EMPLOYMENT TRIBUNALS

Claimant: Miss V Sim

Respondent: Department for Work and Pensions

Heard at: Liverpool **On:** 10, 11, 12, 13 and 14 February 2020

Before: Employment Judge Aspinall
Mrs F Crane
Mrs J E Williams

REPRESENTATION:

Claimant: In person, supported by partner, Mr Brooks
Respondent: Miss Cummings, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is

1. The claimant's claims under section 15 Equality Act 2010 for discrimination arising from disability are not well founded and fail.

2. The claimant's claims under section 20 and 21 Equality Act 2010 for failure to make reasonable adjustments are not well founded and fail.

3. The claimant's claims under section 26 Equality Act 2010 for harassment on the ground of her protected characteristic of disability are not well founded and fail.

4. The claimant's claims under section 27 Equality Act 2010 for victimisation on the protected characteristic of her disability are not well founded and fail.

REASONS

Background

1. By a claim form presented on 12 January 2019 and having obtained an early Conciliation Certificate number R344522/18/07 on 16 November 2019 the claimant brought claims for disability discrimination against her employer. The respondent defended those claims. The matter came to a case management hearing in April 2019 before Employment Judge Horne at which the claims were clarified and the case was listed for this final hearing.

2. The claimant says she has been discriminated against because of her disability under sections 15, 26, 27 of the Equality Act 2010 and she says that during 2017 and up until 5 June 2018 the respondent failed to put in place a reasonable adjustment for her in breach of its duties under section 20 and 21 of the Equality Act 2010.

3. The claimant also included in her Claim Form a reference to "personal injury including psychiatric injury caused to me by my employer treatment of me with regards to my disability". Her claims were set out in an agreed table prepared by Employment Judge Horne following the case management hearing in April 2019.

Factual Allegations

4. This table is a complete list of the occasions of unfavourable treatment, unwanted conduct, detriment and acts inconsistent with the duty to make adjustments. In the right-hand column, "D" means discrimination arising from disability, "A" means failure to make adjustments, "H" means harassment and "V" means victimisation. Unless otherwise stated, the adjustments complaint is based on PCP1.

	Date	Alleged perpetrator	Brief description	Prohibited conduct
1.	May 2017	Mrs Collier	1:1 meeting. Comment about high level of SCRT.	D, A
2.	23/8/17	Mrs Collier	1:1 meeting. Comment about high level of SCRT.	D, A
3.	23/8/17	Mrs Collier	Requiring excessive detail at the same meeting.	D, H
4.	24/10/17	Mrs Collier	1:1 meeting. Comment about high level of SCRT.	D, A

5.	24/10/17	Mrs Collier	Requiring excessive detail at the same meeting.	D, H
6.	April-May 2018	Mrs Collier	One-off meeting, a few weeks before her end-of-year report, for the purpose of discussing the claimant's endometriosis. Comment about high level of SCRT. Requiring excessive detail.	H
7.	May 2018	Mrs Collier	End of year rating "2". Comment in the report about excessive SCRT	D, A, H
8.	15/6/18	Mrs Gardiner	On the claimant's returning from the toilet, saying to the claimant "Be mindful when going on your breaks."	D, A, H

9.	22/6/18	Mrs Collier	Grievance outcome upholds the claimant's end of year rating.	D, A
10.	16/6/18	Mrs Collier	Performance statistics in Mrs Colliers' e-mail attachment include SCRT.	A
11.	Unclear	Mrs Collier and Mrs Murphy	Statements made for the purpose of the claimant's grievance appeal refer to the claimant's "behaviours", which the claimant believes was a reference to the claimant's toilet breaks	D, A
12.	20/8/18	Mr Harrison	Grievance appeal outcome upholds the claimant's end of year rating.	D
13.	30/8/18	Mrs Murphy	Telling the claimant to say, "hello" and "goodbye", deliberately to exacerbate the claimant's stress levels, knowing that the claimant's endometriosis was stress-related.	H
14.	30/8/18	Mrs Murphy	Saying that the claimant was "fit to carry on with survey work" when it should have been obvious that the claimant was too upset.	H

15.	7/11/18	Mrs Whitely	Telling the claimant that her endometriosis was not a disability.	H
16.	7/11/18	Mrs Whitely	Telling the claimant that her e-mails to Mrs Collier could be seen as harassment.	V
17.	8/11/18	Mrs Murphy	Shortly after the claimant had begun her break: (a) Asking where the claimant had been; (b) Saying that she wanted the claimant back at her desk; and (c) Exaggerating the time that the claimant had spent away from her desk.	D, A, H, V
18.	13/11/18	Mrs Whitely	Comparing the claimant's outgoing calls to those of a colleague.	A (PCP2), H
19.	23/11/18	Mrs Murphy	At a meeting, continuing to exaggerate the time the claimant had spent away from her desk on 8/11/18.	A, V

Duty to make adjustments

5. The claimant alleges that the respondent had two provisions, criteria or practices (PCP1 and PCP2) that put her at a substantial disadvantage when compared to non-disabled persons. They were:

a. PCP1 – a requirement to keep SCRT down to a predetermined level; and

b. PCP2 – a requirement for colleagues to make the same or similar numbers of outgoing telephone calls.

The disadvantage caused by both PCP1 and PCP2 stemmed from the claimant's increased need to take toilet breaks, which necessitated time away from her desk.

6. By way of adjustment to PCP1, the claimant says the respondent should have:

a. Allowed a higher amount of SCRT;

b. Ceased to monitor the claimant's SCRT at all; and

c. Disregarded SCRT as an indicator of her performance.

The desired adjustment for PCP2 is to reduce the number of outgoing calls the claimant was expected to make and not to compare her to her colleagues.

7. A List of Issues was agreed at the outset of the final hearing.

List of Issues

8. The following List of Issues was agreed at the outset of the hearing:

Less Favourable Treatment

(1) Did the respondent treat the claimant unfavourably because of something arising in consequence of the claimant's disability claimant contends was the treatment set out in the table of allegations at 1D, 2D, 3D, 4D, 5D, 7D, 8D, 9D, 11D, 12D and 17D? In each case the claimant contends that the reason for the treatment was the claimant taking breaks to go to the toilets.

(2) Furthermore, in regards to the claimant's alleged high SCR time, was the SCR time a valid and legitimate "outcome, key work objective or behaviour", to use according to the respondents own procedures for marking her appraisal rating?

(3) What are the specific of the reasons the respondent alleges that the claimant high RSC time? Did the respondent notify the claimant what the specific other reasons work during the period May 2017 to November 2018, if so when did the respondent notify the claimant?

(4) If the respondent is found to have treated the claimant unfavourably as contended above because of the claimant having to take breaks to go to the toilet, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim, namely:

(a) In respect of the smartcard removed management focus: the orderly and proper management of the respondent staff?

(b) In respect of the discussions: of the claimant's condition, working with the claimant to ensure sufficient support in the proper management of the condition; and

(c) In respect of the appraisal rating: effective and proper administration of the respondent's appraisal process?

Reasonable Adjustments

(5) Did any provision criterion or practice (PCP) of the respondent put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who do not have her condition of endometriosis? The claimant relies on the following PCPs:

(a) PCP1 - a requirement to keep SCR time down to a predetermined level;

(b) PCP2 - a requirement for colleagues to make the same or similar numbers of outgoing telephone calls.

(6) The claimant alleges she was put at a substantial disadvantage caused by both PCP1 and PCP2 stemming from her increased need to take toilet breaks which necessitated time away from her desk.

(7) If the PCPs are found to have been applied, and if the alleged substantial disadvantage is found, did the respondent know that the claimant was likely to be at a substantial disadvantage when compared with persons who are not disabled with endometriosis?

(8) If yes, did the respondent take such steps as it was reasonable to have taken to avoid the disadvantage in accordance with section 20 of the Equality Act, namely:

(a) Was a reasonable adjustment put in place from the claimant's need for frequent toilet breaks because of her endometriosis was first known?

(b) Was there a management cooperation with the claimant's reasonable adjustment to ensure the reasonable adjustment was effective in practice?

(c) Was the claimant's reasonable adjustment breached in the period June 2018 to November 2018 to render the reasonable adjustment ineffective?

(9) In respect of PCP1 the claimant alleges that the respondent placed the claimant at a substantial disadvantage by failing to:

(a) allow a higher amount of SCR time;

(b) cease to monitor the claimant SCR time at all; and

(c) disregard SCR time as an indicator of her performance.

(10) In respect of PCP1, did the respondent take all reasonable steps to avoid any disadvantage, namely:

(a) allow a higher amount of SCR time;

(b) cease to monitor the claimant's SCR time at all; and

(c) disregard SCR time as an indicator of her performance during the allegations marked in the table of factual allegations (allegation 1A, 2A, 4A, 7A, 8A, 9A, 10A, 11A, 17A, 18A and 19A)?

(11) In respect of PCP2:

(a) Did the respondent reduce the number of outbound calls the claimant was expected to make?

(b) Did the respondent compare the claimant's number of calls taken with that of her colleagues?

Harassment

(12) Did the respondent engage in the 10 instances of unwanted conduct marked as allegations 3H, 5H, 6H, 7H, 8H, 13H, 14H, 15H, 17H and 18H in the table of allegations, and were those instances related to the claimant's disability?

(13) Did the conduct have the purpose or effect of creating a degrading environment for the claimant?

Jurisdiction

(14) Has the claimant's claim been brought within three months starting with the acts and omissions to which the claim relates subject to any extension resulting from her ACAS early conciliation?

(15) If not, do the alleged acts and omissions which the claimant refers to in her claim form constitute a continuing act of discrimination, the end of which fell within the time limit?

(16) If not, are there any grounds on which it would be just and equitable to extend time?

Victimisation

(17) Did the claimant perform two protected acts by sending emails to Jane Collier dated 6 and 7 November 2018 complaining about discrimination?

(18) If so, did the respondent subject the claimant to any of the detriments marked V in the Tribunal's list of factual allegations at allegations 16V, 17V and 19V because of those protected acts?

The Hearing

9. The hearing took place over five days in February 2020.

10. The Tribunal made the following adjustments to accommodate the claimant. Time was allowed for comfort breaks both scheduled and unscheduled. The claimant was given a break after giving her evidence and before starting to cross examine the respondent's witnesses. With their agreement the respondent's witnesses gave their evidence from the witness table further away from the claimant so that she did not have to face the people who she said had discriminated against her at such close proximity. The claimant was given time to prepare for cross examination and the timetable was adjusted, by consent, to allow her time between witnesses to prepare for their cross examination. The claimant was allowed to confer with her partner Mr Brooks who assisted with note taking, during the hearing. The claimant was given direction, with the respondent's counsel's approval, in terms that she focus on the list of issues, and check the witness' witness statement for points of contention and ensure that they were put to the witness before concluding cross examination of each witness. The claimant was given general guidance, again with the approval of the respondent's counsel, that she take a slice by slice approach to her questioning rather than putting a whole scenario to a witness. The timetable was adjusted to allow the claimant to work overnight on closing submissions.

11. The claimant said that she was struggling prior to making her closing submissions (but after having heard the respondent's submissions). She said she was tired and emotional and felt dizzy. She did not wish for the hearing to go part heard. The Tribunal adjourned to give the claimant a break and to consider how to proceed. With the respondent's consent the claimant was given options to make her submissions in writing only or to have her partner read her submissions aloud for her. The claimant chose to proceed and spoke to her written submissions herself.

12. The claimant was a well prepared and confident litigant in person. She was robust in in her response to cross examination. The claimant avoided answering questions directly. She gave irrelevant (to the question that had been asked) and repetitive and excessive detail about her condition and the impact of her condition on her.

13. Mr Bramhill, the claimant's Trade Union adviser, gave his evidence in a straightforward and helpful way. He did not expand on his evidence and accepted that his email of 13 November 2018 had been written in collaboration with the claimant and that his view of the case was informed by what the claimant had told him. He was frank in giving answers that might not always assist the claimant's case, for example in relation to the claimant not having brought some of her claims in time, he told us he had advised the claimant about the potential for ET proceedings at the relevant time as he would anyone he was supporting and that conversation would have included advice about strict time limits for claims as he had been up against a deadline in the past.

14. Mr Turner, the claimant's Trade Union adviser, also gave his evidence in a straightforward and helpful way. He remained focused on matters of which he had personal knowledge and was not reluctant to tell us what had happened even where it did not accord with the claimant's version of events, for example in relation to it being

the claimant and not Mrs Murphy who had decided that the claimant would remain at work after the meeting on 30 August 2018.

15. Jane Collier, the claimant's line manager who gave her the rating 2, was reserved in the way she gave her evidence. For example, when she was cross examined by the claimant about why they hadn't met to discuss the performance rating she didn't tell us that there had been a one hour meeting. It was only in re-examination that it came to light that she had met with the claimant for an hour to discuss the year end report and the evidence for the rating. The lack of meeting the claimant was referring to was the claimant's own suggestion that there should have been a further meeting on sign off of the report.

16. The claimant cross examined Mrs Collier with the suggestion that she should not have heard the grievance, even though this suggestion was not made at the time. Mrs Collier was taken to documents and asked to admit she had failed to follow procedures. It was also only on examination of the documents that the Tribunal saw that Mrs Collier was the appropriate person to deal with the grievance against a rating. It was a reconsideration of a decision and the appropriate procedure was in the bundle of documents. Mrs Collier did not make these points for herself.

17. Similarly, Mrs Collier did not take us to the emails which the claimant had sent her after the grievance appeal outcome in which the claimant tells Mrs Collier that she will involve the local MP. Mrs Collier underplayed the impact of managing the claimant. She did not tell us she had a stress management plan in place. It was her colleagues who told us. Mrs Murphy told us she had been concerned about Mrs Collier and how the claimant had been "peck, peck, pecking at her". Mrs Collier did not seek to blame the claimant for her decision to move out of the management role though having to manage the claimant was the most significant factor in her decision to move, and she fairly apportioned the factors that had influenced her move.

18. Mrs Collier readily accepted that she could have done more to document the local arrangement that was in place regarding the claimant's unfettered right to take toilet breaks and the approach she took to the SCR data for the claimant. She regretted not having documented that the claimant's SCR time discussions were about chatting and making drinks. She accepted she had not told the claimant that her SCR time wouldn't even be looked at under 40 – 50 minutes. She didn't document more as it wasn't an issue at the time.

19. We found Mrs Collier to be a wholly reliable witness who, in the face of damaging and unpleasant allegations (that she was excessively questioning the claimant for titillation) (that she was a bad manager) (that she had marked the claimant down because of toilet breaks) remained courteous and measured and fair. She was consistent in her position throughout that the claimant's use of smart card removed time had not been a factor in her rating. She was consistent and credible throughout that the claimant used SCR time for more than just toilet breaks and that this had been raised, albeit not documented as explicitly as, with hindsight, she wished it had been.

20. Dave Harrison, the grievance appeal manager, gave his evidence in a straightforward and helpful way. He was an experienced manager and he gave us the context in which he had heard appeals against performance ratings.

21. Janet Gardiner, a team leader, spoke about the impact of managing the claimant on Mrs Collier and the team. She was a forthright and direct witness. She disputed the date on which it was alleged she had asked the team to be mindful not to go on their breaks at the same time and she readily admitted that she had asked them that, and gave us the context for it. She corroborated Mrs Collier's evidence that Mrs Collier had sent an email informing the team leaders about reasonable adjustments that were put in place.

22. Denise Murphy, Mrs Collier's line manager, was a reliable witness on the issue of the meeting on the stairs on 8 November 2018. Her account of what had motivated her was accepted by the Tribunal. It was corroborated by an email she had sent to Mr Bramhill at the time. She gave her account in an open and honest way, wanting to share her thinking. She readily admitted that she had been wrong to think the claimant had been away from her desk for a long period that day and she stated categorically and with apology to the claimant, that the data persuaded her she had been wrong. We were persuaded as to her sincerity as she had called a meeting to apologise at the time.

23. Mrs Murphy admitted that she had been exasperated at the claimant when the claimant had waited until a handover meeting to a new manager on 30 August 2018 to tell Mrs Murphy that she did not want that new manager. She was exasperated at the claimant at the end of the apology meeting on 23 November 2018. She was ready to admit her own emotional and professional responses to things.

24. Teresa Whiteley, a team leader who became the claimant's line manager when Mrs Collier stood down, gave her evidence in a straightforward and helpful way. We were persuaded by her evidence when she said she was careful around the claimant because she knew her to be volatile; that she had not said that endometriosis was a disability or that the claimant's emails to Mrs Collier could be seen as harassment.

Documents

25. There was an agreed bundle of documents of 483 pages. Some further documents were admitted into the bundle by consent during the course of the hearing. They were the Occupational Health referral forms and the HR Manager's decision making guide.

26. The claimant produced two witness statements each of which had exhibits and those were labelled and agreed.

27. The respondent witnesses each produced a witness statement. The claimant alleged that the way in which the respondent had served its witness statements showed dishonesty. Firstly, she alleged that the statements that arrived on the agreed date of exchange were not signed. The Tribunal explained that this is often the case in practice and that the statements will be signed as the witnesses are sworn in if they

are not already and will stand as the evidence in chief of the witness. Secondly, the claimant said that Denise Murphy's statement had been changed in response to her own statement having been disclosed and that paragraph 36 of Denise Murphy's statement had been added after exchange of witness statements. The respondent accepted that Denise Murphy's statement had an additional paragraph 36 which had been added but that the claimant had had that version of the statement since 3 September 2019 and had not previously raised the issue. The Tribunal conferred on this point and proposed that the paragraph 36 issue would be noted and it would be a matter for the Tribunal as to how much weight to attach to it should there be a clash of evidence in the content of paragraph 36. The respondent and claimant agreed to proceed in this way.

28. The Tribunal saw a short video clip of the claimant promoting the respondent's Employee Assistance Programme.

29. The claimant objected to the inclusion in the bundle of page 82 which was a report that alluded to events not relevant to this claim that took place in 2012. Those events showed that the claimant had been a vulnerable person. The respondent had no objection to its removal. Page 82 was removed from all bundles. The claimant, having argued as to its irrelevance and having had it removed by consent, referred to its subject matter on numerous occasions during the hearing. We have not referred to the content of Page 82 in these reasons save to say that it was agreed that Mrs Murphy, on 8 November 2018, reasonably thought the claimant to be vulnerable and was right to be concerned for her welfare.

30. Mrs Collier, the claimant's line manager was, at the time of the events referred to, known as Jane Clark.

Facts

31. The claimant has worked at the DWP for 14 years as an administrative officer. She worked on the Child Maintenance Group National Helpline. She has endometriosis.

32. In 2016 Jane Collier became her team leader. The claimant told Mrs Collier that she had endometriosis and needed more toilet breaks than others. Mrs Collier agreed that the claimant could take whatever toilet breaks she needed as could any member of staff.

33. Mrs Collier was supervised by Denise Murphy. The team leaders relevant to the claimant's claims were Teresa Whiteley and Janet Gardiner. From June 2017 claimant's place of work was Great Western House Birkenhead.

34. The claimant had, some years before she came to work for the respondent, undertaken a law qualification which included employment law. During 2017 and 2018 she was an Inclusion, Diversity and Equality Officer for the respondent.

35. In Great Western House the helpline was based on the second floor and later moved to a wing on the ground floor. The claimant worked in a large open plan office.

36. The respondent used a computer system to monitor the use of time by its staff. The staff had a "smart card" which logged their working activity. When the staff were taking breaks they would log out of part of the system and this was known as smart card removed time. The staff and their managers referred to it as SCR time.

37. During 2016 – 17 the claimant would sometimes take time to chat, or make drinks or run over on her breaks. This was not unusual for any member of staff and not a significant issue for the respondent. It came up in one to one meetings throughout the year and was documented in the year end report. Mrs Collier wrote:

> "Vicky has had her breaks highlighted and there was a period when she was going over on her break time. Vicky has had a problem with GAD logging her out and I have advised her to keep an eye on this and log any errors and also contact tech now if it continues to be a problem."

38. In May 2017 in a one to one meeting report Mrs Collier again recorded that she had:

> "…spoken to Vicky about her breaks about time lost she is now logging the time she starts her breaks to make sure she stays adhering to her schedule…..Advised Vicky that her smartcard removed figure for the month totalled nearly 7 hours….Vicky said she only ever uses smartcard removed for toilet breaks and printer collections but when I put it in relation to hours it does seem high. I advised Vicky I was not questioning the use of toilet breaks. Vicky has endometriosis which affects her need to have frequent toilet breaks."

Overall this was a positive one to one with good feedback on client service.

39. On 5 July 2017 the claimant had a one-to-one discussion with Mrs Collier. She was questioned about her SCR time at this meeting. She told Mrs Collier that she needed to use the toilet more than other people because of her endometriosis. This was accepted and not a problem to the respondent. The respondent was challenging the non toilet break related SCR time.

<u>23 August 2017 claimant had a one-to-one discussion with Jane Collier</u>

40. At this meeting there was an entry on the report to show that SCR was on the agenda to be discussed alongside other one to one review topics.

<u>24 October 2017 one-to-one discussion</u>

41. In a one to one discussion in October 2017 there was a discussion about SCR time which was understood by both the claimant and Mrs Collier to be unproductive time other than toilet break time and Mrs Collier advised the claimant that it needs to be reduced.

> "I am aware that Vicki has problems during certain times of the month but I advised that this is throughout the month. Vicky said she will try and improve this for the month of November and December. This is a conversation around

> behaviours we have had before and I would really like to see an improvement in the next month."

42. The behaviours referred to, which were not a significant issue for the respondent and were common in call centre one to one discussions, were chatting and making drinks. They were discussed and the claimant agreed to seek to reduce them.

43. The respondent has a performance management system. Twice per year employees are invited to self assess and to discuss their performance with their manager. Following that discussion, the line manager then rates the member of staff on a scoring system. There are clearly defined criteria for each rating. The highest rating is a 1. Only about 5 % of employees each year achieve a rating of 1.

44. In autumn 2017 the claimant received her mid year performance report and was rated a 2. The claimant did not object. During the winter of 2017 and into 2018 the claimant's partner was unwell. She was working and supporting him.

45. The claimant alleged that in the spring of 2018 there was a meeting at which Mrs Collier said the claimant was often away from her desk for a long time and asked the claimant what she was doing in the toilets. The claimant alleges she was required to provide a step-by-step detailed and intimate account of what she'd have to do to clean herself and change menstrual product. She alleged that Mrs Collier was asking her for this information for titillation purposes. We find no such meeting ever took place. Mrs Collier never required such detail of the claimant.

46. On or around 8 May 2018 Mrs Collier met with the claimant for about an hour to conduct the performance review meeting. They discussed in some detail the contribution the claimant had made during the performance year. The claimant alluded to the role she had played in the Employee Assist promotion video, though this had not been made in the relevant performance year, and to other contributions. Mrs Collier went away to consider the appropriate rating.

47. Mrs Collier decided that the claimant's performance had been good and scored her a 2. The rating was checked, in the usual way by Mrs Murphy who oversaw the ratings done by her staff of their team members, for consistency. Mrs Murphy was content that the 2 rating for the claimant was consistent with a 2 given to others on the evidence the claimant had provided of her performance. Mrs Murphy countersigned the report.

48. When the claimant received her report on a date between 8 and 16 May 2018 she did not accept the rating. She thought she should have been rated 1 exceptional. The claimant looked at the narrative to find out why she had been marked down from what she had expected to get. She found that Mrs Collier had written:

> "Vicky uses her smartcard removed excessively and we have had conversations throughout the year about this. Vicky has a medical issue which could account for an increase but I've told Vicky I think that it could be reduced."

49. The claimant asked if she could meet with Mrs Collier to discuss the rating as she wasn't happy with the rating. Mrs Collier declined to meet with the claimant. She saw no need for another meeting.

50. On 16 May 2018 the claimant went on line and found some text about disability discrimination and reasonable adjustments which she copied into an email that she sent to herself.

51. On 17 May 2018 the claimant submitted a grievance. She said:

> "I wish to dispute my end of year box marking and its content for several reasons.
>
> I believe that I should be awarded a box marking outstanding/exceeded instead of good due to the shopping list of extras that I have carried out in addition to my day job successfully
>
> The emphasis on my stats/statistics has been excessive.
>
> Despite having one hundred per cent attendance, I feel my medical condition has been used against me in my end of year report.
>
> I feel undervalued.
>
> I want my end of year report box marking changed to an outstanding/exceeded"

52. On 18 May 2018 the claimant placed a printout of the email she had sent herself on 16 May 2018 about failure to make reasonable adjustments on Mrs Collier's desk. At Mrs Collier's suggestion the parties went to a private room to discuss the print out.

53. Mrs Collier made a note of the conversation which appeared in the bundle. There was discussion about what the respondent could do to support the claimant.

54. There was no excessive questioning about the claimant's condition. Mrs Collier raised the need to involve the wellbeing adviser and to set up a Workplace Adjustment Passport and Wellbeing at Work Action Plan. Mrs Collier asked what reasonable adjustments the claimant needed and said she wanted to make a referral to Occupational Health. The claimant resisted the referral saying that it would only be a tick box exercise but Mrs Collier made the referral anyway.

55. After the meeting Mrs Collier prepared and sent the referral request which said:

> "Vicky has an excellent attendance management record she has the long term medical condition endometriosis and this can affect Vicky by needing to take more time away from her work to use the toilet. We are in the process of completing a workplace adjustment passport and well-being at work action plan I have offered Vicky the reasonable adjustments of splitting her breaks to help manage her condition and also to do off-line work if she felt unable to take calls. Can you suggest how I can best support Vicky with her condition. Are there any further reasonable adjustments you can suggest?"

56. The Occupational Health assessment took place on 31 May 2018. It was a telephone assessment. The report said:

> "At work she reports managing well at current support levels but reports struggling with the flow and pain during her monthly periods. She reports that

> she can change her pads up to nearly 4 times before lunchtime…she reports that her managers are very supportive. She also stated that she suffers from urinary frequency and reports that her symptoms are worse during monthly period. She stated that she has not had a detailed discussion with her GP regarding this and I have encouraged her to seek GP support.
>
> In my opinion…Victoria is fit to continue in work…on current support levels. Please continue to support her with regular toilet breaks during her monthly period…appropriate for the business to offer support when she has flares as necessary"

57. On 5 June Mrs Collier met the claimant to discuss the OH report. A note of that meeting records:

> "Vicky does need to use the toilet more frequently when on her periods and also has a condition called urinary frequency which means if she has to use the toilet she needs to go immediately OHS advice was to support Vicky with regular toilet breaks during her monthly period and support when her condition flares up where necessary."

58. The claimant did nothing to correct the potential misunderstanding in this report that her need for more or longer toilet breaks was only during her periods when in fact it was ongoing.

59. Mrs Collier and the claimant went on to discuss reasonable adjustments. It was restated that the claimant could of course continue to take toilet breaks as and when she needed them. There was discussion as to whether the claimant would like, in addition, to be able to split her 15 minute breaks and take them, for example, in three short five-minute breaks but the claimant was happy to keep her breaks as they were. Mrs Collier offered that the claimant could work off-line at any time as required if the claimant was in pain. The claimant declined this offer and said she prefers to stay working to take her mind off the pain. Work was also underway to put in place The Workplace Adjustment Passport and the Wellbeing at Work Action Plan.

<u>Grievance meeting</u>

60. On 5 June 2018 the claimant's grievance meeting against her box 2 rating took place.

61. Mrs Collier conducted the meeting. Janet Gardiner was the note taker. The meeting was a full reconsideration of the rating with Jane Collier asking the claimant to demonstrate evidence of how she had exceeded her key work objectives.

62. The notes showed us that Mrs Collier sought examples of evidence that might lead to a 1 rating. She asked the claimant how she had exceeded key work objectives? The claimant referred to a role she had played in the True Colours workshops, in promoting them, attending and getting people talking. Mrs Collier asked had she had input in developing the material used at the True Colours workshops? She had not.

63. The claimant said she had given a presentation. She had taken part in a video on bullying and harassment but that was in the previous year.

64. Mrs Collier asked what she had done, if anything, to improve the national helpline? Mrs Collier asked had the claimant had any rewards or vouchers?

65. The claimant referred to her role on the Evolve Project. She had been asked to leave this project because of failing to show leadership behaviours. She referred to a role on Firelighter Project and Mrs Collier asked if there had been any results from the project. The claimant said she had made a suggestion that the helpline could send texts to clients. The claimant referred to being a first aider and fire and bomb warden and an evac buddy. The claimant referred to herself as proactive and giving good customer service.

66. Mrs Collier pressed for further examples that might warrant a 1 in asking had the claimant done any extra jobs in her role on the national helpline such as email or sms cleanse work. The claimant had not but informed Mrs Collier that she might be anaemic and often comes to work in pain.

67. This was a second opportunity for claimant to demonstrate leadership or other competences or achievements that might warrant a 1 rating.

68. The claimant stated at this meeting that her increased need for toilet breaks due to her endometriosis had resulted in a high removed smartcard figure for her and that the SCR figure was why she had been marked down. Mrs Collier stated that:

> "Her end of year box marking was not just because of her high removed smartcard."

69. Mrs Collier said later in the same meeting that the endometriosis had not gone against the claimant when she had made the decision on the box mark rating 2, that SCR time was not a factor in the box mark rating and to clear up any misunderstanding Mrs Collier immediately offered to remove the content of smartcard removed stats from any performance review for the claimant.

70. The meeting continued with Mrs Collier pressing the claimant for further evidence that might assist in achieving a higher rating for the claimant but there was none.

<u>7 June 2018 Workplace Adjustment Passport meeting</u>

71. Mrs Collier had enlisted the support of Sharon Devey the well-being representative (as had the claimant independently), and the three women met on 7 June 2018. They discussed the claimant's request to have reasonable adjustment because of her endometriosis symptoms. The claimant again recounted the details of her condition. She was not questioned to elicit this information she offered it freely. The respondent put a reasonable adjustment in place for the disability on 7 June 2018 this was called the Workplace Adjustment Passport and appeared in the bundle.

72. The adjustments were:

> *(1) Due to my medical condition/disability called endometriosis I will require to use the toilet more often and for longer periods of time which will mean*

that my removed smart card statistic will be higher than other people who do not have the medical condition;

(2) I may take a longer lunch break using my own flexi;

(3) I may possible choose to split my fifteen minute breaks into three lots of five minute breaks instead.

73. The adjustments put in place were in addition to the existing unfettered right to take toilet breaks as often and for as long as the claimant needed.

74. After this meeting and having secured the claimant's consent Mrs Collier sent an email to the other team leaders and mangers to attach the Workplace Adjustment Passport for the claimant. It was an email Janet Gardiner saw though it was not in the bundle of documents because Mrs Collier had deleted lots of her email history when she changed roles for the respondent later in 2018.

The "be mindful" comment

75. On an unspecified date prior to this email of 7 June 2018 and prior to Mrs Gardiner being the note taker at the claimant's grievance meeting on 5 June 2018, the claimant went on a break. She went at the same time as 2 other members of staff leaving only 2 on shift to handle calls. There was a command meeting that day with lots of staff out at a meeting and only 5 staff on calls. On return to their desks the staff were approached by Janet Gardiner who was team leader for them that day. Mrs Gardiner asked the staff to be mindful when going on your break as to who else might already have gone and how many would be left, for service level reasons.

76. The claimant accepted this feedback and did not react. She did not say she had been to the toilet because of her endometriosis and she did not show Janet Gardiner a menstrual product neither by waving it in the air nor by opening her handbag to show Mrs Gardiner the product.

Grievance Outcome

77. The claimant received the grievance outcome letter on 23 June 2018 whilst she was on annual leave. The grievance was not upheld. The claimant remained scored as a good, 2. The letter set out the factors that Jane Collier had taken into account. It said:

> "I do not feel that you have delivered all the outcomes to achieve an exceptional box marking", and
>
> "Some of the evidence you have provided is from other performance years, so unfortunately this cannot be taken into account", and
>
> "I will be removing from your end of year report the reference to you using your smartcard removed excessively. The severity of your health condition has been discussed further since this report and we have agreed to put supportive action in place to help you manage your condition, which has been supported by an OHS referral and we have implemented a workplace adjustment passport".

Grievance appeal

78. On 11 July 2018 the claimant appealed against the grievance outcome. The appeal form said:

> "My line manager Jane Collier gave me a "good" end of year box marking. I grieved this decision as I believed I had done enough to warrant an "exceptional" box marking based on the criteria issued by the Agency. Jane did not uphold my grievance, but I felt her decision was flawed and was lacking in substance and clarity. I now wish to appeal her decision. I want my end of year box marking changed from good to exceptional."

Smart card removed data sent out

79. On 16 July 2018 Jane Collier sent a data report to all of her team as usual. The data included a column showing smart card removed time data. She had forgotten to remove the data for the claimant. At the claimant's request she removed the SCR data for the claimant and sent an amended report.

Grievance Appeal Hearing

80. On 27 July 18 an appeal meeting was conducted by Dave Harrison. Mr Harrison met with the claimant and listened to her appeal. Joe Platt put the case for the claimant and argued that she had been marked down because of 1) after call work and 2) her smartcard removed time.

81. The claimant argued that she should have been a 1 because of the "shopping list of extras" that she said she had done to warrant a 1. Mr Harrison considered the evidence that had been before Mrs Collier and he looked at the criteria for box 1 and box 2 ratings and assessed the claimant's evidence including the shopping list of extras against the criteria. During the meeting Mr Platt read aloud the expected performance standards, the criteria for a box mark 1 rating and the examples of an exceptional rating.

82. The criteria were:

> *"You*
>
> - *make a significant contribution over and above others and will be recognised as a role model by your peers and leaders;*
> - *have exceeded some or all of your stretching worker objectives;*
> - *deliver excellent work to a high standard, with pace, accuracy and appropriate prioritisation. You often exceed performance expectations;*
> - *you embrace change positively and encourage others to do the same;*
> - *you are supportive and considered an excellent team player;*

- *you are aware of your own strengths and proactively manage your own development;*
- *you have excellent communication skills, you communicate with confidence and professionalism;*
- *you are client focused with strong evidence to show that you have a client of the heart of everything you do;*
- *you actively challenge discrimination, harassment and victimisation, promoting equal opportunity between all colleagues;*
- *you treat all colleagues, clients fairly and with respect;*
- *you have been fully engaged with the key messages coming out of the 20 1718 national story and have made a significant contribution in refreshing the team's local story and their contribution to improving client outcomes and services being part of DWP.*

You do this by:

- *collaboratively working with colleagues;*
- *actively sharing knowledge and experience consistently and positively demonstrating required competencies and behaviours;*
- *adopting a can-do attitude and acting as a positive and enthusiastic role model to others;*
- *being open to ideas, making suggestions and seeking solutions;*
- *demonstrating high personal standards;*
- *actively seeking stretching opportunities to further develop your own capability and skills;*
- *proactively taking an interest in contributing to team and wider discussion;*
- *participating/volunteering in wider region/DWP forums."*

83. The claimant stated examples of why she said she met the criteria.

84. Mr Harrison was an experienced grievance appeal manager. Ratings are awarded twice per year and he deals with 10 to twelve appeals twice per year. He concluded the meeting telling the claimant he would speak to Mrs Collier and her team leader and would discuss the rating with the claimant again.

85. Mr Harrison spoke to Mrs Collier and separately, to Mrs Murphy to check that procedure had been followed in terms of the consistency checks on ratings. He was satisfied that proper procedure had been followed and that the rating was appropriate

on the evidence provided. He did not go back to discuss the grievance appeal with the claimant as he had said he would do.

Appeal Outcome Letter 16 August 2018

86. On 16 August 2018 the claimant received her appeal outcome letter at her desk. The letter attached a rationale for the decision. The rationale included the facts that the claimant had been a box 2 rating at the mid year point, that some of the evidence was from a different reporting period. It concluded that she was a valued officer but had not met the outcomes to warrant a box 1 rating. Mr Harrison explained:

> *"Vicky who has received performance bonuses during the year. However, both the line manager and the work group leader felt that whilst Vicky had a very good year they didn't feel that she had met the outcomes, KWO's or behaviours to warrant a box 1 exceeded."*

87. The claimant was unhappy with the outcome. She stood up and she was shouting and wailing at her desk and was extremely emotional such that colleagues who were sitting two banks of desks away could hear the commotion. The claimant shared her dissatisfaction with the outcome widely amongst the team. She made remarks that were derogatory to Mrs Collier.

88. The claimant was the "poster girl" for endometriosis in that, as part of her role as an Inclusion, Diversity and Equality Officer, she had agreed to feature in a poster about silent disabilities. The claimant spoke openly, freely and in some detail about her condition to her team, sharing for example that she could soil herself if she did not get to the toilet in time because of her bladder and bowel urgency and frequency. She also spoke about menstrual floods and the detail of the practicalities of coping with her condition in terms of managing her hygiene. She was not embarrassed to do so.

Union Support

89. On 23 August 2018 the claimant met with her union representative Colin Turner to seek advice and support in protesting about the appeal outcome. The claimant told him she thought this was disability discrimination because the toilet breaks had been taken into account in her performance rating. Mr Turner spoke to the claimant about a potential Tribunal claim and the strict time limits for bringing claims. The claimant wanted Mr Turner to write to Mrs Collier and continue to pursue internal redress in getting the rating changed. Mr Turner relied on what the claimant told him had happened to her and collaborated with her to write to Mrs Collier.

90. His letter dated 23 August 2018 argued that the claimant needed more time on toilet breaks due to endometriosis, that remove smart card time was taken into account in measuring performance, that "behaviours" referred to in the grievance outcome and appeal outcome letter in fact meant time spent going to the toilet and that it had been described as "excessive". He referred to Mrs Collier's letter which had said the rating was not *just* because of smart card removal times and sought to argue that this proved that smart card removal times had been taken into account in the year end box rating.

28 August 2018

91. On 28 August 2018 Mrs Murphy was allocating work on the section where the claimant worked as part of her usual management role. She approached the claimant and was told by the claimant that she would not speak to Mrs Murphy without a union representative present. Mrs Murphy agreed to meet with the claimant and Mr Turner.

28 August 2018 meeting

92. Mrs Murphy met with the claimant and her union representative. The claimant wanted to talk about the box mark rating and the unsuccessful grievance and grievance appeal. Mrs Murphy said she did not want to talk about that as the process was complete but she wanted to talk about the impact of the way the claimant was behaving about her rating and grievance and appeal on the breakdown in relationship with her line manager Jane Collier. Mrs Murphy told the claimant that she was concerned about the impact not just on Mrs Collier but on the whole team. Mrs Murphy told the claimant that she should be saying hello and goodbye to people and being pleasant at work.

93. This was a difficult meeting at which the claimant became very upset, talked about her condition in detail and refused to accept the rating or that the process to challenge it had been concluded. Mrs Murphy asked about the claimant's wellbeing and if there was anything else the claimant needed. There was not.

94. Mrs Murphy said that she was going to change the claimant's line manager and that it would be Janet Gardiner going forward. This was being done because of the impact of the claimant's behaviour on Mrs Collier and the rest of the team. A handover meeting was arranged for 30 August 2018.

95. On the way in to work on 30 August 2018 the claimant bumped into Mrs Gardiner, who was to be her new line manager. The claimant raised the subject of her box mark 2 rating and her dissatisfaction with the grievance appeal outcome and how Mrs Collier had discriminated against her because of her toilet breaks and her endometriosis. Mrs Gardiner told the claimant that she was not going to discuss that with her, that coming on to her team would mean a new start.

30 August 2018 meeting Denise Murphy, Janet Gardiner, Colin Turner

96. The claimant came to the meeting and told Mrs Murphy that she had changed her mind and would not consent to having Mrs Gardiner as her line manager as Mrs Gardiner had breached her reasonable adjustment. Mrs Murphy was exasperated to hear this and to find that the claimant had waited till the meeting to announce this. Mrs Murphy had been working with Mrs Gardiner that morning and previously to prepare for a smooth handover and fresh start for the claimant. Mrs Murphy did not know what the claimant meant about breach of her adjustment and the claimant said that it was because Mrs Gardiner had pulled her up about toilet breaks on 15 June 2018. This was an allusion to the be mindful conversation on an unspecified date prior to the claimant's request for a reasonable adjustment. The remarks Mrs Gardiner had made were about breaks (not toilet breaks) and were about maintaining service levels. The claimant mischaracterised the remarks at this meeting to justify her rejection of Mrs Gardiner as her new line manager. The claimant was tearful and again making accusations of disability discrimination. Mrs Murphy acceded to the claimant's objection to Mrs Gardiner as her new line manager.

97. Mrs Murphy had thought the meeting was to be a positive handover but it became at the claimant's instigation, a further discussion of the claimant's condition. The claimant was crying and talking in detail about her condition. Mrs Murphy expressed concern and Mr Turner who was at the meeting agreed that Mrs Murphy raised the issue of a referral to Occupational Health at this time to support the claimant and to revisit the issue of reasonable adjustments for the claimant.

98. Mrs Murphy said at that meeting that the office atmosphere could be cut with a knife and that the claimant needed to move on. Mrs Murphy asked the claimant if she was fit to carry on working. The claimant had lots of flexi time accrued or could have gone home sick as she was distressed. Mrs Murphy made those suggestions to her. The claimant decided that she did not want to do either of those things but wanted to carry on working.

Notes from the 30 August meeting

99. Mrs Murphy shared her notes of the meeting with the claimant. She made plans for Teresa Whiteley to become the claimant's line manager. On 31 August the claimant came to work and at 13.33 composed an email which she sent to herself at a personal email address. This was something she did regularly. She said that she did it to keep notes. On this occasion the email note said:

> "*Came in about 08.45. I said Hello Everyone. People on the helpline replied cheerily. Denise remained silent again. My period pains are severe and almost constant. I had about three hours sleep last night. Even though I am allowed to do other work I am feeling affected by my disability due to endometriosis pains etc, I am fearful to ask as Denise Murphy may use it against me."*

100. The claimant did not approach Mrs Murphy or anyone else to tell them she was unwell, in pain or lacking sleep that day.

101. On 3 September 2018 Mrs Murphy arranged a meeting between the claimant and the new line manager Teresa Whiteley. Mrs Murphy arranged for Sharon Devey the wellbeing lead to attend that meeting too and sent the email to the claimant.

102. On 4 September 2018 the claimant forwarded Mrs Murphy's email to her union representative Mr Bramhill and said "Denise Murphy is bullying me because of my dispute re box marking but more importantly re the disability discrimination". The claimant's email goes on to say, "No HEO should make an AO feel suicidal" and "she is the architect of my problems".

103. On 17 September 2018 the claimant met with Mrs Whiteley and Sharon Devey and it was agreed that the claimant would join Mrs Whiteley's team. Mrs Whiteley sent an email confirming that content of that meeting which included; checking that everything the claimant wanted was in place to support her, noting the claimant's conditions and workplace passport, referring the claimant to OH and discussion about stress, pain clinic and mindfulness sessions. The email records that the claimant said it was management decisions that caused her stress. There was discussion about the availability of the employee assistance programme and an evacuation plan for the claimant. The claimant knew that Mrs Whiteley wanted this to be a fresh start, fully supported, for the claimant.

104. On 11 October 2018 the claimant sent an email to Mrs Murphy, Mrs Collier and Mrs Whiteley. The email tells the managers that a new colleague who has come to work for the respondent has caused the claimant increased anxiety levels. The email says this is because the new colleague, whom it names, bullied the claimant at secondary school. The email recounts instances of the historic, alleged bullying. There is no suggestion that the new colleague has done anything inappropriate in the workplace. The claimant says "on the off chance she starts again I will not tolerate it …I have emailed you all to make you aware. I am not looking to confront her but neither will I take any nonsense either. If she says or does something negative towards me I will report it and expect action to be taken accordingly."

Claimant's Correspondence

105. The claimant persisted in opposing her rating during the autumn of 2018. She wrote to Mrs Collier and copied in other managers. She threatened to involve her MP and she copied correspondence to the Permanent Secretary level in the DWP.

106. On 16 October 2018, unbeknown to management at that time the claimant entered ACAS Early Conciliation.

107. On 29 October 2018 the claimant wrote to Mrs Collier protesting again about the box mark rating and saying "despite me going through the grievance process you have still not explained to me in detail why I did not get the top box mark rating" She goes on to say "I want a full explanation in writing by 4pm on Friday 2 November 2018. …please also copy your reply to Peter Schofield the DWP Permanent Secretary…please note I am considering raising the matter with my local MP."

108. Later that same day the claimant also wrote to the grievance appeal manager David Harrison. Her email gives a deadline for response by 2pm on Friday 2 November 2018. The claimant says, "I want a full/detailed explanation" and requests that the response be copied to the Permanent Secretary. Again, the claimant says she is considering going to her local MP about the rating.

109. On 2 November Mr Harrison replied to the claimant and refers to the email to Jane Collier on 29 October 2018, saying his response covers the reply to both emails. Mr Harrison tells the claimant that the decision he made was final and there is no higher internal right of appeal. He attaches links to the grievance procedure and decision makers guide.

110. Notwithstanding this reply from Mr Harrison the claimant again emailed Mrs Collier, on 6 November 2018, saying:

> *"Hello there Jane, I noticed I am still waiting for you to tell me what were your other considerations/ reasons for not giving me the top performance box marking". The email goes on to say "I have phoned the local constituency of my MP Margaret Greenwood to inform her about the matter".*

7 November 2018 – The claimant meets with Teresa Whiteley

111. On 7 November Mrs Whiteley met with the claimant to take over as her new line manager. The claimant raised her complaints about her rating and Mrs Collier

discriminating against her because of her condition. The claimant spoke in detail about her condition. Mrs Whiteley expressed empathy and asked how long it was since the claimant had had a referral as things had moved on in medicine and it might be that more could be done to help the claimant. The claimant had seen her GP recently and told Mrs Whiteley that was the case. Wires became crossed because they both spoke about seeing a doctor but Mrs Whiteley was meaning a consultant referral and the claimant was meaning her GP meeting. Mrs Whiteley did not say endometriosis wasn't a disability. The claimant did not say she hadn't seen a doctor for 10 years.

112. Mrs Whiteley did not say that the claimant writing to Mrs Collier was harassment or could be seen as harassment.

113. On 7 November 2018 at 13.44 the claimant sent an email to Mrs Whiteley in which she again protested about her box mark rating and refered to Mrs Collier, alleging that Mrs Collier was discriminating against her. The claimant says

> *"by ignoring my requests she (Mrs Collier) is further discriminating against me (which is unlawful) I feel I am being discriminated by Jane Clarke (Mrs Collier) as she won't tell me what outcomes I did not meet and why? Where is the accountability here please? She still has not apologised for her actions. It is unacceptable management behaviour".*

The claimant goes on to describe how the alleged discrimination has exacerbated her endometriosis.

114. Mrs Whiteley spoke to the claimant about that email again encouraging her to put the past behind her and move on. The claimant sent another email at 16.04 to Mrs Whiteley repeating her allegations and concluding "It looks to me like a case of section 15 Equality Act discrimination arising from a disability. I say this with a sense of sadness. Have a google of it yourself if you are feeling curious".

<u>8 November email from Mrs Collier</u>

115. Mrs Collier discussed the claimant's continuing pursuit of her with her line manager Mrs Murphy. By November 2018 Mrs Collier was herself on a stress reduction plan at work because of the stress she felt from the claimant's continuing pursuit of her and a box 1 rating. Mrs Collier had been acting up as a manager in 2018. She was inexperienced. She had support from Mrs Murphy. By November 2018 Mrs Murphy agreed with Mrs Collier that they would work together on an email to the claimant that Mrs Collier would send. The email would tell the claimant that there would be no further discussion about the rating.

116. Mrs Murphy was concerned about the wellbeing of both Mrs Collier and the claimant at this time. She considered the timing of the email and it was agreed that the email would be sent on 8 November 2018.

117. On 8 November Mrs Murphy planned to keep an eye on the claimant because she would be receiving an email with content that she would not like. The claimant had told Mrs Murphy previously about incidents and feelings (the content of which was contained in a document at page 82 of the bundle and was removed) both historic and

more recent that gave Mrs Murphy legitimate cause for concern about the claimant's welfare that day.

118. Mrs Murphy was under pressure that day in her own role and covering other duties. She popped to the claimant's work area twice during the hour between 10 and 11 am and did not see the claimant. Mrs Murphy was busy and thought she would check back later. When she did, a third time, the claimant was not there and Mrs Murphy had a moment of panic in which she thought she had not seen the claimant for over 45 minutes and that maybe she had taken her eye off the ball and some harm had come to the claimant.

119. Mrs Murphy set off to find the claimant to check on her. She searched the common areas and toilets on the ground and first floor. On the second floor landing she saw the claimant coming up the stairs and was relieved to see she looked fine.

120. The claimant had been working between 10.00 and 11.00am. She had had toilet breaks but had otherwise been at work. She hadn't seen Mrs Murphy looking for her. Just before 11, as she was entitled to do, she took her break. She headed upstairs with a newspaper to pass to a friend. She met Mrs Murphy in the second floor stair well. Mrs Murphy said she had been looking for the claimant, that she had been missing for twenty minutes and asked where she had been. The claimant said she had been at her desk and was in the first minute of a break. Mrs Murphy could tell immediately that the claimant was fine and that she was telling the truth. Mrs Murphy said that was fine and that she would see the claimant back at her desk. They parted. It was a short conversation. The claimant did not raise the rating and there was no discussion about the rating or the grievance. The claimant took her break and returned to work.

121. The claimant requested system generated reports to prove her work and her whereabouts between 10 and 11am on 8 November 2018.

122. During October and November 2018 the claimant continued to talk about her condition and her perception that she had been discriminated against by Mrs Collier and Mrs Gardiner to her team members. The team members felt uncomfortable at having to hear this and felt they were being asked to take sides. The atmosphere at work continued to be difficult.

123. During this time the claimant's productivity was about 40% that of her colleagues. The work the claimant did was to a high quality, error free survey work, but she spent a lot of time writing things up in after call work and made about 40 % of the calls that others made. The claimant spent time chatting and making drinks for people, she overran on her breaks and lunch and she was often upset at her desk and dwelling on her rating, her grievance and her grievance appeal outcome. She consulted her union representatives for advice. The claimant talked openly and often about her grievance and about the intimate detail of her condition in the office during work time.

<u>13 November 2018 meeting with Mrs Whiteley</u>

124. On 13 November 2018 Mrs Whiteley met with the claimant to show her the reports she had requested showing her work and whereabouts for 8 November 2018.

Mrs Whiteley showed the claimant her own data and an anonymised report for another member of staff.

125. There was no minimum required number of calls for individual staff on that section at that time. The claimant had done about a third of what the colleague had done. This was not the data the claimant wanted. The claimant wanted to be able to show she had been at her desk between 10 and 11 am when she had been accused by Mrs Murphy of being missing for twenty minutes.

126. The claimant approached Mrs Collier for the data. She got the data she needed from a VERINT report that showed her outbound call times. She had spent 19 minutes on outbound calls between 10 and 11am on 8 November 2018.

127. Mrs Murphy became aware of this data and called a meeting to apologise to the claimant. Mrs Murphy could see that the claimant had been working at times between 10 and 11 am and also could possibly have been away from her desk at the times that Mrs Murphy looked in to check on her.

128. On 19 November Mrs Murphy wrote to Mr Bramhill, the claimant's union representative and told him that the data revealed that the claimant had been engaged on telephone duties for 19 minutes but for the remaining 40 minutes of the hour between 10 and 11 am nothing was recorded.

23 November 2018

129. On 23 November 2018 the claimant brought Mr Bramhill with her to the apology meeting. Mrs Murphy gave an unreserved apology. Mrs Murphy explained that her only concern had been for the claimant's welfare. Mrs Murphy explained that her concern had been because she knew the claimant would receive the email from Mrs Collier that morning and because she knew that the claimant would not like its content.

130. The claimant then led the meeting over old ground of the grievance and appeal and her endometriosis. The claimant cried during the meeting and clutched Mr Bramhill's arm. The meeting concluded and as the parties left the meeting room Mrs Murphy repeated that it could be true that the claimant had been both working and away from her desk for twenty minutes between 10 and 11 am on 8 November 2018. Mrs Murphy made this remark because she was exasperated that her apology meeting had again turned into a meeting at which the claimant raised her box mark rating and her condition.

131. On 12 January 2019 the claimant brought her Tribunal claims.

Relevant Law

Burden of Proof

132. The Equality Act 2010 provides for a shifting burden of proof. Section 136 says:

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

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

133. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

134. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

135. If in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Time limits

136. The time limit for Equality Act claims appears in section 123 as follows:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable …

(2) …

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it".

137. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96 considered the circumstances in which there will be an act extending over a period.

> "The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy"

could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

Early Conciliation Provisions

138. Section 18A of the Employment Tribunals Act 1996 contains a requirement that before a person (the prospective claimant) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information in the prescribed manner about that matter.

139. The prescribed period means prescribed in Employment Tribunal procedure regulations. In relation to claims for disability discrimination the prescribed period is three months.

Discrimination arising from disability

140. Section 15 of the Equality Act 2010 reads as follows:-

"(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".

141. A Section 15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

142. Scott v Kenton Schools Academy Trust [2019] UKEAT 0031 considered the test, under Section 15, of something arising in consequence of the disability. HHJ Auerbach said at paragraph 41 of the judgment:

"The test has been examined in prior authorities now on a number of occasions, as well as other aspects of Section 15. The most useful guidance to be found in one place, I think, is that in the decision of the President of the EAT, as she then was, Simler J, in Pnaiser v NHS England & Another [2016] IRLR 170 where she drew the threads together of the previous authorities, as follows:

31. ……the proper approach to determining section 15 claims …. can be summarised as follows:

> *(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
>
> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. ..*
>
> *(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

I observe that the tenor of all of this guidance is that, whilst it is a causation test, and whilst there must be some sufficient connection between the disability and the something relied upon in the particular case in order, for the "in consequence test" to be satisfied, the connection can be a relatively loose one."

Duty to make Reasonable Adjustments

143. Section 39(5) Equality Act 2010 applies to an employer the duty to make reasonable adjustments. Further provisions about the duty to make reasonable adjustments appear in Section 20, Section 21 and Schedule 8.

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

144. The words "provision criterion or practice are not defined in The Equality Act 2010. The Commission Code of Practice paragraph 6.10 says the phrase "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions".

145. The importance of a Tribunal going through each of the constituent parts of the provisions relating to the duty to make reasonable adjustments was emphasised by the EAT in Environment Agency –v- Rowan [2008] ICR 218 and reinforced in The Royal Bank of Scotland –v- Ashton [2011] ICR 632.

146. The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in 2018 in Sheikholeslami v The University of Edinburgh UK EATS 2018 Mrs Justice Simler considered the comparison exercise. At paragraph 48:

> "*It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question…There is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances."*
>
> *"The PCP may bite harder on the disabled group than it does on those without a disability. Whether there is a substantial disadvantage is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."*

147. The Code provides that a PCP is a PCP that is applied by or on behalf of the respondent.

148. In Ishola v Transport for London [2020] EWCA Civ 112 Lady Justice Simler considered what might amount to a PCP at para 35:

> *"The words "provision, criterion or practice" are not terms of art, but are ordinary English words…they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application."*

149. And at paragraph 37:

> *"In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treated employee by an act or decision and neither direct discrimination nor disability -related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."*

150. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being "more than minor or trivial".

Harassment

151. The definition of harassment appears in section 26 Equality Act 2010:

> **"(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…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (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."**

Victimisation

152. The definition of victimisation appears in section 27 Equality Act 2010:

> **"A person A victimises another person B if A subjects B to a detriment because:**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act."**

153. A protected act includes:

> **(a) bringing proceedings under this Act;**

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that another person has contravened the Act.

154. At sub paragraph (3) Section 27 provides:

"Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made in bad faith."

Applying the Law

State of knowledge of disability

155. The respondent knew throughout the relevant period for the purposes of these claims that the claimant was suffering from endometriosis and so was disabled for the purposes of the Equality Act 2010. Our reasons for reaching that conclusion are that:

(1) The claimant told Mrs Collier in 2016 when she became her new team leader about her need for frequent toilet breaks as a result of her endometriosis.

(2) In 2016 the claimant featured in a poster campaign at work to raise awareness of hidden disabilities such as endometriosis. The posters have been on display at the claimant's place of work from 2016 to date.

(3) Mrs Collier referred to the claimant's condition in her end of year People Performance Report for 2016 to 2017.

(4) On 31 May 2018 the respondent's Occupational Health report describes the claimant's endometriosis as a chronic lifelong condition.

The Time Issue

156. The claimant brought proceedings on 12 January 2019. She entered early Conciliation on 16 October 2018 and achieved her certificate on 12 December 2018.

157. The respondent accepted that the allegations at,15,16,17,18 and 19 of the table compiled by Employment Judge Horne as part of his case management and set out above were brought in time.

158. Applying Compass Group UK and Ireland Limited v Morgan [2016] IRLR 924 the acts occurring after the claimant entered early conciliation on 16 October 2018, at 15,16,17,18 and 19 fall within the ambit of the early conciliation certificate.

159. The respondent submitted that the allegations at 1 – 14 on the table were brought out of time.

160. The Tribunal went on to consider whether any of the acts complained of at 1 - 14 on the table were brought into time because they were part of a course of conduct extending over a period within section 123 Equality Act 2010.

Time and the Section 15 claim

161. Applying Hendricks, the Tribunal found that the respondent's conduct at allegations 7, 9, 11, 12 and 17 were all part of the same course of conduct in relation to the section 15 claim. The claimant's complaint is that she was rated box mark 2 and not 1. She believes that her SCR removed time (which she says was used exclusively for toilet breaks and that her need for (increased) toilet breaks arose in consequence of her disability) was a factor in her box marking and that she was "marked down" because of toilet break time.

162. Mrs Murphy went looking for the claimant on 8 November 2018 (allegation 17) because she was concerned for the claimant's welfare knowing that the claimant was to receive an email from Mrs Collier telling her that there would be no further redress about her ongoing dissatisfaction with her box mark rating. The acts complained of at allegation 17 arise out of the state of affairs in which the respondent considered the claimant to be a box mark 2. That claim is brought in time. It brings the earlier acts at 7, 9, 11, and 12 into time.

163. Our reason for concluding that the acts at 7, 9, 11 and 12 form part of course of conduct extending over a period (brought into time by the allegation at 17) is that they relate to the same subject matter; the rating, and the same decision makers; Mrs Collier, Mrs Murphy and Mr Harrison. We find the respondent was responsible for an ongoing state of affairs in which the claimant was rated as a box 2 and not box 1. At 7, Mrs Collier rated the claimant at 2. At 9, Mrs Collier denied the grievance against the 2 rating. At 11 there was discussion about the box mark rating as part of the claimant's grievance appeal. At 12, Mr Harrison denied the grievance appeal.

164. For those reasons the Tribunal has jurisdiction to consider the section 15 complaint at allegations 7,9,11,12 and 17 as a course of conduct extending over a period of time within Section 123 Equality Act 2010.

165. The section 15 claim allegations as 1, 2, 3, 4 and 5 relate to allegations that SCR time was being monitored and subsequently used to mark the claimant down. They form part of a course of conduct extending over a period of time in which the respondent monitored SCR time and spoke to employees about it where it became excessive, with allegations at 7, 9, 11, 12 and 17.

166. Our reason for this finding is that they relate to the same subject matter; smart card removed time and the extent to which, if any, it factored in the box mark rating.

167. For that reason the Tribunal has jurisdiction to consider the section 15 complaints at allegations 1, 2, 3, 4 and 5.

168. The section 15 claim at allegation at 8 relates to Mrs Gardiner's "be mindful" comment. It does not form part of a course of conduct extending over a period. It is not connected to the claimant's box mark rating. It is not about smart card removed time and the monitoring of it. It is about the timing in the sense of when breaks are taken and staffing levels at those times, and not about the duration or measuring of the breaks or SCR time generally. Mrs Gardiner made the comment to all 5 members of staff on the section at the time. It was a remark relating to staffing levels and was

not part of any measurement of SCR time and not part of any decision making in relation to the claimant's performance review box mark rating, her grievance or appeal.

169. The "be mindful" remark allegation is therefore brought out of time and the Tribunal has no jurisdiction under Section 123 (1) (a) to hear the section 15 claim in relation the "be mindful" comment at allegation 8.

170. We then had to ask ourselves would it be just and equitable to extend time to allow the claimant to bring the section 15 claim at allegation 8 out of time. We consider this point together with the other claims arising out of the "be mindful" comment below.

Time and the Section 20 and 21 claims

171. In relation to the section 20 and 21 claims for failure to make reasonable adjustments, it was agreed that the claims at 17, 18 and 19 were brought in time.

172. Applying Hendricks, we find that the allegations at 1, 2, 4, 7, 9, 10, 11, 17, and 19 all formed part of the same course of conduct extending over a period of time within section 123 Equality Act 2010. The allegations have the same subject matter. They relate to the respondent's practice (if any) of monitoring smart card removed time and requirement (if any) to keep SCR time down to a predetermined level.

173. They are brought into time by the allegation at 17, Mrs Murphy's concern for the claimant's welfare and enquiry as to the claimant's use of working time between 10 and 11 am on 8 November 2018 and by Mrs Murphy's remark at allegation 19 on 23 November 2018 that the claimant had been away from her desk.

174. There is a significant time gap between allegation 11 made in August 2018 at the claimant's grievance appeal and allegation 17 on 8 November 2018. We considered, applying Hendricks that nonetheless a state of affairs continued to exist in that the respondent continued to monitor SCR time and seek to reduce it for all staff during that period. We were persuaded of this by the availability to Mrs Murphy and Mrs Collier of data (in the form of printed reports, which they referred to as VERINT reports and GAD data) which Mrs Whiteley shared with the claimant on 13 November 2018 showing her working time.

175. At allegation 8, Mrs Gardiner's "be mindful" comment forms part of the claimant's complaint that the respondent failed to make reasonable adjustments. This claim is brought out of time in that it the incident took place at some unspecified date prior to 5 June 2018. It does not form part of an ongoing state of affairs in which the respondent was seeking to monitor and reduce SCR time. It is an unrelated incident in which Mrs Gardiner was seeking to ensure adequate staffing levels among call handlers. The Tribunal has no jurisdiction under Section 123(1)(a) to hear the Section 20 and 21 claims in relation to the "be mindful" allegation at 8. We consider, below, whether it would be just and equitable to extend time in relation to this allegation.

176. At 18 there is also an allegation, within time, that there was a second PCP applied to the claimant.

Time and the section 26 claims

177. In relation to the harassment claims under section 26 Equality Act 2010, the allegations at 3,5,6,7,13,14, are all part of the same course of conduct extending over a period because they all relate to the allegation that the respondent was engaging in unwanted conduct in challenging the claimant about SCR time. The allegations relate to Mrs Collier and Mrs Murphy.

178. At 8, the claimant includes the allegation about Mrs Gardiner's "be mindful" comment as part of her harassment complaint. This is brought out of time. We find for the reasons set out at paragraphs 168 and 175 above that the remark does not form part of a course of conduct extending over a period of time but we consider whether it would be just and equitable to extend time for this complaint below.

179. Claims 15, 17 and 18 are brought in time and bring the earlier claims at 3, 5, 6, 7, 13 and 14 into time as part of a course of conduct extending over a period for the harassment complaint.

Time and the section 27 claims

180. The victimisation claims, it was agreed, at 16,17 and 19 are brought in time.

Time and the "be mindful" comment at allegation 8: the just and equitable ground

181. Section 123(1)(b) provides that a Tribunal may extend the usual three month time limit where it is just and equitable to do so.

182. The claimant made submissions both at final hearing and in writing to the Tribunal on 21 March 2019 as to why it was just and equitable to extend time.

183. The factors to be considered include the reason for and length of delay and the potential prejudice to the respondent in allowing the claim to be brought late.

184. We have considered the prejudice to the respondent in allowing the claimant to bring the claim out of time and we find that there is minimal prejudice in this case as the respondent has been able to call relevant witnesses and present relevant documents.

185. The length of delay is considerable. We find the "be mindful" comment was made in or around early June 2018 and the claimant brought proceedings in January 2019.

186. Turning to the reason for the delay we find that the claimant was well informed about Tribunal claims and time limits both by her own education and experience and from her union advisers at that time. On 16 May 2018 she had researched disability discrimination (albeit in relation to reasonable adjustments) and on 18 May 2018 had placed an extract from something she had found on the internet on her manager's desk. Throughout August she was receiving advice and support from her union who told her about Tribunal claims and time limits. On 7 November the claimant sent an email to Mrs Whiteley which included the remark "it looks to me like a case of Section 15 Equality Act 2010, discrimination arising from a disability...have a google of it yourself if you are feeling curious"

187. We find that the reason the claimant did not bring proceedings about the "be mindful" comment in time was both because at the time it was made she did not think it related exclusively to her or to her toilet break or disability and because she chose to pursue internal processes because what she wanted at that time was not a Tribunal claim but a box mark 1 rating.

188. Accordingly, it is not just and equitable in this case to extend time for the claimant to bring her claims about the "be mindful" comment. Each of them, the Section 15 claim, the Section 20 and 21 claims, and the Section 26 is out of time and the Tribunal does not have jurisdiction to consider them.

189. Turning now to the claimant's claims we consider each of allegations by reference to the relevant section of the Equality Act 2010. We label the allegations using the numbering in the table set out above.

The Section 15 claims: discrimination arising from disability

190. Applying Pnaiser we identified, in respect of each allegation, what was the unfavourable treatment, by whom and what was the reason for the unfavourable treatment. We focused on the reason in the mind of the perpetrator of the treatment. We reminded ourselves that the reason need not be the main or sole reason but must have had a significant effect in the sense of being more than trivial. Once we established the treatment and reason for it we then asked was that reason something that arose in consequence of the claimant's disability and we noted that there need only be a loose connection between the disability and the something that arose in consequence of it.

Allegations 1, 2, 3, 4 and 5D

191. We find that there was no discrimination arising out of disability in relation to allegations 1, 2, 3, 4 and 5D. .

192. The claimant was not required to give detail of her condition or management of it as alleged at 3D and 5D. We were persuaded by the evidence of Mrs Collier that no such detail was required. There was no unfavourable treatment of requiring excessive detail at 3D and 5D.

193. Insofar as the claimant was questioned about SCR at 1, 2 and 4D and that questioning amount to unfavourable treatment, we find that the questioning did not arise in consequence of her disability. The discussions about SCR time related not to toilet break time but to time the claimant spent chatting and making drinks. The claimant agreed to seek to reduce that time. She would not (and could not) have agreed to seek to reduce toilet break time. The discussions were documented in the one to one meetings but did not include reference to chatting and making drinks because this was not an issue for Mrs Collier who made the notes, in the sense that the claimant had agreed to seek to reduce it and they moved on.

194. Applying Pnaiser, the reason for discussions about SCR time was to seek to minimise (non toilet break related) unproductive time. The claimant's (non toilet break related) unproductive time did not arise out of her disability. It arose out of her chatting and making drinks.

195. The claims at allegations 1, 2, 3, 4 and 5D fail.

Allegation 7D

196. The alleged unfavourable treatment was the claimant being marked as a 2 and not a 1 in her performance rating. This was done by Mrs Collier following a one to one meeting that had lasted about an hour. We then considered what was the reason for that rating. Mrs Collier applied the criteria for rating. The sole reason that Mrs Collier did not mark the claimant a 1 was that the claimant did not adduce evidence to match the box mark 1 criteria.

197. We then asked ourselves did the reason; the claimant's failure to adduce evidence to reach into box 1, arise in consequence of the claimant's disability. Even applying a loose connection, we found that the claimant's failure to adduce evidence to reach into box mark 1 was wholly unrelated to her disability.

198. The claimant submitted and it was her case throughout the hearing that she was *marked down* (our emphasis) because of her smart card removed time which she said equated to her toilet break time. In support of her submission she referred to the entry in the notes of the grievance meeting at which the grievance was discussed which reported Mrs Collier as having said:

> "Her end of year box marking was not **just** because of her high removed smartcard."

199. This was an unfortunate use of language. We preferred the oral evidence of Mrs Collier, to the submission of the claimant, that SCR time was not a factor in the rating. We were further persuaded by the references elsewhere in the grievance meeting notes to Mrs Collier saying clearly that SCR time had not been a factor in the scoring and by references to Mrs Collier questioning the claimant to elicit evidence to warrant a box mark 1 score. We also considered that these notes recorded what had been a difficult conversation and were not written by Mrs Collier.

200. We were also persuaded that SCR time had not been a factor in the box mark rating by the references to the criteria for scoring in the grievance and grievance appeal meeting, and by the process that Mrs Murphy went through in checking for consistency by Mrs Collier in the application of the rating to the claimant and others.

201. The claim is not well founded and fails.

Allegation 8D

202. The claimant alleged that on 15 June 2018 Mrs Gardiner reprimanded her, and others, about toilet break time saying, "be mindful of when you go on your breaks". We have found this claim to be out of time and have no jurisdiction to deal with it.

Allegation 9D

203. The unfavourable treatment alleged here was that the grievance outcome upheld the year end rating. Failure to uphold a grievance is capable of being unfavourable treatment.

204. What was the reason for that treatment? The claimant argued, not at the time but as part of her case at Tribunal, that Mrs Collier should not have heard this grievance because it was about her rating the claimant a 2 and she was therefore biased. The claimant alleged that Mrs Collier had to uphold the grievance so as to cover up her own previous discrimination (in using the claimant's toilet break time to mark the claimant down).

205. We find it was in accordance with the respondent's procedure that a manager would conduct a reconsideration of her own decision on a rating.

206. Mrs Collier heard the grievance with a note taker present and the claimant's representative present. Mrs Collier had had her rating of the claimant signed off by Mrs Murphy who had conducted a consistency check to ensure the claimant's 2 rating was equivalent to the evidence provided by other employees also rated 2. There was no attempt by Mrs Collier to cover anything up, not on initial rating and not at the grievance hearing. Mrs Collier looked again at the evidence and the criteria for rating. Mrs Collier questioned the claimant asking her what she had done to meet the requirements for box 1. Mrs Collier asked what the claimant had done if anything to improve the national helpline? This showed us that Mrs Collier was looking for evidence to help the claimant reach up to a box 1 rating and we were satisfied that if that evidence had been there Mrs Collier would have scored the claimant a 1. The evidence was not there.

207. The reason Mrs Collier dismissed the grievance and upheld the 2 rating was because after reconsidering the claimant's evidence and even asking her for any new evidence that might allow her to achieve a higher rating, the evidence for a 1 rating wasn't there.

208. The claimant's failure to provide evidence to reach up into a box 1 rating at her grievance hearing did not arise in consequence of her disability.

209. The claimant's claim is not well founded and fails.

<u>Allegation 11D</u>

210. This allegation relates to the grievance appeal. The claimant argued that statements made by Mr Harrison about "behaviours" were a reference to her toilet breaks and were acts of discrimination arising in consequence of her disability.

211. Referring to someone's behaviours, of itself, is not unfavourable treatment. We accepted the evidence of Mr Harrison and Mrs Collier that the behaviours referred to were the tendency of the claimant to overrun on lunch and other breaks and to chat and make drinks for people. The claimant accepted that she might make drinks for people who were not on break when she was on a break but she absolutely refuted that she stopped to chat on her way to or from the toilet. At Tribunal she told us what might happen to her if she delayed when she needed the toilet and sought to use this to refute the suggestion that she overran on breaks. The claimant said that as there was no contemporaneous note of her having been spoken to about chatting or making drinks, her evidence that "behaviours" meant toilet breaks should be preferred. We reject that argument.

212. Mrs Collier had raised SCR time in one to one meetings prior to the 2017-2018 year end performance rating, as a topic for discussion and this did not relate to toilet breaks. Mrs Collier had not documented explicitly that the claimant had been chatting and making drinks but Mrs Collier had flagged up unproductive time and the claimant had agreed to seek to reduce it. It was disingenuous of the claimant at Tribunal to say that the "behaviours" were her toilet breaks. She had given commitments to seek to reduce her SCR time and would not (and could not because of her disability) have done so had this related to toilet breaks.

213. The claimant was not treated unfavourably when Mr Harrison referred to behaviours. He was referring to unproductive time other than toilet break time. Mrs Collier, when she spoke to the claimant about reducing remove smartcard time, and Mr Harrison when he referred to behaviours as unproductive time (other than toilet break time) were not treating the claimant unfavourably.

214. If they had been, then the reason for that was the proper concern of a manager to seek to reduce unproductive time. Would that reason, if we had found there was unfavourable treatment, have arisen in consequence of the claimant's disability?

215. We found it would not. The claimant was spoken to because she was overrunning on breaks because, sometimes, she chatted or made drinks for colleagues. Chatting and making drinks did not arise in consequence of the claimant's disability.

216. This part of the claimant's claim was not well founded and fails.

Allegation 12D

217. The claimant argued that her grievance appeal outcome upholding her rating was another act of discrimination arising from disability. Her argument was that her toilet breaks continued to be used against her in the rating. Mr Harrison told us that at the appeal the claimant was arguing as to why she should be a 1. The claimant had a "shopping list" of things that she felt would justify a rating of 1.

218. Mr Harrison considered the things on the shopping list including the role the claimant had played in the Employee Assist Programme promotional video and vouchers and rewards she had received. Mr Harrison told us that the claimant's evidence was not all from the relevant performance year and not of the standard needed to justify a 1.

219. Failing to uphold a grievance appeal is unfavourable treatment. The reason Mr Harrison did not uphold the appeal was because the claimant's evidence was not not of the standard needed to justify a 1.

220. Did that reason arise in consequence of the claimant's disability? It did not. Her failure to produce evidence to warrant a box 1 rating did not arise in consequence of her disability. It arose because she had not done enough in the relevant year to meet the criteria that Mrs Collier had had to apply and Mr Harrison had to scrutinise.

221. This part of the claimant's claim is not well founded and fails.

Allegation 17D

222. This allegation related to the incident between the claimant and Mrs Murphy on 8 November 2018 when Mrs Murphy had gone looking for the claimant believing her to have been away from her desk for some time. Mrs Murphy met the claimant on the stairs, said she was worried about the claimant and asked her where she had been and said she wanted to see her back at her desk.

223. We considered that the unfavourable treatment was being sought out and questioned and asked to go back to her desk. We had to ask what was the reason for that treatment. We accepted Mrs Murphy's evidence that she went to look for the claimant that day out of a genuine concern for the claimant's welfare. Mrs Murphy knew that the claimant was receiving an email with content that she would not like. Mrs Murphy was experiencing a high level of work and responsibility that day and was seeking to keep an eye on the claimant's wellbeing and thought she had taken her eye off the ball. Mrs Murphy was concerned with what she feared might be a safeguarding issue for the claimant, who she reasonably believed to be a vulnerable member of staff.

224. Did that reason arise in consequence of the claimant's disability? The claimant's disability is endometriosis. Mrs Murphy's concern for the claimant's wellbeing did not arise in consequence of the claimant having endometriosis but because Mrs Murphy knew the claimant to be someone who was receiving an unpleasant email that morning and was someone who had a history that caused Mrs Murphy, rightly, to consider her to be vulnerable.

225. Asking where the claimant had been and saying she wanted her back at her desk did not arise in consequence of the claimant's disability. It arose in consequence of Mrs Murphy's concern for the claimant that day. This part of the claimant's claim is not well founded and fails.

226. The claimant alleged that Mrs Murphy exaggerated the time that the claimant had spent away from her desk that day. It was Mrs Murphy's reasonable belief at that time that the claimant may have been away from her desk for over twenty minutes as Mrs Murphy had not seen her on occasions when she had checked during a window of approximately 45 minutes. Mrs Murphy was not monitoring the claimant's presence. She was busy that day and just looking over when she remembered. She did not exaggerate the time, she presented her rough, honest, impression and later apologised when she saw the data that showed her impression may have been wrong, or rather that both her impression and the claimant's stated position that she was working during 10 and 11am may have been right.

227. There was no unfavourable treatment in relation to the time Mrs Murphy said the claimant had been away from her desk. If there had been, then the reason for it was Mrs Murphy's rough, honest, impression that it was true. That reason did not arise in consequence of the claimant's disability. It arose out of Mrs Murphy not having seen the claimant during that window on 8 November 2018.

228. The claimant's claims for discrimination arising from disability under section 15 Equality Act 2010 at 7D, 8D, 9D, 11D, 12D and 17D are not well founded and fail.

The Section 20 and 21 reasonable adjustment claims

229. We had to decide in relation to each of the A allegations in the table, what was the provision, criterion or practice of the respondent, was it applied to the claimant and others and if so did it put the claimant at a substantial disadvantage compared to a non disabled person?

230. A PCP is to be interpreted liberally especially in relation to practice.

231. We asked ourselves what was the PCP? The claimant said the PCP was a requirement to keep SCR time down to a predetermined level and that for allegation 18A the PCP was a requirement for a minimum number of calls to be made.

Allegations 1, 2, and 4A

232. Allegations 1, 2 and 4 related to the claimant being asked about SCR time at one to one meetings in May 2017, August 2017 and October 2017.

233. We heard from Mrs Collier that she had a practice of keeping an eye on SCR stats for her team and that it was her practice to raise SCR with staff in one to one's if the SCR was over about 20 – 30 minutes. This practice was not applied to the claimant.

234. Mrs Collier knew that the claimant had endometriosis and knew that this meant she needed longer and more frequent toilet breaks. Mrs Collier adjusted her practice of using 20 – 30 minutes as a trigger time for a conversation about SCR time to a trigger time of 40 – 50 minutes for this claimant.

235. Was the practice of keeping an eye on SCR time of over 40 – 50 minutes for the claimant a PCP? Yes, using the ordinary, English words of the meaning of provision, criterion or practice we found that Mrs Collier's "practice" applied to the claimant amounted to a PCP within Section 20 and 21 of the Equality Act 2010. We applied Ishola in finding that the practice applied to the claimant amounted to a PCP because it was a practice that although applied only to the claimant might be applied to other hypothetical employees in the same circumstances in future.

236. A PCP has to have the effect of putting the claimant at a substantial, that is more than minor or trivial, disadvantage compared to those who are not disabled. Looked at objectively, the practice of monitoring SCR time (at 40-50 minutes) did not put the claimant at a substantial disadvantage. Any disadvantage was minor or trivial in that all that flowed from it was a conversation. Those conversations were a routine part of management, appearing on the agenda for the one to one monthly supervision meetings for all staff. The claimant had those routine conversations in May 2017, August 2017 and October 2017 and she had agreed to seek to reduce her (non toilet break) SCR time.

237. If the PCP of 20 – 30 minutes SCR time being used as a trigger for a conversation was applied to the claimant (we found it was not) then it would not have put the claimant at a substantial disadvantage when compared to others because, as above, all that flowed from it was a conversation. If, further in the alternative, there was substantial disadvantage to the claimant (and we found there was not) then the

respondent took reasonable steps to avoid that disadvantage in adjusting the trigger time to 40 -50 minutes for the claimant.

238. The claimant's claims at 1A, 2A and 4A are not well founded and fail.

Allegation 7A

239. This related to the year end box mark rating 2. The claimant argued that the PCP was a requirement to keep SCR time down to a predetermined level. We have found that Mrs Collier's practice of monitoring SCR time (40- 50minutes) for the claimant amounted to a practice.

240. We also found as a fact that SCR time was not taken into account in the box mark rating. The claimant's SCR time did not prevent the claimant from reaching up and achieving a box mark rating of 1. It was the absence of evidence to substantiate a 1 that was the factor affecting the rating, not SCR time, nor any toilet break component of that time.

241. As SCR time was not a factor in Mrs Collier's rating of the claimant's performance, viewed objectively, there could be no substantial disadvantage to the claimant. For this reason, the allegation of failure to make a reasonable adjustment at 7A fails.

Allegation 9A

242. This allegation related to Mrs Collier upholding her original rating at the grievance hearing. The PCP complained of was again the requirement to keep SCR time to a predetermined level.

243. Mrs Collier heard the grievance as she was entitled to do under the respondent's policy. At the grievance hearing Mrs Collier revisited the evidence for the box mark rating and found that the claimant had not at the first review meeting and did not at the grievance meeting (when she was, in effect, given a second opportunity to achieve a 1) adduce evidence to justify a box mark 1 rating.

244. Mrs Collier referred to the criteria and questioned the claimant to elicit evidence to justify a box mark 1 rating. None was forthcoming. The SCR time had not been a factor in the original box mark rating and was not a factor in the grievance reconsideration of the box mark rating.

245. There was no substantial disadvantage to the claimant as SCR time was not a factor in the grievance decision making. As no substantial disadvantage arose, there was no obligation on the respondent to take any steps to seek to avoid it.

246. The claimant argued that the respondent ought to have:

(a) *Allowed a higher amount of SCR time.* We do not accept that the duty to make reasonable adjustments arose in relation to SCR time (because no substantial disadvantage flowed from it) but if the duty had arisen then the respondent did not fail to allow a higher amount of SCR time for the claimant. Mrs Collier allowed 40 -50 minutes of SCR time for the claimant.

(b) *Ceased to monitor the claimant's SCR time at all*. The duty to make adjustments did not arise but if it had then it was not a reasonable step to require the respondent not to measure non-productive time of the claimant at all. It is a reasonable and legitimate requirement of the respondent that it should know the productivity of its staff.

(c) *Disregarded SCR time as an indicator of her performance.* The duty to make adjustments did not arise as the claimant was not at any substantial disadvantage but if it had arisen then it was not a reasonable step to require the employer to discount all SCR time as an indicator of performance. The respondent was entitled to monitor non toilet break SCR time.

247. From 5 June onwards, there was a reasonable adjustment in place. Its terms were:

"(1) Due to my medical condition/disability called endometriosis I will require to use the toilet more often and for longer periods of time which will mean that my removed smart card statistic will be higher than other people who do not have the medical condition.

(2) *I may take a longer lunch break using my own flexi.*

(3) I may possible choose to split my fifteen minute breaks into three lots of five minute breaks instead."

248. We had to ask ourselves was monitoring SCR time a breach of the adjustment in place? It was not. The reasonable adjustment flagged that the claimant's SCR time would be higher and allowed the claimant to use her time as she wished to best manage her condition.

249. Measuring SCR time was never about measuring toilet time. It was about measuring non productive other time e.g. time spent chatting or making drinks. Continuing to keep an eye on non productive (non toilet break) time, was not a breach of the claimant's reasonable adjustments.

250. There was no failure to reasonably adjust in continuing to monitor SCR time and no breach of the reasonable adjustment in place in continuing to monitor SCR time.

Allegation 10A

251. The claimant said that the respondent failed to reasonably adjust in that Mrs Collier sent out a data report on 16 July 2018 that included SCR data for the claimant.

252. Mrs Collier had offered, at the grievance meeting to remove SCR data for the claimant so as to satisfy the claimant that SCR data did not factor in performance rating. Mrs Collier forgot to do that in a report that she sent out on 16 July 2018 and when the claimant raised this Mrs Collier immediately edited the report and resent it.

253. Did this amount to a failure to reasonably adjust?

254. The PCP was Mrs Collier's practice of monitoring SCR time for the claimant at 40-50 minutes per day. No substantial disadvantage arose from the application of that PCP to the claimant. Given that no substantial disadvantage arose, there could be no duty to take reasonable steps to seek to avoid that disadvantage.

255. Removing SCR data from the performance reports was a kind offer made by Mrs Collier to seek to reassure the claimant (who would not let go of the idea that she had been marked down in her rating because of toilet break time) that SCR time was not a factor in box mark rating.

256. The claimant alleged that in sending out the report Mrs Collier breached the 5 June 2018 agreement on reasonable adjustment. There was no reasonable adjustment in place to stop the respondent measuring SCR time and reporting on it. The adjustments were to record that the claimant's SCR time would be higher than those who did not have her condition. Mrs Collier did not breach a reasonable adjustment by sending out the report showing the claimant's SCR data.

257. We are persuaded by Mrs Collier's evidence that this was a genuine oversight on her part, for which she was sorry, and that she corrected it as soon as it was brought to her attention.

258. The claimant's claim is not well founded and fails.

Allegation 11A

259. This allegation relates to Mr Harrison referring to the claimant's behaviours at the grievance appeal meeting.

260. The claimant says the respondent failed to reasonably adjust in that it applied to her the practice of requiring a predetermined level of SCR time.

261. The claimant said that the appeal officer's reference to "behaviours" was a reference to her toilet break time. We find it was not. It was a reference to non toilet break related SCR time which was time the claimant had spent chatting and making drinks for others. It had been referred to by Mrs Collier previously during the performance year and the claimant had agreed to seek to reduce it. It was also a reference to the lack of evidence of behaviours that might allow the claimant to reach up into a box mark 1 rating.

262. Was Mr Harrison referring to behaviours effectively a breach of the reasonable adjustments in place? We find not. The reasonable adjustments related to toilet break time and other time the claimant might need to take to manage her condition.

263. The behaviours Mr Harrison referred to were non toilet break, non productive time that did not feature in the rating decision (for example) chatting and making drinks. The behaviours were also a reference to evidence that the claimant might have adduced but did not that might have allowed her to reach into a box mark 1 rating. Mr

Harrison's reference to behaviours at the grievance appeal was not a breach of the reasonable adjustments in place.

264. This part of the claimant's claim fails.

Allegation 17A

265. On the 8 November Mrs Murphy went looking for the claimant because she was concerned for her welfare. In the conversation they had at the top of the second floor stairs Mrs Murphy referred to claimant's whereabouts during 10 and 11 am that morning.

266. The claimant says this was a failure to reasonably adjust in that the respondent had a PCP (a requirement to keep SCR down to a predetermined level) that placed her at a substantial disadvantage and that it ought to have taken steps to avoid the disadvantage. The steps the claimant claimed it ought to have taken and our reasoning as to why this aspect of her claim fails is set out at allegation 9A above.

267. The claimant also says that the conversation at the top of the stairs was a breach of the reasonable adjustment in place from 5 June 2018.

268. We find that the conversation on the stairs with Mrs Murphy and in particular Mrs Murphy asking where the claimant had been and saying that she wanted the claimant back at her desk and exaggerating (in the claimant's words) the time that the claimant had spent away from her desk is not a breach of a reasonable adjustment as there was no adjustment in place to prevent or limit discussion about the claimant's whereabouts, or how she had spent her time.

269. The claimant had an unrestricted right at all times to go to the toilet. Mrs Murphy was not interfering with that right. The claimant had a reasonable adjustment in place allowing her flexibility in the use of her break times. She also had an offer from Mrs Collier that she could at any time work off line if she was in pain so as to support her in managing her condition. Mrs Murphy made a legitimate enquiry based on her concern for the claimant's welfare. Mrs Murphy did not exaggerate the time the claimant was away from her desk. Mrs Murphy relied on her own rough, honest impression of the situation. She did not breach the reasonable adjustments or render them ineffective.

270. This part of the claimant's claim fails.

Allegation 18

271. At a meeting on 18 November Mrs Whiteley provided the claimant with data that she thought the claimant had requested. The claimant wanted to be able to prove that she had been working between 10 and 11 am on 8 November 2018. Mrs Whiteley produced reports that were broader in scope than that. Mrs Whiteley gave the claimant data about her own performance and an anonymised example of the performance of another colleague.

272. The context for this meeting is that Mrs Whiteley had become the claimant's line manager in an attempt by the respondent to have the claimant move on from her pursuit of Mrs Collier and a box mark 1 rating. Mrs Whiteley had talked to the claimant about a fresh start.

273. The claimant was continuing to seek to show that managers were criticising her for toilet break time (that was her aim in wanting data about the 8 November 2018) and thereby discriminating against her because of her disability.

274. The claimant's grievance and appeal had been heard and she had been told that that was the end of the matter but she had been corresponding with managers indicating that she would refer the discrimination to the Permanent Under Secretary to the Department and to her MP.

275. Mrs Whiteley produced the data in an effort to show the claimant the differences in her performance and that of her colleagues, outwith the impact of her disability. What Mrs Whiteley was seeking to do was to demonstrate that the claimant was spending time pursuing an argument about her box mark rating and seeking to build a case that managers were criticising her for her toilet break time when that time (spent pursuing her argument) could have been used more productively in meeting the aims of the service.

276. The claimant says there was a second PCP of requiring colleagues to make the same or similar numbers of outgoing telephone calls. She says she was put at a substantial disadvantage by this PCP because of her increased need to take toilet breaks which necessitated time away from her desk.

277. We asked ourselves was there a provision, criterion or practice of requiring colleagues to make the same or similar numbers of calls. If so, did it put the clamant at a substantial disadvantage? Did the respondent know the claimant was likely to be at a substantial disadvantage and, if so, did it take steps to avoid the disadvantage?

278. Mrs Whiteley did not have a practice of requiring a particular number of calls from an employee. That would not be feasible as calls were of different duration and outcome. The section the claimant was working on was tasked with achieving a number of surveys as a section, and all staff were expected to contribute towards this. Not every call resulted in a survey. There was a team survey target in place but no individual calls targets.

279. We were persuaded by the oral evidence of Mrs Whiteley that there was no individual requirement to make a particular number of calls. If this was the case, the claimant asked her in cross examination, why had she compared the claimant's performance to that of an anonymised colleague. We found her evidence compelling when she explained why. She said:

> "You were saying you didn't get a top box mark because of time away from your desk and that's not right so I thought if I showed you the difference that might help you……your performance was considerably lower than other staff every day… I was aware that you were spending time typing up notes at your desk re your ongoing situation, your appeal (against the rating). I thought if you saw

> the data in black and white…you had a rant ongoing about Jane (Mrs Collier)…it would help. I said that was the past and we should draw a line under it."

280. The data that the claimant and Mrs Whiteley looked at showed that the claimant had carried out 36 outbound calls whereas the other member of staff had done 103. Mrs Whiteley told the claimant that her performance was about 40% of that of other team members at that time. This was not to impose an individual performance requirement but to seek to get the claimant to move on from her pursuit of Mrs Collier and a box mark 1 rating and to contribute more productively to the work of the section.

281. Mrs Whiteley described the claimant as volatile. She said that a laid back approach had been taken to managing the claimant's performance because she was volatile and because of her ongoing complaints about her rating. In effect, there was no requirement on the claimant to perform to any level at all at that time.

282. We were persuaded by Mrs Whiteley's evidence that there were no individual call targets on the claimant or anyone else. We find there was no PCP of requiring a minimum number of calls as alleged at PCP2 and this part of the claimant's claim fails.

283. The failure to reasonably adjust claims are not well founded and fail.

The Section 26 harassment claims

284. The unwanted conduct within Section 26 of the Equality Act of which the claimant complains is set out in the table above at allegations 3,5,6,7,8,13,14,15,17 and 18.

285. We find that each of those instances would, if we found that they had happened, amount to unwanted conduct.

Allegation 3H

286. We find that the allegation at 3, that Mrs Collier required excessive detail of the claimant's condition of her at a meeting on 23 August 2017, did not happen. Mrs Collier gave evidence that she had never required detail of the claimant at all. The claimant had offered detail, explicit detail about toileting and hygiene, about the condition and Mrs Collier had not interrupted. We were persuaded by her oral evidence when she told us "I would never stop anyone from telling me how they felt, it is part of your wellbeing so I would never stop you". She did not question the claimant about the condition on 23 August 2017. She did not require detail.

287. The claimant, at Tribunal, alleged that not only had Mrs Collier required excessive detail of her but that this had been done for titillation purposes. We were persuaded by Mrs Collier's reaction to it in oral evidence, how distasteful she found it, that that was not the case.

Allegation 5H

288. The claimant also alleged that Mrs Collier had required excessive detail from her about her condition at a meeting on 24 October 2017. We find that Mrs Collier did

not ask for detail but the claimant offered it and when the claimant asked, "do you want more?" Mrs Collier acquiesced. We were persuaded by Mrs Collier's evidence that she did not require the claimant to give more information than she was comfortable with. She said, "I did not push you to give any invasive or private details". We believed her because her account was consistent with her evidence that throughout 2017 and 2018 there was an unfettered right for the claimant to take whatever time she needed for toilet breaks. She had no need to ask for detail as there was already an unfettered right to take whatever time was needed.

289. The chronology also persuaded us on this point. The claimant had not protested about toilet break time or SCR time at all until after her box mark 2 rating. We found it not credible to suggest that Mrs Collier had been restricting or monitoring toilet break time as part of SCR time in any way and for the claimant not to have objected to that at the time.

Allegation 6H

290. The claimant made the same allegation, that Mrs Collier had required excessive detail of her condition from her but this time it was alleged to have happened at a one off meeting that took place in April or May 2018 to discuss the claimant's endometriosis.

291. We accepted Mrs Collier's evidence that no such meeting ever took place. There would have been no need for it. The claimant was happy with the local informal arrangement that was in place that she could take whatever toilet breaks she needed whenever she needed them. There were regular one to one supervision meetings at which SCR time discussions took place and the claimant could have raised any wellbeing issues she had then as wellbeing was part of those discussions. There was no need for a separate meeting about the claimant's endometriosis. No such meeting took place.

292. We were further persuaded by the action Mrs Collier took, swiftly, between 18 May 2018 and 5 June 2018 to engage the support of the wellbeing adviser and get a Workplace Adjustment Passport and wellbeing plan in place, that if a meeting had taken place specifically to discuss the claimant's endometriosis prior to that date Mrs Collier would have both documented that meeting and referred the claimant on to the wellbeing adviser.

293. Again, the claimant alleged that excessive detail was required of her for titillation purposes and again, for the reasons set out above, we find that was not the case.

294. Taken together, we find that the events described at allegations at 3, 5 and 6, were fabricated by the claimant in furtherance of her claim to link her box mark rating 2 to her disability. She was constructing an argument that SCR time was used exclusively for toilet break time, that she was challenged about her toilet break time and that SCR time was a factor in her box mark rating.

Allegation 7H

295. Was the unwanted conduct of Mrs Collier rating the claimant a 2 in her year end report, conduct that was related to a relevant protected characteristic and if so, did the 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?

296. The reason for the year end rating 2 was not related to a relevant protected characteristic. The reason the claimant didn't get a box mark 1 rating was because she did not adduce evidence at the one to one review meeting with Mrs Collier that allowed Mrs Collier, when applying the criteria, to award her a box mark 1.

297. Mrs Collier did not take SCR time into account in making that rating. We find this to be the case even though Mrs Collier referred to excessive SCR time. The reference to SCR time did not relate to toilet break time. It related to the time the claimant had spent going over on lunch breaks, chatting and making drinks. This had been raised in one to one's during the performance year. Mrs Collier had not specifically documented the conversations about lunch breaks, chatting and making drinks, she had seen no need to as they were not an issue and the claimant had agreed to seek to reduce her SCR time. The reference to SCR time in the rating did not relate to the claimant's toilet break time and did not relate to her disability.

298. The reason for the box mark 2 rating (lack of evidence for a 1) was not related to a relevant protected characteristic of the claimant's, namely her endometriosis. This part of the harassment claim is not well founded and fails.

Allegation 13H

299. At a meeting on 30 August 2018 Mrs Murphy telling the claimant to say hello and goodbye to her colleagues was not conduct related to a relevant protected characteristic. Mrs Murphy gave this instruction because of the breakdown in relationships within the team at that time.

300. The meeting had been called so that there could be a handover to a new line manager for the claimant but, at the eleventh hour, at the start of the meeting the claimant declined to be managed by Mrs Gardiner. Mrs Murphy and Mrs Gardiner had been working to prepare for the handover. Mrs Murphy was understandably exasperated at the claimant's late change in position. The claimant's reason for declining to be managed by Mrs Gardiner was because that morning the claimant had bumped into Mrs Gardiner on the way into work and had raised her box mark rating with Mrs Gardiner and had got short shrift. She had been told by Mrs Gardiner that there was to be a fresh start.

301. Between bumping into Mrs Gardiner and coming to the handover meeting the claimant changed her position and used the remark Mrs Gardiner had made in early June, the "be mindful" comment, at the meeting, as a reason to reject Mrs Gardiner as her line manager.

302. Mrs Murphy made Occupational Health referrals and spoke about the office atmosphere. She said it could be cut with a knife and she encouraged the claimant, as part of an attempt to improve workplace relationships and the atmosphere in the workplace, to be pleasant and to say hello and goodbye to her colleagues.

303. Mrs Murphy's comments were not related to the claimant's endometriosis. They were related to the breakdown of relationships within the team.

304. The claimant alleged that Mrs Murphy had deliberately tried to exacerbate the claimant's stress in that meeting knowing that the claimant's endometriosis was stress related. Mrs Murphy felt that this was a particularly nasty allegation for the claimant to have made. We found no evidence whatsoever to substantiate it.

305. The claimant alleged that Mrs Murphy said she was fit to carry on with survey work and in effect made her go back to work despite being upset. This did not happen. Mrs Murphy offered the claimant the opportunity to take some of her flexi time and go home. We were persuaded by the evidence of the claimant's own witness Mr Turner that it was the claimant who had insisted on continuing working that day and not Mrs Murphy. The claimant was a wholly unreliable witness on this point.

306. The claimant's claim at 13H is not well founded and fails.

Allegation 15H

307. On 7 November 2018 Mrs Whiteley met with the claimant to take over as her new line manager. There was discussion about the claimant's condition. Mrs Whiteley did not say that endometriosis was not a disability. We find that the unwanted conduct that the claimant alleges did not take place.

308. We prefer the evidence of Mrs Whiteley on this point. We found her to be credible because she told us she had looked up endometriosis before meeting with the claimant and was very careful about broaching anything with the claimant. She also told us that she wanted the claimant to be comfortable and had gone so far as to suggest that if the claimant ever needed a shower at work then she was fine with that.

309. The claimant was a wholly unreliable witness on this point. The remark was not made. The claimant's claim at allegation 15H is not well founded and fails.

Allegation 17H

310. We had to consider whether Mrs Murphy asking where the claimant had been, wanting the claimant back at her desk and exaggerating the time the claimant had spent away from her desk was conduct related to a protected characteristic and if so whether it had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

311. In applying Section 26 we found that Mrs Murphy's treatment of the claimant on 8 November 2018 was not related to a protected characteristic. That is to say, Mrs Murphy didn't challenge the claimant because she had endometriosis, she challenged the claimant because she was concerned for her (non disability related) welfare

312. If the treatment had been disability related, which we find it was not, then we do not accept that it would have had the effect of violating the claimant's dignity or creating the environment set out in Section 26 for her.

313. In reaching our determination on the purpose or effect we considered the factors in subsection (4) of section 26 of the Equality Act 2010. That is, we took into account the perception of the claimant, the other circumstances of the case and whether or not it was reasonable for the conduct to have that effect.

314. The perception of the claimant as to the events of 8 November 2018 was coloured by her desire to achieve a box mark 1 rating. We find the claimant was engaged in a sustained campaign to incriminate Mrs Collier and Mrs Murphy as people who had discriminated against her so as to get her box mark rating changed from a 2 to a 1. Her desire to achieve the change led her to repurpose conversations that had taken place. This was evident in relation to the content of the conversation on the stairs with Mrs Murphy on 8 November 2018. In her witness statement the claimant says it included content about her rating and her argument that toilet break time had been part of the rating. Counsel took the claimant to her Claim Form and pointed out that she had not said the conversation included the rating in her Claim Form. Counsel pressed on to suggest that it had been added later. The claimant said that was not the case. We felt it was highly improbable that the conversation on the stairs which was about where had the claimant been would have been opened by the claimant with a discussion of her year end rating. The conversation did not include the rating. The claimant had repurposed it to support her claim.

315. We believed Mrs Murphy's account of the broader circumstances of the incident on 8 November 2018. Her evidence was that she was genuinely concerned for the claimant that day. She told us she thought she had taken her eye off the ball and that some harm had come to the claimant. We found Mrs Murphy to be fair minded because she told us that when she challenged the claimant about where she had been and the claimant replied that she had just started her break she could "tell by Vicky's body language she was telling the truth" and we found she acted fairly because she called a meeting after this specifically to apologise to the claimant.

316. We found Mrs Murphy was someone who took a balanced view when she told us that the claimant's performance rating was good, at the top end of the 2 range, when there were many staff who had just scraped a 2, and that she had gone through the rating when she had first seen it to check it was consistent with scores for other people based on similar evidence. She had gone through it again when Mr Harrison spoke to her about it at the appeal stage. She had looked for evidence to reach up to a 1 but found none.

317. Mrs Murphy told us that the broader context was one in which she had seen Mrs Collier turn from a strong, confident young woman to a bag of nerves because of the claimant's pursuit of her and a box mark 1 rating and that by September a stress reduction plan had to be put in place for Mrs Collier. We found Mrs Murphy to be fair minded and balanced in showing concern for both the claimant and Mrs Collier.

318. Mrs Murphy told us about the atmosphere on the section which she said could be cut with a knife. We had corroborating evidence from Mrs Collier and Mrs Gardiner that the claimant spoke often about her grievance and from Mrs Whiteley that she tried to get people to take sides with her against Mrs Collier.

319. The claimant's evidence was that there was no atmosphere at work. This was not credible in the light of the evidence of the respondent's witnesses, nor the claimant's own evidence when she told us that she had talked to her colleagues about her grievance. She accepted she had had been tearful at her desk and had talked about why that was. We saw that she had sent herself emails recording her perception of events. She told us she had invited more than ten colleagues to come to Tribunal to observe her case and that she had asked her new line manager what she thought of how Mrs Collier had treated her.

320. We heard the claimant's evidence under cross examination and observed for ourselves how, when pressed for detail on a contentious point, she digressed into talking about her condition and to offering detail talking about how she "flooded" or "pissed or shit" herself or describing the texture and consistency of her menstrual flow.

321. We saw the claimant's correspondence to Mrs Collier, Mrs Murphy, Mr Harrison and others in which she intimated involving the Permanent Under Secretary to the department in her box mark rating dispute and in which she stated that she would be informing her local MP about her case. We saw that the claimant persisted in this correspondence after she had been told that internal processes had been exhausted and that she persisted in writing to and copying correspondence to Mrs Collier after Mrs Collier had stood down as her line manager.

322. We saw the unfounded allegations that the claimant made that Mrs Collier had sought out detail of her condition for titillation purposes and that Mrs Murphy had deliberately tried to exacerbate the claimant's stress on 30 August 2018 so as to worsen her endometriosis symptomatology. We saw the unfounded allegations that Mrs Murphy had insisted on that same date that the claimant carry on working when she was upset when, by Mr Turner's evidence, that was not the case. We saw the unfounded allegation that Mrs Whiteley had said endometriosis was not a disability.

323. We saw the email the claimant sent about a new starter at work. The claimant sent it to Mrs Murphy, Mrs Collier and Mrs Whiteley. The claimant sets out allegations of bullying she says she suffered at school and reports that the bully, she names her, has now come to work at the respondent's premises. "I am giving you a bit of background because on the off chance she starts again, I will not tolerate it" and "if she says or does something negative towards me I will report it and expect action to be taken accordingly".

324. We concluded that for this claimant, in the event that any of the unwanted conduct had been disability related (which it was not) it would not have had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

<u>Allegation 18H</u>

325. Mrs Whiteley's conduct in comparing the claimant's performance to that of an anonymised employee was not related to the claimant's disability. It was related to the claimant's low productivity and time spent pursuing a box mark 1 rating. Mrs Whiteley was the claimant's line manager. We accepted Mrs Whiteley's evidence that she was trying to assist the claimant to move away from feeling aggrieved at her rating

and to make a fresh start. She was trying to demonstrate to the claimant how much more productive the claimant might be if she did not spend time pursuing a box mark 1 rating.

326. For the reasons set out above, we do not accept that even if this conduct had been disability related it had the purpose or effect of creating the environment in Section 26.

327. The claimant's allegation at 18H is not well founded and fails.

The Section 27 victimisation claims

Protected acts

328. On 6 November 2018 the claimant sent an email to Mrs Collier. We considered whether that email amounted to a protected act within Section 27 Equality Act 2010. The Act sets out at Section 27(2)(a) to (d) examples of protected acts.

329. Section 27(2)(c) provides that "doing any other thing for the purposes of or in connection with this Act can amount to a protected act"

330. We find that the email was not sent "for the purposes of or in connection with this Act". We find that the claimant wanted her box mark rating changing to a 1 and her purpose in sending the email was to exert pressure on Mrs Collier to get the rating changed. This email does not refer to discrimination, or disability or the claimant's toilet breaks.

331. If the email had been a protected act (which we found it was not) then we find that the claimant was not subjected to any detriment *because of* the email. We deal with detriment below.

332. On 7 November 2018 the claimant sent an email to Mrs Whiteley and copied it to Mrs Collier and others. The claimant says in the email:

> *"She is further discriminating against me (which is unlawful). I feel I am being discriminated by Jane Clarke…"* and *"My endometriosis symptoms have become worse because of the discrimination I have experienced at work by management."*

333. It makes a clear allegation of discrimination. The email of 7 November 2018 is a protected act within Section 27(2)(d).

Allegation 16V

334. The claimant alleges that she suffered a detriment on 7 November 2018 when Mrs Whiteley told the claimant that her emails to Mrs Collier could be seen as harassment.

335. We find that no such remark was made. We were persuaded by the evidence of Mrs Whiteley that she was careful with the claimant because she saw the claimant as a volatile person. The claimant suffered no detriment because the remark was not made.

Allegation 17V

336. The claimant alleged that she suffered detriment on 8 November 2018 at the meeting on the stairs incident when Mrs Murphy asked where the claimant had been, said she wanted the claimant back at her desk and exaggerated the time spent away from her desk. For the reasons set out above these acts were not *because of* the protected act email but because Mrs Murphy had a genuine concern for the claimant's welfare that day.

Allegation 19V

337. The claimant alleged that she suffered detriment on 23 November 2018 when Mrs Murphy continued to exaggerate time claimant spent away from her desk on 8 November 2018. Mrs Murphy had called that meeting to apologise to the claimant. Having seen the data Mrs Murphy could see that it was both true that the claimant had been working between 10 and 11am and that it could be that the claimant had had a cumulative total of twenty minutes away from her desk that morning.

338. Mrs Murphy's remark, made at the close of the meeting, was unfortunate. She had called a meeting to apologise and the claimant had again talked about her condition and her box mark rating. We find Mrs Murphy did not make the remark *because of* the protected act email. The email was sent to Mrs Whiteley and Mrs Murphy, whose evidence we accepted, did not recall having seen it. Mrs Murphy made the remark not because of the email but because she was exasperated by the claimant.

Conclusion

339. There was no discrimination arising out of a disability in this case because the SCR time was not a factor in the box mark rating decision making. The claimant wasn't "marked down" because of it, the reason for the 2 rating was that she hadn't adduced evidence to allow Mrs Collier or Mrs Murphy or Mr Harrison to "reach up" to a mark 1 for her.

340. There was no failure to make reasonable adjustments in this case because there was throughout May and up to June 18 a local arrangement working well and after June 18 (within days of it being requested) a formal reasonable adjustment in place that worked well and was not breached or made ineffective by the respondent.

341. There was no harassment of the claimant. The respondent did not engage in unwanted conduct *relevant to a protected* characteristic. It did nothing to create a humiliating, degrading or offensive environment for the claimant.

342. There was no victimisation of the claimant. Although she performed a protected act in raising discrimination issues in an email on 7 November 2018, there was no detriment because of it.

Decision

343. It is the unanimous decision of this Tribunal that the claimant's claims are not well founded and fail. The question of remedy does not arise so no award for compensation, for personal injury or otherwise, is appropriate.

Employment Judge Aspinall

Date: 22 May 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
22 May 2020

FOR THE TRIBUNAL OFFICE