audit leads were aware of the agreed adjustment.

83.10 In relation to additional support, Ms Tanner stated there at different times (in the same meeting), the claimant had said both that he wanted to know in advance about all the work that he was going to have to do on a particular audit (so that he could plan it), but also that he should just be told on a Monday what his work would be for that week only (to avoid anxiety in relation to the amount of work that was being required). Ms Tanner said that there was no additional support that could be offered in relation to managing his workload.

84. The invitation letter was from David Kellet, Human Resources Manager. informed the Claimant that he could submit a written response (by 19 September) if he chose to do so, and that he could be accompanied to the hearing. It told him that dismissal was a possible outcome. The opening paragraph stated:

> *As Corinne Tanner discussed with you this morning, the NAO has had increasing concerns about your attendance record and your capability to perform in your role as an Assistant Auditor. Whilst appreciating that there have been some genuine reasons for your poor attendance record and performance issues, the NAO considers that it has supported you as far as reasonably possible for us to do so and that there has not been sufficient improvement in respect of either issue. After careful consideration the NAO has, therefore, reached the view that we must now consider formally with you whether there is any realistic prospect in the foreseeable future of you being able to achieve and maintain a satisfactory standard of attendance and performance in your role*

85. The meeting and letter dated 8 September 2017 where the first time that the Claimant had been told that the Respondent was considering a capability process, or a dismissal. The reference to "not been sufficient improvement" was not a reference to any warning or monitoring period that had been applied, or to any standard of improvement that the Claimant had been told to achieve.

86. On 8 September 2017, the Claimant contacted the People Director, Tim Phillips, and informed him about the capability process. Mr Phillips replied to say that he was not involved in the capability process, but the Claimant would have the opportunity to put his case. He also supplied details of a confidential helpline.

87. On 14 September 2017, the Claimant contacted Susan Ronaldson, one of the Respondent's directors involved with the trainee programme. He suggested to her that the proposal to call him to the 21 July meeting was inappropriate, and asked that he be allowed to go to college in September, and that the review be deferred until after that tuition, around mid-October. The Claimant's union rep wrote to HR and made a similar request.

88. Ms Ronaldson contacted HR Director, John McCann and asked him for advice. She mentioned that the Claimant was concerned that the matter had been prejudged as he was being told not to attend college. Mr McCann looked into the matter and replied later the same day (14 September) to say that the papers were "hugely comprehensive, detailed and evidenced based." He said that the

Claimant's "frequent and unpredictable absences appear to be making it extremely difficult to allocate him to work".

89. The Claimant's requests to be allowed to start the college tuition (for the exams scheduled for December) was not granted. The respondent allowed some extra time for the Claimant to produce his written response (which he submitted 28 September 2017). Amongst other things, he stated that he had self-referred to Remploy (and commented that the Respondent should have alerted him to this scheme.) Subsequently, Remploy offered the Claimant a case worker to provide support with work/college for a period of 6 months.

90. The meeting took place on 2 October 2017. Ms Hilary Lower, Director and Senior Statutory Auditor, chaired the meeting. She allowed the Claimant (as requested by him) to have one hour uninterrupted to present his case. At the meeting, Ms Tanner also presented her case, and the parties answered each other's questions, then summed up. The Claimant was accompanied by his union representative and Ms Measures also attended the meeting, as did a note-taker. At the end of the meeting, Ms Lower suggested that she would aim to make a decision as soon as possible. The Claimant asked to be allocated work in the mean time, and that was agreed.

91. On 2 October 2017, Ms Tanner ceased to be the Claimant's line manager. The Respondent did not appoint another Audit Manager (or similar) to manage the Claimant. For administrative purposes, he reported to Ms Akroyd.

92. After the meeting, on 3 October, the Claimant supplied some extra documents, being his reply to the documents Ms Tanner had produced responding to his 24 September submissions.

93. On 4 October 2017, the Claimant asked to do an online course to help prepare for the TC exam scheduled that December. The Respondent declined, stating that further OH advice would have to be sought to see if he was fit enough. No further Occupational Health advice had previously been sought since the 3 July report. By email dated 6 October 2017, from Ms Louisa Szanto, the Respondent stated that, subject to the Occupational Health advice, and provided he could be released by his team, he could sit his remaining (4) Professional Stage exams in March 2018 and June 2018, and take his (3) Advanced Stage exams in November 2018. In other words, based on that schedule, the Claimant would have been completing the Advanced Stage exams 12 months later than the original schedule, and with a more tightly compressed schedule for the remaining 7 exams than had originally been envisaged.

94. Ms Lower sought further information in relation to the examinations that the Claimant had taken so far, and was due to take. She received a detailed reply from Katie Clifford which, amongst other things, stated that the training contract was due to expire in December 2018, and could not be extended beyond that, and that – in theory – a tuition and exam taking timetable could be implemented for him to complete his exams by November 2018. This would be subject to his team being able to release him for extended periods time during 2018, and, of course, to the Claimant passing the exams.

95. On 11 October 2017, Ms Lower emailed Mr Kellet to enquire whether the December 2018 was a firm cut off point, or whether there could be an extension. Mr Kellet replied to say that extensions for trainees had been granted in the past, including maternity leave and long term sickness absence. He said that it may be difficult to defend to a tribunal a decision not to extend the contract where there was a legitimate reason for doing so. He suggested that Ms Lower's decision should focus more on Ms Tanner's written remarks about underperformance, and less on her later oral comments about performance being easily coachable. Ms Lower replied to Mr Kellet to say that her decision would be based on the evidence.

96. On 15 October 2017, Ms Lower sent an opinion and basis for conclusion to David Kellett, and copied it to Ms Szanto. The following day, she contacted John McCann and asked him if anything more was required from her. After further discussion, a meeting was arranged for 23 October 2017 for Ms Lower to convey her decision to the Claimant. She then sent a letter dated 25 October 2017, enclosing Summary and Basis for Conclusion. Ms Lower's decision was that the Claimant was dismissed with notice. The letter stated:

    96.1 The Claimant's last day of service would be 29 November 2017.

    96.2 The termination was "on the grounds of capability".

    96.3 The 3 issues which Ms Lower had considered key were:
        96.3.1 Is there a gap between what you can/have done and what we reasonably expect given your grade and experience? If so
        96.3.2 Is that gap expected to be ongoing or could it realistically be closed. If it's likely to be ongoing
        96.3.3 Is there a realistic likelihood of achieving and sustaining sufficient improvement to meet requirements within a reasonable time frame.

    96.4 It was Ms Lower's opinion that even if he completed the remaining exams by November 2018, he would be a year behind his peers.

    96.5 There were performance issues which (coupled with the amount of time that he would need to spend on study if he were to complete the exams by November 2018) meant that there was no realistic likelihood that the Claimant could demonstrate the required standards of an AA3 by the end of 2018.

    96.6 That Ms Lower had taken into account the advice of Remploy and Occupational Health

    96.7 That the Claimant had the right to appeal.

97. The Summary and Basis for Conclusion said that:

    97.1 The Claimant was 18 months behind on his exam schedule, and that he took much longer to complete work tasks than others, and did not always deliver work of the required quality.

    97.2 His work was not up to AA2 standards, but should be (the higher) AA3.

97.3 His line manager believed that performance concerns could be addressed through coaching to get him to the AA2 standard.

97.4 The need to attend college to prepare for exams would limit the opportunities for his work performance to be improved.

97.5 Further sickness absence might impact on both the schedule for exams, and the schedule for improving work performance.

97.6 The issues which Ms Tanner had mentioned about July 2017 (in connection with the absences after hiking, and the day after the social event) were not part of Ms Lower's reasons. Furthermore, Ms Lower believed that those comments, and the reference to the code of conduct, might be considered pejorative.

98. The Claimant did appeal. Pending the appeal, the Respondent decided that it should not seek to engage with the Remploy case worker. Ms Akroyd made a referral to Occupational Health.

99. On 28 November 2017, the Claimant submitted complaints to the Respondent (to John McCann specifically) and asked Mr McCann to consider the complaint at the same time as the appeal against dismissal. The complaint referred to the (alleged) treatment of the Claimant by Ms Tanner and Mr Keane. The Claimant was given an extended period of time to submit his full grounds of appeal, until after he had seen the Occupational Health report. He submitted his full grounds on 3 January 2018.

100. The appeal grounds alleged:

100.1 The decision to follow Annex 5 of Chapter Twenty, rather than the procedure in the main part of Chapter Twenty was inappropriate and unfair

100.2 His training contract could have been extended, if necessary, and that had been done for another trainee. He suggested this would have allowed him substantial time to do audit work after finishing exams (in November 2018).

100.3 That Ms Tanner's report had focused on future poor attendance being a barrier to improving performance, but that Ms Lower had given a dismissal reason as being failure to demonstrate AA3 level of competency, an argument which the Claimant had not been able to comment on because it had not previously been raised.

100.4 There had been failures to make adjustments (change of line manager)

100.5 There had been bias against him due to his disability

100.6 The Respondent had prevented him attending college to prepare for exams in December 2017, but then had relied on the lack of time those exams in 2018 as part of the reason to dismiss him.

101. The appeal hearing, chaired by John McCann took place on 2 February 2018. The Claimant had also submitted a Data Subject Access Request. He was allowed to

make further written submissions (with supporting documents) after the appeal hearing. The appeal was by way of review rather than re-hearing. Mr McCann told the Claimant of the outcome of the appeal and complaint by email dated 15 March 2018, with the detailed reasons being supplied by a letter attached to an email dated 20 March 2018.

101.1 Mr McCann did not uphold the complaint, finding that the evidence did not show bullying or discrimination, or failure to respect the Claimant's dignity at work.

101.2 Mr McCann dismissed the appeal, holding that

101.2.1 The Respondent had followed the correct procedure

101.2.2 The behaviour of line managers was not unfair or discriminatory

101.2.3 There were no material errors in the assessment of his performance or the assumptions made in relation to the timetable for attaining professional qualification.

102. Mr McCann's finding was that the "Capability Procedure" (in other words Annex 5) was designed to consider cases where there was a clear gap between the employee's capability and what the Respondent reasonably expects, including where the gap was the result of a disability. He concluded that it had been appropriate to use that procedure in this case, and rejected the Claimant's argument that he should recuse himself of the basis that he had stated to Ms Donaldson on 14 September 2017, that this was the correct procedure. In his opinion, the key issue was whether the Claimant could meet the requirements of his role within a reasonable time frame.

The Law

Disability

103. Section 6 of EA 2010 states (in part)

(1) A person (P) has a disability if—
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
(2) …
(3) In relation to the protected characteristic of disability—
(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
…

104. Schedule 1 of EA 2010 states (in part)

2 Long-term effects
(1) The effect of an impairment is long-term if—
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

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

5 Effect of medical treatment
(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.
(2) *"Measures"* includes, in particular, medical treatment and the use of a prosthesis or other aid.

Time Limits

105. Section 123 of EA 2010 states (in part)

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

Direct Discrimination

106. Section 13(1) of EA 2010 states

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

107. Section 39 EA 2010 provides that an employer must not discriminate against an employee. The characteristics which are protected by the legislation include disability.

108. When applying the definition of discrimination in accordance with section 13(1) EA 2010, it is necessary to consider how the respondent has treated the claimant and to consider whether it has done so less favourably than it has treated a comparator. The comparator can either be an actual person or a hypothetical person. Either way, the comparator's circumstances must be the same as the claimant's other than the protected characteristic in question.

109. In relation to disability the claimant relies on severe depression and anxiety. Therefore, the relevant comparator would have to be somebody who did not have that condition (regardless of whether or not they had any other disabilities).

110. If we are satisfied that the claimant has been treated less favourably than the comparator, then we must consider the reason for that difference in treatment. In particular, we must consider whether it is because of the protected characteristic or not. We must analyse both conscious and subconscious mental processes and motivations for actions and decisions.

111. Section 136 EA 2010 sets out the manner in which the burden of proof operates in a discrimination case. A two stage approach is necessary.
    111.1 At the first stage the tribunal considers whether the claimant has proved facts (on the balance of probabilities) from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. At this stage it would not be sufficient for the claimant to simply prove that she has been treated badly, or even that she has been treated less favourably than her comparator. There has to be some evidential basis upon which the tribunal could reasonably infer that the claimant's protected characteristic (consciously or subconsciously) caused the alleged discriminator to act in the way that they did. That being said, the tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate.
    111.2 If the claimant succeeds at that first stage, then that means that the burden of proof has shifted to the respondent and that the claim must be upheld unless the respondent proves that the treatment was in no sense whatsoever because of the protected characteristic.

<u>Discrimination arising from disability</u>

112. Section 15 EA 2010 states

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

113. The elements that must be made out in order for the claimant to succeed in a S.15 claim are:
    113.1 there must be unfavourable treatment;
    113.2 there must be something that arises in consequence of the claimant's disability;
    113.3 the unfavourable treatment must be because of (in other words, caused by) the something that arises in consequence of the disability, and
    113.4 the alleged discriminator cannot show at least one of the following:
        113.4.1 that the unfavourable treatment was a proportionate means of achieving a legitimate aim AND/OR
        113.4.2 that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability.

114. The word "unfavourably" in Section 15(1) EA 2010 is not separately defined by the legislation and must be interpreted consistently with case law and taking account of the Equality and Human Rights Commission's Code of Practice on Employment.

115. The section does not require the disabled person to show that his or her treatment was less favourable than that experienced by a comparator. The fact that a particular policy has been applied to a disabled person in circumstances in which the same policy would have been applied to a non-disabled person does not, in itself, mean that there has been no unfavourable treatment. In other words, a decision that adversely affects the Claimant could potentially still amount to treating the Claimant unfavourably even if the decision was based on a policy that was applied to other employees as well.

116. Dismissal can amount to unfavourable treatment, as could treatment which is much less disadvantageous to an employee than dismissal. However, it does not follow that there has been unfavourable treatment merely because a Claimant can prove that they genuinely believe that they should have had better treatment.

117. For section 15, the unfavourable treatment must be shown by the claimant to be because of something arising in consequence of his or her disability, as opposed to being because of the disability itself. If the treatment is because of the disability itself then (that may potentially be a breach of section 13 of EA 2010, but) the Claimant has not demonstrated a breach of section 15.

118. There is a need to consider two separate steps when considering causation. One is that the disability had the consequence of "something" (which is an objective test); the second is that the claimant was treated unfavourably because of that "something" (which requires consideration of the decision-maker's thought process and motivation, both conscious and subconscious). While the tribunal must undertake both parts of the analysis, and do so separately, before making a finding of a breach of Section 15, it can perform either one before the other.

119. When considering whether the claimant was treated unfavourably because of that "something", the "something" need not be the sole reason for the treatment, but it must be a significant, or more than trivial, reason. It does not matter if the employer was unaware that the "something" was connected to the person's disability.

120. A complaint of discrimination arising from disability will not succeed if the Respondent is able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim relied upon should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Business needs and economic efficiency may be legitimate aims, but simply demonstrating that one course of action was less costly than another may not be sufficient.

121. In relation to proportionality, it is not necessary for the Respondent to go as far as proving that the course of action which it chose to follow was the only possible way of achieving the legitimate aim. However, if less discriminatory measures could have been taken to achieve the same objective, then that might imply that the treatment was not proportionate. It is necessary to carry out a balancing exercise which takes into account the importance (to the Respondent) of achieving the legitimate aim, and the means adopted to pursue that aim, in comparison to the discriminatory effect of the treatment. It is unnecessary that the Respondent demonstrate that it had itself carried out the necessary balancing exercise; what

matters is that the tribunal carries out that exercise, based on the evidence presented at the tribunal hearing.

122. If a Respondent employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for that Respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

123. When considering what the Respondent knew (and/or what it "could not reasonably have been expected to know"), the relevant time is the time at which the (alleged) unfavourable treatment occurred. Naturally this might mean that different decisions on the Respondent's knowledge are reached in relation to different allegations of unfavourable treatment, including, for example, a decision to dismiss and a decision to reject an appeal.

Failure to make reasonable adjustments

124. Section 20 EA 2010 says, in part

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
…
(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

125. Section 21 EA 2010 says, in part

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

126. Paragraph 20 of Schedule 8 states (in part)

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

127. The expression "provision, criterion or practice" ("PCP") is not expressly defined in the legislation, but we must have regard to the guidance given by the Equality and Human Rights Commission's Code of Practice on Employment to the effect that the expression should be "construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions" and that it "may also include decisions to do something in the future" and even one-off or discretionary decisions.

128. The Claimant must clearly identify the PCPs to which it is asserted adjustments ought to have been made. We must only consider those PCPs as identified by the claimant. See Secretary of State for Justice v Prospere EAT 0412/14.

129. When considering whether there has been a breach of Section 21, we must precisely identify the nature and extent of each disadvantage to which the claimant was allegedly subjected. Furthermore, we must consider whether there is a substantial disadvantage when the relevant (alleged) PCP is applied to the Claimant in comparison to when the same PCP is applied to persons who are not disabled.

130. The claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred that the duty may have been breached. If he does so, then we need to identify the step or steps, if any, which the Respondent could have taken to prevent the claimant suffering the disadvantage in question. If there appear to be such steps, the burden is on the Respondent to show that the disadvantage would not have been eliminated or reduced by the potential adjustment and/or that the adjustment was not a reasonable one for it to have had to make.

131. There is no breach of section 21 if the employer did not know, and could not reasonably have been expected to know, that the Claimant had the disability. Furthermore, in relation to a particular disadvantage, there is no breach of section 21 if the employer did not know, and could not reasonably have been expected to know, that the PCP would place the Claimant at that disadvantage.

Unfair dismissal

132. Section 98 of ERA 1996 says (in part)

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> …
> (b) relates to the conduct of the employee,
> …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

133. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for the fair reason relied on (capability or some other substantial reason). Where an employee is dismissed for lack of capability, it is sufficient that the employer honestly believed on reasonable grounds that the employee was incapable or incompetent. It is not necessary for the employer to prove that he was - in fact - incapable or incompetent. Furthermore, a particular employer can insist on levels of performance that are higher than those at comparable organisations. If the respondent fails to persuade the tribunal that it had a genuine belief that the claimant was not capable (or, in the alternative, that there was no realistic possibility of the Claimant's completing his training programme within a reasonable time frame) and that it genuinely dismissed her for that reason, then the dismissal will be unfair.

134. Provided the respondent does persuade us that the claimant was dismissed for that reason, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996. In considering this general reasonableness, we will take into account the respondent's size and administrative resources and we will decide whether the respondent acted reasonably or unreasonably in treating the capability (or the impossibility of completing the training programme, as the case may be) as a sufficient reason for dismissal.

135. In considering the question of reasonableness, we must analyse whether the respondent had a reasonable basis to believe that the Claimant lacked capability (or that there was not realistic possibility of completing the training programme, as the case may be). We should also consider whether or not the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, we must consider whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA).

136. It is not the role of this tribunal to assess the evidence and to decide whether the claimant should or should not have been dismissed. In other words, it is not our role to substitute our own decisions for the decisions made by the respondent.

137. We must take care not to conflate the tests for whether a dismissal was a breach of the Equality Act with the tests for whether the dismissal was unfair contrary to the Employment Rights Act. For example, when considering (as we must do in accordance with Section 15 EA 2010) whether a dismissal was proportionate, we must perform our own balancing exercise, but when considering whether the

dismissal was unfair, we must look at the employer's rationale. A dismissal which is discriminatory is not necessarily a dismissal which is unfair.

138. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by the Employment Tribunal if it is relevant to a question arising during the proceedings (see section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code sets out one procedure, for both 'conduct' and 'poor performance', but acknowledges that an employer might choose to have separate procedures. Having (and following) a separate procedure for performance is permissible, provided that the procedure for poor performance meets the basic principles of fairness set out in the Code.

139. As mentioned by the House of Lords in Polkey v AE Dayton Services Ltd 1988 ICR 142, HL, employers might not be considered to have acted reasonably in dismissing for lack of capability unless they have given the employee fair warning and a chance to improve. The ACAS Code confirms the importance of warnings as part of the process, stating at paragraph 19: "Where … employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A … failure to improve performance within a set period would normally result in a final written warning." Paragraph 21 of the Code states that a warning should set out what improvement in performance is required, together with a timescale. However, it does not automatically follow that a dismissal will necessarily be unfair if no formal warning is given (as also mentioned by the House of Lords in Polkey). Furthermore, the ACAS code acknowledges that sometimes it might be appropriate to issue a final warning, where no first warning was given, or to dismiss, where no prior warning was given.

Analysis and conclusions

140. Using the numbering in the list of issues, it is convenient first for us to consider first paragraph 4 (disability), and then consider the Equality Act claims (paragraphs 5 to 7). We will then address the time limit issues for those claims (paragraph 2). After that, we will deal with unfair dismissal (paragraph 3).

List of Issues, Paragraph 4 - disability

141. The Claimant was disabled with effect from prior to 18 April 2016 and the Respondent ought reasonably to have known that the Claimant was disabled with effect from that date, following consideration of the report of Dr Crawford dated 18 April 2016. In saying this, we do not ignore that Dr Crawford expressed the view that she thought it "unlikely" that the Claimant was within the definition in the Equality Act. However, that is only one factor for us to take into account. (See, for example, Gallop v Newport City Council 2014 IRLR 211, CA). In our view, the report contained sufficient information for the Respondent to be aware that
    141.1 The condition was affecting the Claimant's ability to get to work and college on time;
    141.2 The condition was having a sufficient effect on the Claimant that his GP had arranged both therapy and medication;
    141.3 The Claimant was not considered well enough to do tuition straight away, and also was recommended to have a reduced workload

141.4 The condition was such that Dr Crawford suggested that the examination board might offer – in connection with exams not due to take place until September 2016 (5 months after the date of her report) – "adjustments to students with health impairment"

141.5 The Claimant was suffering a recurrence of a previous condition which he had had several years earlier, and that the effects which he was currently experiencing had commenced in late 2015.

142. The combined effect of the information in the report (together with the information which the Respondent had received from the Claimant when he was reporting his sickness absences) is that the Respondent was aware that the condition was having a substantial adverse effect on the Claimant's day to day activities, and that the condition was one which had first occurred more than 12 months earlier, and that the condition was likely to last for more than 12 months, albeit there might be times in the future when the effects on his day to day activities would be less severe than they were as of April 2016.

List of Issues, Paragraph 5 – Direct Disability Discrimination

Alleged less favourable treatment – List of Issues 5.2.1

143. The Respondent did not treat the Claimant less favourably than it would have treated a comparator (adopting the Claimant's definition as per List of Issues 5.1). It is true that the Respondent did not replace Corinne Tanner as the Claimant's line-manager, or replace Nikki Measures as the HR adviser, but that was not because of the Claimant's disability. It was because the Respondent (Mr Keane, specifically, but also Ms Tanner and HR) believed that those individuals were doing their jobs appropriately, and did not need to be replaced.

Alleged less favourable treatment – List of Issues 5.2.2(i)

144. It is correct that Ms Tanner believed that the issues the Claimant had were not with the individuals but the fact that such individuals were holding him to account when he considered issues should be overlooked. This was not less favourable treatment because of the Claimant's disability. Her reason for holding this belief was not the fact that the Claimant had a mental health condition.

Alleged less favourable treatment – List of Issues 5.2.2(ii)

145. The Respondent did not treat the Claimant less favourably than it would have treated a comparator (adopting the Claimant's definition as per List of Issues 5.1, but noting that the material circumstance are that the Claimant, and therefore his hypothetical comparator were asking to attend a GP's appointment the following day, without stating that it was urgent, and in circumstances in which the following day was a less convenient for an absence than the following week). Ms Tanner asked the Claimant if his appointment was urgent, and let him know both (a) that if it was not urgent, she would prefer him to work as normally the following day and to see the GP the following week and (b) that if it was urgent, he should let her know. As soon as he confirmed that it was urgent, she made it clear that it was OK for him to go to the appointment. The reason for her approach is that there

was potentially a lot of work for the Claimant (or the hypothetical comparator) to do the next day, and less work the following week.

Alleged less favourable treatment – List of Issues 5.2.3(i)

146. We do not find that Ms Tanner exhibited bias. Her reason for mentioning the fact that the Claimant had been off sick on Thursday/Friday 6/7 July 2017 and was then off again on Monday-Wednesday 10-12 July 2017 is that on the Claimant's own account the cause of the second absence was different to that of the first. The cause of the second absence was the Claimant's own voluntary decision to undertake an activity, in hot weather, which, in Ms Tanner's opinion could foreseeably lead to exhaustion (as did, in fact, happen). Her reason for including paragraph 48 in her report was not the fact that the Claimant has a mental health condition which amounts to a disability; she would have included a similar paragraph in the case report relating to a comparator employee, who did not have a mental health condition, but who had reported as being too ill to attend work due to low energy on the Thursday and Friday, and who reported as being too ill to attend work the following week due to heat exhaustion due to activities from the Sunday.

Alleged less favourable treatment – List of Issues 5.2.3(ii)

147. In paragraph 49 of the report, Ms Tanner continues that after the absence from 10-12 July 2017 just mentioned, the Claimant returned to work on Thursday 13 July, before being off again on Friday 14 July 2017, and from Monday-Wednesday 17-18 July 2017, then being back on Thursday 20 July 2017, before being off again on Friday 21 July. She reported that on Thursday 20 July, there had been a social day, and that the Claimant had participated fully both during daytime, and in the evening after what would have been office hours. Ms Tanner would have included this information in a report relating to a comparator employee, who did not have a mental health condition, but who did have a similar pattern of absence to the Claimant. She wanted the decision-maker to have all the information, which included, but was not limited to, Ms Tanner's own observations having seen the Claimant on 20 July 2017. This paragraph does not amount to less favourable treatment because of the Claimant's protected characteristic.

Alleged less favourable treatment – List of Issues 5.2.3(iii)

148. Paragraph 47 of the report was not less favourable treatment. Ms Tanner was not motivated, either consciously or subconsciously, by the fact that the Claimant had a disability. If another employee, one who did not have a mental health condition, but who had had similar amounts of absence to the Claimant, had reported as too sick to work (i) immediately following hiking in hot weather on a Sunday and/or (ii) immediately after a social day/evening on a Thursday, then Ms Tanner would have included the same reference to the Code of Conduct in her report about that employee.

Alleged less favourable treatment – List of Issues 5.2.4

149. This was not less favourable treatment because of the Claimant's disability. The Claimant had informed Ms Tanner that his judgment over a particular issue (his

decision not to turn up for the exam) may have been impaired at the time of his decision (December 2016), but that he only realised several months later, with hindsight, that his judgment had been impaired the previous December. Ms Tanner's comment that an auditor's impaired judgment might be a cause of concerns that might need to be explored with Occupational Health was not motivated by the Claimant's condition. She would have had exactly the same concerns if a comparator employee – who did not have a mental health condition - had alleged that their judgment had been impaired, unbeknownst to them, for some reason in the past if she was concerned that there might be a repeat of such impairment (undetected by the comparator employee) in the future.

Alleged less favourable treatment – List of Issues 5.2.4

150. The date of the email in question, from Ms Tanner to Ms Measures, was 13 March 2017 at 10:42am; it was commenting on the contents of the Claimant's email dated 10 March. The relevant circumstances for a comparator are that

150.1 the comparator's union representative had told the comparator, on 20 February 2017, in the presence of Ms Tanner, to consider visiting a doctor to be signed off sick for exams due to take place in March

150.2 the comparator had taken study leave, not sick leave, after 20 February 2017;

150.3 the comparator had been seen by Ms Tanner in the Respondent's premises after 20 February, without telling her – or giving her reason to suspect – that he should be on a period of sick leave rather than stufy leave

150.4 the comparator had sent an email on 10 March 2017 to inform the Respondent that they had seen a doctor that day who was going to retrospectively certify that the comparator had been too ill to work since 20 February 2017,

151. The email in question was sent to HR. It was not less favourable treatment because of a disability. Ms Tanner would have sent a similar email, supplying similar information and seeking similar advice, in relation to a comparator employee. Ms Tanner's comment that it was not clear why the Claimant had left it 3 weeks from 20 February to contact his GP was factually accurate. The Claimant's email had not addressed that issue. The email did not amount to treating the Claimant less favourably because of his disability.

<u>List of Issues, Paragraph 6 – Discrimination arising from disability</u>

152. We have found that the Respondent was aware (or ought reasonably to have been aware) that the Claimant had depression and anxiety, and that this amounted to a disability, from 18 April 2016 onwards.

153. All of the matters referred to in paragraphs 6.2.1 to 6.2.3 of the list of issues did occur.

154. In relation to paragraph 5.2.1 of the list of issues, it is true that the Claimant did say that he wanted a change of line-manager and HR officer, and true that he said it was because of disability, and true that the Respondent did not grant his requests.

155. In relation to paragraph 5.2.2 of the list of issues, we do not agree with the characterisation that Ms Tanner "made her own medical judgments". The events described in 5.2.2(i) and (ii) did occur.

156. In relation to paragraph 5.2.3 of the list of issues, we do not necessarily agree that the comments in paragraphs 47-49 of the report are biased or pejorative (though we acknowledge that Ms Lower considered them pejorative). Whether they were appropriate or not will form part of our analysis below. Ms Tanner did refer, in those paragraphs, to a potential breach of the code of conduct, and query whether the Claimant had exercised poor judgment and whether he was looking after himself appropriately.

157. In relation to paragraph 5.2.4 of the list of issues, Ms Tanner did send an email raising those concerns. Whether she did so inappropriately or not will form part of our analysis below.

158. In relation to paragraph 5.2.4 of the list of issues, Ms Tanner did not indicate that she doubted "the genuineness of the Claimant's disability". She relayed the chronology of events in her email to HR which sought advice on an unusual situation, namely that the Claimant had been treated as having been on pre-booked study leave, followed by pre-booked annual leave, from 20 February, and had – on 10 March 2017 – stated for the first time that he should have that period reclassified as sickness absence. He also stated that he had not seen his GP until 10 March. Her reason for informing HR that the Claimant had had the outward appearance of being too ill to study (and had not said he was ill to study) was to ensure that HR had all the necessary information to advise her and the Respondent.

instances of mistakes made in his work

159. The Claimant did not satisfy us that there were specific instances of mistakes made in his work that were something arising from his disability.

159.1 He did not provide specific alleged examples of such mistakes, but rather suggested that it was inevitable that all employees do make some mistakes occasionally, and so, on that basis, it was likely that he made mistakes some of the time.

159.2 He said that it was plausible that his disability was a contributory factor for some of those mistakes, but he accepted that others would have been due to human error, unconnected with disability.

159.3 There was no reasonable basis on which we could analyse any given mistake in the Claimant's work, and decide whether that particular mistake was, or was not, something arising from a disability.

159.4 Furthermore, the medical evidence did not state that the Claimant's disability meant that he would necessarily make mistakes in his work. Rather the medical evidence, and the Claimant's own discussions with the Respondent were that he should have extra time to complete his work and he would be given less work. While we could potentially have inferred from that that there

might be mistakes in the Claimant's work if he was not given the extra time, we were satisfied that he was given the extra time. In fact, the Claimant's work output was very low.

159.5 Thus, we are not satisfied that any particular errors in the Claimant's work were something arising from disability.

160. Furthermore, the feedback which was given to the Respondent from the audit leads was that the quality of some of the work which the Claimant did actually complete was of a high standard. The problems with his work were (a) the number of tasks which were totally incomplete and (b) the number of tasks which were only partially completed. The problem was not the mistakes made in the work which was done. Thus instances of mistakes made in the Claimant's work were not more than a trivial part of the Respondent's reasons for initiating the dismissal process, or dismissing the Claimant or rejecting his appeal.

161. We have made our findings above in relation to what Ms Tanner actually did (and her reasons) in relation to the matters referred to in paragraphs 5.2.1 to 5.2.5 of the list of issues. Instances of mistakes made in the Claimant's work were not any part of Ms Tanner's reasons for any of those acts.

Reduced Productivity at work

162. The Claimant was less productive than colleagues, and the reason for that was his disability. The medical evidence supported that proposition; furthermore, during his employment the Respondent agreed that the Claimant should be given a reduced volume of work (the specific details of which were to be agreed between the Claimant and the audit lead for each assignment, and the overall details fo which were to be monitored by the Claimant and Ms Tanner). Reduced productivity at work was something arising in consequence of the Claimant's disability.

Sickness absence

163. As per the findings of fact above, not all of the Claimant's sickness absence was because of disability, but he did have a lot of sickness absence because of his disability. Therefore, some, but not all, of the Claimant's sickness absence was something arising in consequence of the Claimant's disability.

Unfavourable treatment and causation

164. Mr McCann's rejection of the Claimant's complaints (see the list of issues at 6.2.3) was not because of something arising from the Claimant's disability. It was because Mr McCann did not think that the complaints should be upheld.

165. Each of the other matters referred to at paragraphs 6.2.1 to 6.2.3 was unfavourable treatment. In each case, the Claimant's sickness absence was an important factor which was part of the reason for the act. In each case, the Claimant's reduced productivity at work was a more than trivial part of the reason for the act.

166. In relation to what is set out at paragraphs 5.2.1 to 5.2.5 of the list of issues, we have set out our findings and analysis of what happened, and why, above.

166.1 Re paragraphs 5.2.1 and 5.2.2(i), it was not unfavourable treatment that the Claimant was obliged to interact with Ms Tanner or Ms Measures. In each case, they carried out their obligations responsibly. Setting a low bar, and treating the decision to decline to change line-manager or HR officer as unfavourable treatment (on the basis that the Claimant repeatedly requested that such a benefit be conferred upon him by the Respondent), the reason for the refusal to make the requested changes was not either the Claimant's sickness absence, or his reduced productivity. The reason was that the Respondent genuinely did not think that the changes were necessary or appropriate.

166.2 Re paragraph 5.2.2(ii), there was no unfavourable treatment. The Claimant was simply asked a question about the urgency of the appointment. He did in fact go to the appointment. He was told that he could go to the appointment as soon as he answered the question. The question was not unreasonable or inappropriate.

166.3 Re paragraph 5.2.3(i), the Claimant's going hiking was not something arising from his disability. The cause of Ms Tanner's remarks in paragraph 48 of the report was not something arising from his disability.

166.4 Re paragraph 5.2.3(ii) and (iii), we have found that Ms Tanner did not doubt "the seriousness or genuineness of the Claimant's disability". That was not why she wrote what she did in paragraph 49 of the report. We are not satisfied that the inclusion of paragraphs 47 and 49 in the report was unfavourable treatment. Ms Tanner was seeking to place all of the potentially relevant information into the report so that (a) the Claimant could comment on it and (b) the decision-maker could make a fully-informed decision. These brief remarks were not an important part of the 70-paragraph report, or an important part of the reason that a hearing had been arranged. In relation to causation, the Claimant's sickness absence on 21 July 2017 was the whole reason for paragraph 49 and part of the reason for paragraph 47. Therefore, the contents of paragraphs 47 and 49 of the report are because of something arising in consequence of the Claimant's disability.

166.5 Re paragraph 5.2.4, we are not satisfied that this amounts to unfavourable treatment. Ms Tanner identified that (according to the Claimant's own account) his judgment had been affected on a particular matter, and Ms Tanner informed the appropriate human resources officer that it might be appropriate to obtain medical advice about the likelihood of his judgment being affected in the future on other matters, including the work that he was contracted to perform for the Respondent.

166.6 Re paragraph 5.2.5, we are not satisfied that this amounts to unfavourable treatment. Ms Tanner wanted to discuss the implications of the Claimant's seeing his GP on 10 March 2017 and seeking to have his absence from 20 February 2017 retrospectively reclassified as sickness absence. It was not unfavourable treatment of the Claimant for her to seek a meeting with HR and/or her line-manager to discuss the matter. Nor was it unfavourable treatment for her to report what she had observed when she had encountered the Claimant during the period in question.

Proportionate means of achieving a legitimate aim – (Act 6.2.1)

167. The Respondent relies on efficient operation of the business as its aim. We accept that it is legitimate for the Respondent to seek to ensure that those individuals on its training agreements are capable of completing the examinations, and that its employees are capable of performing their duties.

168. In relation to the Respondent's decision that, on 8 September 2017, it would instigate the procedure set out in Annex 5, we have to consider whether that was proportionate. In doing so, we take into account that there were other steps that could have been taken (such as informal warning that improvement was required, or else following the full performance procedure set out in Chapter Twenty). We also take into account the extent to which the Respondent actually did follow the steps that, as set out in Annex 5 itself, should be followed before it is adopted.

    168.1 We heard no specific evidence about exactly what Mr Phillips, the People Director, had said about the prospect of commencing Annex 5 on being notified by Ms Tanner that this was a possibility. However, it was clear that he regarded the commencement of the Annex 5 procedure as a decision for other people. This is despite the fact that Annex 5 says that it is "essential" that the People Director be consulted.

    168.2 Medical evidence more recent than the 3 July 2017 Occupational Health report was not obtained. That advice anticipated that the Claimant was likely to be able to undertake tuition in September, and exams in December 2017 (while also recommending a further Occupational Health report be obtained in approximately September).

    168.3 No formal decision by the Respondent that the Claimant had the protection of EA 2010 was made. We accept that adjustments had been implemented and that Occupational Health had not suggested other adjustments. However, Annex 5 does specify that EA 2010 (referred to as "the Equalities Act") should be considered and protected characteristics identified.

169. Balancing the importance to the Respondent of achieving its legitimate aim, against the effects of the treatment, we are not satisfied that initiating the capability process was proportionate. The Respondent initiated this process instead of allowing the Claimant to undertake the tuition for exams in December 2017 (and instead of getting medical advice as to whether he was fit enough to do that tuition and those exams). The Claimant had not previously been warned that this procedure might be initiated. On the contrary, his expectation had been that he would be commencing tuition that month. The Claimant had previously been willing to attempt the tuition earlier (commencing 30 June, for an exam in September 2017) and it had been the Respondent which had first suggested (a suggestion which both Occupational Health and the Claimant subsequently agreed was sensible) that he delay until September. When the suggestion to delay until September was made, the Claimant was not told that the Respondent might instead treat the delays in his exams as a significant reason to be relied on for commencing a dismissal process.

170. Furthermore, the full Chapter Twenty "Managing Underperformance" process contained a number of a chances for an employee to be warned about under performance, and have the opportunity to improve. It is not proportionate that an employee who is disabled should have fewer warnings and/or chances to improve.

Proportionate means of achieving a legitimate aim – (Act 6.2.2)

171. In reaching her decision to dismiss, Ms Lower had no more recent medical advice than the Occupational Health report of 3 July 2017. She regarded Annex 5 as indicating that dismissal was appropriate if she answered the following questions

    171.1.1 Is there a gap between Claimant's performance and what was reasonably expect of his grade and experience? If so
    171.1.2 Is that gap expected to be ongoing or could it realistically be closed.
    171.1.3 Is there a realistic likelihood of achieving and sustaining sufficient improvement to meet requirements within a reasonable time frame.

172. Annex 5, however, is an exception to the Respondent's normal capability procedure, as set out earlier in in Chapter Twenty. The exception is one which applies when the reason for the gap is "due to a medical condition or disability".

173. Balancing the importance to the Respondent of achieving its legitimate aim, against the effects of the treatment, we are not satisfied that dismissing the Claimant was proportionate. Ms Lower was aware that the most recent Occupational Health advice had been that the Claimant was likely to be fit to do tuition and exams in the latter part of 2017, and that the Respondent had taken the decision not to allow him to go to college without having had further medical advice.

174. It was not proportionate to make a decision to terminate employment (on the basis that it was considered the Claimant had no chance of attaining the required standards) without either (i) allowing him to take steps towards the exams in December 2017, and seeing if he failed or was unable to take them or (ii) obtaining medical advice to the effect that he should not do so. Furthermore, it was not proportionate (having prevented the Claimant from making an attempt at a December sitting) to decide that he should be dismissed on the basis that he would not be (realistically) able to do his remaining exams in 2018.

175. Ms Lower was also aware that it was theoretically possible to extend his contract, and that this had been done in other cases. It was not proportionate to decide that there should be no extension to the Claimant's contract to allow him to at least attempt to comply with the schedule of 2 exams in March, 2 in June and 3 in November. The Claimant had been successful in his earlier exams and so it was not entirely hopeless that he could pass the future exams. It was accepted by Ms Lower that there had been medical reasons for his subsequent difficulties in passing the next ones. Occupational Health had not said that these medical difficulties would continue indefinitely and, on the contrary, had suggested that the Claimant was improving (albeit further relapse was a possibility).

176. The Respondent would not have been engaging in an open-ended commitment if it had continued the Claimant's employment beyond November 2017 (as opposed to dismissing him). Only a limited number of re-sits were possible and (subject to

further discussion with ICAEW) getting to the stage of passing the Advanced exams by November 2018 was potentially a longstop date for the Training Agreement. It is true that the Claimant would have been spending a large proportion of his time on tuition rather than doing audit work, but the importance to the Respondent of its legitimate aim was not outweighed by the discriminatory effect of dismissing the Claimant without giving him a further opportunity to get back on track with the examination schedule.

Proportionate means of achieving a legitimate aim – (Act 6.2.3, rejection of appeal)

177. We did not find that there was additional evidence, in the Claimant's favour, available to Mr McCann that had been unavailable to Ms Lower. One difficulty that the Claimant had by the time of the appeal was that much time had passed. This was not the Respondent's fault. The Respondent had allowed the Claimant to have additional time. Reinstating the Claimant shortly after the February 2018 hearing (or shortly after his further written submissions) would not necessarily have allowed sufficient time for the Claimant to complete all the exams in time.

178. Part of the appeal which was rejected was the Claimant's argument that Annex 5 had not been appropriate. As mentioned above, our judgment is that it was not proportionate for the Respondent to instigate Annex 5, and then to dismiss the Claimant on the basis that Annex 5 was applicable. It was not (in our opinion) proportionate to use Annex 5 at all, or to dismiss the Claimant in October (with effect from November). Mr McCann's decision to dismiss the appeal was not made on the basis that the further passage of time from October to March made reinstatement impossible or impractical, but was made on the basis that the use of Annex 5 had in fact been correct, and the decision to dismiss was not unreasonable. In our view, failing to cure the discriminatory dismissal by reinstating the Claimant was not proportionate.

<u>List of Issues, Paragraph 7 – Failure to make adjustments</u>

179. We have found that the Respondent was aware (or ought reasonably to have been aware) that the Claimant had depression and anxiety, and that this amounted to a disability, from 18 April 2016 onwards.

180. The Claimant has failed to satisfy us that there was a PCP that the Respondent would not change an employee's line-manager no matter how difficult the relationship became. He has satisfied us that the Respondent refused to change his line-manager. We are not satisfied that the Claimant was placed at a disadvantage by having Ms Tanner as his line-manager and nor are we satisfied that a change of line-manager would have reduced any difficulties that the Claimant was having in communicating with the Respondent or its managers.

181. The Claimant has failed to satisfy us that there was a PCP that the Respondent would not offer mediation no matter how difficult relationships between staff became. He has not satisfied us that he sought mediation (although that, in itself, would not be mean that a reasonable adjustments claim could not succeed). He has not satisfied us that relationships at work were placing him at a disadvantage, or that that disadvantage might have been reduced by mediation.

182. The Claimant has not satisfied us that any difficulty which he perceived in his relationships with either Ms Tanner or Ms Measures exacerbated his conditions or caused him to be off sick, or to be able to perform his work when not off sick. Furthermore, he has not satisfied us that any difficulty which he perceived in those relationships was because of his disability.

183. In relation to paragraph 7.1.3 of the list of issues, the suggested PCP is somewhat vague. The alleged disadvantage is at 7.2.3.

    183.1 Our findings were that the Respondent engaged with the Claimant thoroughly in relation to his tuition in 2016 and up to March 2017. The Claimant had college tuition arranged, and when he did not attend that, and expressed a preference for on-line tuition, that was arranged instead. It would not have been reasonable for the Respondent to have had to offer more tuition in the period up to and including March 2017.

    183.2 After March 2017, the Claimant was not permitted to undertake tuition starting in June 2017, but that was agreed by Occupational Health as being sensible (and the Claimant also concurred). It was because the Claimant was not considered fit enough to attend. He was not prevented because of the alleged PCP.

    183.3 In September 2017, the Claimant was not permitted to undertake tuition. That was because the Respondent had instigated the capability process, not because of the alleged PCP.

184. The Claimant has not satisfied us that it had an overarching policy of never engaging with Remploy. In his case, the decision made after the dismissal was that there would be no engagement with Remploy during the notice period. We are not satisfied that the Respondent's engaging with Remploy during the notice period would have alleviated any disadvantage that the Claimant was suffering. In particular, we reject the suggestion that the Claimant's appeal might have been successful had the Respondent engaged with Remploy. In terms of the period prior to dismissal, it would not have been reasonable for the Respondent to have had to proactively seek out Remploy and engage with them.

<u>List of Issues, Paragraph 2 – Time Limits</u>

185. ACAS were contacted on 21 February 2018. Early conciliation ended on 21 March 2018, and the claim was submitted within a month of that date. Therefore, any Equality Act claim relating to acts or omissions which occurred on or after 22 November 2017 is in time. However, for incidents prior to that the claim might be out of time.

186. The claims relating to dismissal itself (both the unfair dismissal and the Equality Act claims) are in time, as the termination of employment was 29 November 2017.

187. The complaints (of direct discrimination and discrimination arising from disability) in relation to the allegations in paragraph 5.2.3 of the list of issues are in time on the basis that the report is sufficiently closely connected with the dismissal to be considered part of a continuing act. In the alternative, it would be just and equitable to extend time for these complaints because the Respondent would not be

prejudiced by having to defend the specific contents of a report which was relied on by the dismissing officer, given that it was going to have to defend the dismissing officer's decision in any event.

188. In relation to the complaints that the Respondent did not change the Claimant's line manager, those are out of time given that his line manager was changed to Polly Akroyd in October 2017. It would be just and equitable to extend time on the basis of the Claimant's medical condition, and on the basis that the Respondent was not unduly prejudiced as Ms Tanner and Mr Keane were able to give evidence and produce documents. Indeed, they satisfied us that there had been no breaches of the Equality Act (either as direct discrimination, discrimination arising from disability, or failure to make reasonable adjustments). Furthermore, the connection between the Claimant's treatment by the Respondent generally and his line-manager in particular was a matter that needed to be considered when assessing the claims which were in time.

189. The complaints (of direct discrimination and discrimination arising from disability) in relation to the allegations in paragraph 5.2.2(ii), and 5.2.4 and 5.2.5 of the list of issues are out of time on the basis that they were not continuing acts, and started and finished on, respectively 2 February 2017, 4 May 2017 and 10 March 2017. This was a long time, in each case, before the Claimant commenced early conciliation. It is not just and equitable to extend time. Although the Respondent had not been greatly prejudiced by having to defend the allegations, there is some prejudice from Ms Tanner having to recall exact reasons for particular sentences in emails from a long time ago. They were each weak allegations, with no associated financial loss.

190. The allegations of failing to engage with Remploy and failing to engage in mediation are in time on the basis that the Claimant is arguing that the failures continued up to date of dismissal.

191. In relation to paragraph 7.1.3 of the list of issues, it would be just and equitable to extend time for that claim on the basis that the issues of exactly what tuition the claimant did and did not have, and the reasons for that, were part and parcel of our consideration of the claims which were in time, and the Respondent was not prejudiced.

<u>Unfair dismissal</u>

192. The reason for the Claimant's dismissal was capability. That was the reason mentioned in the dismissal letter. As the dismissal letter explained in more detail, Ms Lower considered that there was a gap in the Claimant's performance, and the performance levels that might reasonably be expected of him. This included his performance in relation to exams and his performance in relation to his work. She believed that December 2018 was a reasonable time frame by which require that the Claimant should attain the performance levels that the Respondent might reasonably expect of him, and that there was no realistic possibility that he would achieve that.

193. Ms Lower followed Annex 5 of Chapter Twenty of the HR Manual (as opposed to the procedure in the rest of Chapter Twenty).

194. We must not substitute our own judgment for that of Ms Lower. We are not doing that when we say that it was reasonable for Ms Lower to decide that December 2018 was the date by which the Respondent was entitled to expect that the Claimant should be able to demonstrate that he could perform to the standards required of him by the Respondent and that, by then, he would need to have passed all his remaining exams.

195. Our opinion is that it was outside the band of reasonable responses to decide to terminate the Claimant's employment, based on the evidence presented to Ms Lower, and that it was outside the band of reasonable responses to adopt the Annex 5 procedure in the circumstances of this case, taking into account that Annex 5 gave the employee less opportunity to improve and demonstrate improvement than (i) would be given to an employee whose performance issues were not disability related and (ii) are suggested by (but not a mandatory requirement of) the ACAS code of practice.

196. Ms Lower made an assessment that the Claimant's examination record from September 2016, and his absence record since the last OH report in July 2017, implied that he could not realistically be expected to pass 2 exams in March 2018, 2 in June, and then 3 in November 2018. However, she did not obtain Occupational Health advice before reaching that conclusion. Given that his failures to pass FM and TC in September 2016, December 2016 and March 2017 (and his failure to commence tuition in June 2017 with a view to taking in September 2017) was for medical reasons (and disability-related medical reasons, as we have found) it was outside the band of reasonable responses to assess the likelihood of him being able to take those exams in the future as being insufficient without having obtained medical advice, particularly given that the most recent medical advice available opined that he would be able to complete the exams. She concluded that the Claimant's absences since July 2017 meant that his improvement had not progressed as well as Dr Crawford had been anticipating in her 3 July report and that is work situation had not reached the stability required before (based on the 3 July report) tuition should begin. However, Dr Crawford had expressly stated that she would want to see the Claimant again before he started tuition and the Respondent had not arranged that.

197. It was outside the band of reasonable responses for the Respondent to dismiss the Claimant without previous warnings of the possibility having been given, in circumstances in which (i) the Claimant had a training agreement due to last until December 2018 and (ii) the Respondent had persuaded the Claimant to delay tuition from June 2017 to September 2017 without warning him that there were steps that he needed to take to ensure that the September 2017 tuition would commence and/or that the Respondent might dismiss him without allowing any further attempts at tuition.

<u>Polkey and Contributory Fault</u>

198. We have to assess what might have happened had the Claimant not been unfairly dismissed with effect from 29 November 2017. In particular, we have to consider the chances that he might have been dismissed fairly.

199. On our analysis, the chances of the Claimant's being fairly dismissed any earlier than 31 December 2017 is zero. A fair dismissal could not have taken place without either medical evidence to support the view that the Claimant was not going to be able to complete his training (or, at least, his exams) or else a further failure by the Claimant in his exams or else a further failed attempt to commence tuition.

200. Had the Claimant not been dismissed when he was, and in the manner that he was, we think that there is a fairly high chance that a fair dismissal would have taken place in the future. The dismissal might have been non-renewal of a fixed term contract, or else an express termination of a future employment contract (assuming that his fixed term contract was renewed). It is, of course, not an exact science to consider all the possible outcomes that might have occurred.

201. One possible outcome is that the Claimant would

    201.1 have been well enough (and the Occupational Health evidence confirmed he was well enough) to complete tuition

    201.2 have passed all his remaining exams by November 2018

    201.3 demonstrated to the Respondent that he had reached (or could reach within a reasonable period) the requirements to be employed by them permanently as a qualified person.

202. However, that is not the only possible outcome. In our judgment, it is not the most likely outcome either. It is also possible that the Claimant might

    202.1 have not become well enough to commence tuition (or not well enough for Occupational Health to recommend it)

    202.2 have started tuition but failed to complete it

    202.3 have sat the exams but failed and eventually ran out of re-sit opportunities

    202.4 failed to reach a standard of work performance sufficient for the Respondent to offer him employment.

    202.5 Not have been offered employment for other reasons.

203. We have taken the view that there should be a 75% reduction to the compensatory award for unfair dismissal that would otherwise have been awarded for loss of earnings in the period 1 January 2018 onwards (with no reduction in relation to the period up to 31 December 2017).

Outcome and next steps

204. At the remedy hearing, we will consider the parties positions on (i) reinstatement; (ii) contributory fault; (iii) hurt feelings; (iv) loss of earnings; basic award.

Employment Judge Quill

Date 5th Feb 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

06/02/2020

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FOR EMPLOYMENT TRIBUNALS