EMPLOYMENT TRIBUNALS

Claimant: Kelly-Anne Chester

Respondent: Department for Work and Pensions

Heard at: **Manchester** **On:20,21,22,23,24,27 January 2020 and in chambers on 2 March 2020**

Before: **Employment Judge Leach, Mr Ostrowski, Mr McCaughey**

Representation:

Claimant: In person
Respondent: Mr S Lewis (Counsel)

JUDGMENT

Claims under s26 Equality Act 2010 ("EqA")

1. All the claimants claims of harassment (protected characteristic disability) are dismissed.

Claims under s15 EqA.

2. The respondent's acts of

    a. Inviting the claimant to a disciplinary meeting in April 2018.
    b. dismissing the claimant on 17 August 2018
    c. rejecting the claimant's appeal against dismissal

    amount to discrimination arising from the claimant's disability contrary to s15 EqA.

3. All other claims of discrimination arising from the claimant's disability are dismissed.

Claims under s20 and 21 EqA, that the respondent failed to make reasonable adjustments

4. The respondent failed to make reasonable adjustments in relation to:-
   a. The claimant's working hours
   b. The application of the respondent's probationary procedure

5. All other claims of a failure to make reasonable adjustments are dismissed.

Claim under s19 EqA

6. The claim of indirect discrimination (protected characteristic, disability) is dismissed.

REASONS

A. Introduction

1. This case concerns the claimant's employment by the respondent, the management of the claimant during the employment and her dismissal from employment.

2. In this Introduction section we summarise the facts. We do not consider the facts set out in this summary to be in dispute but in any event what we set out below is our finding of the facts stated in this introduction. We make references to page numbers throughout this document. These reference are to the file of documents used at the hearing.

3. The claimant was employed by the respondent, from October 2017 until August 2018. Throughout this time the claimant was under a probationary period.

4. Initially there were no issues in relation to the claimant's conduct, performance or attendance. Her 8 week probationary review was positive.

5. The claimant has a mental impairment. She informed the respondent of this at an early stage and the respondent accepts that at all relevant times (1) the claimant had a disability (within the meaning of s6 of the Equality Act 2010 (EqA) and (2) the respondent was aware of this.

6. On 5 February 2018, the claimant spoke with her manager, Michelle Wilson ("MW"), and she informed MW of a dip in her mental health and her concern of the impact this was having on her performance. The claimant described to MW that she had woken that day at 7.30am as usual but then lost time in the morning being "spaced out" and resulting in her not arriving to work until noon.

7. MW referred the claimant for a priority occupational health ("OH") appointment. An appointment was made for the next day and a report also provided the next day. The report informed that the claimant should see her GP as a priority. It provided an opinion that the claimant was suffering from severe depression and moderate anxiety. It noted that the claimant was likely to be disabled for the purposes of the Equality Act 2010 ("EqA")

8. On 6 February 2018, MW spoke with the claimant about the OH report. As far as work issues were concerned, the claimant informed MW that she had no issues in relation to her work or workload. Her issues were in relation to her getting in to work on time and she was struggling to get in to work on time before noon. The claimant and MW agreed that it was best for the claimant to be at work for routine and structure.

9. On 7 February 2018 the claimant was able to secure a GP appointment. It was an emergency appointment. She had a long wait and did not see the doctor until 3pm. Some medication was prescribed including anti-depressants. The claimant was told/was aware that she would take some time to adjust to the anti-depressant medication. She made the respondent aware of this.

10. On 9 February 2018, the claimant and MW had an informal meeting when they discussed and completed a document called a Workplace Adjustment passport ("WAP")

11. The claimant continued in work although continued to have issues in relation to her start time. She was absent due to illness on 21 -23 February 2018.

12. A return to work meeting was held on 26 February 2018 and on her return to work, the claimant was still arriving late on a number of occasions. The claimant's attendance times did improve over the following weeks but she was still late on many occasions, having regard to the targeted start times.

13. On 11 March 2018, a schedule of start times was written up and agreed with the claimant. These were start times that the claimant said she would try to adhere to.

14. On 13 April 2018 the claimant was invited to a formal meeting due to a concern about her conduct. The stated concern was that she failed to attend work at the agreed start time between 09/02/18 and 13/04/18. The hearing took place on 26 April 2018 and resulted in a formal warning being issued.

15. The claimant was absent from work from 30 April 2018 until 29 May 2018. The reason given was anxiety and depression. At the commencement of this period of sickness the claimant was under the care of a mental health crisis team. During the period of absence the claimant was placed on a week long therapy course by the crisis team.

16. On the claimant's return to work she was under a new manager, Phil

Carter. The respondent's formal processes applied and a number of meetings took place. One meeting was arranged to discuss concerns about the probationary period and the extent of sickness absence which had by then built up. The other meeting was arranged to discuss "*aspects of* [the claimant's] *performance*" (invite letter of 14 June 2018 at page 328).

17. At the same time the claimant made a number of requests for adjustments that she considered would assist her in attending and undertaking work. These requests resulted in extensive emails at the beginning of June, between the claimant and her new manager Phil Carter.

18. The outcome of the meetings noted at 16 above, was that the claimant was referred to a "decision maker" so that a decision could be made about whether to dismiss the claimant.

19. Colin Billingsley (CB) was the appointed decision maker. He received a file of papers relating to the whole of the claimant's probationary period. He held a meeting with the claimant on 6 July 2018. He decided that the claimant should be dismissed and wrote to her by letter of 13 July 2018 to communicate the decision. The claimant's contract of employment provided for 5 weeks' notice and her last day of employment was 17 August 2018.

20. The claimant appealed her dismissal. The appeal was heard by Gillian Thomas ("GT") on 31 August 2018. The decision to dismiss was upheld.

B. The Employment Tribunal hearing.

21. The hearing lasted 6 days. Some points of minor clarification arose in relation to the allegations and issues at the beginning of day one and end of day six and these are reflected in the section below detailing the allegations and issues.

22. The claimant gave evidence on days one and 2. The respondent's witnesses gave evidence on days 3,4,5 and the morning of day 6.

23. The tribunal finished early at the claimant's request on day 2 and ensured regular breaks throughout the hearing.

24. The claimant admitted that her recollection on a number of issues was vague. She told us sometimes her recollection of events was difficult, that she could not recall; when asked whether something occurred her responses would sometimes be along the lines of "I assume so" or "I assume so but I can't recall. " This was particularly the case in relation to events prior to the claimant's period of absence from 30 April 2018 and included a number of meetings relevant to the complaints raised.

25. The respondent's witnesses, Michelle Williams and Christine Horrocks had a clearer recollection of meetings and other events in the period up to

and including 26 April 2018.

26. The other witnesses called by the respondent appeared to have reasonable (but varied) recollections on key issues.

27. We comment on witness evidence where relevant below.

C. The Allegations

Note that in this section C and in section D we have retained the original numbering from the schedule to the case management order

Allegations of harassment – section 26 Equality 2010 and/or allegations of unfavourable treatment arising from disability pursuant to section 15 Equality Act 2010

1. At a return to work interview, the next working day after the claimant's absence on 21-23 February 2018 the claimant's line manager, Michelle Wilson, asked inappropriate questions about the claimant's illness and employment. These were:

    - Are you sure you are suitable for this type of work?
    - Did you disclose your disability at the start of employment?

The claimant relies upon these comments as allegations of harassment related to disability pursuant to section 26 Equality Act 2010.

2. On 29 March 2018 the claimant's probation was extended for four weeks. The claimant relies on this extension of her probation as unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010. The "something" is the claimant's poor timekeeping. It is the claimant's case that poor timekeeping arose in consequence of her disability of anxiety and depression.

3. In a few meetings held in April 2018 with Michelle Wilson the claimant raised issues about her health, stress levels and attendance. In particular the claimant explained the reason for her lateness, namely that some days she had to pluck up courage to come into work when she was standing outside the building. She also explained that the extension of the probationary period and the monitoring of her was causing extra stress. The claimant complains that Michelle Wilson failed to acknowledge her concerns in any meaningful way. The claimant states that Michelle Wilson, when the claimant explained she found it difficult to attend on a Friday because illness meant she became tired during the week, stated, *"we all struggled on Fridays"* and laughed. The claimant states that Michelle Wilson's failure to acknowledge her concerns in any meaningful way and the comment "*we all struggle on Fridays*" followed by laughter amounts to

unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010, or unwanted conduct pursuant to section 26 Equality Act 2010.

4. The claimant states that whenever she exercised her right to flexible working she was asked to discuss her lateness with Michelle Wilson, who treated her as though she had misbehaved. The claimant states Michelle Wilson used a condescending tone when discussing lateness with her. The claimant relies on these facts as unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 or unwanted conduct pursuant to section 26 Equality Act 2010.

5. The claimant was issued with an invitation to a disciplinary meeting. The claimant relies on this as unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 or unwanted conduct pursuant to section 26 Equality Act 2010. Note it was clarified on day one of the final hearing that this was a reference to the invitation letter at page 281.

6. On 26 April 2018 Christine Horrocks, when the claimant said she felt discriminated against in the probationary period, asked the claimant if she wanted the allegations written down, in a tone of voice that suggested it was a silly suggestion. The claimant relies on this fact as an allegation of unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 or unwanted conduct pursuant to section 26 Equality Act 2010.

7. On her return to work after 29 May 2018 the claimant emailed Phil Carter in or around June 2018 making suggestions of reasonable adjustments. He informed her she could not have the adjustments. The claimant considers the refusal amounts to unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 or unwanted conduct pursuant to section 26 Equality Act 2010.

8. The claimant escalated her concerns to Senior Executive Officer, Gary Lindley, and Higher Executive Officer, Anne Mountcastle, by including them in the email she sent to Phil Carter. The failure of Mr Lindley and Ms Mountcastle to act on the claimant's correspondence sent in or around June 2018 is an allegation of unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 or unwanted conduct pursuant to section 26 Equality Act 2010.

9. The claimant was dismissed on 13 July 2018. She considers her dismissal was an act of unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010. The “something” was the failure of the claimant to meet the required standard and pass the probationary period. It is the claimant's case that this failure was due to her anxiety and depression.

10. The claimant's appeal against dismissal was rejected. The claimant considers the rejection of her appeal was an act of unfavourable treatment because of something arising in consequence of her disability pursuant to section 15 Equality Act 2010.

Allegations of failure to make reasonable adjustments pursuant to sections 20-22 Equality Act 2010

11. The provision, criterion or practice ("PCP") is "changes in workplace at short notice in particular being moved to a new team within the building". The claimant says this put her at a substantial disadvantage in relation to a relevant matter because her disability of anxiety and depression made it difficult for her to deal with change. A reasonable adjustment to avoid the substantial disadvantage was to give the claimant reasonable notice of at least 24 hours of any move to a new team.

12. The second "PCP" is "carrying out the role of case manager between 10.30am to 6.30pm with half an hour for a lunch break". The claimant states these hours put her at a substantial disadvantage in relation to a relevant matter because her anxiety and depression made it difficult to work effectively during this length of shift. The reasonable adjustments contended for were:

    (i) A longer lunch break of one hour once per week;

    (ii) A short five minute break each hour;

    (iii) A small time allowance for extra curricula activities.

13. The third "PCP" is "requiring a case manager to conduct online paperwork in an open plan office which could be noisy". The claimant states this put her at a substantial disadvantage in relation to a relevant matter because her disability made it difficult for her to concentrate. The reasonable adjustment was to allow the claimant to listen to music through earphones at work.

14. The fourth "PCP" is "the respondent's grievance procedure required a complaint to be put in writing". The claimant states the nature of her disability made it difficult for her to put her complaint in a legible form and so she was placed at a substantial disadvantage. The reasonable adjustment was to allow the claimant to make a grievance complaint verbally in a meeting.

15. The fifth "PCP" is the *"application of the respondent's probation policy".* The claimant states it placed her at a substantial disadvantage in relation to a relevant matter because her illness made it difficult for her to attend work on time which meant she did not pass the probationary period. The reasonable adjustment was to extend the probationary period further.

Indirect discrimination -section 19 Equality Act 2010.

16. The "PCP" is "the requirement under the respondent's sickness absence management policy for employees to report sickness absence on a telephone line which was staffed for one hour only in the morning." The claimant states this put disabled people as a group at a disadvantage because disabled people do not always know when they are going to be too unwell to attend. The claimant says she was put at that disadvantage.

D. The Issues

Discrimination arising from disability – section 15 Equality Act 2010

1. Did the respondent treat the claimant unfavourably as set out in the Schedule of Allegations document?

2. Did the respondent treat the claimant as above because of "something" arising in consequence of the disability? What is the "something"? Did it arise in consequence of disability?

3. If yes, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Indirect Discrimination-section 19 Equality Act 2010

4. Did the respondent apply a provision, criterion or practice ("PCP") to the claimant which it also applied to employees who did not share the claimant's disability?

5. If so, did the PCP put employees who have anxiety and depression at a disadvantage compared to employees who do not have that disability, such group including disabled and non-disabled employees?

6. If so, did the PCP put the claimant at that disadvantage?

7. If so, can the respondent show that the PCP was a proportionate means of achieving a legitimate aim?

Reasonable Adjustments-section 20 to 21 Equality Act 2010

8. Did the respondent apply a PCP to the claimant as set out in the Schedule of Allegations document?

9. Did the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

10. Did the respondent take such steps as it was reasonable to have to take to avoid the disadvantage?

11. Did the respondent know the claimant was likely to be placed at the disadvantage set out above?

Harassment-section 26 Equality Act 2010

12. Did the respondent engage in the unwanted conduct set out in the Schedule of Allegations document?

13. If yes, was it related to the claimant's disability of anxiety and depression?

14. Did the unwanted conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Time Limits.

1. Were the claimant's claims presented within time?

2. If not is it just and equitable to extend time

E. Findings of Fact

<u>The respondent's probationary procedure</u>

28. Documents relating to the respondent's probation procedure are at pages 35 to 56. These policies and procedures provide for a probationary period of six months. At page 35 the following is noted:

"The probationary period is a time for new employees to learn what is expected of them in their new role, to show that they are capable of the job and that they can also meet the standards of behavior and attendance that the department expects."

"Your manager will review your progress regularly throughout the probationary period and give you advice and guidance when you need it. They will complete performance discussions with you to assist and give feedback on your conduct, attendance and work performance. Your manager will do all they reasonably can to help you to succeed so that your appointments can be confirmed at the end of the probationary period."

"In exceptional circumstances (e.g. long-term absences) your probation may be extended by up to three months and to give you a final opportunity to show that you can achieve the necessary standards of conduct, attendance and work performance. If this happens your manager will carefully consider the length of the extension period taking your personal circumstances into account and agree an appropriate period with your countersigning manager. The extension will be for a period of not less than four weeks and not more than three months."

"Important Information

All managers must ensure that they are aware of the Diversity and

Equality Policies."

29. During "Probation" at page 40 the following is stated:

"As well as providing support and guidance when needed during probation it is important that at the review meetings the manager

…explains clearly any areas in which the probationer is failing to meet required standards and explains what additional follow-up action is required by the probationer or will be provided by the manager to deal with it.

…reviews Equality Act requirements and reasonable adjustments where this is appropriate."

30. At page 41 under the heading "Attendance" –

"4.2 Managers must…

- *Consider disability related absences and disregard any pregnancy related absence in line with the Attendance Management Policy and consider extending the probation period if the absence has had a significant impact on the probation period."*

4.3 There are differences from the normal Attendance Management Policy, Procedure and Advice when dealing with sick absence for a probationer. These are explained in the following paragraphs:

- *Short-term Absence – if a probationer has a total of four or more days sick leave (pro rata for part-time staff) the manager should consider a written warning. The manager should take into account the special circumstances listed in the Attendance Management Procedures to decide if a written warning is appropriate.*
- *When interviewing the probationer the manager should remind them that future conduct, attendance and work performance will all be closely monitored and that they may be dismissed if they have further absence or if their work performance or conduct is not up to the required standards.*
- *If a written warning is not appropriate the manager should give the probationer the "no further action" letter explaining why, and that any further absences may result in a written warning and dismissal due to failing probation.*
- *If the probationer has further sick absence during the probation period after a written warning and none of the special circumstances listed in the Attendance Management Procedures apply, dismissal may be considered by a decision maker."*

31. At page 42 under the hearing "Work Performance" –

"4.4 When dealing with a probationer there are differences from the normal managing poor performance policy procedures and advice. These are when setting objectives managers must take account of the probationer's lack of experience, working pattern and any reasonable adjustments made for a disability under the People Performance Policy.

- *If the probationer is not achieving the required standard set out in their objectives the manager must establish if any additional support or training can be provided or if an underlying problem exists.*

- *When all reasonable steps have been taken to help the probationer but the required standard is still not being achieved, the manager will issue a written warning and set an appropriate review period. The review period should not normally be longer than one month but can in exceptional circumstances be extended up to a maximum of three months to take account of reasonable adjustments as a result of a disability and training needs. This review period should be agreed with the probationer's countersigning manager. If the required improvement is still not achieved dismissal should be considered by the decision maker."*

32. At page 47 under the heading "6. Considering Dismissal" –

"6. If the manager's submission to the decision maker recommends terminating the appointment it must contain sufficient information and evidence for the decision maker to consider the case in full before making a decision.

6.2 …

6.3 Before making a decision the decision maker must –

- *Invite the probationer to a meeting to discuss the manager's comments and recommendation and allow them to respond and present their own case and any mitigating circumstances;*

- *Advise them that they have the right to be represented by a trade union representative or work colleague;*

- *Follow the guidance in the HR decision maker's guide to ensure the process and outcome is fair, reasonable and transparent."*

33. At page 48 under the heading "8. Extending Probation" –

"In exceptional circumstances, for example when a probationer is absent

for a single lengthy period of the probationary period, managers may decide to extend probation. The manager should carefully consider the length of the extension taking the probationer's individual circumstances into account and agree this with the countersigning manager. It must be for a minimum of four weeks but it must not last longer than the maximum period of three months. Managers must not automatically default to three months when deciding the extension period. The three month period is the exception and most probationers will be able to demonstrate that they have met the standards in a shorter period."

The respondent's absence management procedure.

34. Three versions of the Attendance Management Procedures were provided in the bundle. Each version is an update from the previous version and it is apparent (during the relevant period at least) that updates to these procedures were regular (every four months or so). The wording of the versions is similar and in the course of the hearing reference was made to paragraph numbers of the earliest of the three versions, even though from a time perspective that expired on 18 February 2018. References below to paragraph numbers are from the earliest version (at pages 86-122). Neither party drew our attention to relevant differences between one version of the procedures over another and where reference was made to the attendance management procedure at the hearing, it tended to be the earliest version that was referred to.

35. At page 87:

"Taking formal action: your manager will begin the formal absence management process when you have been absent for either eight days or four spells or more but within the current 12 month rolling period. This is called the trigger point…Different arrangements are in place for employees on probation. Warnings are not automatic and should not be given where one of the special circumstances applies."

36. The arrangement during probation was that the "trigger point" was four days (given that a probation period is generally for six months, so half of the trigger point for a permanent employee over a 12 month period).

37. At page 89, under the heading "Reasonable Adjustments" it states:

"5. If you are disabled your manager has a duty to make reasonable adjustments to enable you to attend work, carry out your role effectively and meet the usual attendance standard where possible. You may wish to complete a workplace adjustments passport. Where appropriate your manager will increase the trigger point by a reasonable amount to take account of absences related to your disability. This is called the disabled employee's trigger point. This decision will be made on a case by case. There must not be any local predetermined blanket limit on what the DETP should be. This means that if you take time off because of your disability you

will not face formal action unless your absence level reaches or exceeds the disabled employee's trigger point. Spells will not apply to disability related absences. A reasonable adjustment is a change to a physical feature environment or procedure to make sure that an employee with a disability is not put at a substantial disadvantage compared to a non disabled person. Any reasonable adjustments which are made to your job, working environment and working patterns will be kept under review."

38. At page 99 under the heading "Irregular Attendance/Short-Term Absence" it states:

"3.2 The manager must consider all known circumstances and have a possible course of action in mind before the meeting. However, the outcome of formal action is not predetermined and interviews can result in one or more outcomes. They should not give a first written warning at the meeting if either –

(a) One of the circumstances detailed in the list below applies –

- *The absence is pregnancy related;*
- *Reasonable adjustments have been identified but not yet made;*
- *The employee is disabled, the absence is directly related to the disability and it is reasonable to increase the trigger point;*
- *The absence is directly caused by an operation or treatment which could help to improve attendance or prevent sickness absence;*
- *…..*

Or

(b) They believe for reasons not detailed in the list that a first written warning would be inappropriate. This may include for example a reasonable expectation of improvement or a compassionate response to bereavement or domestic violence.

An occasional fluctuation of the level of disability related absence would usually be supported and would not normally trigger warning or dismissal action…."

The respondent's flexible working hours agreement.

39. Helpful evidence was provided by Mr Lindley on this point. From this evidence and a review of the flexible working hours agreement (page 57) we established the following:

(1) The respondent operates a flexible working hours policy.

(2) Full-time hours are 37 per week.

(3) It is important that teams within the respondent are properly staffed at all relevant times.

(4) The respondent achieves this by operating what are known as *"tent poles"* within flexible hours. There are two morning tent poles and two afternoon tent poles.

(5) Employees need to choose one tent pole that will apply to them. If a morning tent pole is chosen then the employee is required to be in work before or at the tent pole time.

(6) Morning tent poles are 8.00am or 9.00am and afternoon tent poles are 5.30pm or 6.30pm.

(7) At the opposite end of the day that a tent pole has been selected then an employee will have a scheduled start or finish time. This schedule will be known to the employee's manager although they will be able to inform their manager if they want to attend at a different time on a particular day, therefore making use of the flexi system.

(8) There is a policy of "assumed consent". This means that as long as an employee's start or finish time on any given day is at least 3 hours 42 minutes (i.e. half a day) before or after their tent pole time, there is no need to obtain prior permission to have a different start or finish time to that scheduled, but they are required to inform their manager.

(9) The flexi system allows employees to have flexi credit (i.e. work more than the 37 hours) and flexi debit. Flexi credits can build and employees can take "flexi leave" in accordance with the policy. A flexi debit is permissible only up to three full time days (which translates to just over 22 hours). Where there is a deficit greater than three days, this is known as an excess deficit and the manager is required to raise this with the relevant employee immediately, to agree action to avoid the access deficit developing further and to reduce the existing deficit.

40. In exceptional cases the policy provides as follows (page 65):

"32. In exceptional cases managers can agree that excess flexi deficits can be offset once during a rolling 12 month period by:

- *Converting up to five days annual leave (pro rata for part-time employees) into hours and entering this as an authorised credit on the flexi record; or*

- *In very exceptional cases, and only with the employee's*

signed agreement, by converting up to five days' pay (pro rate for part-time employees) into hours and entering this as an authorised credit on the flexi record. In all cases managers must ensure that making this deduction will not bring the employee's salary below National Minimum Wage levels by checking with the Employee Services Centre first.

33. However, an explicit written agreement about the employee's contracted working hours must be reached with the employee to ensure that the situation is not allowed to develop again. This may include for example discussing and agreeing a temporary change to the employee's contractual working hours to better manage short-term caring difficulties.

34. Before allowing an employee to use annual leave or pay to reduce an excess flexi deficit managers must always first consider whether an attendance problem exists that should instead be addressed by management action."

<u>The position as at 6 February 2018</u>

41. We find as follows:-

(1) On 5 February 2018 the claimant arrived at work and informed her manager (MW) that she was struggling with her mental health and particularly with getting into work.

(2) MW arranged for an Occupational Health appointment for the claimant, at very short notice, and in the meantime the claimant was taken off telephone duty.

(3) MW also noted that she and the claimant should review how the claimant feels on a daily basis.

(4) The Occupational Health report was obtained the next day. We accept that the claimant's health was as described in the report, which includes the following:

"On assessment today her symptoms suggested she had severe depression and moderate anxiety. As you would expect, her symptoms are affecting her everyday life and her work. Symptoms include low mood, disturbed sleep, poor concentration and raised anxiety."

"Based on my assessment in my opinion Ms Chester is close to not being fit for work due to her mental health symptoms. However, although she struggles to get to work once she is there she feels better. I recommend if you can accommodate it and whilst she can manage it she stays in work on modified work. Miss Chester's mental health symptoms will mean she will struggle with work at time I recommend she work at her own pace and is given extra time to check work."

"Ms Chester need GP assessment is a priority – I have asked her GP to see her tomorrow, please allow her time off work for this appointment."

"Ms Chester mental ill health conditions are long-term and flare-ups are possible, her symptoms of depression are not well controlled at the moment, she needs GP assessment and may need time off work and/or additional treatment."

42. The Occupational Health expert also noted that it was likely that the claimant's condition would be a disability.

43. The claimant and MW discussed this report. The notes of this discussion are at page 223. These notes include the following:

    "I will continue to put an exception in for the mornings if she feels she can't get in till 12."

    Also:

    "We both agreed it would be best if we can keep her at work for routine and structure so for her to work within her ability and she will get support from me."

    And:

    "Lastly if Kelly feels she needs an extra five minute break to let me know."

44. Our findings are that MW acted quickly and appropriately out of concern for the claimant's health.

45. However, there then began a period of confusion about what was and was not agreed as far as the flexi-time and working hours were concerned. In fact, it appears that this confusion continued up to and including the appeal against dismissal stage. It was not clear what was meant by "exception." The Tribunal had understood that may mean some allowance or flexi credit would be permitted. However and as explained below, it became apparent that this was not what was being referred to – or at least not what happened.

<u>7-23 February 2018</u>

46. A WAP form was completed on 9 February 2018. MW met with the claimant in order to complete this. The adjustments recorded are on the form at page 226:-

    "Attempt to arrive at 11am to address concerns over deficit of flexi and relieve stress of it."

    " An additional few minute break in the morning to leave the building and get some fresh air to clear head."

    "self monitor for phones rather than being taken off them permanently-

if feeling low, uncomfortable with calls etc., to put in exception"

"Take a few minutes out to read guidance and do some self teaching as and when needed."

47. Concerns about flexi deficit are clearly referred to. The WAP form, setting out adjustments, did not make any reference to *"exceptions"* that had been mentioned in the earlier discussion of 6 February 2018. As at the 14 February, the way to address the concern over flexi deficit was to come in earlier – something which the claimant was struggling with for medical reasons at that time, as identified by the OH report. Reference to an "earlier" start at this stage was to 11am.

48. MW and the claimant met on 14 February 2018. Notes of this meeting are at page 228. Relevant points from this meeting are:-

    a. The claimant's flexi deficit was discussed. She was then 18 hours in deficit. The notes record the way to address this was "*we agreed for her to try to get in at 10.30but to review it daily. She arrived at 10.30am today but didn't log on to 11am again to calm down. As a reasonable adjustment I agreed for her to flexi credit from 10.30s as not to cause any more stress about her flexi and to review this daily."* The claimant was therefore provided a 30 minute flexi credit for this .

    b. *"she has a counselling appointment for an initial assessment next Tuesday at 09.30, again I agreed to flexi credit from 10.30"* Therefore some flexi credit was provided to enable her to attend an appointment.

    c. *"I also carried out her 16 week probation review. Her journal and phone checks are good, she follows the triggers and cleanses the cases. She has settled in to the team and does help out when she can. I have no issues with Kelly's work."*

49. The claimant was absent due to sickness on 21, 22 and 23 February 2018. She completed a self certification form which recorded "*mental health-strong anxiety and depression, felt unsafe."* And *"felt unsafe to be out of the house/on my own. Partner had to stay home with me."*

50. MW held a welcome back discussion with the claimant on the claimants first day back at work – 26 February 2018. A note of this discussion is at page 232-3. In this discussion the claimant was told that she needed to call the absence line to report an absence (see findings on this below). The claimant was also told that she had by then had 4 days of absence due to sickness which was a trigger point for considering a written warning (see reference at para 36 above). She was told that she could have an allowance of an additional 2 days over the following 2 weeks as a reasonable adjustment. This related to the medication that the claimant was taking. MW understood that the medication may take 4 weeks or so to be effective. As at the 26 February, there were 2 weeks left of this initial 4 week period.

51. Also on 26 February 2018, the claimant (with MW) completed a document called a stress management plan. The claimant focused on the stress she says she felt from a forthcoming home move rather than anything work related.

52. We find that, as at 26 February 2018:-

    a. Claimant was continuing to be affected by the mental impairment identified by the OH report.

    b. On almost all days, she had been able to attend work but was absent from 21-23 February 2018.

    c. She had commenced medication and we accept that she was told that this would take some time to be effective and there would be a period of some adjustment. The claimant provided evidence of this which was not challenged. Notes of meetings also indicate the respondent accepts this was the position (see for example reference to a period of adjustment of 4 weeks to 2 months at page 255). We find a period of adjustment to new medication would be required, that it was unclear exactly how long the adjustment would take but that it should be around 4 weeks to 2 months. We find that MW considered a period of adjustment limited to 4 weeks only.

    d. The claimant had behaved as the OH report had anticipated - as noted above and repeated below. *Based on my assessment in my opinion Ms Chester is close to not being fit for work due to her mental health symptoms. However, although she struggles to get to work once she is there she feels better. I recommend if you can accommodate it and whilst she can manage it she stays in work on modified work. Miss Chester's mental health symptoms will mean she will struggle with work at time I recommend she work at her own pace and is given extra time to check work."*

    e. Allowances had been made on 2 occasions in relation to the claimant's flexi time record.

<u>27 February to 12 April 2018</u>

53. The claimant was not satisfied with the stress management plan completed with MW and asked that she be allowed to look at completing this with an independent manager rather than with MW. The respondent agreed to this and a second assessment was undertaken, this time with another manager called Christine Horrocks. The second assessment form is dated 1 March 2018 and the assessment form is at pages 244 to 252.

54. Under the heading "Demands" the claimant records 2 main concerns.

    "I struggle with taking breaks as often I need space and to clear my head and the usual breaks don't quite fill this need." And:

    "*My flexi is causing me some concern as I was dipping into it to get*

extra time I needed in the mornings to be able to work around my mental health. This no longer feels like an option."

55. A potential solution to the first of these concerns (considered by the claimant) was "we *have agreed an extra few minutes a day as a reasonable adjustment and having a wander to make a brew/take a few minutes breather every now and again. I'm unsure if this is helping as it depends how my mood is."*

56. Under the heading of "potential solution" to the second concern, the claimant records "*Unsure of solution".*

57. Other concerns are raised in this document but it is particularly the timekeeping issue that are relevant to the issues in these proceedings.

58. A series of internal emails, then commented on the claimant's timekeeping. These emails included input from a more senior manager, Ann Mountcastle.

59. On 28 March 2018, the claimant was informed that her attendance was unsatisfactory and so her probationary period was going to be extended by 4 weeks to enable her to improve her attendance/flexi time record. The maximum by which flexi time could be in deficit was 22.12 hours and the claimants record was shown to be in excess of this.

60. The claimant was unhappy about being told that her record was unsatisfactory and so her probationary period had been extended rather than ending successfully. We note here that there still appeared to be no issue with the quality of the claimant's work. On 28 March 2018, MW sent an internal email to a senior manager, Andy Gerrard which included the following comment "*her quality of work has not been any issue, its just her time management"* and Andy Gerrard's response "*you can reaffirm that the quality of her work is not the issue (so in effect objectives etc are irrelevant to the issue)"*

61. The Tribunal has not been provided with records of the claimant's attendance times (other than for a period 29 May 2018 to 20 June 2018 at page 341). As far as the period February to 26 April is concerned, we have formed a view and made findings based on the evidence provided and the references to timekeeping in documents provided. The claimant has given evidence that her start times were improving. These are our findings in relation to the claimant's timekeeping up to 12 April.

    a. There was not an issue with the claimant's finish time. She worked until 18.30pm on a consistent basis. The issue concerned her start times.

    b. In early February, the claimant was not getting in to work before midday (reference for example at 224)

    c. By mid February, she was still coming in after 12 noon on some days but earlier on other days. As at 14 February 2018, claimant

was around 18 hours in debit on flexi time (reference at page 228).

d. As at 5 March the respondent (Christine Horrocks) agreed that the claimant should aim to attend work at 11.30am for a week, then 11am for a week from 12 March and then 10.30am from 19 March and 10am from 26 March. This is referred to in meeting notes at page 255. In that same meeting, it was also noted that the claimant's mood was low and her new medication can take 4 weeks to 2 months to take effect (the meeting took place about 4 weeks after new medication had begun).

e. At a meeting on 6 April, there was a discussion about start times. MW thought the claimant had started later than the flexi record showed. According to MW the claimant's start times were 10.40, 10.40, 10.55 and 10.55 (rather than 10.30,10,30,10.45, 10.45 that claimant had recorded).

f. No flexi credit had been provided for doctor appointments, including the urgent doctor appointment on 8 February 2018 that was strongly recommended by the OH report. On 9 April 2018, some adjustment was made for the 8 February absence (but not for the whole day that the claimant claimed to have taken up with waiting to see her GP) as well as an adjustment for another doctor appointment.

g. Once these adjustments had been made, as at 9 April the flexi debit was 19 hours 24 minutes (noted by MW at the bottom of page 272) At that stage therefore it was under the 22.12 debit that the claimant was told was required (see notes of meeting of 6 April 2018, half way down 232. MWs notes include *"I told Kelly she has to have her flexi debit under 22.12 by the end of the 4 week period which is in 2 weeks."* 3 days after this meeting, the debit hours were under 22.12.

h. As at 9 February 2018 therefore the flexi deficit appears to have increased from around 18 hours at the beginning of February 2018 to 19.24 hours on 9 April. The claimant was still arriving after 10.30am but her start times had improved and were getting earlier.

<u>13- 26 April 2018</u>

62. MW met with the claimant on 13 April 2018. There are 2 versions of notes of this meeting, one from the respondent (page 278) and one from the claimant (279). From the evidence we have heard we do not prefer one version over the other. There are consistencies between the 2 notes and where a point is covered in one version but not the other we do not find that is fabricated but rather that it is a point raised at the meeting but captured in one version of events only.

63. It is clear that the issue of the claimant's start times were raised. We find

that there was a recognition that improvement was being seen but that the start time of 10.30am was not being met.

64. As we have noted above, we have not been provided with anything like a full picture of the claimants start times and flexi records and have made findings from the information we have been given. Our findings are above. As at 9 April, the flexi deficit was 19.24. No reference was being made to an excessive flexi deficit (in excess of 22.10) on 13 April) or for that matter at the meeting of 26 April referred to below). From the evidence we had we find that the position continued to improve in relation to flexi deficit and start times.

65. At the meeting the claimant also noted that the pressure of increased monitoring was having an adverse effect on her, worsening her mental impairment.

66. Following the meeting, the respondent wrote to the claimant to tell her that she may be issued with a written warning because she had failed to adhere to agreed start times.

67. The claimant raised the issue of the WAP report of February 2018, which had noted aiming for 11am start, noting that the purpose of that report was to assist in alleviating stress (report at page 226).

68. A meeting then took place on 26 April 2018. Notes of the meeting are at pages 285 to 287. The meeting resulted in the claimant receiving a warning. She was provided with a warning because she had not "*adhered to the agreed fixed start times".* A written warning was prepared although not provided to the claimant until following her return to work at the end of May following a lengthy absence (referred to below).

69. As at the 26 April 2018 we find:-

    a. The claimant was still not attending at 10.30am – her tent pole start time.

    b. The claimant's start time was improving and she was by then close to achieving a 10.30am start time.

    c. The claimant had been provided with some flexi credits on an occasional ad hoc basis to take account of medical appointments and a couple to take account of her having arrived at work but, due to anxiety, being unable to commence work. Taking account of this, the claimant's flexi deficit remained within the permitted boundary of 22.10 hours.

    d. The claimant had had 3 day's absence from the date of the occupational health appointment of 8 February 2018.

    e. No issues had been raised about the quality of the claimant's work.

    f. The claimant had a WAP which had not been updated and which referred to aiming for an "11am" start.

g. The claimant had had more recent discussions than the one resulting in the WAP where earlier start times had been agreed.

h. The respondent accepted that the claimant struggled in attending work at 10.30 because of her disability (which is consistent with the OH report).

The claimant's absence from 30 April to 29 May 2018

70. At or around end April 2018, responsibility for managing the claimant moved from MW to Phil Carter (PC).

71. The claimant did not attend work on 30 April or make any contact to say she would not be in work. MW was unable to make contact with the claimant and so visited the claimant's home. PC accompanied her. The claimant was not at home. In fact, she was at hospital receiving urgent treatment.

72. Following this joint home visit, the management of the claimant's absence passed to PC. The claimant had become very ill and on 30 April 2018 she had attended hospital, and had been placed under the care of a mental health crisis team and was in hospital for a period of time.

73. It is clear during this one month absence that the claimant did not update the respondent about her absence, in ways which complied with the respondent's procedures/expectations. Contact was however made by the claimant on 1 May and by the claimant's partner on 2 May 2018.

74. PC had a telephone discussion with a member of the mental health crisis team on 3 May 2018. PC's own note of his call with the crisis team member states as follows *"In his opinion she wouldn't be able to make the daily calls to the Absence Line in her current condition. I explained this was necessary as no medical evidence had been provided and said that a fit note should be with us tomorrow."* This comment was made and recorded at a stage when PC was aware that the claimant was under the control of a mental health crisis team and had been hospitalized.

75. PC obtained advice from the respondent's remote HR team during the time he was responsible for managing the claimant. He made contact with them on 3 May 2018. There is a reference by the HR caseworker, at the bottom of 294 "*you have advised me that you have probationer who is absent and hasn't been contacting to notify their absence as per the normal procedures and you wanted some further advice."* We note there that there was no reference by PC to the crisis team that the claimant had been referred into, no reference to the fact that the claimant had managed to contact the respondent on 1 May, the claimant's partner/husband had been in touch on 2 May 2018 and no reference to the contact with the crisis team on 3 May.

76. We also note the following in relation to PC's management during this absence:-

    a. PC's reference on a manager's template document (undated but which we find was completed early May 2018). He completed the section "*what options have you considered*" he noted the only option was "*refer to decision manager as failed probation"* We find this is a reference to moving the process on to dismiss the claimant.

    b. By 10 May 2018, PC had not received the fit note that the crisis team said they would send. There was no evidence of him chasing this. He had been told by the internal HR adviser that he could consider contacting the crisis team to chase up the fit note but he did not.

    c. On 16 May 2018 PC issued a letter (page 305) informing the claimant that there had been no contact since 1 May. Clearly there had. He had spoken with the claimant's partner on 2 May and also with the crisis team on 3 May but not referred to this. The letter informed the claimant that unless a fit note was received the absence would be treated as unauthorized absence. The letter did not acknowledge that the crisis team had said to PC that they would provide a fit note on the claimant's behalf.

    d. On 25 May 2018 PC issued a further letter (page 308) stating that he had not heard from the claimant since she was last in work on 30 April, which is simply wrong.

77. On 25 May 2018, the claimant wrote to PC and enclosed 2 fit notes covering the period of absence. This letter was hand delivered to the respondent although did not reach PC straight away.

78. We find that PC had an inflexible approach to the management of the claimant's absence, that he did not even take the steps that had been recommended (making contact with the crisis team to chase the fit note they had promised). We find, even before her return to work PC saw the claimant as a management problem that should be resolved by referring the matter to a decision maker (moving to her dismissal for failing a probationary period).

<u>The claimant's return to work and request for adjustments.</u>

79. PC carried out a welcome back discussion with the claimant on 29 May 2018.

80. The claimant wanted to discuss the formal warning she had been informed of on 26 April 2018 as well as the fact that her absences then exceeded the limits within her probationary period. She was told by PC was that it was not appropriate to do this at that meeting.

81. We find that what followed the return to work was a deterioration/breakdown in relations between PC and the claimant. The claimant contacted PC setting out a range of adjustments that she considered would assist her. PC was unwilling to engage in much consideration of these adjustments although as we have noted, our finding is that he was by that stage focussed on moving the issue on to a decision maker and dismissal. We find that the claimant's return to work had not changed his position on this.

82. On 5 June 2018 the claimant emailed PC with a range of adjustment /action requests. They are wide ranging. Some examples of the request and response provided by PC on 6 June

> "A fair and reasonable time allowance in the mornings where my flexi will not be affected (a "buffer" as it were) agreed by both of us."
>
> PC response *"your flexitime arrangements are contractual and working is them part of your probation* [we assume this is intended to read "working with them is part of your probation] *they cannot be altered or the same concession would have to be offered to all of your colleagues."*
>
> "I'd also like to ask why I haven't been offered shorter working days or a "phased" return to work? This is information I found myself and hadn't been made aware this could be an option. As you'll understand from my late arrival this morning I've struggled with my usual working hours this week and didn't realise that there was any other option than to try to meet them.
>
> PC response *"your fit notes don't mention any of this being required and the fact that you were out of contact for 4 weeks meant we didn't have the normal discussions where this might have been discussed. At the RTW you said that you were ready to work with the exception of telephony" .*
>
> "An allowance to listen to music while working on a trial basis to be reviewed should you believe this is impacting my work in any form"
>
> PC response *"the only person with a similar adjustment is for a medical condition which you don't have – the same concession would have to be offered to all your colleagues."*
>
> "A new OH referral due to the change in severity of my health".
>
> PC first response "*I can discuss with OHS …whether this is needed"*
>
> Claimant reply – "please let me know when you will be able to do this

and if so when I am likely to hear an outcome to this."

PC second response "*Referrals take a considerable length of time to arrange and report back. What is the change in severity of your health"*

83. On this last example we note that PC queried the claimant's statement that the severity of her health had changed even though he was aware that the claimant had been hospitalized and placed under the care of a mental health crisis team. The response to this and other matters is consistent with our finding that PC's focus was on moving the process on to a decision maker and dismissal. He was not prepared to consider what steps may assist the claimant. He was not prepared to obtain an up to date advice from an OH specialist.

84. We also note that PC was advised on 6 June by HR, not to reply to questions raised by the claimant (which we understand to be further, follow on questions raised by her). This is noted in the respondent's timeline document at page 215 *"follow up email from Kelly with further questions- will reply. 6/6/18 instructed not to by HRBP."*

Meetings on 15 June 2018.

85. PC held 2 meetings with the claimant on 15 June 2018. The first of these was in connection with the claimant's timekeeping and the second was in connection with the claimant's absence.

86. The meetings preceded PC's referral to a decision maker. The claimant was represented by Carl Ewin, a union representative, at both meetings.

87. At the meetings:-

    a. It was noted that the claimant had a change in medication following her long absence in May and it was hoped that this would bring improvement

    b. It was suggested (page 329) that where there was an issue with the claimants flexi deficit then consideration could be given to reducing this by utilizing holidays (we note this is provided for in the flexible working hours agreement (see paragraph 40 above).

    c. A reduction in working hours (which we find to be a proposal for part time working hours) was suggested (bottom of 330)

    d. PC noted that the probationary period had already been extended twice and if it would be extended a third time it would be "extremely special circumstances and that it would be the final extension after seeking advice from appropriate sources." We find that this comment effectively meant that there was almost no chance of a further extension being provided and that the claimant's dismissal was by then almost inevitable. No consideration was given to the suggestions made by Carl Ewin.

The claimant's dismissal

88. The decision to refer the claimant to a decision maker was made by PC, at meetings on 15 June 2018.

89. The decision maker was Colin Billingsby ("CB"), an Operational Lead with the respondent and one of its Senior Executive Officers ("SEO"). CB wrote to the claimant on 25 June 2018, inviting her to a formal interview to discuss performance attendance and conduct, noting that the interview may result in the claimant's dismissal.

90. The meeting/interview took place on 6 July 2018. The meeting notes are at 362-364. They confirm that the meeting was a review of the whole of the probationary period. CB told us that he had a pack of papers relating to the claimants employment from commencement and throughout her employment. CB also had available a decision maker's checklist which he completed as part of his decision making (367-371). The checklist is one for dismissal for attendance related reasons. We note the following from the checklist:-

   a. No comments were made against the checklist question about information on reasonable adjustments requested. (368)

   b. At page 369 the written warning was noted and also noted that "*management have already put in place an extensive range of appropriate reasonable adjustments. These were agreed by MOS in order to support a return to and remain in work. Probation has been extended on 2 separate occasions in order for MOS to have further time to demonstrate the expected standards of attendance. Despite this support attendance, performance and behaviours did not improve. All matters were discussed with MOS 15/06/18. Continually absent since 18/06/18 and failed to cooperate with certain procedures"*

   c. The adjustments referred to were not identified in the checklist. We find that this was a reference to changes to the claimant's start time that were raised in February and March 2018.

   d. CB commented - "*30/4/18 written warning failed to meet the standards expected."* (369)

   e. The checklist specifically asks if occupational health advice has been sought in the previous 3 months. CB noted that it had not. CB noted that occupational health advice had been obtained earlier and that OH recommendations had been incorporated in a workplace adjustment passport.

   f. The checklist asks if there have been periods of Part time medical grounds (PTMG) and CB responded that there was substantial evidence of this. We find that a return to work on PTMG had been

refused by PC and that this was a misunderstanding by CB.

91. CB decides to dismiss the claimant. The letter of dismissal is dated 13 July 2018 and is at pages 374-6. The reasons for dismissal are recorded as follows:-

> *"it is my view that management have already put in place a range of appropriate reasonable adjustments that were agreed with you in order to support your return to and remain in work.*
>
> *In addition your probation has been extended on 2 separate occasions in order for you to have further time to demonstrate the expected standards of attendance. Despite this support your attendance improvement and behaviours did not improve so these matters were discussed with you on 15 June 2018.*
>
> *You have also been continually absent since 18/06/18 and failed to cooperate with certain procedures. It is my view that reasonable procedures have nto worked and there is no evidence that suggests to me that any further reasonable adjustments could be implemented to support your return to work."*

The appeal.

92. We heard evidence from Gillian Thomas ("GT") senior operations manager with the respondent.

93. GTs recollection of the appeal hearing was not always good; something she accepted when providing evidence before us. Our relevant findings of fact in relation to the appeal are as follows:-

    a. GT had the same papers as CB. The appeal therefore considered the whole of the claimant's probationary period.

    b. The issue of part time hours was raised by the claimant and her representative, including a return to work on part time medical grounds and a later start date.

    c. The issue of additional breaks during the working day was also raised.

    d. GT received HR advice that a return to work on part time medical grounds basis was not appropriate as the claimant had not had enough time off work due to sickness. No flexibility was considered.

    e. The appeal was not successful.

The impact of the claimant's disability.

94. We set out our findings of fact

    a. We accept the terms of the occupational health report.

b. We find that the impact of the claimant's mental impairment would have continued for some time following the report.

c. We find that it was the claimants disability that caused problems with her attending work at the intended start dates. The respondent has not sought to challenge this. Some reference has been made that the claimant may sometimes be chaotic but no case has been made that her late attendance was due to factors other than her disability.

d. We accept that the claimant's disability was the cause of the absences from work.

F. The Law.

95. The claimant's claims are all made under the Equality Act 2010 (EqA), relying on the protected characteristic of disability.

96. Legislation and commentary relating to the claims brought is set out below.

s.15 EqA Discrimination arising from disability

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

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

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

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

Subsection 2 above does not apply to this case. The respondent accepts it knew that the claimant had the disability.

.

97. In Secretary of State for Justice and anor v Dunn EAT 0234/16 the Employment Appeal Tribunal ("EAT") noted 4 findings to be made, for the claimant to succeed in a section 15 claim:-

a. there must be *unfavourable treatment*
b. there must be *something* that arises in consequence of the claimant's disability
c. the unfavourable treatment must be *because of* (i.e. caused by) the something that arises in consequence of the disability, and
d. the alleged discriminator cannot show that the unfavourable treatment is *a proportionate means of achieving a legitimate aim*.

98. In Paisner v.NHS England (UKEAT/0137/15/LA) the EAT provided guidance to Employment Tribunals when considering these claims which we summarise below.

    a. The tribunal should decide what caused the treatment complained of – or what the reason for that treatment was.
    b. There may be more than one cause. The “something” might not be the sole or main cause but it must have a significant impact.
    c. Motives are irrelevant
    d. The tribunal should decide whether the/a cause is “something arising in consequence of” the claimants disability. There could be a range of causal links under the expression *“something arising in consequence of…”*

s19 EqA. Indirect discrimination

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

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

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

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

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

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

Objective Justification defence.

99. The “objective justification” defence (showing an act or omission is a proportionate means of achieving a legitimate aim) is relevant to claims brought under s15 and 19 above.

100. Mr Lewis referred to a number of authorities in relation to this defence:-

    a. Cadman v. HSE (2004) IRLR 971. This case considered the material factor defence in an equal pay claim. Mr Lewis referred to this (identifying paragraph 31 of the judgment specifically) to note that where we are considering whether a step is necessary in order to achieve a legitimate aim, we should consider whether the step is reasonably necessary, not absolutely essential. The Court of Appeal in Cadman noted *“the difference between necessary*

and reasonably necessary is a significant one"

b. O Brian v. MOJ 2013 IRLR 323. and Homer v. Chief Constable of West Yorkshire 2012 IRLR 601 were also referred to in relation to the same point

c. Air Products v. Cockram 2018 IRLR 755. This age discrimination case also considered the objective justification defence. Mr Lewis referred to paragraph 14 of this judgment to support his argument that it is not necessary for the respondent to have identified the legitimate aim of adopting the measure in question. On this point, we note the following quote (set out in the Air Products judgment) from the judgment in Seldon v. Clarkson Wright and Jakes 2012 IRLR 590

> "*There is in fact no hint in the Luxembourg cases that the objective pursued has to be that which was in the minds of those who adopted the measure in the first place…….It was for the national court to "seek out the reason for maintaining the measure in question and thus to identify the objective which it pursues" So it would seem that, while it has to be the actual objective this may be an ex post facto realization."*

s26 EQA Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(26(2) and (3) not relevant.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

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

101. Mr Lewis also referred to a number of authorities in relation to harassment claims under s26.

102. In Grant v. HM Land Registry 2011 IRLR748, the Court of Appeal noted that it was not every unwanted act or comment based on a

protected characteristic that would give rise to a valid claim under s26. The judgment(at paragraph 47) includes the following comment on the wording of s26 *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."*

103. In GMB v. Henderson (2017) IRLR 340, the Court of appeal noted that the element of purpose under s26(1) (b) and whether the conduct complained of is related to a protected characteristic would require *"a consideration of the mental processes of the potential harasser*" (at paragraph 7 of the judgment).

Reasonable adjustments.

104. The claimant raises claims under s20(3) EqA. This imposes a duty on an employer *"where a provision criterion or practice of [the employer] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

105. Mr Lewis referred us to a number of authorities, including:-

a. Callaghan v. Glasgow City Council 2001 IRLR 724 – no duty on the employers to provide part time working as a reasonable adjustment, where the employee had not requested it.

b. Tarbuck v. Sainsbury Supermarkets Limited 2006 IRLR 664 – a failure to consult about possible reasonable adjustments, was not in itself a breach of s20 EqA.

106. We note that, in order for the duty to make reasonable adjustments to apply, a claimant needs to show that s/he has been put to a substantial disadvantage in relation to a relevant mater in comparison to persons who are not disabled.

Time Limits

107. All claims are brought under the EqA.

108. Section 123 EqA provides that complaints may not be brought after the end of 3 months "*starting with the date of the act to which the complaint relates"* (s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

109. In the case of a complaint about dismissal, the act complained of is the expiry of notice, rather than the giving of notice (Lupetti v. Wrens Old House 1984 ICR 348).

110. Section123(3)(a) notes that conduct extending over a period of time is to be treated as done at the end of the period.

111. Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within *"such other period as the employment tribunal thinks just and equitable."*

112. Mr Lewis has referred to the case of Robertson v. Bexley Community Centre 2003 IRLR 434 noting the following passages from this Court of Appeal judgment:-

"if the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so." (para 23)
"…the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule." (para 25 of the judgment)

113. The EqA itself does not set out what Tribunals should take in to account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. We note the following:-

a. British Coal v. Keeble EAT 496/96 in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980 . These are listed below:-

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information.
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

b. Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283, EAT.This case noted that the issue of the balance of prejudice and

the potential merits of the reasonable adjustments claim were relevant considerations to whether to grant an extension of time.

c. The claimant has asked us to consider all of the complaints as a continuing act of discrimination ending on the dismissal date. We have considered this test by asking whether there was "a continuing discriminatory state of affairs" - words used in the judgment of Hendricks v. Police Commissioner 2002 EWCA 1686 (paragraph 49) and the wording at s123 (3)(a) EqA noted above.

G. Analysis and findings.

114. In this section, we deal first with the time limit point considering whether claims are out of time and if so which claims and whether they should proceed. Then we address the complaints and issues as agreed.

Time Limits

115. We have considered the terms of s123 EqA and the guidance from the authorities noted above. Our decision is as follows:-

a. The allegations made by the claimant are of conduct extending over a continuing period by employees of the respondent. Central to the allegations is the respondent's management of the claimant and application of its policies in the months prior to and leading up to dismissal. The dismissal officer, CB, was provided with all of the documentation relating to the management of the claimant throughout her employment. One of his roles at the dismissal stage was to review all of that documentation to ensure that the decision to dismiss was appropriate.
b. The conduct is the ongoing conduct of managing the claimant from the time that the respondent became aware of her disability – 8 February 2018 upto and including her dismissal and appeal. We find the claimant's claims are in time applying s123(3)(a) EqA noted above.
c. In the alternative, we find it would be just and equitable to allow an extension in order to enable the claimant to bring her claims, having regard to the checklist provided by s33 of the Limitation Act 1980 (noted above):-
    i. We are satisfied that the delay is in part at least explained by the claimant's disability and including periods of absence between end April and her dismissal
    ii. The evidence in the case has not been adversely affected by delay. Many meetings are documented and all correspondence has been retained. The party whose evidence is the least clear in places is the claimants and this is the impact of the claimant's disability and/or medication rather than the delay itself
    iii. We are not aware of any lack of cooperation on the part of

the claimant in providing information.

iv. The claimant acted promptly enough to ensure that her claim relating to her dismissal was brought on time.

v. We do not know whether the claimant took professional advice. We are aware that the claimant was represented in internal hearings by a union representative but are not aware of whether the claimant requested advice from the relevant union about employment tribunal proceedings and if so whether it was given.

Allegations of harassment – section 26 Equality 2010 and/or allegations of unfavourable treatment arising from disability pursuant to section 15 Equality Act 2010

116. Complaint

1. *At a return to work interview, the next working day after the claimant's absence on 21-23 February 2018 the claimant's line manager, Michelle Wilson, asked inappropriate questions about the claimant's illness and employment. These were:*

(i) Are you sure you are suitable for this type of work?

(ii) Did you disclose your disability at the start of employment?

The claimant relies upon these comments as allegations of harassment related to disability pursuant to section 26 Equality Act 2010.

117. Finding

a. The Claimant by her own admission does not have a clear recollection of this meeting.

b. MW denies making the comments.

c. We considered the evidence of MW presented to us in written form, through her witness statements and meeting notes and we have also heard from her. Our finding is that she was attempting to provide some assistance to the claimant and to address the issue appropriately. We also note:
   i. The meeting record was signed by the claimant (without any reference or indication of any such comments being made)
   ii. The view of MW at this time was that the claimant was performing well in her role.

d. We do not find that the specific comments alleged were made.

118. Complaint

2. *On 29 March 2018 the claimant's probation was extended for four weeks. The claimant relies on this extension of her probation as unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010. The "something" is the claimant's poor timekeeping. It is the claimant's case that poor timekeeping arose in consequence of her disability of anxiety and depression.*

119. Finding

a. The probationary period was extended and that was something which arose in consequence of the claimant's disability. We do not find that the extension was unfavourable treatment. The purpose of the extension was to provide further time for the claimant to comply with the respondent's requirement for he claimant to meet her tent pole start time. The extension could have been longer but in any event, further extensions could have been agreed within this period. This first extension at the end of March, did not amount to unfavourable treatment contrary to s15 EqA.

120. Complaint.

We considered the next 2 allegations together.

3. *In a few meetings held in April 2018 with Michelle Wilson the claimant raised issues about her health, stress levels and attendance. In particular the claimant explained the reason for her lateness, namely that some days she had to pluck up courage to come into work when she was standing outside the building. She also explained that the extension of the probationary period and the monitoring of her was causing extra stress. The claimant complains that Michelle Wilson failed to acknowledge her concerns in any meaningful way. The claimant states that Michelle Wilson, when the claimant explained she found it difficult to attend on a Friday because illness meant she became tired during the week, stated, "we all struggled on Fridays" and laughed. The claimant states that Michelle Wilson's failure to acknowledge her concerns in any meaningful way and the comment "we all struggle on Fridays" followed by laughter amounts to unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010, or unwanted conduct pursuant to section 26 Equality Act 2010.*

4. *The claimant states that whenever she exercised her right to flexible working she was asked to discuss her lateness with Michelle Wilson, who treated her as though she had misbehaved. The claimant states Michelle Wilson used a condescending tone when discussing lateness with her. The claimant relies on these facts as unfavourable treatment because of something arising in*

consequence of disability pursuant to section 15 Equality Act 2010 or unwanted conduct pursuant to section 26 Equality Act 2010.

121. Finding

a. We find that MW did not treat the claimant as though she had misbehaved. We find that she was not condescending.

b. We find that the comment "we all struggle on Fridays" (or something similar) was made within a general discussion amongst workplace colleagues. We regard the comment as a "TGI Friday" type of comment, generally made amongst colleagues about working on to the end of a hard working week, rather than anything directed at the claimant.

c. We do not find that the comment had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for the claimant, taking in to account the factors set out in 26(4)EqA.

d. Nor do we find the comment amounted to unfavourable treatment because of something arising in consequence of the claimant's disability.

e. It is clear to us that MW did genuinely attempt to manage the claimant appropriately whilst also looking to comply with the respondent's processes and procedures. We do not find that either of the complaints noted above amounts to a breach of either s15 or 26 EqA.

122. Complaint

5. *The claimant was issued with an invitation to a disciplinary meeting. The claimant relies on this as unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 or unwanted conduct pursuant to section 26 Equality Act 2010. Note it was clarified on day one of the final hearing that this was a reference to the invitation letter at page 281.*

123. Finding

a. We find that issuing the invitation to the disciplinary meeting did not amount to harassment under s26 EqA.
b. As for the complaint made under s15:-
    i. The invitation letter was unfavourable treatment
    ii. The issue of the claimants absence/timekeeping was something arising in consequence of the claimant's disability.
    iii. The unfavourable treatment (the invitation letter) was caused

by/because of the issue of the claimant's absence/timekeeping.

c. It was necessary therefore to consider (under s15(1)(b) EqA) whether the respondent could show that the treatment was a proportionate means of achieving a legitimate aim. We set out our decision in relation to the identified legitimate aims below, under allegation 9.

124. Complaint

6. *On 26 April 2018 Christine Horrocks, when the claimant said she felt discriminated against in the probationary period, asked the claimant if she wanted the allegations written down, in a tone of voice that suggested it was a silly suggestion. The claimant relies on this fact as an allegation of unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 or unwanted conduct pursuant to section 26 Equality Act 2010.*

125. Finding

a. We accept CH's evidence that she attended the meeting on 26 April as a notetaker and she took notes of the meeting. She may in the course of the meeting have asked for clarification or repetition of points. We do not find that CH expressed opinions about the strengths or weaknesses of points made in the meeting or used a tone of voice that suggested something said by the claimant was a silly suggestion.

b. We do not find that CH's conduct at this meeting amounted to unfavourable treatment contrary to s15 EqA or unwanted conduct contrary to s26 EqA.

126. Complaint

7. *On her return to work after 29 May 2018 the claimant emailed Phil Carter in or around June 2018 making suggestions of reasonable adjustments. He informed her she could not have the adjustments. The claimant considers the refusal amounts to unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 or unwanted conduct pursuant to section 26 Equality Act 2010.*

127. Finding

a. We have noted in our findings that we are critical of PC including in his responses to the claimant's requests for adjustments.

b. In this complaint the claimant does not complain about a failure to

make any of the proposed adjustments; it is generally the behaviour of PC to refuse to engage further in correspondence or meetings with the adjustments that she is complaining about.

c. We note that on 6 August 2018, PC had been informed by HR not to engage further (reference at page 215) of 6 August.

d. We also note the stated intention to discuss at the meeting(s) of 15 June 2018.

e. We do not find that these acts in themselves amounted either to harassment under s26 EqA.

f. As for the claim of unfavourable treatment under s15 EqA; we have considered this together with (and as part of) the allegation concerning the claimant's dismissal.

128. Complaint

8. *The claimant escalated her concerns to Senior Executive Officer, Gary Lindley, and Higher Executive Officer, Anne Mountcastle, by including them in the email she sent to Phil Carter. The failure of Mr Lindley and Ms Mountcastle to act on the claimant's correspondence sent in or around June 2018 is an allegation of unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 or unwanted conduct pursuant to section 26 Equality Act 2010.*

129. Finding

a. We find that these managers were copied in to the correspondence at this stage and it was reasonable for them not to act unless they were specifically asked by less senior staff to become involved. Their inaction at this stage did not amount to harassment. It was not something done in consequence of the claimant's disability either. The inactivity was because those managers dealing directly with the issue at the time did not ask for their involvement.

130. *Complaint*

9. *The claimant was dismissed on 13 July 2018. She considers her dismissal was an act of unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010. The "something" was the failure of the claimant to meet the required standard and pass the probationary period. It is the claimant's case that this failure was due to her anxiety and depression.*

131. Finding

a. We find that the claimant's dismissal was unfavourable treatment, that the issue of the claimant's timekeeping/absence was something that arose in consequence of the claimant's disability, the dismissal was because of/caused by the issue of the claimant's timekeeping/absence.

b. The reason for the claimant's dismissal was the failure to meet the required standards and pass the probationary period, particularly the claimant's absence and her failures to meet fixed start times for which she was provided with a formal warning.

c. The decision to dismiss was made by CB, having regard to account the formal warning issued on 30 April 2018 and the claimant's absences. He considered that all appropriate reasonable adjustments had been made.

d. The respondent identified a legitimate aim at paragraph 22 of its amended grounds of resistance (page 32). In his submissions Mr Lewis identified an alternative legitimate aim. Mr Lewis confirmed that these legitimate aims are relevant to allegations 2,5 and 9. We set both out below.

"All new employees must complete a probation period of six months. The Probation Policy and Probation Procedures are intended to bring attendance, conduct and performance up to the expected standard. Failure to meet the expected standards during probation would be dealt with in the same way, which is a proportionate way of achieving a legitimate aim, namely to ensure that the Respondent can continue to provide the level of service its customers require within its budget and avoiding any undue burden falling on other members of staff." (Aim 1)

The alternative aim identified by Mr Lewis at the hearing, is as follows:-

"to operate a probationary period arrangement in which new employees are required to reach reasonably expected standards including in relation to attendance and timekeeping" (Aim 2)

e. We find that Aim 2 noted above is very similar to Aim 1. We note that the wording of Aim 1 suggests no flexibility from the respondent's probation policy and procedures, particularly the wording "*Failure to meet the expected standards during probation would be dealt with in the same way*". Managing employees with disabilities does require flexibility at times.

f. We accept that Aim 2 is a legitimate aim. It is legitimate for employers to have probationary periods in place, to ensure that individuals are recruited and trained who are capable of meeting an employer's reasonable standards.

g. We find that the respondent has not shown that the dismissal was a proportionate means to achieve this legitimate aim. These are our reasons:-

    i. the formal warning of April 2018, should not have been applied. This was a disproportionate means to achieve the aim of achieving reasonable standards of attendance and timekeeping standards. As noted in our findings of fact, the claimant's attendance and timekeeping was improving and this was in line with the expectations laid down in the occupational health report. By April 2018, the claimant was also meeting the expectations of the WAP.
    ii. The management of the claimant during the absence from 30 April to 29 May had no regard to the seriousness of the claimant's medical condition and other relevant circumstances. The requirement to report absence daily was excessive and impractical; the correspondence sent to the claimant in order to address attendance and reporting of absence did not truly state the position/was inaccurate and took no account of the statement by the crisis team, that they would provide absence/fit notes. The management was disproportionate.
    iii. The management of the claimant in the weeks following her return from this absence had no regard to the seriousness of the claimant's medical condition/reason for the claimant's absence. It was entirely focussed on moving to the claimant's dismissal rather than understanding the claimant's position and steps to take to assist the claimant meet required standards of attendance and timekeeping. This was disproportionate.
    iv. The decision maker meeting on 6 July 2018 was an opportunity to correct the issues noted above, explore reasonable adjustments and arrange for an up to date occupational health advice. Unfortunately this opportunity was not taken.

h. We find that there were less discriminatory alternatives to achieve the respondent's legitimate aim. Encouragement rather than warning was a less discriminatory alternative as at 26 April 2018; constructive communication with the crisis team, the claimant and an occupational health expert in order to provide a supportive return to work would have been a less discriminatory alternative to PC's focus of moving the claimant through the internal processes to dismissal. A less discriminatory alternative would have included an extended probationary period. This would have provided the claimant with the opportunity of meeting the respondent's requirements in relation to timekeeping and attendance with appropriate management support, medical input and the reasonable adjustments noted below.

132. Complaint

10. *The claimant's appeal against dismissal was rejected. The claimant considers the rejection of her appeal was an act of unfavourable treatment because of something arising in consequence of her disability pursuant to section 15 Equality Act 2010.*

133. Finding

a. Just as the decision manager meeting was an opportunity to properly address a supported return to work for the claimant and to correct previous actions (which formed part of the continuing act leading up to dismissal) so was the appeal.
b. The rejection of the appeal was something arising in consequence of the claimant's disability. The reason for the rejection of the appeal was the same reason for the claimant's dismissal.
c. We have identified above, less discriminatory alternatives to dismissal – which are also applicable to the appeal.

Allegations of failure to make reasonable adjustments pursuant to sections 20-22 Equality Act 2010

134. Complaint

11. *The provision, criterion or practice ("PCP") is "changes in workplace at short notice in particular being moved to a new team within the building". The claimant says this put her at a substantial disadvantage in relation to a relevant matter because her disability of anxiety and depression made it difficult for her to deal with change. A reasonable adjustment to avoid the substantial disadvantage was to give the claimant reasonable notice of at least 24 hours of any move to a new team.*

135. Finding

a. We accept the respondent's evidence that the introduction of Universal credit (a very important matter for the teams in which the claimant had been based) was in a state of constant flux and subject to short term changes.

b. We accept that the change from MW to PC resulted in substantial disadvantage to the claimant. We have already made clear our criticisms of PC's management of the claimant. We find that had the claimant been managed appropriately, in a non discriminatory manner and with adjustments we note below, any short notice changes required for operational reasons would not have placed

the claimant at a substantial disadvantage.

136. Complaint

12. *The second "PCP" is "carrying out the role of case manager between 10.30am to 6.30pm with half an hour for a lunch break". The claimant states these hours put her at a substantial disadvantage in relation to a relevant matter because her anxiety and depression made it difficult to work effectively during this length of shift. The reasonable adjustments contended for were:*

(iv) A longer lunch break of one hour once per week;

(v) A short five minute break each hour;

(vi) *A small time allowance for extra curricula activities*.

137. Finding

a. We find that working the hours of 10.30am to 6.30pm with a half hour lunch break did place the claimant at a substantial disadvantage in comparison with persons who are not disabled.

b. In reaching this finding we note:-

i. The respondent accepts that the cause of the claimant's lateness on a large number of days, was her disability. The respondent has not put forward a case that there was an alternative cause.
ii. The occupational health report of February 2018, noted the impact that the claimant's mental impairment was having on her ability to get in to work in the mornings.
iii. The claimant herself noted this throughout the period February 2018 to her dismissal.
iv. The claimant also noted the benefit that additional break times provided for her. Initially this appears to have been accepted but on an ad hoc informal basis which did not continue, particularly on the change in management from MW to PC.

c. Having made this finding, we considered whether there were reasonable adjustments to overcome the disadvantage. We find the main time issue for the claimant was the start time. Following her return to work at the end May/beginning June 2018, the claimant did ask for adjustments. She asked about a part time return to work and other concessions in relation to her working hours but PC refused to consider them (see our findings of fact at para 82 and 87.c above).

d. We find that it would have been reasonable to have made

adjustments to the claimant's working hours. Part time hours could and should have been agreed which provided for a later start and a longer allowance for breaks. There may have been an impact on the claimant's salary (she may have been paid for the hours worked) but the employment would have been maintained. It may have been for a limited period of time as the claimant's condition improved following her serious adverse episode which kept her off work throughout May 2018.

138. Complaint

13. *The third "PCP" is "requiring a case manager to conduct online paperwork in an open plan office which could be noisy". The claimant states this put her at a substantial disadvantage in relation to a relevant matter because her disability made it difficult for her to concentrate. The reasonable adjustment was to allow the claimant to listen to music through earphones at work.*

139. Finding

a. Our response to this complaint is the same as to complaint 12 above. Further medical input would have provided an informed opinion as to whether the claimant's condition disadvantaged her as claimed and if so whether this reasonable adjustment would have avoided the disadvantage.
b. However. based on the evidence before the tribunal, we do not find that the adjustments raised in complaint 12, would have avoided the substantial disadvantage claimed.

140. Complaint

14. *The fourth "PCP" is "the respondent's grievance procedure required a complaint to be put in writing". The claimant states the nature of her disability made it difficult for her to put her complaint in a legible form and so she was placed at a substantial disadvantage. The reasonable adjustment was to allow the claimant to make a grievance complaint verbally in a meeting.*

141. Finding

a. There is no evidence to indicate that the claimant had/has any difficulty in putting grievances/complaints in writing. Further, the claimant did have trade union assistance through the internal processes who could have provided assistance to the claimant in putting together written complaints. We do not find that this provision put the claimant at a substantial disadvantage.

142. Complaint

15. *The fifth "PCP" is the "application of the respondent's probation policy". The claimant states it placed her at a substantial disadvantage in relation to a relevant matter because her illness made it difficult for her to attend work on time which meant she did not pass the probationary period. The reasonable adjustment was to extend the probationary period further*.

143. Finding

a. Our findings of fact include extracts from the respondent's probationary policy. It is clear to us from the policy wording itself that the policy is inflexible. The wording notes that an extension to the probationary period is exceptional and even then only up to 3 months. The wording indicates that there must be no extension beyond that 3 months.

b. The evidence of the respondent's witnesses confirmed an inflexible approach. There will be occasions when the impact of an employee's disability require adjustments to be taken which take employers outside of their usual policies and processes (in this case, the respondent's probationary process). In appropriate circumstances it may well be a reasonable adjustment to extend a probationary period and sometimes for more than 3 months or to suspend a probationary period and restart it. It was clear to the tribunal that the respondent's managers felt constrained by the terms of the respondent's procedures rather than being prepared to consider reasonable adjustments which might take matters outside of a written procedure.

c. In this instance the claimant's disability caused difficulties identified in February and then with a sudden and significant worsening in May. The occupational health evidence was that the claimant had a long term condition but that these severe episodes were temporary.

d. Had the claimant been appropriately managed in April, May and June, then no further extension may have been required at the end of an extended period of probationary leave. However and as at the date of the decision manager's meeting on 6 July 2018, it would have been a reasonable adjustment to have extended the probationary period to overcome the disadvantage that the disability had by then caused which would also have address the disproportionate approach of the respondent noted above.

Allegation of Indirect Discrimination - contrary to s19 EqA.

16. *The "PCP" is "the requirement under the respondent's sickness absence management policy for employees to report sickness absence on a telephone line which was staffed for one hour only in the morning." The claimant states this put disabled people as a group at a disadvantage because disabled people do not always know when they are going to be too unwell to attend. The claimant says she was put at that disadvantage.*

144. Finding

a. Whilst the respondent generally required unplanned absences to be reported via a telephone process in place, the respondent showed some flexibility to assist the claimant in that both MW and PC provided the claimant with their own direct contact details so that she could contact them directly in the event that she was unable to attend work.

b. Further or alternatively, putting in place a process for employees to report unplanned absences is a proportionate means of achieving a legitimate aim of planning and managing the respondent's operation effectively. In considering the issue of proportionality, we also had regard to the consequences of not complying; they were being given alternative contact methods. We do not find that the claimant's failure to report her absences under this process caused or contributed to the decision to dismiss or provide a warning. It was the timekeeping/ absence issue that led to the warning and then to the dismissal; not a failure to comply with the respondent's process of reporting lateness or absence.

c. This claim therefore fails.

Employment Judge Leach

Date: 3 April 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

7 April 2020

FOR THE TRIBUNAL OFFICE