Case Number: 2201583/2018 & 2206097/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs B Mirikwe	**v**	**HM Passport Office**

Heard at: London Central

On: 13, 14, 15, 16, 17, 20, 21, 22 and 23 January 2020

Before: Employment Judge A James
Mr G Bishop
Mr D Clay

Representation

For the Claimant: Mr T Walker, counsel

For the Respondent: Mr M Green, counsel

JUDGMENT ON LIABILITY

(1) The claims succeed for unfair dismissal (s 98(4) Employment Rights Act 1996); the claims under s 15 Equality Act 2010 in relation to (a) the imposition of the First Written Attendance Warning on 19 October 2017 and (b) the claimant's dismissal; the reasonable adjustment claims (s 20 Equality Act 2010) in relation to (a) the alteration of trigger points for attendance management purposes; (b) moving the Claimant to a quiet work area with reduced sensory stimulus, including the Claimant's previous work bay/avoidance of bright lights; and (c) the provision of an adapted keyboard and screen protector.

(2) All of the successful claims were presented in time (s 123(1)(a) and (b) Equality Act 2010).

(3) All other claims do not succeed and are dismissed.

REASONS

The Issues

1. The claimant presented claims for unfair dismissal, disability discrimination, and breach of contract/wages in her two conjoined claim forms. The issues were agreed by the parties and sent to the tribunal, following a preliminary hearing on 29 April 2019. We did invite Mr Walker to consider refining the issues prior to the evidence being heard in relation to the issue of substantial disadvantage. No formal change was made, although as set out below, Mr Walker did put the substantial disadvantage issues slightly differently in his final submissions. Nothing significant turned on that. The agreed list of issues is as follows.

Unfair Dismissal

1 Was the reason or the principal reason for the Claimant's dismissal one within subsection 98 (1) or (2) of the Employment Rights Act 1996 ('ERA'; 'a potentially fair reason'? The Respondent asserts that the reason for dismissal was capability. The Claimant asserts that it was her disabilities.

2. If the Respondent dismissed the Claimant for a potentially fair reason did the Respondent fulfil their obligations under subsection 98(4) of the ERA in acting reasonably in all the circumstances?

3. In particular did the Respondent:

a. Adopt a fair procedure, particularly its Attendance Management Policy and Procedures;
b. Consider OH advice and recommendations;
c. Consider recommended reasonable adjustments before referring the Claimant's circumstances to a Decision Maker Hearing;
d. Refer the Claimant back to OH where there were concerns, in accordance with the Respondent's Policy and Best Practice;
e. Taking into account mitigating circumstances, such as
i. the Claimant's 17 years' service and absence record prior to 20161
ii. the Claimant's accident at work on 14 October 2016;
iii, that details of performance concerns had not been raised with the Claimant;
iv. adjustments recommended by OH on 22 December 2014, 2 October 2017,9 March and 11 April 2018;
v. the Claimant's grievance dated 27 November 20L7;
vi. the Claimant's readiness to return to work from 4 July 2018;
vii. the subjectivity of the Decision Maker's determination of what is considered a reasonable timescale for returning to work.

4. Was the decision to dismiss the Claimant within the band of reasonable responses?

5. If the Claimant's dismissal is found to be unfair, should there be a Polkey reduction to any compensatory award that the Tribunal may be minded to award?

6. Secondly, did the Claimant contribute towards her own dismissal in any way, and if so, would it be just and equitable to make a reduction to both basic and/or compensatory awards?

Disability

7. The Respondent accepts that from October 2017 to date, the Claimant's Arthralgia Arthritis, migraines, depression and/or anxiety amount to disabilities under section 6 Equality Act 2010.

Jurisdiction

8. Has the Claimant brought her complaints under the EqA within the three-month time limit (s.123(1)(a) EqA 2010)?

9. If not, would it be just and equitable for the Tribunal to extend time (s.123(1)(b) EqA 2010)?

Discrimination Arising from Disability

10. Did the Respondent treat the Claimant unfavourably by:

> *a. Imposing a First Written Attendance Warning on 19 October 2017;*
> *b. Refusing to consider alterations to absence management triggers on 7 November 2017;*
> *c. Raising ambiguous performance concerns and requiring the Claimant to attend a performance management meeting on 8 November 2017;*
> *d. Dismissing her on 19 June 2018.*

11. If so, was it because of something arising in consequence of the Claimant's disability, namely:

a. Her absence from work; and/or
b. Her request and/or the requirement of reasonable adjustments to be made to her working environment and equipment.

12. Has the Respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The legitimate aim relied on is 'the implementation of an absence management procedure that seeks to both minimise the impact of ill-health on an employee's attendance whilst also ensuring the efficient running of the department'. (GOR para 22, page 83)

Failure to Make Reasonable Adjustments

13. Did the Respondent apply a provision, criterion or practice ("PCP") which placed the Claimant at a substantial disadvantage in comparison with people who do not suffer from the Claimant's disabilities? The Claimant relies on the following PCPs:

a. The requirement to provide regular and effective service;
b. The ability to return to work within a timescale that management considered reasonable;
c. Work to be carried out in an open plan, noisy, and brightly lit office environment;
d. Inconsistent or no breaks during working hours;
e. Use of standard office equipment;
f. Documenting all sickness absences as one record;
g. Non-payment of cab fares for staff.

14. The Claimant contends that the substantial disadvantage that she suffered was as follows:

a. Imposition of the First Written Warning on 19 October 2017:
b. Being subject to an Attendance Management Process, including the Review Meeting on 1 February 2018;
c. Being subject to anxiety and migraines caused by attending a noisy, open plan and brightly lit office;
d. Exacerbation of her disabilities by irregular or no breaks from work;
e. Exacerbation of her disabilities by the burden of using standard office equipment;
f. Reduction in annual leave for rest and relaxation;
g. Adverse sickness absence record;
h. Difficulty with using public transport when disabilities were exacerbated.

15. If the PCPs placed the Claimant at a substantial disadvantage, did the Respondent fail to make reasonable adjustments to avoid the disadvantage? The Claimant avers that the following would have been reasonable adjustments:

a. Alteration and increase in trigger points for Attendance Management;
b. Moving the Claimant to a quiet work area with reduced sensory stimulus, including the Claimant's previous work bay;
c. Avoidance of bright lights;
d. Regular micro breaks every hour and short breaks throughout the working day;
e. Suitable space to rest if she was experiencing a migraine;
f. Formal workstation assessment; to include an adapted keyboard, ergonomic chair and screen protector;
g. Recording disability related absence separately to other sickness absence;

h. Provision and payment of cab fares when Claimant's disabilities flared up.

Victimisation

16. Did the Claimant undertake a protected act within the meaning of S.27(1) EqA 2010? The Claimant relies on the following protected acts:

a. Grievance dated November 2017, asserting disability discrimination and failure to make reasonable adjustments;
b. Employment Tribunal Claim number 2201583/2018.

17. Did the Respondent subject the Claimant to a detriment, namely her dismissal, as a result of the above protected acts?

Unauthorised Deductions from Wages/Breach of Contract

18. Was the Claimant entitled to payment under the Civil Service Compensation Scheme because her employment was terminated on grounds of ill health?

19. If so, has the Respondent paid the Claimant her full entitlement? The Claimant avers that deductions of approximately £6,000 have been made from her compensation without authority or clarification of the deductions.

Remedies

21.If the Claimant's claims are well-founded, is she entitled to the following compensation:

a. compensation for unfair dismissal;
b. an order for reinstatement;
c. a declaration in relation to the Claimant's discriminatory treatment;
d. an award for injury to feelings as compensation for unlawful discrimination suffered;
e. full compensation under the Civil Service Compensation Scheme?

The hearing

2 The hearing on liability took place over nine days. Evidence and submissions on liability were dealt with on the first six days. Deliberations took place on the remainder of the sixth, and on the seventh and eighth days. It was arranged that on the ninth day, the tribunal would give its decision and reasons and, if the claimant was successful, would go on to deal with remedy, to the extent necessary or required. Having delivered our judgment orally, the parties requested that the remedy hearing be adjourned, to enable the parties to consider the implications of the judgment for remedy. We agreed to do so.

3 The tribunal heard evidence from the claimant, from Mr Pav Alam, Industrial Officer for the Public and Commercial Services Union (PCS) and Joycelyne Pramang, Examination Officer for HMPO and the HMPO Branch Secretary for PCS.

4 For the respondent we heard from Lindsay Gouevia MacLeod, Service Delivery Manager who heard the appeal against the First Written Attendance Warning (FWAW), from the dismissing officer Sharon Sauer, a grade SEO civil servant and from Danny Frost, Head of Operations for the South and Wales areas who heard the appeal against dismissal.

5 We also read statements from Karen Barkley, a Grade EO civil servant and Martin Aherne, a grade SEO civil servant. Unfortunately, Ms Barkley was not able to attend during the hearing due to ill health. Mr Green informed us that he had decided to rely on her written statement, rather than apply to adjourn the hearing. As a consequence, her evidence carried much less weight than if she had been able to attend and have her evidence tested under cross-examination. Mr Aherne's statement sets out the calculations in relation to the deductions made. In the end, the CSCS payment issue appeared to come down to whether the deductions should have been made gross from the claimant's final salary payments etc, or net of tax and NI. That was to be a matter for submissions rather than evidence. The figures and calculations in Mr Aherne's statement were agreed.

6 There was an agreed trial bundle consisting of two lever arch files containing about 500 pages each. A few additional pages were added during the hearing.

7 Reasonable adjustments were made for the claimant. An adjustable chair was provided. She was able to take and encouraged to ask for regular breaks as appropriate and was reminded of that on a number of occasions. She was able to stand up and stretch and move around, as required, during her evidence, and whilst other witnesses were giving evidence.

Factual findings

8 The claimant started work for the respondent on 29 April 2001 as a Passport Officer.

9 The respondent (HMPO) is part of the Home Office. HMPO is responsible for issuing passports in the UK and issues arising from that work. The claimant worked at its Globe House office in Westminster, SW1.

10 The claimant was diagnosed with arthralgia arthritis in 2001. She was diagnosed with migraines in 2002.

11 In July 2014, following the death of her husband, she was diagnosed with depression.

Workstation assessments, 2014, 2015 and 2016

12 A workstation assessment was carried out for the claimant on 16 December 2014. This confirmed that her display screen was too high. It was repositioned. Her document holder needed replacing. It was noted that her chair was ten years old. The headrest was not correctly positioned and needed to be corrected. There were no other issues raised in relation to the chair at that time.

13 Lighting and noise were said to be 'the main issues for Bridgette in her current position. She will need to move away from the windows and from the printer or any area where colleagues may need constant access around her desk'. As for breaks, it was stated that the claimant 'does try to take a 5 to 10-minute break away from her desk every hour as recommended' but that she does not always remember to do it. The covering letter with the report dated 22 December 2014, from Health Management, recommended that generally, all employees who could be considered users of computer equipment should take 'micro-breaks every 15 minutes or so (stop inputting, look around and change eye focus length) and a minute or two every hour to enable change of posture and position and stretching'.

14 In the recommendation section of the report it was noted that 'initially a change of workstation position would be recommended. Bridgette will be more comfortable sat away from the window and noisy office equipment'. It was also stated that 'a filter for Bridgette's display screen may be helpful to reduce the number of migraines she suffers'.

15 A further workstation assessment was carried out on 28 April 2015. The report noted that the anti-glare screen needed to be replaced as it was chipped and stuck on with tape around the edges. No issues were raised in relation to her keyboard. It was recommended that her chair be replaced. In relation to lighting and noise it stated: 'no issues have been reported with lighting and noise within the office'. Similar advice to that contained in the 2014 report was given about regular breaks and changes of activity. The outcome and recommendations section confirmed that a new chair should be provided, a new table fan, and an antiglare screen for her monitor.

16 In the bundle is an equipment request, (page 732A), relating to a new chair for the claimant. The date of the request is 21 May 2015. It is recorded that the new chair was received and installed by August 2015. The claimant was adamant in her evidence that was wrong, and that a new chair was not provided. We deal with that conflict of evidence below.

17 During 2015 the claimant was suspended for a period. The claimant was aggrieved by her suspension. She was subsequently exonerated, following the investigation, and she returned to work. When she came back however, she was moved from her previous workstation and to a new team. This was not discussed with her beforehand. Prior to the move she was happy with the area where she had been sitting, in a booth, which was both quieter and less bright. She was unhappy about the location of her new workstation.

18 A further workstation assessment was carried out on 12 July 2016. The covering letter contained the same recommendations in relation to breaks and micro breaks as the 2014 report covering letter. The report itself states: 'Ms Mirikwe reported that she was able to take a break when required whilst at

work and she also left the workstation to perform admin duties'. In the brief history section, it was noted that she had frequent migraines as well as lower back and neck pain. The report noted that her back condition was aggravated by sitting for too long and relieved by frequent movement. She told the assessor that she 'was constantly changing position to feel comfortable and feels that she would benefit from a more supportive chair'. No problems were noted regarding the keyboard. In section 8 it was noted that 'a DSE compliant office chair was being utilised. It was observed that this did not fit Ms Mirikwe well, as the contours of the backrest did not suit the shape of her spine'.

19 In relation to lighting and noise it was noted that 'the lighting appeared suitable and was achieved via recessed strip lighting and windows to provide natural light.… Ms Mirikwe started to find the natural lighting and the surrounding office to occasionally aggravate her migraines. The noise in the office is reported to sometimes be too loud as people are frequently moving around'.

20 It was recommended that 'a DSE compliant chair with the following features is supplied to improve Ms Mirikwe's back support and to encourage increased movement'. A list of the features of a DSE compliant chair then followed. The report further recommended; 'As the tape holding the screen filter in place can somewhat obstruct Mrs Mirikwe's view, it is recommended that either a replacement filter be provided or a way in which to hold it in place without the tape is found'.

21 The claimant stated in her evidence before us that the chair referred to in this OH report was the chair that she was using when the accident occurred in October 2016 – see below. We find however, on the basis of the equipment request, that a new chair had been supplied. However, we also find, based on the 2016 OH report, that the chair that was provided was not in fact suitable for the claimant and that a different chair should have been provided for her.

Accident at work – 14 October 2016

22 On 14 October 2016 the claimant suffered an accident at work. She fell as she was getting up from her office chair which tipped up as she did so. She struck her face against the desk and fell to the ground. The chair fell on top of her and pinned her down. The claimant believed that if she been provided with a new chair, the accident would not have happened. She was subsequently signed off work on 24 October 2016 with 'bruising and migraine' and remained off work until 8 December 2016. The subsequent fit notes refer to 'migraines' as being the reason for her sickness absence.

23 The claimant attended the emergency department regarding the accident at her desk on 23 December 2016, after she had returned to work. The Estates Manager's undated email at page 750 in the bundle, confirms that they were aware that OH had recommended a new chair 'which is awaiting approval from HOPG'. The author of the report, Ms Ullah, stated that her and a colleague had checked the chair the claimant had been sitting in when the accident occurred and it appeared to be stable and sturdy and in a good condition.

24 It is the claimant's case that following the accident at work on 14 October 2016 her migraines increased. She therefore linked her absences to the accident at work. The absence records show that there was a demonstrable

increase in her sickness absence for migraines following the accident. In the two years from October 2014 to October 2016, the claimant had five absences totalling nine days. In the six months from January to July 2017, the claimant had five absences totalling 14 days. It is clear therefore that there was a significant increase in absences due to migraines following the accident. That does not necessarily mean that those absences were caused by the accident however, an issue we return to below.

25 By the time of the claimant's return to work on 8 December 2016, a suitable ergonomic chair had been sourced and provided for her. The claimant confirmed that she was happy with this new chair.

Absence management process - 2017

26 The claimant was absent because of a migraine, between 11 and 13 January 2017.

27 The claimant applied for civil service injury benefit, following her accident. She was referred to OH, who made enquiries, amongst others, with her GP. On 20 January 2017 the claimant gave her consent for a medical report to be obtained.

28 On 25 January 2017 there was an investigation regarding the claimant's accident at her desk.

29 On 31 March 2017 an OH doctor requested further information regarding the accident from the claimant's GP. Yet further information was requested on 25 May 2017.

30 On 12 April 2017 the claimant left work early due to a migraine. The claimant was subsequently absent due to a migraine between 8 and 10 May 2017.

31 We were directed to emails between Karen Barkley, Khayrun Rhaman and Esther Amara dated 28 June 2017, in which Khayrun Rahman asked: 'who advised not to put the claimant on a sickness warning?' We did not find anything sinister in relation to that email, which simply reflected a manager at a higher level going through sickness absence records and checking why a warning had not been given when potentially it could have been. This does however demonstrate that the claimant's then line manager Karen Barkley was not complying with the absence management procedure. For example, there was no return to work meeting with the claimant following her lengthy absence between October and December 2016. There do not appear to have been any return to work meetings following the absences referred to above, in 2017.

32 The reply from Karen Barkley to Khayrun Rahman of 28 June 2017 stated that she had been advised that no action should be taken until a decision was made regarding the claimant's injury benefit application. The claimant does not appear to have been told by Ms Barkley that she was waiting for that, before deciding what to do in relation to the absences. If the claimant had been told about it, there was no record.

The Absence Management Procedure (AMP)

33 The Absence Management Procedure (AMP) is a key document in this case and it is therefore necessary to look at it in some detail. The numbers in brackets below refer to the paragraph numbers in the document.

34 The AMP states that it is important to act quickly to minimise the impact of ill health and attendance on performance (4). The manager and employee are to work together and adopt a work-focused approach (5). Managers should act early to address health issues which may affect attendance or performance, support employees to return to work as soon as possible following a period of sickness absence, hold a formal attendance meeting with all employees who reach consideration trigger points and decide whether to take formal action and regularly access relevant online staffing reports etc (6).

35 Workplace adjustments are dealt with from paragraph 11 onwards. It is noted that those are legally required for staff with a disability. But it is also 'good practice to consider any request for adjustments', not just those that the employer is legally obliged to make.

36 If an employee takes sick leave, the manager and employee should have a discussion by telephone. Following that initial contact with the employee the manager should, amongst other things, carry out a stress risk assessment if the absence is stress-related (21).

37 The manager and employee should have a Return to Work discussion after every period of sickness absence, ideally on the day the employee returns to work. The discussion should include a review of all sickness absences in the rolling 12-month period (45).

38 Attendance should be formally reviewed if an employee's sickness absence level reaches the consideration point (53). The consideration trigger points are set out in paragraph 54 as either six working days or three spells of absence during, amongst others, a rolling 12-month period.

39 According to paragraph 49, there are six exceptions where sickness absence will automatically not count towards consideration trigger points. These include, where an employee has a disability and reasonable adjustments which will enable the employee to return to work have not yet been considered or made; or where there is a qualifying injury at work. Paragraph 49 also states that 'discretion may be awarded in other cases, subject to evidence-based decisions by line-managers' (and see para of the AMP 61 below). The claimant was not waiting for reasonable adjustments to be carried out which would enable her to return to work, at the time that the warning was issued. As noted below, her absence was not a qualifying injury for reasons which are set out in the September 2017 OH report.

40 When an employee's sickness absence level reaches or exceeds the consideration trigger point, the line manager should consider whether a written attendance warning is appropriate (59). Paragraph 61 states: 'A warning should not be given if the sickness absence is due to an injury sustained, or disease contracted, in the course of the employee's duties. The employee may be able to claim injury benefit. If injury benefit is awarded, the initial and up to a maximum of six months absence will be exempted as a qualified injury at work. This will ensure full pay before normal sick pay arrangements are applied.… Line managers have discretion not to give a Written Attendance Warning. The manager should consider the circumstances of the absence and the employee's absence history.'

41 There then follows a three-month improvement period and/or a nine-month sustained improvement - paragraphs 69 to 74 - during which a stage 2 final

written warning can be issued. If the employee does not meet the attendance level expected of them following a stage 2 final written attendance warning, dismissal should automatically be considered (74).

42 During a continuous long-term sickness absence, the manager and employee are to meet at an informal review to keep in touch and explore the support needed to help the employee return to work (79). Paragraph 80 states that meetings should take place as follows: an informal review (KIT) after 14 consecutive calendar days of sickness absence; a formal attendance review meeting after 28 consecutive calendar days; another when the sickness absence has lasted three months; and every quarter thereafter. At 12 months there should be mandatory consideration of dismissal.

43 After the informal review, the manager should consider whether the business can continue to support the sickness absence. If not, they are to arrange a formal attendance review meeting (a FARM – para 82, AMP). FARMs are dealt with between paragraphs 83 and 88 which confirm, amongst other things, that during such a meeting the manager should undertake the same actions as in an informal review; discuss with the employee whether they are likely to return to work in a reasonable timescale; consider whether there may be an underlying disability and whether any reasonable adjustments may be appropriate; and consider whether the business can continue supporting the employee's absence.

44 Paragraphs 89 to 101 deal with situations where the employer is considering dismissal. Where an employee is absent for a reason related to disability, the Department 'must explore options to make workplace adjustments which will enable the employee to return to work' (90). According to paragraph 96, the decision manager should dismiss the employee if all the following apply: the business can no longer support the employee's level of sickness absence; downgrading is not appropriate or the employee rejects this option; where there are no further workplace adjustments which can be made to help the employee return to satisfactory attendance levels in a reasonable timeframe; occupational health advice has been received within the last three months; and an application for ill-health retirement (IHR) would not be appropriate. It is accepted that downgrading and IHR were not applicable in the claimant's case.

45 Appeals against dismissal are dealt with between paragraphs 102 and 114. Amongst other things, the appeal manager should consider the evidence used for the original decision and any new evidence provided by the employee for the appeal (111). An appeal hearing should be conducted as a full rehearing of the case, where dismissal or downgrading is being considered (although that is not mandatory where only a warning has been given). This means that the appeal manager 'must consider all the facts afresh and come to their own decision' (112).

<u>Formal Attendance Review Meeting (FARM) 28 July 2017</u>

46 A Formal Attendance Review Meeting (FARM) took place on 28 July 2017. Present were the claimant, Leslie Frost from PCS, Karen Barkley and Nilza Passangy as notetaker. Amongst other things, at that meeting, the claimant complained that the accident could have been avoided. She argued that she was paying the price of management's lack of a duty of care for her. (We find

that she was referring in that regard to the problem with her chair). There was some discussion about changes to the absence trigger points - Ms Barkley said that that had been looked into. There is no record as to how the trigger points were changed, if at all and we find that there was no formal recording of that. Ms Barkley told the claimant at the meeting that she was not able to change the triggers again. It is not clear how they were changed, if at all, due to the lack of any formal record of it. At the conclusion of the meeting, the claimant's union representative complained that there were still many unresolved issues from the last meeting. Ms Barkley stated that once the occupational health report came through she would arrange to meet with the claimant to discuss it.

6 September 2017 OH report – qualifying injury issue

47 The claimant was absent between 22 and 24 August 2017 because of a migraine.

48 OH advice was eventually provided by Health Management about the claimant's eligibility for civil service injury benefit on 6 September 2017, in relation to the October 2016 accident. The claimant informed us and we accept that this report was written without any meeting with her and without speaking to her. It was determined that the claimant was not eligible for injury benefit because the reason for the absence – namely, migraines - was not caused by the accident. Specifically, the conclusion (see page 767 of the bundle) of Dr Mirza that there wasn't a direct causative relationship between the accident and the medical cause of the absence under consideration; and that the medical cause of the absence was not 50% or more attributable to the accident.

49 However, Doctor Mirza did conclude (page 768), that: 'Considering the previous history of headaches/migraines it would not be unreasonable to anticipate that the index event at work contributed towards symptoms of her headaches/migraines during the alleged period of absence. However, in my opinion the incident at work as alleged is unlikely to be mainly responsible for her headaches/migraines. It would also be relevant to comment our understanding (sic) that… the injury benefit scheme rules do not provide for an award in respect of an exacerbation of that pre-existing medical condition … In my opinion this lady's headaches/migraines… are unlikely to be mainly related to the index event. Additionally, this is a recurrent episode of migraines/headaches … which she has had a history of prior to the index event and subsequently as noted above injury benefit scheme rules do not provide for an award in respect of recurrence of a pre-existing medical condition. In my opinion and for the reasons noted above the medical criteria for a qualifying injury are unlikely to be satisfied'.

2 October 2017 OH Report

50 The claimant was absent by reason of migraine on 28 and 29 September 2017.

51 On 2 October 2017 an OH assessment was obtained regarding the claimant's fitness to work. The subsequent letter reported that the claimant had noted that since the accident the frequency of her migraine attacks had increased significantly and she was currently experiencing migraines 2 to 3 times a week which could last up to 4 days and could cause blurred vision and neck

stiffness as well as sensitivity to bright light. The letter confirmed the claimant's belief that the primary trigger for her migraines was stress. The migraines occurred mostly at work. She was having a migraine attack during the consultation, and it was noted that she was sensitive to bright light.

52 The OH letter goes on to note that the claimant was suffering from depression and that the claimant believed this was made worse by lack of support from management. The doctor concluded that the claimant was fit to continue in her role with adjustments. Ideally she should work in an environment with reduced sensory stimulus and if possible, work in a quiet area of the office. The report suggested that the respondent 'may wish to review the lighting in the office. Ms Mirikwe would benefit from avoiding bright light. She should take regular short breaks from her desk ideally every hour'. The doctor recommended that the employer provide a quiet darkened room for Ms Mirikwe to rest in should a migraine attack occur at work. The report suggests that the respondent consider adjusting the sickness absence trigger levels, but that it was an organisational decision. Finally, the letter noted that an ergonomic keyboard had previously been provided but had gone missing. It recommended that the position in relation to her keyboard be reviewed and that she should be provided with a suitable one.

53 It was the respondent's case that the claimant was offered two other keyboards but she refused them. The claimant was adamant that no further keyboards had been offered. The notes of the grievance meeting on 26 January 2018 record the claimant's union representative Ms Pramang stating that a keyboard had been offered and not accepted.

54 We find that the claimant was offered two further keyboards; but there is no record as to when those were offered, why the claimant refused them, and whether or not the refusal was reasonable. No one wrote to the claimant afterwards to suggest that her refusal was unreasonable and no further attempts were made to obtain a suitable keyboard. That adjustment therefore remained outstanding.

First Written Attendance Warning

55 The claimant was absent by reason of migraine on 17 and 18 October 2017.

56 She received a First Written Attendance Warning (FWAW) on 19 October 2017. This warning came out of the blue. There should, under the procedure, have been a further meeting with the claimant in order to discuss the occupational health reports, prior to the warning being issued. The letter of 19 October refers to a meeting with Ms Barkley on 8 August 2017. It is common ground that there no meeting took place on that date. In any event, a meeting then would have predated the OH reports of September and October 2017. The letter also refers to the monitoring period for the warning being for a period of 12 months from 27 June 2016 to 14 July 2017, a period which had already expired. Further, that was not a period of 12 months.

57 The claimant appealed against the FWAW on 26 October 2017. The appeal is dealt with further below.

Meetings with Mr Dalon – November 2017

58 A meeting took place between the claimant and Jonathan Dalon on 6 November 2017 to discuss the 2 October 2017 OH report. An email was sent

to the claimant by Mr Dalon following the meeting, summarising the points discussed. Mr Dalon agreed to look into the possibility of moving her work location. He agreed that a darkened room was available for her use if she suffered a migraine whilst at work, that being the first aid room. He referred to microbreaks being difficult to allow on an hourly basis. This was probably in the context of the claimant saying she was entitled to a 10 to 15-minute break every hour – see below. He agreed to her having an extra break in the afternoon, in addition to a 20-minute break in the morning and a 40-minute break for lunch. He declined to alter the managing attendance figures and targets and stated that those would be reviewed when the other adjustments had been put in place and a proper internal assessment on performance and remedial actions had been made. He undertook to replace the ergonomic keyboard. As for the screen filter, he undertook to look at that and compare it to other ones in the back office and seek to replace it only 'if it were a hazard'.

59 As for the lighting issue, Mr Dalon says that he would speak to his colleague Esther Amara about a move to her previous work location. The claimant went there with Mr Dalon after the meeting, to show him where that was. She was confident, following the meeting, that she would be moved to her previous location.

60 In relation to the micro-breaks issue, the claimant told us that she should be allowed a 10 to 15-minute break every hour, away from her desk, to stretch and move around but that it was impossible to reach her targets if she did so. The amount of time she suggested is clearly different to the breaks recommended in the occupational health reports, as noted above. The claimant accepted that she was told that she could take breaks, but that she couldn't meet the targets if she did take them and therefore she generally did not. During cross-examination the claimant denied that Mr Dalon had offered her an extra 20-minute break in the afternoon. Having been taken to the document, she accepted that it had in fact been offered.

61 As for the screen filter, that did not fit properly to her computer and had to be taped onto it. It kept falling off. The claimant told us that it caused a migraine but there wasn't any medical evidence to support that contention and we reject it. She was still using the same screen filter when she went off sick and it had not been replaced.

62 The list of issues refers to the documenting of all sickness absences in one document – we find that was the practice. That does not appear to be disputed.

Stage 1 Written Performance Warning

63 A performance management meeting took place on 8 November 2017. Present were the claimant, Mr Dalon, and Joycelyne Pramang her union representative. The claimant complained that the performance concerns were "ambiguous". The notes of the meeting are in the bundle, and referred to alleged errors on 14 August '2016' (we assume it is meant to refer to 2017), two errors on 18 August 2017, a further one in August, and further errors on 6 September, 12 October and 1 November 2017. We find that the errors raised were not ambiguous. It is clear what was being discussed.

64 The claimant confirmed during cross-examination that she was not saying that these performance issues were raised in retaliation for her asking for reasonable adjustments.

65 There appears to have been no dispute by the claimant that the errors had occurred. The main issue taken by her and her union representative was that the errors should have been raised at the time that they occurred, not two to three months later. She also provided an explanation for some of them.

66 Ms Pramang was cross-examined at length about this meeting. She had concerns about the meeting because there did not appear to have been any informal process followed, prior to this formal performance meeting taking place. It seemed odd to her, as an experienced union representative, that management had progressed straight to a formal meeting. Similarly, Ms Pramang took issue with the fact that the mistakes went back a number of months. A log is kept of any mistakes made. The usual practice is for the line manager to raise those issues with the employee, as and when they arise. If those issues continued to arise, a more formal meeting would take place. The claimant's case was very unusual, Ms Pramang explained to us, in that there were issues raised which went back so long and which had not previously been raised. The whole point of raising issues when they arise, is to flag them up with the employee and give them a chance to improve. Further, it could be the case, for example, that an employee was following an old policy, having not been provided with the new one. If that was the reason, providing them with the new policy would then make it much less likely that the mistakes would reoccur.

67 Following the meeting, a Stage 1 Written Performance Warning was issued. A copy of the warning was provided by Ms Pramang at the hearing. Surprisingly, that had not been disclosed by the respondent prior to the hearing. Up to that point, her case had proceeded on the assumption that a formal warning had not been issued. There does not appear to have been any appeal against it, although the claimant did go off on long-term sickness absence shortly thereafter.

68 Ms Pramang told us in cross-examination that she had been told by Mr Dalon that he was not going to give the claimant a warning, but then he was told that he had to, and that is why the warning was subsequently given. Ms Pramang said she had an email from Mr Dalon to that effect and would produce it. No such email has been produced to us and we therefore make no such finding.

Appeal against FWAW – 21 November 2017

69 An appeal hearing took place in relation to the issue of the FWAW on 21 November 2017 between the claimant and Mrs Linda Gouevia MacLeod, Customer Services Manager and Ms Pramang.

70 Mrs MacLeod accepted that the appeal hearing was conducted by her as a complete rehearing, so she was not fettered by the decision of Ms Barkley on 19 October 2017. She accepted that under the AMP, return to work discussions should take place after each absence; and that any adjustments to sickness absence trigger points should be noted on the record. She accepted that the purpose of a warning, pursuant to paragraph 59 of the policy, was to alert an employee that attendance levels must improve. She accepted in relation to the claimant's previous sickness absences, including in June and July 2017, that the claimant should been invited to return to work meetings with her manager Karen Barkley but that those meetings did not take place, in contravention of the policy.

71 She also agreed that the 12 July 2016 OH report stated that the claimant required a DSE compliant chair and that the claimant was complaining about that. She accepted that the claimant had asked for a stress risk assessment but could not recall if that was done. The claimant did not have an ergonomic keyboard at that time; that adjustment was still outstanding. She accepted that had the claimant had to wait for two years for the armrests to be replaced on her chair, that would not be acceptable and she could understand why the claimant would feel frustrated.

72 There was also a discussion about regular one to one meetings. The claimant was asking for regular meetings and Mrs MacLeod accepted that those one-to-one meetings were for the manager and an employee to discuss worries and issues. (We note here that we accept what Ms Sauer told us later on that those meetings could raise performance issues too). The claimant told us, and we accept, that Ms Barkley had told her that those one-to-one meetings would be about performance and not about the claimant's worries and issues. If one to one meetings had not taken place, Mrs Macleod accepted that would be 'disappointing'. We find that they did not take place as frequently as they should have and that they were not balanced meetings which looked at both the concerns of the employee as well as any performance issues.

73 As noted above, under the AMP, a meeting should take place with the employee to discuss the OH report(s), before a warning is given. There were two OH reports relevant to the issuing of the FWAW. The report in relation to injury benefit of September 2017; and the OH report of 2 October 2017. Mrs MacLeod agreed that both OH reports should have been discussed with the claimant before a warning was issued, and if not, the claimant would justifiably feel that the procedure had not been properly complied with. She accepted that there was no record of any discussion having taken place. She recalled that she did consider a record of the meeting; she told us that she was 'pretty confident' that was considered as part of the FWAW appeal. She did not have a discussion with Ms Barkley about such a meeting; she recalls seeing a document as part of her consideration of the documents relating to the appeal. Whether or not her recollection is correct, we find that no such meeting took place between Ms Barkley and the claimant. We were not

shown any record of such a meeting taking place and we accept the evidence of both claimant and Ms Pramang that it did not.

74 Mrs MacLeod was questioned at length about paragraph 61 of the AMP (see above). Mrs MacLeod accepted that there is a difference between the first part of paragraph 61 and the second part of it. Her interpretation, as confirmed in re-examination, as to the first part, was that the absence had to be completely due to the accident, not just partly due to it. She agreed that the circumstances of the claimant's accident at work were such that it would be classed as having occurred in the course of her duties.

75 Mrs MacLeod accepted that the claimant's migraine-related absences increased significantly after the accident. She also accepted that the increase in the claimant's migraines stemmed from her accident but she took that into account in her decision on the appeal. During re-examination by Mr Green she accepted that the accident had exacerbated the migraines; she did not have an exact idea how much, in terms of the number of days extra that this would have led to in terms of absence.

76 On page 484 in the bundle, are notes of the meeting which appears to show that Mrs MacLeod misread the September 2017 report in relation to the injury benefit issue, by stating that 'it would be unreasonable to anticipate that the index event contributed towards symptoms of her headaches/migraines', when in fact it should have said that it would 'not be unreasonable' to link the two. This was clearly an error, although we find it was a genuine error on her part.

77 At the close of cross-examination, Mrs MacLeod conceded that the decision of Ms Barkley could have been different if the occupational reports had been discussed. Almost immediately afterwards, at the beginning of re-examination by Mr Green, she appeared to say the opposite, by stating that she did not think that the decision would have been different in relation to the issuing of a warning; the difference would have been that the reasonable adjustments were followed up. That was contradictory.

78 Mrs MacLeod told us and we accept that trigger points would usually no more than double to 12 days, or six absences, in a rolling twelve-month period.

79 Mrs Macleod said that in coming to her decision, she considered the overall level of absence of the claimant, including the 6.5 weeks she had been absent following the accident.

80 Ms Pramang's interpretation of paragraph 61 was that an automatic exception should have applied. She considered it strange, by reference to the procedure, for a warning to have been issued, so long after the claimant's absence between October and December 2016. Under the AMP, a return to work meeting should have taken place straight after the claimant returned to work in December 2016.

81 In her view, it was not necessary for the respondent to wait for the occupational health advice in relation to injury benefit, because an automatic exemption applied. The injury the claimant suffered occurred in the course of her employment duties – para 61 therefore applied. It was evident to her as the claimant's representative that the sickness absence was due to the accident. She hoped that management would apply their discretion in those circumstances, to the extent that any discretion applied. The claimant banged

her head and her migraines increased after that. She did not think what she described as the 'hard-line route' applied by management should have resulted from the circumstances of this case.

82 On the day of the appeal hearing on 21 November 2017 the claimant suffered a migraine attack at work. She left home early. As things turned out, she never returned to work after that date. The claimant asked the respondent to pay for a taxi ride home for her but that was refused. She was upset about that because she understood that the day before, HMPO had paid for a taxi home for a colleague who had been taken ill at work.

83 The claimant was signed off from work, the reason being 'stress at work, low mood', on 27 November 2017. She was referred for weekly counselling. The subsequent fit notes she received from her GP refer to "low mood".

84 The claimant raised a formal grievance on 27 November 2017, in which she complained, amongst other things, of disability discrimination.

85 The appeal decision in relation to the attendance warning was delivered on 28 November 2017. The appeal was rejected.

Grievance meeting 26/01/2018; FARM meeting 01/02/2018

86 Ms Rahman wrote to the claimant regarding her grievance on 29 November 2017. The claimant was asked to meet with her new line manager Lera LaSalle to try to resolve it informally. An invitation was issued to an informal grievance meeting on 3 January 2018. The claimant was invited to a formal grievance meeting on 15 January 2018. The formal grievance meeting subsequently took place on 26 January 2018.

87 ACAS early conciliation was commenced on 4 December 2017 in relation to the first ET claim. The first ACAS early conciliation certificate was issued on 4 January 2018.

88 A 'keeping in touch' call took place with Lera La Salle on 7 December 2017. On 12 January 2018 an invitation was sent regarding a FARM to discuss the claimant's progress and what the employer could do to help the claimant return to work.

89 There was a discussion at the grievance meeting about the respondent paying taxi fares for some employees but not for others. The way the claim was put in the list of issues is that the respondent had a policy of not paying taxi fares. The claimant accepted in evidence that the fact that they did pay taxi fares for some staff shows that the respondent did not have a blanket policy of not paying taxi fares for staff at all. There is a note in the bundle on page 479Q in relation to her colleague who on 20 November 2017 was taken ill and for whom the department paid for a taxi home. The note records his symptoms. He had been vomiting in his section and in the toilets in the mezzanine; he had stomach-ache, headache and dizziness and was feeling cold. He was taken to relax in the first aid room and was given a bowl in case he vomited. While waiting for the cab to arrive which had been ordered for him, he vomited twice in front of the person who wrote up the note.

90 On 30 January 2018 solicitors acting on behalf of the claimant served a notice of claim on the respondent regarding the October 2016 accident. For reasons which are not entirely clear, but which do not affect our decision, a personal injury claim is no longer being pursued.

91 The formal attendance review meeting (FARM) took place on 1 February 2018. Present were the claimant, Ms La-Salle, and Ms Pramang. Ms Pramang and the claimant raised concerns that a number of reasonable adjustments remained outstanding, including the provision of an ergonomic keyboard, a screen filter, and moving the claimant to a less brightly lit and quieter area of the office. The notes record, for instance, the claimant saying: ' … as no reasonable adjustments have been made, where do we go from here? She is concerned she will return to the same issue'.

92 The written decision on the claimant's grievance was given on 12 February 2018. The grievance was rejected. In the decision letter, Ms LaSalle stated that it was not possible to make the adjustments requested in relation to the workstation. The reasons given (page 572B), included that amending the lighting would impact others working in the back office. As for working in a quiet area, the letter said that noise levels fluctuate throughout the floor due to the operational nature of the work carried out. And as for avoiding bright lights, the letter said that this would impact on other colleagues who were sitting near her and this was deemed to be unreasonable. The letter confirmed that the additional breaks as advised by Mr Dalon were still on offer and that 'there are opportunities throughout the day to move away from your desk which would be considered as a micro-break'. Ms LaSalle again declined to increase the sickness absence triggers. She stated in the letter that the claimant's ergonomic keyboard was sufficient, and that the screen filter was not deemed a hazard, which meant that it was not going to be replaced.

93 On 14 February 2018 Ms LaSalle wrote to inform the claimant that as she was unlikely to be able to return to work within a reasonable time, she would consider whether her sickness absence could continue to be supported or whether dismissal was appropriate. The claimant was told that once up to date OH advice was available a formal meeting would be arranged.

94 The claimant responded to Ms La Salle on 16 February 2018. Her letter raised the failure to follow OH advice on reasonable adjustments, and in particular the move to a different area, the ergonomic keyboard, the screen filter, and trigger points. The claimant complained that Mr Dalon had agreed that she could be moved from her current work area but she had not subsequently been moved and nor had she heard from Mr Dalon or his colleague Ms Esther Amara about that. Ms Pramang told us that she continued to raise the reasonable adjustments issue on the claimant's behalf after this letter but there was no record of that and we do not accept it. In any event however, by the time of the attendance management meeting on 21 May 2018, those reasonable adjustments had not been progressed at all.

Referral for dismissal meeting

95 The claimant was informed in a letter from Ms LaSalle dated 1 March 2018 that a decision had been made to refer her case to Sharon Sauer, Decision Manager, to decide whether she should be dismissed or whether her sickness absence level could continue to be supported.

96 The claimant presented her first Employment Tribunal claim (2201583/2018) on 6 March 2018. This is argued to be a second protected act, (issue 16b), because it again raised complaints, amongst other things, of disability discrimination.

97 The claimant met Dr Mirza of Health Management Ltd on 7 March 2018. An OH report dated 9 March 2018 was subsequently sent to Ms LaSalle on 11 April 2018. Dr Mirza noted that the claimant's 'perceptions [about her work situation] are important since they are clearly linked in medical terms to the symptoms that she is reporting'. Dr Mirza concluded: 'From talking to Ms Mirikwe I think the main issue here exists within the employment and is not going to be particularly amenable to a medical approach. Once her perceived work-related concerns are addressed and resolved Ms Mirikwe can attempt a phased return back to work.' He recommended a gradual return to full-time duties, perhaps starting with 50% to 75% of her workload and then gradually increasing to full-time duties within 4 to 6 weeks.

The 15 May 2018 meeting

98 A formal attendance meeting was scheduled with Sharon Sauer on 1 May 2018 but this was later adjourned to 15 May 2018. The claimant did not attend that meeting because at the time she was not well enough. She was represented at that hearing by Ms Pramang. The minutes record amongst other things that Ms Pramang told Ms Sauer that 'every time BM is forced to attend a meeting this causes her a breakdown'. There was an issue about the claimant attending her workplace, Globe House, at this point in time. The meeting was adjourned.

99 Ms Sauer told us that she found the approach by Ms Pramang to be quite challenging at this meeting. We accept that she did so. Ms Pramang is a forthright representative who puts forward member's cases passionately and forcefully. We accept that management could at times find her approach quite challenging. The law recognises that and provides protection to union reps who present as challenging.

100 Ms Pramang was reading from a script for much of the meeting. Ms Pramang argued that the failure to carry out the reasonable adjustments was the main reason preventing the claimant's return to work. She also raised the lack of continuity of management as being a problem. Ms Sauer accepted in cross examination (see further below) that this might have been a problem. She also accepted that the reasonable adjustments were not recorded on the system, and a disability passport, which an employee should complete in case they changed line manager, was not being utilised.

101 Ms Sauer subsequently invited the claimant to a further formal attendance review meeting. It was proposed that the meeting take place at a more 'acceptable' venue ie not at Globe House.

102 We were referred to draft letters in the bundle dated 21 May 2018. It had been suggested by the claimant and Mr Alam that Ms Sauer came to the meeting having already decided to dismiss the claimant. That allegation was retracted by Mr Alam at the hearing, as he accepted that those draft letters were not written prior to 8 June meeting, as demonstrated by the fact that they referred to the claimant's email about her visit to her GP, following that meeting. We accept that those drafts post-date the meeting.

Formal Attendance Review Meeting – 8 June 2018

103 The formal attendance review meeting took place on 8 June 2018 at Clive House. Present were the claimant, Ms Sauer, Mr Alam and Ms Fabusuyi (from

HR). Prior to the meeting, Ms Sauer was provided with and considered all of the relevant OH reports.

104 There was a discussion at the meeting about the location of the claimant's workstation. The minutes record that the claimant stated that around September 2017 there was a conversation with Mr Rahman that resulted in more lights being turned back on. The claimant denied that such a conversation took place. She stated that the lights had never been turned off. We preferred Ms Sauer's evidence on this point. We find that there had been an attempt to switch the lights off at one stage but because other staff complained, the lights had to be turned back on. Mr Alam recalled Ms Sauer mentioning the lights being reviewed as it was causing health and safety issues for others. He suggested that they bring in external help to resolve this issue from a specialist Home Office team – see further below.

105 The minutes record the claimant as saying, when asked by Ms Sauer how her health was: 'Not good at all'. The claimant said that what she actually said was that her health was 'not bad at all'. Again, we prefer Ms Sauer's evidence on this issue. We find that the claimant was still unwell at that point.

106 The minutes go on to say that when asked later how she felt about a return to work, the claimant said that she had 'mixed feelings; the claimant said that she prayed [the meeting with her GP] would be positive. She would like to have the GP decide' whether she was fit enough to attend work.

107 Mr Alam's recollection of the meeting was that the claimant had indicated that she felt better. When asked about her fitness to return to work, she referred to the benefit of counselling, and that was the basis of her belief that she could return to work. The claimant wanted to check with her GP, and agreed to see her GP quickly, so a decision could then be made. The claimant was anxious about the meeting but did indicate that she was willing to come back to work within a reasonable timescale. We accept his evidence in relation to that.

108 As a general point, Mr Alam stated that in bullying and harassment cases, where a formal process is followed and the employee's case is rejected, management should still work to try to repair working relationships, to enable the employee and their manager(s) to continue to work together. That, he said, is a responsibility of management. That is what he was trying to facilitate here.

109 He agreed that the issues in relation to the keyboard and screen filter were relatively minor issues. In relation to Mr Dalon's email, there were a number of matters mentioned in that email which were not followed up and in particular, moving the claimant to a low stimulus area elsewhere. Help and advice was available from a specialist reasonable adjustments team within the Home Office. He was aware of a union member for whom the lighting issue had been resolved as a result of their intervention.

110 Ms Sauer accepted in cross examination that a stress risk assessment should have been carried out pursuant to paragraph 21 of the AMP but wasn't. She accepted that no Return to Work plans were completed by Karen Barkley. Or at least if they were, there was no record of them. She also conceded that the ongoing screen filter issue could affect an employee's morale and subsequently their productivity.

111 There was reference at the meeting to the claimant's new line manager Helal Miah. The claimant mentioned her 'suspicion' that when she had a telephone conversation with him during which private medical issues were discussed, there were other people in the background listening in. She could hear people in the background during her telephone call. The notes record her as saying this had: 'made me feel uncomfortable, I'm not sure if I can trust this person'. Mr Alam's take on that issue was that it demonstrated to him a person who was personally cautious about coming back to work. Mr Alam saw his role in the meeting as being to argue that the claimant was somebody for whom there had been issues but who wanted to get back to work and who loves her job. She therefore needed to be supported properly, for example with the provision of a buddy, and regular meetings with a new line manager, in order to facilitate her return. He was willing to assist with that process.

112 As for the workplace adjustments, it was generally agreed that they could all be resolved on her return. Ms Sauer stated for example that none of the adjustments required were insurmountable. As we shall see in due course, Mr Frost agreed with that assessment. We find that the adjustments could indeed have been made.

113 Mr Alam's view by the end of the meeting was that all of the reasonable adjustment issues could be resolved. He could not recall whether there was any discussion about a phased return, but the assumption would be that management would usually follow that advice, if OH recommended it. Management would rarely go against OH advice.

114 At the conclusion of the meeting it was agreed that the claimant would update Ms Sauer after her appointment with her GP on 11 June 2018.

Visit to GP and follow-up email

115 The claimant saw her GP on 11 June 2018. She said in her email the same day that her GP had confirmed that she was fit to return to work when her fit-note ran out on 4 July 2018. Her email stated: 'I did see my doctor today as I promised. She advised that she will issue me with a fit for work certificate once the existing sick cert runs out as long as issues at work are resolved'. We find that what was meant by the words 'as long as issues of work are resolved' mainly related to the reasonable adjustment issues. The claimant stated in cross examination that she felt that the meeting with Ms Sauer had been positive, and that the issues would be resolved, in relation to both the adjustments, and mediation with her managers. She believed Ms Sauer was going to do something about it. She couldn't enter into any such mediation while she was at home, only when she returned to work.

116 In an email from Mr Alam to Ms Sauer dated 13 June 2018 regarding the claimant's return to work he confirmed that the GP had indicated that they were happy to issue a fit to return to work note following the expiry of the current note on 3 July 2018 which would mean Bridgette returning to work on 4 July 2018, in three weeks' time. He continued: 'I would also hope the positive support Bridgette has received through psychological therapy, as well as the employee assistance programme (EAP) will enable a successful return to work for her.' The email also referred to a number of reasonable adjustments, namely the ergonomic keyboard, screen filter and office lighting. He continued: 'Can I reiterate that I believe that building a positive relationship with her manager Helal presents a real opportunity to move things forward. I

would also hope that you look into the possibility of a work buddy that could assist Bridgette return to work during the initial period. I would also suggest a phased return to work as per the OH report'.

117 Mr Alam gave evidence during cross examination that in the context of the claimant's email, including her reference to a fit note, the 'issues to be resolved' prior to her return to work were the reasonable adjustments, which had been agreed. He believed that the GP would set out the adjustments required in the fit note. The April 2018 OH report made clear that there were issues with the claimant's perception about how she was being treated in the workplace. Those issues needed to be resolved in the longer term and he set out in his email how he proposed that they be resolved. However, they could not be resolved whilst the claimant remained off work and we find that is not what she meant in her email.

Decision to dismiss - 19 June 2018

118 Following the receipt of those emails, and the meeting preceding them, Ms Sauer decided to dismiss the claimant. This was confirmed in a letter dated 19 June 2018. The claimant was dismissed with a payment in lieu of notice and 100% efficiency compensation under the Civil Service Compensation Scheme (CSCS) for being dismissed for unsatisfactory attendance.

119 The decision letter stated, amongst other things: '…*Your representations regarding how you feel you have been treated by the organisation and the fact that you feel this is a contributor to your current ill-health*. I was particularly concerned that you felt unable to attend the workplace for our meeting as this may be an indicator that a return to work is not forthcoming. We discussed the talking therapy and medication you have been undertaking. You stated that this was helping you, however you are unable to provide me with details of how successful this had been or what the prognosis for the treatment would be going forward. I also considered your recent email regarding the GP's appointment on 11 June 2018 and fit note dated until 4 July 2018 and that despite agreeing that we have resolved the workplace issues which you say are preventing you from returning to work, based on the information you provide in your email, you and your GP still do not feel you will be fit enough to return for some weeks at least. I further noted that you found it distressing to discuss details regarding the workplace in the meeting and have concerns that this again outlines that you are unable, in the near future, to return to work as you are not fit enough to do so. I have also considered that should a return to work occur, you will not be well enough to sustain a return or provide ongoing regular and effective service in light of these concerns.'

120 The letter referred to the reasonable adjustments issues and confirmed that it should be possible for those to be resolved. The letter goes on however 'based on your comments in the meeting, [I] have concerns that you may not currently be receptive to other issues in the workplace, such as performance management … I have also noted and been concerned regarding your level of willingness to engage with the managing attendance process and the previous meeting [I] have tried to conduct with you …. I have decided that your employment with the Home Office must be terminated because you have been unable to confirm that you can return to work within a timescale that I consider reasonable. I have sincere concerns, not only around your current health, well-being and fitness for work, but also as previously stated, around

your ability to sustain a satisfactory level of attendance in accordance with Home Office attendance standards in the future'.

121 Ms Sauer told us and we accept that the FWAW did not affect her decision. She did however take account of the overall level of absence. The perceived issues between the claimant and the management team were a significant factor in her decision to dismiss. Such issues were 'a serious concern' for her. The meeting took place outside her usual workplace; the claimant was distressed and had to take a break. This did not 'instil her with confidence'. She did not feel a return to work was 'likely'.

122 A key issue was whether the clamant could provide regular and effective service. In deciding this issue, she looked at what had happened but also at what was likely to happen in the future. She told us and we accept that the phrase 'regular and effective service' is a commonly used term within HMPO.

123 As for the one to one meetings, Ms Sauer told us and again we accept that the respondent had started to change its process so these meetings were more about employee well-being. Performance issues could still be discussed but the meetings should start from the employee's wellbeing. Ms Sauer conceded that a manager was possibly not doing their job properly if they did not hold one to one meetings with staff regularly. Mrs Sauer was not aware of the wider collective issues or the collective grievance etc. It did not form part of her decision.

Appeal against dismissal

124 The claimant appealed the decision to dismiss her on 2 July 2018. Amongst other things, she stated the following, by reference to the OH report the issues not particularly amenable to a medical approach. "The reasons for my illness and my later panic attacks at Globe House are entirely related to how I feel I was treated by HMPO management in relation to my health and the failure to make reasonable adjustment for my condition (migraines). I did not have a mental health condition prior to this."

125 Her fit-note expired on 3 July 2018. The claimant informed us that that was not renewed, but we note from pages 704/5 of the bundle, that the GP notes record that a further fit note was issued for the period 4 July to 31 August 2018. The claimant had of course been dismissed by then.

126 An appeal hearing was scheduled for 30 July 2018 but had to be rearranged because the claimant's union representative Mr Alam was not available. The appeal hearing took place on 6 September 2018. Present were the claimant, Mr Alam, Mr Danny Frost who chaired the hearing, Ms Carol Hedger, case worker and Ms Joanne Bateman, notetaker.

127 There is reference to the claimant not wanting to go to Globe House for the appeal hearing. We accept this was because the claimant had been sacked. She did not want to attend Globe House and risk seeing her colleagues as she felt ashamed.

128 The appeal notes record (page 660) that the claimant told Mr Frost that 'she was in a better place than she had ever been; she said she was stronger, resilient, had finished counselling and both her GP and therapist had said she was ready to return. She added that 6/7 months ago, been through hell, but now she is much better… since the end of June/July, might be 85% ready;

today I feel 99% ready; at the point of dismissal I was ready… I'm in a better place now'.

129 The difficulties created by the claimant being near to her line manager, which resulted in her being regularly disturbed by colleagues coming up and asking the line manager questions was discussed. It comes across as a negative issue in the minutes, see page 663. That aspect of the minutes was subject to suggested amendments to the appeal notes provided by Mr Alam, after they had been sent to him and the claimant. The suggested correction clarified that there was no general problem about the claimant being near to her manager: 'It was only an issue due to the noise of the printers and staff constantly approaching the manager for advice'. That issue was resolvable by making reasonable adjustments.

130 On page 661 is a reference to wider issues within Globe House. The claimant believed that managers were not supporting staff. It had, she said, been voted the second worst place to work in the Home Office. Mr Alam also informed us that some of his colleagues were dealing with a wider issue in relation to the Globe House HMPO office. Two group executive members had met with groups of members in that office and worked with Bob King who was in charge of the London office, in order to resolve the issues between staff and management. We were informed that a number of changes were made, and some people were moved. He said that this was a good example of the union and managers working together in order to bring about positive change.

131 There was a discussion about a possible phased return. This was initially raised by Mr Alam. Mr Frost is recorded as saying: 'We wouldn't look at a phased return, as it's protracting an absence further; you would have to come back to work full-time. Bridgette asked would that be with occupational health support. Danny said with regards to the reduced hour aspect in your request, yes it's difficult at first when returning, but you work your way through it. [Mr Alam] said that was raised through the managing attendance process. Danny said not a consideration re phased return. Pav agreed, saying that a phased return would be contradictory'.

132 Mr Alam stated in his witness statement, that he withdrew the request for a phased return, due to Mr Frost's opposition to it, as demonstrated above. Mr Frost was questioned about that during the hearing. Despite being taken to the notes, which quite clearly record him refusing a phased return, he said that he could not understand what Mr Alam was saying. He suggested that the minutes were not accurate; what he was trying to do, he said, was test the authenticity of the claimant's argument that she could return to work immediately. He told us that a phased return contradicted that. We return to this in our conclusions as it is of some significance.

133 There was also reference by Mr Frost to his concern that the claimant would, if she returned to Globe House, come across her previous managers. In fact, Ms LaSalle was no longer working for the respondent, Ms Barkley was absent on long-term sickness absence, and Mr Dalon had moved to the eighth floor.

134 Mr Frost confirmed that it was mentioned at the appeal that the management culture was being looked into by Bob King. Bob King is Mr Frost's line manager. Mr Frost did not speak to him about the wider issues.

The Appeal Decision Letter - 11 September 2018

135 The claimant's appeal against dismissal was rejected by Mr Frost in a letter dated 11 September 2018. Mr Alam conceded that the appeal was rejected for genuine reasons although he did of course disagree with them.

136 Amongst other things, Mr Frost stated: 'Although there was some evidence provided that you would be able to return to work in the immediate future should the decision have been reinstatement, my concern relates to the lack of assurance given that you would be able to sustain full and effective attendance thereafter. Despite stating that you have felt much better since June/July time, you are seemingly unable to enter Globe House to attend a previously scheduled appeal hearing at the end of July, citing that such attendance was too stressful for you, although the meeting had been arranged on the eighth floor… I asked you at the hearing what has changed since that time to give me assurance that you will be able to return immediately. Your response was that you felt that there were rumours surrounding you in the office that would prevent you attending a hearing there at that time. I note that you have sought counselling on this issue and at the appeal hearing you felt this was no one else's business. This does still however suggest to me that your ability to return and remain at work was not sufficiently assured. I should note that despite this advice from your counsellor, the meeting was still held outside of Globe House.'

137 He confirmed that in his view the lighting and noise issues could be addressed relatively easily but nevertheless continued: 'I felt that your concern to being seated close to your manager, whilst at the same time requesting additional support was contradictory. I had hoped to hear more from you about how you would manage your own condition and work with your manager on supporting that plan, however I felt that you presented a view that your condition was for your manager to address rather than yourself, and that throughout your absence you had not been sufficiently proactive and taken every action possible to enable the earliest possible return to work. This again provides little assurance of continued attendance in future, had you been reinstated … It was stated at the meeting, but later withdrawn that you would be seeking a three-week phased return to work, although there was no medical evidence to support this. I did note however that such an action would only protract the absence further, negating your claim that you are fit to return to effective and continued employment. Overall therefore the picture of evidence relating to your imminent and sustained return was weaker than I was hoping to see'.

138 The FWAW played no part in Mr Frost's decision. Her sickness absence overall was a factor. His decision was based on the view that if the claimant came back to work, he was not sure she would remain at work. Mr Frost told us he thought that considerable efforts had been made to help the claimant return but those attempts failed. When asked if he should not have given the claimant a chance to show she could return and give effective service he said that HMPO could not 'continue to give her an opportunity', (although we note that there had not in fact been any point since November 2017 when the claimant had been in a position to return). He had concerns that the claimant felt there were rumours abounding about her, due to her unwillingness to meet at Globe House. He used that to form the view that her ability to remain at work was not sufficiently assured. He could not comment on her perception,

his view was that if she was concerned what people thought, what would change in future?

139 A further Employment Tribunal claim was submitted on 18 September 2018, arising out of the claimant's dismissal.

Civil Service Compensation Scheme Payment

140 The claimant subsequently received a full Civil Service Compensation Scheme payment (i.e. 100 per cent). She complains that deductions were made from that unlawfully, and/or that there was a breach of contract because she did not receive what she was contractually entitled to. By the time of the hearing, it had been conceded by the claimant that she was not in a position to query the amounts that were alleged to have been overpaid to her, or the actual amounts that were deducted.

141 The respondent's case was that she had, during her employment, been overpaid to the tune of over £11,000. She did not receive her pay in October 2018, and approximately £6,000 was withheld from the CSCS payment. The case proceeded during the hearing on the basis that the sole issue to be determined was whether or not the fact that the deductions had been made gross, but the sums had been paid to the claimant net, meant that there had been an unauthorised deduction of wages and/or a breach of contract. The Home Office overpayment recovery process document is within the bundle of documents. Paragraph 11 on page 175 confirms that the balance of any outstanding debts will be deducted from the final leaver's salary and any other payments due such as untaken leave payments, pay award arrears or compensation payments. Employees are to be notified in advance of any such final deductions.

The Law

Time limits

142 The relevant time-limit in a discrimination case is set out at section 123(1) Equality Act 2010. The tribunal is usually only able to hear a claim if it is presented within three months of the act complained about, subject to the extension of any time limit as a result of ACAS early conciliation. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. If the claim is presented outside the primary limitation period of three months, the tribunal may still consider the claim if it was brought within such other period as the employment tribunal thinks 'just and equitable'.

Unfair dismissal

143 The law relating to unfair dismissal is set out in S.98 of the Employment Rights Act 1996 (ERA). In order to show that a dismissal is fair, an employer needs to prove that the dismissal was for a potentially fair reason (S.98(1) and (2) ERA). A tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

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.

144 The function of the Industrial Tribunal, as an industrial jury, is to determine whether in the circumstances of each particular case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. Further, in looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably make in the circumstances.

Disability

145 A person has a disability if she has a mental or physical impairment which is long term (i.e. has lasted 12 months or more or is likely to do so); and has a substantial adverse effect on her ability to carry out normal day to day activities (S.6 and Schedule 1 Equality Act 2010). The term 'normal day to day activities' includes the ability to participate in professional working life.

Burden of proof

146 Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

147 Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

148 The Court of Appeal in Madarassy, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

149 Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870 at para 32:

> *They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.*

Discrimination arising from disability

150 Section 15 Equality Act 2010 reads:

> *(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.*

151 In a disability discrimination claim under section 15, an employment tribunal must make findings in relation to the following:

- 151.1 The contravention of section 39 of the Equality Act relied on – in this case either section 39(2)(c) – dismissal, or (d) - detriment.
- 151.2 The contravention relied on by the employee must amount to unfavourable treatment.
- 151.3 It must be "something arising in consequence of disability"; for example, disability related sickness absence.
- 151.4 The unfavourable treatment must be because of something arising in consequence of disability.
- 151.5 If unfavourable treatment is shown to arise for that reason, the tribunal must consider the issue of justification, that is whether the employer can show the treatment was "a proportionate means of achieving a legitimate aim".
- 151.6 In addition, the employee must show that the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on. [Note, knowledge has not been an issue in this case].

See the decisions of the EAT in T-Systems Ltd v Lewis UKEAT0042/15 and Pnaiser v NHS England [2016] IRLR 170 (EAT).

152 As for objective justification, an employer must demonstrate that any unfavourable treatment that is found to be linked to the disability must be

objectively justified. In other words, that the treatment is a proportionate means of achieving a legitimate aim.

153 According to Harvey's encyclopaedia of Employment Law [Division L.3.A(4)(d), at paragraph 377.01]: 'As stated expressly in the EAT judgment in *City of York Council v Grosset UKEAT/0015/16 (1 November 2016, unreported)*, the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* (*[2018] EWCA Civ 1105***,** *[2018] IRLR 746*) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'.

154 Harvey continues at paragraph 377.03*: 'O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145***,** *[2017] IRLR 547* involved the dismissal of a teacher due to her poor attendance record. She had a long period of absence following being assaulted at school. By the time of her appeal against dismissal her GP had signed a 'fit to work' certificate, and her therapist had indicated that she would return to her 'pre trauma functioning' within 10–12 sessions. The appeal decision makers were sceptical as to whether this was likely. Ms O'Brien succeeded in both her unfair dismissal and s 15 claims. The EAT upheld an appeal by the school, but the Court of Appeal restored the decision of the ET. In relation to the discrimination claim, the dismissal was undoubtedly unfavourable treatment arising in consequence of the disability-related absence, and the ET had been entitled to accept that the school had a legitimate aim, namely 'the efficient running of the school, the reduction of costs and the need to provide a good standard of teaching'. However, the ET did not find the dismissal to be proportionate in circumstances where there had not been specific evidence as to the effect that Ms O'Brien's absence was having on the school and where, in light of the positive medical evidence, the school ought to have 'waited a little longer'.

155 'The CA did not consider the test of asking whether the employer's response was 'reasonable' for the purposes of *ERA 1996 s 98(4)* when determining the unfair dismissal claim to be, in substance, markedly different from the test of considering whether the treatment was 'proportionate' and therefore justified when applying *EqA 2010 s 15*. Underhill LJ remarked (at [53]): 'The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law.' However, Sales LJ in *City of York Council v Grosset [2018] EWCA Civ 1105**,** [2018] IRLR 746* held at [55] that 'Underhill LJ was addressing his remarks to the particular facts of that case, and was not seeking to lay down any general proposition that the test under s 15(1)(b) EqA and the test for unfair dismissal are the same. No doubt in some fact situations they may have similar effect, as Underhill LJ was prepared to accept in *O'Brien*. But generally the tests are plainly distinct, as emphasised in *Homer [v Chief Constable of West Yorkshire Police [2012] UKSC 15**,** [2012] IRLR 601]*'.'

Reasonable adjustments

156 Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer.

157 Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage. The same duty arises where the substantial disadvantage arises from a failure to provide an auxiliary aid or a physical feature of premises.

158 Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated in recognition of their special needs.

159 In *Environment Agency v Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4,* the EAT gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must first identify:

(1) the PCP applied by or on behalf of the employer;

(2) the identity of non-disabled comparators; and

(3) the nature and extent of the substantial disadvantage suffered by the claimant in comparison with those comparators.

Once these matters have been identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified.

160 The question however is whether the employer failed to make reasonable adjustments as a question of fact, not whether it simply failed to consider making any. The latter is not in itself a breach of s 20 - *Tarbuck v Sainsbury Supermarkets Ltd [2006 IRLR 664, EAT.*

161 The test of reasonableness imports an objective standard. The Tribunal must examine the issue not just from the perspective of the Claimant but also consider wider implications including the operational objectives of the employer.

162 The Statutory Code of Practice on Employment 2011 published by the Equalities and Human Rights Commission contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be considered in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

163 As for knowledge, for the S.20 EQuA duty to apply, an employer must have actual or constructive knowledge both of the disability and of the

disadvantage which is said to arise from it (EQuA para 20, Schedule 8). Again, we note that knowledge has not been an issue in this case.

Victimisation

164 In order to succeed in a victimisation claim, a claimant must demonstrate that she did a protected act. This includes making a complaint of discrimination covered by the Equality Act. A claimant must then show that she was subjected to unfavourable treatment because of the protected act(s) (S.27 EQuA).

Breach of contract

165 A worker is entitled to be paid the amounts agreed in her contract with her employer.

Unauthorised deduction of wages

166 A worker is entitled to be paid the amounts payable to her, whether under the terms of her contract with her employer, 'or otherwise' (such as under statute, for example, statutory sick pay or holiday pay – see S.23 Employment Rights Act 1996)). A worker's wages may include allowances, such as London-weighting and shift allowances (S.27 ERA).

Conclusions

167 We now apply the law to the facts to determine the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

168 Before considering each of the legal and factual issues in the case, we deal with the question of credibility. We were invited by Mr Green to find that the evidence presented by and on behalf of the claimant was not credible, whereas that presented on behalf of the respondent was. We found matters to be somewhat more nuanced than that. In coming to our findings of fact, we have looked at the evidence presented in relation to each of the relevant disputed facts in turn. We have set out whose evidence we have preferred, and why, at the appropriate points.

169 As far as the claimant is concerned, we accept that she was not the most reliable of witnesses and that what she said often contradicted what was set out in documents. However, that did not mean that her concerns about the way she was being managed were without foundation, a point we return to in some detail below. As far as Mr Alam is concerned, we found him to be a believable and reliable witness, who was willing to make concessions when appropriate. For example, in relation to the 21 May 2018 draft dismissal letter. He appeared to us to be an experienced trade union representative who was genuinely trying to act as a bridge between the claimant and management at the dismissal and the appeal hearings, in order to facilitate her return to the workplace.

170 As for Ms Pramang, she is clearly passionate about the work that she does as a union representative, and no doubt her style often brings her into conflict with management. As already stated, she is protected as a union representative in relation to the way she carries out her duties. However, she

would perhaps sometimes do better for union members if she adopted a less combative style. We found Ms Pramang to be a reasonable witness in relation to policies such as the AMP which she clearly had a good grasp of, together with a clear idea as to how that should be applied and interpreted. Whilst we did not always agree with her, the discussion in relation to paragraph 61 of the AMP is a good example of where she was doing her best to further the claimant's interests. Mr Green rightly conceded that paragraph 61 of the procedure is not as well drafted as it could be. In those circumstances, Ms Pramang cannot be criticised for trying to exploit the ambiguity in paragraph 61 to the claimant's advantage. It is worth saying that the tribunal spent some time working out what it meant and how it should be applied to her case.

171 As for Ms Sauer, we found her to be a believable and genuine witness. However, we do not consider that she always came to a reasonable conclusion in relation to the matters before her. As for Mr Frost, it should be clear from the facts found above and some of the comments below, that we found his evidence at times to be quite unconvincing, the most notable example of which was his approach to the question of a phased return.

172 In short, whilst we do of course accept that Mr Green was entitled to put forward the submission he did in relation to credibility, we respectfully disagree with him for the reasons set out above. This is not a case where we consider that the issue of credibility was nearly as black and white as Mr Green suggested.

Unfair dismissal (Issues 1 to 4)

Potentially fair reason (Issue 1)

173 The first question in any unfair dismissal claim is whether there was a potentially fair reason for the dismissal. Mr Walker argues that this was not really a capability dismissal, it was a conduct dismissal and/or a dismissal for some other substantial reason. He was referring to the respondent's expressed concerns about whether the claimant would provide effective service and whether she would be prepared to be managed under for example the attendance management procedure and/or performance management procedure in future. He argued in his submissions, paragraph 13, that the dismissal was because of her disability or due to something arising from her disabilities. We note in passing that there does not appear to have been any suggestion in the list of issues that the claimant was pursuing a direct disability discrimination claim. In any event, it would not have succeeded.

174 We conclude that the dismissal was for a potentially fair reason, namely, capability. Mr Alam conceded, rightly in our view, that both Ms Sauer and Mr Frost genuinely believed that they made their decisions due to their beliefs about the claimant's ability to return to work within a reasonable timeframe, and thereafter to sustain her attendance at work. Such reasons relate to capability, which includes considerations of an employee's health and how that might impact on their attendance at work. They did not think she was well enough either to return to work in a reasonable period and/or to sustain her attendance at work thereafter.

175 We did have some concerns about Mr Frost's reference to 'management intervention time' in his evidence before us. He did however clarify that what

he meant by that was the amount of time that line managers were spending in managing for example, attendance meetings, and the writing up of notes afterwards by notetakers and trade union representatives. He also said that when members of staff were off work, their manager could end up doing as much work if not more work because they had to manage the work of the person who was absent.

176 It was part of the claimant's pleaded case that her dismissal was because of her grievance and/or because of the first Employment Tribunal claim, both being protected acts. There was not any convincing evidence put before us to suggest that either of those protected acts had any influence on the decisions of Ms Sauer and Mr Frost. We conclude that they did not. The reason for dismissal was capability.

Fairness of dismissal (Issues 2 to 4)

177 We were asked to assess the question of the fairness of the dismissal by reference, in part, to issues 3 a. to e. We consider briefly each of these in turn.

177.1 a. Did R adopt a fair procedure, particularly its Attendance Management Policy and Procedures. There were issues in relation to the application of the AMP by Ms Barkley. We accept however Ms Sauer's and Mr Frost's evidence that the FWAW did not affect their decision. The dismissal hearing was rearranged by Ms Sauer on two occasions and following the meeting at which the claimant could not be present in May 2018, she invited the claimant to a meeting, which she was subsequently able to attend. The appeal hearing was also rearranged because of Mr Alam's unavailability for the first proposed appeal hearing date. In terms of the procedure adopted therefore, we consider that it was applied correctly, and the procedure itself was fair, at the dismissal and appeal hearings.

177.2 b. Consider OH advice and recommendations. It was clear that by the time of the dismissal and the appeal hearings, the respondent and the claimant were agreed that the adjustments that were outstanding could be made. However, that advice had not been followed in full from the date of the 2 October 2017 OH report, up until the June 2018 meeting. Mr Dalon had agreed a number of adjustments but had not followed up in relation to the screen filter and keyboard, and more significantly, the move to a different work area. He did however only have approximately two weeks between the meeting on 6 November 2017 (and his follow-up email of 7 November) to arrange that, before the claimant was absent due to illness.

177.3 Mr Dalon having agreed to the move in principle, on 1 February 2018, Ms LaSalle wrote to the claimant, in quite trenchant terms, about the outstanding adjustments. She made it clear that a number of them would not be carried out and in particular, the move to a different work area, any adjustment to trigger points, the provision of an ergonomic keyboard and the provision of a screen filter. The claimant complained about that in her letter of 16 February 2018 but there was no further communication with her about the adjustments between her writing that letter and the dismissal meeting on the 8 June. We conclude that the failure to agree those adjustments was an impediment to her return between February and June 2018.

177.4 c. Consider recommended reasonable adjustments before referring the Claimant's circumstances to a Decision Maker Hearing. See b. above. There was some dispute between Mr Walker and Mr Green as to what Ms Sauer had said in her evidence before the Employment Tribunal as to whether or not it was reasonably common to move to a dismissal hearing before the 12 months mandatory consideration point. All three members of the panel have a note to the effect that her evidence was that it was reasonably common to do so, in line with Mr Green's note.

177.5 d. Refer the Claimant back to OH where there were concerns, in accordance with the Respondent's Policy and Best Practice. Again, see b. above.

177.6 e. Taking into account mitigating circumstances, such as:

177.6.1 i. the Claimant's 17 years' service and absence record prior to 2016. The claimant did have relatively lengthy service, which is a factor in her favour. Ultimately however, whatever her service, the respondent would have been entitled to dismiss her at some point if her absence history did not improve. On its own, it would not have affected the fairness of the decision but it is a relevant factor. As for her absence record prior to 2016, it is true that during for example the period of four years prior to her workplace accident on 14 October 2016, her absence history was much better. It then deteriorated following the accident at work on 14 October 2016, and the various issues which arose due to the way that she was, or perceived she was being mismanaged in relation to attendance and performance management and the outstanding reasonable adjustments. We return to those matters below.

177.6.2 ii. the Claimant's accident at work on 14 October 2016. It is certainly the case, as noted above, that the claimant's absence record was much better prior to her accident. Her employer was entitled in principle however to look at the absence record after that date, in considering the question as to whether or not she was likely to be able to maintain effective attendance in future. Again, that is an issue we return to below.

177.6.3 iii. that details of performance concerns had not been raised with the Claimant. We can understand why, in the pleaded case, this was put forward. As noted above, it was not until the fourth day of the hearing, when Ms Pramang gave evidence, that the performance warning which Mr Dalon had given to the claimant in about November 2017 was put before us. Performance concerns were therefore raised with her. There is however an issue about those matters not being raised with her at the time that they occurred to give her a chance to improve. Again, this is something we consider further below.

177.6.4 iv. adjustments recommended by OH on 22 December 2014, 2 October 2017,9 March and 11 April 2018. See b. above.

177.6.5 v. the Claimant's grievance dated 27 November 2017; as stated above, we do not consider that the claimant's grievance was taken into account by the respondent in deciding whether or not to

dismiss. We return below to the concerns of the claimant in relation to the way that she perceived she was being managed, which were raised in her grievance.

177.6.6 vi. the Claimant's readiness to return to work from 4 July 2018. It was clear that at the meeting on 8 June 2018, the claimant wanted to speak to her GP before confirming when she would be able to return to work. Having done so, she gave a fairly strong indication that she would indeed be returning on 4 July 2018. The reference to the 'issues at work being resolved' was something which Ms Sauer took into account, and we consider that further in our general discussion below.

177.6.7 vii. the subjectivity of the Decision Maker's determination of what is considered a reasonable timescale for returning to work. The claimant was indicating that she could return to work within 4 weeks of the 8 June meeting. We consider that was a reasonable timescale. The question is whether it was reasonable for Ms Sauer to conclude that a return was unlikely in such a timescale.

178 In considering the reasonableness or otherwise of the dismissal below, we remind ourselves of three matters. First, the importance of not substituting our own decision for that of the employer. Second, the words of the statute. Third, that the band of reasonable responses test is not a perversity test.

The claimant's concerns about her work situation

179 We have considered a number of factors affecting the claimant's perception of her workplace situation. These include the following:

179.1 The 2014 occupational health report recommended that a screen filter be provided. The 28 April 2015 report noted that she had one but it was chipped and held on with tape. The 2016 report repeated the same. The situation had not been resolved prior to her dismissal. On its own, this is relatively minor. But it could and did affect the claimant's morale.

179.2 In 2015, the claimant was suspended. On her return, she was moved to a new team and from her workstation, to another desk. This happened without any consultation with her. Any move should have been discussed with her beforehand. She was not happy at her new workstation and was still unhappy at the time of her dismissal.

179.3 The October 2016 accident occurred in a chair that occupational health had recommended be changed for one which was more suitable for her. It is not necessary for us to make any finding as to whether or not that chair caused the accident. The chair had not been replaced as recommended, and that was the chair the claimant had the accident in.

179.4 Ms Barkley failed to carry out return to work meetings as required under the AMP. There was also a lack of regular one-to-one meetings. Those that did take place concentrated on the claimant's performance, rather than them being a balanced discussion, starting from the employee's perspective.

179.5 As for the FWAW, this arose in the context of sickness absence linked, at least in part, to the accident in a chair which should have been

replaced. The subsequent migraines were linked at least partially to that accident.

179.6 Following the meeting with Ms Barkley on 28 July 2017 after which Ms Barkley agreed to hold a further meting when the OH reports were available. There was no further meeting with her, as required by the AMP, prior to the FWAW being issued. That was a serious breach of the policy. The claimant was being held to account for breaches of policy but her manager was not.

179.7 The September 2016 OH report was prepared without any discussion with the claimant or any meeting with her.

179.8 Despite the claimant being off with a stress-related illness from 27 November 2017 onwards, no stress risk assessment was carried out. Even though she was off sick, that did not make the carrying out of a stress risk assessment insurmountable. It could have been conducted over the telephone or after the January/February meetings. There was no attempt to carry one out.

179.9 Finally, the claimant was given a performance warning in November 2017, in relation to matters which had not been raised with her at the time. Had the procedures been properly followed, those issues would have been raised earlier. The claimant would then have had the opportunity to remedy them, which may have resulted in no formal proceedings being taken against her.

180 In the experience of the members of the tribunal, the above is an exceptional list of matters which about which the claimant reasonably felt aggrieved. When it came to the decision to dismiss, and the decision on the appeal, neither Ms Sauer or Mr Frost took these matters into account or attempted to consider the matter from the claimant's perspective at all. It was in our view outside the range or reasonable responses in the circumstances of this case for them not to do so. They did of course as managers have a right to manage; but proper and effective management means being able to consider matters from the employee's perspective, as well as from the employer's. Instead, they appeared to have simply viewed her as a 'difficult' employee, without adequately considering why she might be being 'difficult'.

181 Ms Sauer specifically confirmed that the perceived issues between the claimant and the management team were a significant factor in her decision to dismiss. As is clear from the above however, those 'perceptions' were based in reality. There was an exceptional number of matters affecting the claimant's perception of her work situation and giving rise to an understandable sense of grievance. Ultimately, unless she was able to put those behind her on return to work, her continuing employment was under threat. But in judging the fairness of the decision to dismiss in June 2019, in our view they tip the balance in favour of the claimant and the dismissal decision outside the reasonable responses range.

182 The claimant could have returned on a stage two final written warning, which would have meant it was relatively easy to bring matters to a head, were she to be absent for short periods on a regular but sporadic basis following her return, and/or if she were she to take another lengthy period of sickness absence thereafter. We do of course recognise that it is not for us to substitute

our view for the employer's by simply saying that the employer should have adopted that alternative instead of dismissing the claimant. We are however bound to consider whether, in the light of that clear alternative, the decision to dismiss the clamant at this time was outside the range of reasonable responses. We find that it was.

183 Further, Ms Sauer di not sufficiently appreciate that the reason for the claimant's absence from November 2017 was anxiety and depression. That illness, which is a disability, was going to colour the way that the claimant saw matters, and perceived management issues. Ms Sauer states in her decision letter that the claimant had been unable to provide any detail about how successful the talking therapy had been and about her progress. But after the meeting the claimant gave a clear indication that she was willing to return on 4 July and that her GP would give her a fit note for that date, subject to the workplace issues being resolved. The fact that the claimant found it distressing to discuss details about workplace issues, was only to be expected, given the nature of her illness. These points have more force, given that it is accepted that the claimant by this stage had a mental health disability too. They are also relevant circumstances against which to judge the fairness of the decision to dismiss.

184 Ms Sauer refers in her decision letter to the claimant's failure to engage in the AMP. But in doing so, there was no recognition of the failings of Ms Barkley, in relation to that process. Ms Barkley's failings were significant. Similarly, there wasn't any acknowledgement of the somewhat trenchant rejection by Ms LaSalle of the adjustments that remained outstanding and which she was refusing to make, prior to the claimant being able to return to work and the affect that had on the claimant. That refusal effectively put a block on the claimant's return to work.

185 As for the conclusion that the claimant was 'unable to confirm that [she could] return to work within a timescale that I consider reasonable', the claimant had indicated that she should be fit to return to work within 4 weeks of that meeting having taken place. By the date of the decision letter, that date was just 15 days away. That was a reasonable timescale. Ms Sauer's conclusion that it was not was unreasonable.

186 Ms Sauer also appeared to believe that the reference in the GP's email to workplace issues 'being resolved' before the claimant could return to work, meant that unless the claimant's concerns about the way she perceived she was being treated by management were resolved, as well as the reasonable adjustments issues, she would not be able to return. We conclude that was not a reasonable assumption for her to hold. Clearly, the management issues could only be resolved after the claimant had returned to work. That was obvious to Mr Alam, in view of what was discussed at the 8 June meeting. He made clear his willingness to engage with management, including Ms Sauer, in order to facilitate the claimant's return to work. It was unreasonable to assume that the claimant would not return to work by the 4 July, for this reason.

187 Finally, we consider Ms Sauer's conclusion that the claimant would not be able to maintain effective service. There was clearly a question mark about that. Had management acted reasonably in relation to the absence management and performance management processes and had it not

previously, through Ms LaSalle on 12 February 2018, refused to implement key reasonable adjustments, dismissing at this point would have been within the range of reasonable responses. We conclude however that given the various matters set out above, looked at in their totality, dismissal at this point, for an employee with the claimant's length of service, was not within the permissible range.

188 As for Mr Frost's decision on the appeal, he appeared to concede that the claimant could return to work in the near future. He was, on the basis of the information provided at the appeal hearing, quite right to do so.

189 He relied on the claimant's unwillingness to attend her workplace, Globe House, for the appeal hearing as evidence that she was not really fit to return to work at Globe House. That conclusion contradicts the claimant's statement to the appeal that she was fit to return, that she was in a much better place after treatment for her mental health disability and the benefits of the ongoing support from her GP and her union. Further, she had understandably felt ashamed about having been dismissed. Were she to be reinstated, that sense of shame would have been lifted. Reasonable employers would have recognised that. Mr Frost did not.

190 As for Mr Frost finding it contradictory that the claimant wanted support from her manager but did not want to be seated near him, Mr Frost unreasonably failed to appreciate what the claimant and her representative were saying in relation to that matter. We refer to our findings of fact in that respect above. It was not reasonable to hold that her position was contradictory. It clearly was not.

191 As for the claimant not being 'proactive enough' about a return to work, we do not understand this remark. We again conclude that it was an unreasonable conclusion for Mr Frost to come to since it had no reasonable basis in fact. The claimant had been told by Ms LaSalle that significant reasonable adjustments were not going to be made, which he and Ms Sauer later concluded were in fact reasonable adjustments and that they could and would be made. After the 12 February 2018 letter, the claimant was unlikely to be able to return to work as a result of management's unreasonable position in relation to those adjustments. Until management took a more reasonable approach, as Ms Sauer and Mr Frost later did, the claimant could not have been more proactive in relation to her return to work.

192 As for the issue about the 3-week phased return, Mr Frost stated in the appeal decision letter that there was 'no medical evidence to support this'. There clearly was, as noted above in our findings of fact. It is very significant in our view that Mr Frost failed to appreciate this, demonstrating that his was not the approach of a reasonable employer, acting within the band of reasonable responses. We found his suggestion that this section of the appeal meeting notes did not reflect the actual discussion that took place to be wholly unconvincing. We have found that the minutes do indeed reflect what happened, as follows.

193 Mr Alam properly raised the question of a phased return in the light of the OH report. Ms Sauer had been happy to consider that. Mr Frost by contrast told the claimant that the respondent would not look at a phased return and commented: 'Yes it's difficult at first when returning, but you work your way through it". That was an unjustifiable position to take, in the context of a

request for a phased return, supported by occupational health, in relation to an employee who had been absent for about 10 months by the time of the appeal, for a stress-related illness which amounted to a disability. A short, phased return would clearly have been reasonable in those circumstances. Mr Frost's rejection of it was wholly unreasonable.

194 In arriving at our decision as to whether or not the dismissal was fair, we again remind ourselves that it is not for us to substitute our decision for that of the employer. Our job is to review the reasoning behind both the decision to dismiss and the decision to reject the appeal by reason of capability, in order to conclude whether or not those decisions were reasonable or unreasonable, at the time that they were taken, bearing in mind all the circumstances of the case, as outlined above, including equity and the substantial merits of the case. We have set out above a number of significant factors in the decision-making process which we consider to be unreasonable. In arriving at our conclusion that the dismissal was unfair, we have taken account of those factors as a whole. On their own, any one of those factors may not have been enough. But taken together, they tip the balance significantly against the respondent.

195 The decision of Ms Sauer is certainly more finely balanced (even though we still consider it falls outside the band of reasonable responses). However, the fairness of the dismissal must in any event be judged by what happened at both the dismissal and appeal hearings. And Mr Frost's decision on the appeal was clearly outside the range of reasonable responses of a reasonable employer.

196 If the decision had been instead to give the claimant a further chance to prove that she was able to put the management issues behind her and give effective service in future, it is a matter of speculation as to what would have happened. That is an issue for remedy in due course.

Disability (Issue 7)

197 The Respondent accepts that from October 2017 to date, the Claimant's Arthralgia Arthritis, migraines, depression and/or anxiety amount to disabilities under section 6 Equality Act 2010.

Burden of proof provisions

198 In reaching our conclusions on the disability discrimination issues we have considered the burden of proof provisions under the Equality Act 2010. However, since we have been able to make clear findings of fact in relation to the issues before us, we have not found those provisions have assisted us one way or the other in this particular case.

Section 15 claims

Imposing a first written attendance warning on 19 October 2017 (Issue 10a)

199 We conclude, first, that this was both unfavourable treatment and a detriment. Further, it arose from disability-related absence, namely absence due to migraines. That was something arising in consequence of the claimant's disability. The key question is whether or not the giving of the warning was justified.

200 We conclude that giving the claimant a FWAW on 19 October 2017, without a meeting having taken place with her to discuss that, as required by the policy,

at which the OH reports could have been discussed, was not a proportionate means of achieving a legitimate aim. The legitimate aim relied on is 'the implementation of an absence management procedure that seeks to both minimise the impact of ill-health on an employee's attendance whilst also ensuring the efficient running of the department'. (GOR para 22, page 83)

201 We find that the aim was legitimate. But the means used to achieve it in this case were not proportionate. The provisions of the AMP are important. The failure to hold a meeting was a serious matter, not just a trivial breach of procedure. This claim therefore succeeds.

202 As for the appeal hearing, we note that this was dealt with by Mrs MacLeod as a complete rehearing. Mrs MacLeod informed us and we have accepted that she considered the sickness absence record of the claimant, in deciding to confirm the warning. By this stage the claimant had had 14 days absence, in less than 12 months, even if the 6.5 weeks following the accident had been disregarded (which Mrs MacLeod did not). The claimant told us in evidence that she considered that increasing the trigger point to 9 days would have been reasonable. Mrs MacLeod's evidence was that trigger points are not increased to more than 12 days (i.e. double). Even if the trigger points had been increased therefore, and the 6.5 weeks absence following the accident was disregarded, whether completely or in part, a warning could still reasonably have been given.

203 As for the first sentence of paragraph 61 of the AMP, had this been a case where the subsequent absences were all clearly caused by the initial injury, we consider that the sickness absence related to the accident should have been discounted. However, in the circumstances of this case there was room for argument about the extent to which the occurrence of migraines had been exacerbated by the injury. The conclusion arrived at by Mrs MacLeod was one she could have legitimately arrived at, on the basis of the OH report. We therefore conclude that confirmation of the warning at the appeal hearing following the appeal hearing was a proportionate means of achieving the legitimate aim set out above, the claimant having been given by that stage an opportunity to make full representations about it.

Alterations to absence management triggers - 7 November 2017 (Issue 10b)

204 Refusing to alter absence management triggers could be classed as a detriment and as unfavourable treatment. However, this aspect of the case is far better analysed as a reasonable adjustments claim – see further below. In any event, we conclude that the decision of Mr Dalon to refuse to alter the absence management triggers at that stage had nothing to do with the 'something arising from the claimant's disability' relied on by the claimant in this case. i.e. disability related absence and/or her request for reasonable adjustments. This issue does not succeed.

Ambiguous Performance concerns/performance meeting 08/11/17 - Issue 10 c

205 First, we have found that the performance concerns raised were not ambiguous, so that aspect of the claim fails. As for the performance management meeting on 8 November 2017, that could be classed as unfavourable treatment and as a detriment. However, we conclude that Mr Dalon did not subject the claimant to performance management processes, because of the claimant's disability related absence or because of her request

for reasonable adjustments. We conclude that Mr Dalon acted as he did because of the wider approach to performance management issues in HMPO at that time. Whilst we note that PCS had an issue with that performance management drive, Mr Dalon, as a manager, had to follow the management line. There was no link between the performance management meeting and either the claimant's disability related absence, or her reasonable adjustments request.

Dismissing the claimant on 19 June 2018 (Issue 10d)

206 The dismissal of a claimant is classed as discrimination by section 39 (2)(c) Equality Act 2010. It is clearly unfavourable treatment. The dismissal arose from the sickness absence of the claimant, the vast majority of which was due to migraines and to anxiety and depression. It was disability related. The dismissal was therefore because of something arising in consequence of the claimant's disability. The legitimate aim relied on is that stated above, which we conclude is a legitimate aim. Again therefore, this aspect of the claimant's case turns on the question of justification.

207 In considering the question as to whether or not the dismissal was a proportionate means of achieving that legitimate aim, we refer to all of the factors we have mentioned above in arriving at the conclusion that the dismissal was unfair. We remind ourselves that, pursuant to the *Grosset* case, the test to be applied in an unfair dismissal claim is not the same as in a section 15 Equality Act claim. In a section 15 claim, we are entitled to objectively assess the employer's decision to dismiss, not simply to review it. The test is an objective one to be applied by an employment tribunal, while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of our reasoning.

208 Bearing in mind the factors set out above, including the claimant's length of service, the various failings of management, the effect of those failings on the claimant, the refusal by Ms LaSalle to implement key adjustments, and the flaws in the reasoning of Ms Sauer and Mr Frost, we consider that objectively judged, the dismissal was not a proportionate means of achieving a legitimate aim. This was in our view clearly a case where the employer should have waited 'a little longer' (to use the language of *O'Brien*) and given the claimant a chance to show that she could return to work when she had indicated she would have and subsequently provide effective service in future. If not, dismissal could have followed relatively quickly, given that the claimant was already on a warning and could potentially have been placed on a final written warning. The legitimate aim did not require the claimant to be dismissed when she was. It was not necessary and was too draconian in the circumstances which we have described in detail above.

Failure to make reasonable adjustments (Issues 13 to 15)

209 These claims are dealt with below in relation to each step contended for by the claimant.

a. Alteration/increase in trigger points for Attendance Management (Issue 15a)

210 The relevant PCPs are at 13 a and b above. It is accepted by the respondent that those are PCPs and created a substantial disadvantage for the claimant. We agree.

211 The sickness absence management triggers were mentioned in the October 2017 occupational health report, although they had clearly been considered before then as well. The AMP requires that consideration be given to whether or not they should be changed. Had this been the first time that the question had been raised, we consider that Mr Dalon's approach may have been reasonable. However, at the time that he made his decision not to adjust the trigger points, a number of adjustments had been outstanding for some time. It would have been reasonable to adjust the triggers at that point. Once the adjustments were in place, and a proper internal assessment done on performance and remedial actions, he could have looked at them again. We therefore conclude that there was a failure to make a reasonable adjustment at this time. The fact that it would probably not have made any difference ultimately to the dismissal outcome or the FWAW does not affect our conclusion as to whether or not the adjustment should have been made.

b. Moving the Claimant to a quiet work area with reduced sensory stimulus, including the Claimant's previous work bay / c. Avoidance of bright lights (Issues 15b and 15c)

212 We conclude that there was a PCP and/or a physical feature of the premises, which gave rise to a substantial disadvantage, namely the requirement to work in an open plan environment, which was brightly lit, and noisy. This placed the claimant at a substantial advantage, since because of her migraines, and the frequent headaches that they gave rise to, she was more sensitive to bright light and to noise, than non-disabled colleagues. These matters were clearly raised in the occupational health reports, particularly in October 2017.

213 We conclude that it would have been a reasonable step to move the claimant to a quiet work area with reduced sensory stimulus, including the claimant's previous work bay. Mr Dalon agreed to look into this when he met with the claimant on 6 November and confirmed that in this email of 7 November 2017. We further conclude however that it would not have been possible for the respondent to have made this adjustment by the time the claimant went off sick on 21 November 2017. Although it would undoubtedly have helped her perception at that stage, of the workplace and lack of management support, had Mr Dalon been more proactive.

214 The respondent had access to a specialist reasonable adjustment team, as well as Access to Work. The fact that the claimant went off sick on 21 November 2017 does not end matters there, in the light of Ms LaSalle's letter of 12 February 2018, making it clear that the previously agreed adjustments were not going to be made. The move to a quiet work area with reduced sensory stimulus etc was the key adjustment that the claimant was requesting. The respondent's failure to agree to make that adjustment was part of the reason she could not return to work between February and May 2018.

215 A suitable place to work could have been found for the claimant whilst she was on sick leave, at the latest by the beginning of April 2018. Both Ms Sauer and Mr Frost agreed that it was an adjustment that could be made. This, together with Mr Alam's evidence in relation to the specialist adjustment team and the example he gave of another member in the Ministry of Justice who that team had helped, only reinforces our view that this was a reasonable adjustment and that there was a failure to take this reasonable step. Had it been taken, it is likely that it would have alleviated the substantial

disadvantage, as evidenced by the fact that up until 2015 when the claimant was moved from her workstation, there had not been any particular issue in relation to sensory stimulus.

d. Regular microbreaks every hour/short breaks throughout working day (Issue 15d)

216 The relevant PCP in relation to this proposed step is 'inconsistent or no breaks during working hours'. There was no such PCP. The claimant was entitled to take micro breaks, and indeed that is what the occupational health reports had consistently recommended from 2014 onwards. The claimant clearly misunderstood the adjustment that occupational health had recommended. It was her view that she should be allowed to take 10 to 15 minute-breaks every hour. We do not consider that would have been reasonable. It was not what OH was recommending.

217 On the basis that there wasn't a relevant PCP, as contended for by the claimant, and on the basis that she clearly misunderstood what was being recommended, we do not consider that there was a failure to make a reasonable adjustment.

e. Suitable space to rest if she was experiencing a migraine (Issue 15e)

218 It is clear from Mr Dalon's email of 7 November 2017 that the claimant was advised that she could use the first aid room, to recover in, were she to suffer a migraine attack at work. This was to enable her to remain at work, in the hope that the migraine would pass and she would be able to continue her duties once the migraine was under control. We consider that this adjustment was offered a reasonable time after it had been recommended. There was not therefore a failure to make this reasonable adjustment.

f. Formal workstation assessment; to include an adapted keyboard, ergonomic chair and screen protector (Issue 15 f)

219 In relation to the ergonomic chair, it is clear from our findings of fact, that by October 2017, the date by which the claimant is conceded to have had had a disability, the claimant had a suitable ergonomic chair. That had been provided on her return to work from her workplace accident, in about December 2016.

220 As for the adapted keyboard, and the screen protector, those were still outstanding in October 2017, and were recommended adjustments. These were pleaded as PCP issues but they are clearly in fact auxiliary aids. The claimant was at a substantial disadvantage as a result of them not being provided and having to use standard equipment because the keyboard she was using affected her arthritis which caused pain in her hands; and the screen protector helps to reduce glare, and therefore helped to mitigate the effects of her migraines and/or to reduce the likelihood of them occurring at all. As is apparent from our findings of fact in relation to the keyboard, the claimant may at some stage have been offered another keyboard. It is however entirely unclear as to when that happened and whether her refusal of those particular keyboards was unreasonable. It was incumbent on the respondent to have proper paperwork in place or witness evidence in order to prove it was. Neither has been provided.

221 These adjustments were still outstanding in October 2017 and these items should have been made available. The screen protector was first mentioned in 2014 and we consider that on any assessment, a properly functioning screen protector should have been provided by the beginning of November 2017. As for the keyboard, this is first mentioned in the OH report in 2 October 2017 and Mr Dalon agreed to replace it at the 6 November meeting. It does take some time to obtain such items, so we do not consider that this was a step that should have been completed by 21 November 2017 when the claimant went off sick. Nevertheless, this matter was revisited during the meeting with Ms LaSalle in relation to the claimant's grievance, and as noted above, the screen protector and keyboard were two adjustments which she said were not going to be made. Whilst these matters were potentially minor, compared to the move of her workstation etc (i.e. issues 15b and c), they were still adjustments which should have been carried out. The continuing failure to agree these adjustments from 12 February 2018 onwards amounted to failures to make reasonable adjustments.

222 As for the workstation assessment, the carrying out of a workstation assessment or risk assessment is not a step - see *Tarbuck* and related cases.

g. Recording disability related absence separately to other sickness absence (Issue 15g)

223 This could well amount to a PCP. However, this part of the claim fails because the claimant was not under any substantial disadvantage as a result of any such practice of the respondent to record disability related absence separately to other sickness absence. All of the sickness absence which affected the claimant, in relation to the matters raised by her claim, was either for migraines, or was linked to her disability of anxiety and depression. Her absence from October 2016 onwards was not for any other reason. Recording the disability related absence separately to other sickness absence would not have alleviated any substantial disadvantage to the claimant even if there had been any, because there was no non-disability related absence to record. Taking this step would therefore have made no difference whatsoever to either the issuing of the first written attendance warning or to the dismissal. In addition, there is no obligation on an employer to discount all disability related absence. The real issue, it seems to us, is not how sickness absence is recorded but the extent to which disability related sickness absence is considered in any management decisions. The former risks putting form above substance.

h. Provision and payment of cab fares when disabilities flared up (Issue 15h)

224 We find that there was no such PCP. The respondent exercised discretion on a case-by-case basis in relation to the payment of taxi fares for staff. Given that this was how the claim was put in the list of issues, it necessarily fails. In any event, whilst we could see how it could be argued that there was a substantial disadvantage to the claimant had there been such a practice, we do not consider that the step contended for by the claimant would be a reasonable step. Further, the question as to 'when the claimant's disabilities flared up' is too vague for us to have been able to determine this issue.

Victimisation (Issues 16 and 17)

225 The respondent conceded on day two of the hearing that the acts relied on by the Claimant were protected acts within the meaning of s 27(2) EqA 2010? The protected acts were the grievance dated November 2017, asserting disability discrimination and failure to make reasonable adjustments; and the issuing of the first Employment Tribunal Claim, raising disability discrimination claims.

226 The key issue is whether the Respondent subjected the Claimant to unfavourable treatment because of one or both of the above protected acts. The Claimant relies on one alleged unfavourable/detrimental act, namely the decision to dismiss her. We refer to our conclusions above that the reason for the dismissal of the claimant was capability. We further conclude that neither the claimant's grievance, nor the submission of her first employment tribunal claim, had any influence on the decisions of Ms Sauer or Mr Frost. In those circumstances, this claim fails.

Unauthorised Deductions from Wages/Breach of Contract (Issues 18 and 19)

227 The first issue was whether or not the Claimant was entitled to payment under the Civil Service Compensation Scheme because her employment was terminated on grounds of ill health? The respondent accepts that she was indeed so entitled - so that issue was conceded.

228 The second issue is whether, if so, the Respondent has paid the Claimant her full entitlement? The Claimant argued that deductions of approximately £6,000 were made from her compensation without authority or clarification of the deductions. The claimant accepted that the respondent was entitled to make deductions from the final payments, including her pay, accrued holiday pay, payment in lieu of notice and the compensation scheme payment. It was accepted by the time of the hearing that the payments were made 'with authority'.

229 As noted above, the claimant conceded through Mr Walker her counsel, that she not in a position to challenge the figures themselves. So, the amounts that have been deducted are accepted. The key issue for the claimant, as it was put at the commencement of the hearing, was that when she was originally paid the subsequently deducted amounts, she was paid net of tax and NI. By contrast, when the deductions were subsequently made, they were made gross. That, the claimant argued, left her out of pocket in relation to tax and NI.

230 By the time of the final submissions, Mr Walker was not in a position to say what amounts had been deducted by way of tax and National Insurance. The figures were not available. Necessarily therefore, we are not in a position to determine what amounts could potentially be payable for unauthorised deduction of wages or for breach of contract, even if we had found that the deductions were indeed made in breach of contract and/or were unauthorised deduction of wages. In those circumstances, the claims necessarily fail.

231 During final submissions, Mr Walker stated that there could well have been an argument that the deduction of the alleged overpayments from the claimant's wages in October 2018 was an unauthorised deduction. Unfortunately, presumably because of the paucity of information that the claimant solicitors had at the time the claim was submitted, the claim was not pleaded in that way initially. The case proceeded before us on the basis that this issue was

solely concerned with the question of whether or not the deduction should have been made net of tax and National Insurance. Not surprisingly, Mr Walker did not make any application to amend the basis of the claim at such a late stage in the proceedings. We did not hear any evidence as to the terms or potential terms of the claimant's contract, whether contained in contracts or policy documents etc, relating to deductions of overpayments. Since that issue was not before us, and we heard no evidence on it, we are not able to determine it.

232 This is however a matter that we hope the respondent will cooperate with the claimant in relation to, so that the claimant can contact HMRC, with a view to any tax and national insurance which has potentially been overpaid, being returned to her.

Time-limits

233 The first ET1 was presented on 6 March 2018. Acas EC occurred between 4 December 2017 and 4 January 2018, a period of one calendar month. The effect of Acas EC in these circumstances is to extend the usual deadline by one month. Therefore, all matters which predate the period of 4 months less one day, prior to the submission of the claim are potentially out of time, ie those matters which occurred prior to 7 November 2017.

234 In relation to the claims on which we have found for the claimant, the only claim which is potentially out of time is the claim in relation to the first written attendance warning, which was given on 19 October 2017. We find that the warning given was part of conduct extending over a period, since the imposition of the first written attendance warning was part of the application of the absence management procedures, which culminated in the claimant's dismissal on 19 June 2018. We have also concluded that there were failures to make reasonable adjustments from November 2017 onwards, and we further find that the issue of the warning on 19 October 2017 was part of that conduct extending over a period too.

235 Even if we were wrong in relation to the 'conduct extending over a period' issue, we conclude that it would in any event be just and equitable to extend the time limit in the circumstances of this case, to allow the claim to be submitted, some 19 days later than it should otherwise have been.

236 Evidence in relation to the first written attendance warning is relevant to the other matters in the claimant's claim and forms part of the relevant background. We rightly heard evidence in relation to it and would have done so even if that had not been pursued as a separate claim. The respondent has not been under any disadvantage, given the date when the claim was submitted, and given that such documentary records relating to the issue of the warning that did exist were contained in the claimant's personnel file, which would have been readily available to the respondent. The respondent was on notice shortly after 6 March 2018 that a claim had been submitted against it.

237 For all of these reasons, even if we had concluded that this claim was not part of conduct extending over a period, we conclude that it was submitted within such other period as we consider just and equitable.

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Employment Judge Andrew James
London Central Region

Dated 9th March 2020

Sent to the parties on:

10/03/2020

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For the Tribunals Office

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