Case number: 2602464/2018 Reserved

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
Mr K Preston	And	E.ON Energy Solutions Limited

AT A FINAL HEARING

Held at: Leicester **On**: 17-21 February 2020
And in Chambers 14 April 2020.

Before: Employment Judge R Clark
Mrs Chris Pattisson
Mr Chandra Bogaita

REPRESENTATION
For the Claimant: Mr N Parsons, the claimant's partner.
For the Respondent: Mr Gillie of Counsel.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows: -

1. The claims of disability discrimination **fail and are dismissed**.

REASONS

1. Introduction

1.1 This is a claim of disability discrimination. It arises from the events leading up to the respondent's decision to terminate the claimant's employment effective on 15 June 2018.

1.2 The claims are put on 4 legal bases:-

a) There are a series of adjustments alleged that Mr Preston says the respondent was under a duty to make, were reasonable to make but which it failed to make.

b) There are a series of acts or omission that are alleged to amount to unfavourable treatment because of something arising in consequence of his disability. The something arising relied on is his sickness absence.

c) There are a series of acts said to amount to harassment related to his disability

d) There are a series of acts said to amount to detriments on the ground that Mr Preston did a protected act. The protected act is his grievance lodged on 5 April 2018.

2. Jurisdiction

2.1 The original claim included a claim of unfair dismissal. This was struck out at a previous preliminary hearing as Mr Preston did not have the necessary qualifying service.

2.2 The claim was presented on 27 September 2018 following early conciliation between 17 and 31 July 2018. As a result, any allegations prior to 14 June 2018 are out of time. The only matter which is in time, is the decision to dismiss Mr Preston communicated by letter dated 15 June 2018. All the other allegations are on the face of it out of time. In order to engage jurisdiction to determine those potentially out of time allegations, we will need to consider when each allegation crystallises and, consequently, when time expired. That will include whether the allegation forms part of conduct extending over a period. If that leads to that particular allegation being out of time, we will then have to consider any relevant evidence on the question of whether to extend time on a just and equitable basis. However, we have adopted an approach to consider all allegations on their merits in the first instance. Only if they would succeed on their merits would we then need to engage with the jurisdiction question.

3. The Issues

3.1 The issues were identified at the two previous preliminary hearings. As a result, tables of allegations under each legal cause of action were prepared by Mr Preston and have been reduced to a single agreed list of issues. We adopt those as the basis of the issues we need to determine in this case. Because of their length, we have set them out as an appendix to this judgment. We adopt the questions it poses as the structure of our decisions below.

4. Evidence

4.1 For the Claimant we heard from Mr Preston himself. We also heard from his partner, Mr Parsons. Until he attended an internal hearing in April 2018, Mr Parsons had no direct evidence of the events within the workplace and his evidence was mainly dealing with how he had had to deal with Mr Preston at home. Mr Parsons did, however, have some understanding of this particular workplace, having previously been an employee. We should add an acknowledgment to Mr Parsons. Although he had no prior experience of advocacy,

he very much grew into the role during the course of the week's hearing and we wanted to record our gratitude to him for assisting Mr Preston to advance his claim.

4.2 For the Respondent we heard from Mrs Emma Butler, Mr Justin Goosey, Mr Imran Arif, Mrs Naseera Hafeji and Mrs Julie Williams

4.3 All witnesses adopted written statements on oath or affirmation and were questioned. We received a substantial bundle running to around 1000 pages with the additions and considered those documents we were taken to. Mr Gillie made oral closing submissions, speaking to written submissions on the reasonable adjustment claim. Mr Parsons requested, and was given, time to reflect on any submissions he may wish to make but in the end decided there was nothing he wished to say.

5. Preliminary Issues

5.1 Adjustments to the process had been agreed in advance in relation to how documents were read out by Mr Preston and the provision of extra breaks as necessary. We implemented all of those. The need for an adjustment to the requirement for Mr Preston to read was initially put at a very high level. It was said that he could not read anything at all. That initial position softened to not reading lengthy passages.

5.2 In addition, Mr Parsons made an application at the start of the hearing to exclude the respondent's witnesses during the time he was in the hearing room. In other words, at all times. His grounds for the application were that he had not realised they would be in attendance and because it would cause him heightened stress and anxiety to make eye contact with people he did not think he would ever have to meet again. The respondent opposed the application.

5.3 We refused the application after balancing two competing principles. On one hand was the principal of open justice and, in particular, the need for the respondent's witnesses to hear what was being said about them in the claimant's own evidence in order to respond or give instructions as necessary. This was not a case which warranted witnesses being excluded for the sake of testing the truth of their own evidence. On the other hand, we had regard to rule 41 of the 2013 rules and the principal that the tribunal is free to vary its procedures where it is in the interest of justice to do so. We decided the balance between the two tipped against granting the claimant's application. Whilst we were concerned about the late application and the apparently unrealistic position of not expecting those for whom witness statements had been exchanged to be in attendance, we decided the application on the basis that adequate adjustments could be made to the conduct of proceedings short of excluding witnesses. Firstly, we caused the hearing room to be arranged so that a screen could be erected between the claimant and the respondent's witnesses. Secondly, at the claimant's request, we permitted Mr Preston to absent himself from the hearing room for other aspects of the proceedings on two conditions. First, that Mr Parsons assured us he was in a position to properly conduct the claimant's case in his absence. In that regard we would permit additional breaks to be used to allow updates and instructions to be exchanged

between them. Secondly, should Mr Preston wish to re-join the hearing, that we are given notice so that appropriate arrangements could again be made with regard to the screen.

5.4 In the event, Mr Preston became demonstrably more comfortable with the surroundings and the conduct of the proceedings and was able to remain in the room and face the witnesses throughout. In that development, there may be something of a metaphor for the case itself. Once Mr Preston was able to dip his toe into the water, he discovered it was not as cold as he had first feared.

6. Disability

6.1 Disability has been conceded. We do not need to determine that issue. We do, however, need to have an understanding of the disability, its nature and effects in order to understand certain aspects of the various claims made. That is particularly so in respect of assessing matters such as disadvantage, knowledge, the reasonableness of an adjustment amongst other liability issues.

6.2 The disability is primary reading epilepsy ("PRE"). It is a form of epilepsy stimulated by reading. Mr Preston was diagnosed in 2009 after suffering two tonic-clonic seizures (previously termed grand-mal seizures) at ages 15 and 22. The evidence of the diagnosis itself records that the condition is a rare condition; the Consultant Neurologist described seeing only two cases in 10 years. The initial clinical plan advised medication and for Mr Preston to continue reading with a view to eliminating the effects of the seizures caused by reading. He did not keep up with either, nor did he return for an alternative treatment plan. We find the prospect of a tonic-clonic seizure is the focus of his understandable concern. That is not the only form of seizure. Mr Preston also experiences myoclonic seizures (previously termed petit-mal seizures).

6.3 It has been difficult to grasp hold of the real measure of the frequency and intensity of the effects of the disability. To date, Mr Preston has experienced only the two tonic-clonic seizures referred to which led to his diagnosis some years ago. We do not mean to undermine the seriousness of the condition by referring to the quantity as "only" two, we have borrowed this expression from the consultant when he indicated the measure of the severity of the condition. He does have myoclonic seizures frequently, often daily.

6.4 We felt it was also important for us to understand what happens during a myoclonic seizure. This is described as an involuntary jaw jerk or muscle spasm. Mr Preston interchangeably referred to the myoclonic seizure as an "absence" seizure. He used this term because, for a split second, he may experience a moment of apparent unconsciousness and sometimes this may manifest in momentary confusion, alexia and dysphasia. In the moment of such a seizure, words he would ordinarily be able to read and understand become difficult to comprehend. We find the duration of these events to be that of a split second, again taken from his consultant's description. They require him to gather his thoughts before being able to continue with the task in hand. To put the scale of the seizure into context, Mr Preston said he would be surprised if anyone would notice, including a person with whom he was holding a conversation.

6.5 Mr Preston confirmed there was no inherent disadvantage arising from a myoclonic seizure beyond the momentary forgetfulness we refer to and that in themselves they do not interfere with his ability to work. The significance of myoclonic seizures is that they are an indicator of how his brain is responding to the reading stimuli. The more frequent and intense the myoclonic seizures become, the greater the risk that he may be moving towards a tonic-clonic seizure which is to be avoided. Faced with that situation, the clinical advice is to remove the stimuli by simply stopping reading which might require little more than looking away from the words or sometimes taking a break. These measures allow the effects of the stimuli to subside. In terms of the scale of these control measures, they themselves may occupy an equally short period of time and may coincide with the natural variation in tasks being performed either at work or in his private life.

6.6 We must also record some limitations on the question of disability. First, this case is not put on the basis of a disability arising from mental health although Mr Preston was absent for many months with stress and depressive symptoms. His neurologist also had previously recorded a long-standing history of anxiety and depression unconnected with PRE. On the evidence we have seen in this case we find that PRE is not the cause of Mr Preston's stress, anxiety and depression and we find the two are unrelated. We do, however, accept that being stressed may well mean his awareness of myoclonic seizures are heightened and may be intensified. It is important to record that that is the way Mr Preston puts the relationship between stress and PRE. It is also important to emphasise that we are not asked to decide this case on the basis of a disability arising from stress, anxiety or depression and we have not done so. That is not how it has been put, argued or defended.

6.7 The second limitation relates to the initial engagement with occupational health and the need for display screen equipment assessments which were all triggered by reference to Mr Preston's posture and back pain. We find there is no basis to suggest back pain is in anyway related to PRE.

6.8 The third limitation is that we have no evidence to suggest Mr Preston's susceptibility to seasonal colds and flu and other temporary bouts of ill health was any greater than would be expected in the case of a person who does not have PRE. It is accepted that a performance improvement warning issued to Mr Preston about his attendance in early 2017 was not an act of discrimination relating to PRE. Mr Preston also wears glasses which were prescribed specifically for reading which has been attributed to causing headaches.

6.9 In seeking to put the measure of the potential disadvantages into some sort of context, we found the best evidence was that which came from Mr Preston's consultant neurologist. That had started with a clinical plan which encouraged reading. Of greater significance, however, is the only evidence before us of an adjustment suggested directly in relation to PRE by a treating clinician. This carries weight as it comes from a source with expert understanding of the condition and was given at the height of the issues in this case. That recommendation was limited to "occasional breaks from reading off a computer screen". In that regard it is also important to note the Consultant's opinion that reading from a computer screen was something he managed much better than reading from paper as this seemed to cause fewer jerks. Nevertheless, it was only in respect of the computer that adjustments are

suggested. Mr Preston identifies reading from paper (as opposed to computer screens) as a factor increasing the likelihood of a seizure. We have sought to reconcile these two apparently conflicting positions by focusing simply on the underlying need for reading although, in doing so, we cannot but help observe the way the case has been argued seeking digital versions of written material where it is said to exist in paper only, and paper versions where it is said to exist in digital form only.

6.10 We have concluded that the scale of the likely disadvantage in any given situation is therefore low and the adjustments necessary to reasonably address it adequately are likely to be of similar measure. That conclusion is consistent with other factors in this case. They start with the fact Mr Preston went into this work with the support of Mr Parsons who had direct knowledge of both the working environment and Mr Preston's PRE. Whilst that does not absolve the employer of any duties it acquires, the fact it was an informed decision reinforces our conclusion of the measure of disadvantage. The second is that Mr Preston not only coped but did very well in the environment over a number of years. This has never been anything other than an administrative environment heavily dependent on transfer of information via computer screens whilst talking to customers. He did so for 3 years without adjustments being sought or apparently necessary. Thirdly, his competence and performance in the role led to an offer of permanent employment which was accepted. Finally, when other work-related health issues arose in 2017 leading to a series of formal interventions, PRE was either not raised or, where it was raised, it was not identified as the cause of the issues.

7. Facts

7.1 It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. Our purpose is to make such findings of fact as are necessary to answer the issues in the claim before us and to put them in their proper context. That being said, this case covers a lengthy chronology and there are a large number of allegations and the findings of fact are therefore necessarily lengthy. On that basis, and on the balance of probabilities, we make the following findings of fact.

7.2 The Respondent is a well-known energy retailer. It has a number of customer contact centres. It originally structured its customer support across the business so that each contact centres focused on one area of the business process. For example, billing, debt, metering, home moves etc. It calls each of those areas of business an area of "demand". Each centre had teams of advisers dealing with a demand area and each had an associated complaints resolution team, dealing with the complaints arising from that demand process.

7.3 Its Leicester customer service centre was originally focused on a demand area known in the business as "change of supplier". That is, where customers move their supply between energy suppliers. As with the rest of the business, the majority of the employees worked in teams of advisers dealing with that issue directly and it also had its own team of "complaints resolution managers". We find the nature of the complaint work was the same level of work, it was not any more responsible than the customer adviser's role but we do find it has different demands, due simply to the nature of resolving disputes and resolving a conflict.

Nevertheless, we found it to be a well-managed team under the leadership of Mrs Butler with a very success rate of complaint resolutions.

7.4 In November 2017 that business model changed and each centre's dedicated complaints team was centralised. Leicester's role changed. It became what the respondent then called the "centre of excellence for complaints resolution". All the teams employed at Leicester therefore took on complaint resolution roles dealing with complaints across all the various areas of demand. Mrs Butler continued to lead the team she had dealing with change of supplier complaints and was part of the transformation to the new model. Whilst teams were not expected to cover all areas of demand, they were expected to cover more than one. We find Mr Prestons' team would eventually take on four areas of demand.

7.5 It is significant that when the opportunity to work at E.On arose in 2014, Mr Preston had some inside knowledge of the type of working environment he would be going into as his partner, Mr Parsons, had previously worked for E.On, albeit about 6 years earlier, but in the same type of customer adviser role. He also had full knowledge of Mr Parson's PRE at the time of the application. That knowledge did not give rise to any basis on which Mr Preston was cautioned or advised about any potential concern arising from the inevitable paper and digital reading that would be involved in the role. We find the essential nature of the working environment had not changed between Mr Parsons employment and when Mr Preston joined.

7.6 In 2014, Mr Preston commenced an agency placement with the respondent at the Leicester contact centre. His services were supplied through a contract with the agency, Manpower. Initially, Mr Preston's job was that of a customer services adviser. We find the recruitment procedures for Manpower included disclosure of health issues. In response, we find Mr Preston had said he may need additional time to read through documentation. Shortly after his appointment, Mr Preston sent an email to his Manpower contact letting them know of his condition of PRE but there were no implications or potential disadvantages raised as a result of this. We find no adjustments were discussed, requested nor any disadvantages anticipated by either party. Significantly, we find the information was not passed on to the respondent and there was nothing thereafter that could reasonably have alerted the respondent to the possibility of anything causing disadvantage to Mr Preston. Mr Preston accepted the respondent was not aware of what little communication there was on the issue between him and Manpower.

7.7 The role itself entails all of what one would expect in a customer support environment. It is desk based using telephones and computers which run various databases, programmes and systems to access customer accounts and prepare correspondence. There is a call floor with teams of staff and supervisors. One feature of this case was the use of whiteboards. We find these are small, A4 sized, boards which are simply made available to all staff as an aid to jot down notes about calls. They are not part of a system in the sense that staff were required to use them, and we find some staff would use them and others not use them. They were there for those that wanted to use them for jottings during calls.

7.8 We find Mr Preston did very well in his role. In April 2016 he was invited to apply to move to the complaints resolution team as a complaints resolution manager. The title

manager reflects more the management of complaints, rather than a manager of staff or resources. He was keen to do so initially, as it presented a career development opportunity. He then got cold feet after being concerned about the stress of the role and his awareness of others leaving the team. Nevertheless, he transferred. Mr Preston criticises the fact his transfer continued after he had changed his mind but the explanation arises from two related facts. First, he was at that time still an agency worker and the principal's need was in that area of work. Secondly, he had already demonstrated himself to be a very competent adviser and the respondent's suggestion of him moving to complaints was testament to the high regard in which he was held.

7.9 He joined Mrs Butler's team after completing the training specific to complaints resolution and after passing, an online competency test for which no adjustments were sought nor did he appear to suffer any disadvantage. His performance on the team was better than good. We accept Mr Butler's evidence that he was not only not struggling, he was positively doing well. He was particularly good at the conversations with customers and was even held out as a champion in this regard. We accept his performance on the job was always more than adequate and that the trend was one of someone getting better in the role. Because of his good performance, Mr Preston was offered and accepted employment directly with the respondent as a complaints resolution manager which he commenced from 1 October 2016.

7.10 The transition from agency worker to directly employed required Mr Preston to complete all the typical new employee forms and processes for the respondent. We find Mr Preston completed a "personal details" form containing basic information but including a "yes / no" answer to whether he had a disability. He ticked "yes". No details were given at that time. We find that although Mrs Butler was responsible for sending this and other information to HR to manage his appointment, she did no more than glance over the form. We find there are two reasons for this. The first is that Mr Preston was already well known to her and this was genuinely viewed it as an administrative process to set him up on the respondent's payroll. Secondly, the section containing the disability question is frankly so small that it was likely to be missed. We find that is the more likely explanation for the oversight as Mrs Butler had neither any concept, nor any reason to believe that Mr Preston had a disability and if she had seen the question had been answered affirmatively we find this would have triggered such curiosity that she would have explored this further with Mr Preston. We find Mrs Butler had no knowledge that Mr Preston had a disability generally or PRE specifically. We find the process of completing this form did not prompt Mr Preston to enter into any discussion with Mrs Butler or others.

7.11 Mrs Butler's role was to send the form to the HR department. We find upon receipt, an administrator then performed the necessary steps to set up Mr Preston as an employee. One part of that process was to send out a form of pre-employment health questionnaire if the disability box was ticked. We find when the form got to the administrator, they did in fact cause the health enquiry form to be sent to Mr Preston. We find he chose not to complete the form which was not returned. Had it been, it would have prompted at least a discussion between HR and Mrs Butler and, in turn, Mrs Butler and Mr Preston. It may have prompted a

referral to occupational health. None of those things happened and Mr Preston continued in his role as he had before, working well and without need any apparent disadvantages or any need for adjustments. We find the fact he did not complete that second form to be informative of the real sense of disadvantage in the workplace and we find it was not regarded by him to be substantial. We have considered whether he simply forgot to complete the form but reject that as, if that was the case and if there were substantial disadvantages presented by the work he was doing, he would have been reminded of the issue every time he encountered them.

7.12 In the role of a complaints resolution manager, we find the working day was split into various categories of activity. That included availability time when calls can be taken, time for "wrapping up" the call at the end before taking the next, 15 minutes daily team performance dialogue, 30 minutes weekly individual performance dialogue, 2 hours paperwork time which could be split into two, one-hour slots, and any other allotted time for activities such as coaching or training. For some staff there could be additional duty time, such as if they were a trade union representative. We find the 7½ hour normal working day included ½ hour for lunch and two 10 minute breaks. Unlike other sectors, in this employment these scheduled breaks were paid breaks. We find that is significant and will return to the issue of breaks in the context of the flexibility to offer other adjustments including additional *unpaid* breaks.

7.13 We find the evidence gathered in the later grievance investigation would show that when participating in training sessions, no issues had arisen or been raised in respect of Mr Preston's participation or that he was experiencing any difficulties.

7.14 We accepted Mrs Butler's explanation of the performance management of the complaints team in the following terms. Each team member would take calls and seek to resolve that complaint. Each call would need some time immediately following it to wrap up the complaint. That time was needed to get the case in order. In addition, two hours of time were also allotted to each resolution manager to write up the complaints. That is to do the associated paperwork with the resolution itself. A complaint was resolved when it was disposed of satisfactorily. The aim was for both parties to accept the resolution. Sometimes a resolution was offered which the manager would feel was fair but the customer did not accept. Such a position would still be a "resolution" for the purpose of the team performance, even if the subject matter was then handed over to the appropriate Ombudsman scheme. The complaints team had a large white board on which various updates and messages were conveyed to the team. The white board also conveyed current performance. Each day, the previous day's figures would be put on the board by Mrs Butler. These would include the number of calls taken, the number of complaints resolved, the average handling time, and adherence to schedules.

7.15 Mr Preston was concerned that this scheme of performance management indicated publicly that he was failing. We do not accept that. Firstly, we find there were no individual targets. There was, however, a benchmark of 3 resolutions per day but as each complaint was different, there would be reasons explaining why one person might deal with 6 one day, and 1 the next. Secondly, so far as there was any indication of each team members' performance, we find Mr Preston was always regarded as a high performer and someone Mrs

Butler never felt she might have to engage with about performance issues. If there was potential for disadvantage arising from the respondent's performance management, Mr Preston was not subjected to it.

7.16 Some complaints were straightforward and others at the opposite end of the scale. Some could be resolved immediately, others required further enquiry. For that reason, we find there was no "one size fits all" approach to performance management. Similarly, each adviser could have any number of complaints open at any one time. We find the maximum number for anyone would be in the region of 35-40 open complaints. We do not accept Mr Preston was handling 50 open complaints and we find that, in the run up to the reorganisation of the Leicester office, Mr Preston along with all resolution managers had kept on top of the volume to such an extent that the number of open cases was never more than a handful at any one time.

7.17 We find those management interventions were well structured and we were impressed by the nature of the coaching ethos which celebrated a good day, rather than chastised a bad day. There were weekly team dialogue meetings at which team members could share good and bad experiences during that week's work. We find Mr Preston was a positive contributor to those meetings. He certainly never expressed any concern of anxiety about his exposure in those meetings. There were also side by side dialogue and coaching sessions when Mrs Butler would either join a team member on a live call or they would together review a recording of a previous call. We find all team members had these sessions on a regular basis. Individual members were not singled out. The only statistical indicator Mrs Butler used to identify potential issues was if there was a significant disparity between an individual team members' number of resolutions compared to the team. Again, we find this is not a critical process but a process to support and understand. There would often be a reason why that had been the case based on the nature of the complaints themselves, not the performance of the resolution manager. Again, we find Mr Preston was not someone whose performance ever fell into the category of someone for whom the manager had concerns. In this matter, therefore, we are unable to accept many of the alleged disadvantages.

7.18 None of that, however, means the complaints role does not have its own pressures. There are pressures arising from the fact that the inward calls are not evenly distributed. There are busy times and there are quiet times. Whilst the business teams are managed to try and even out the times people are on the phones and writing up, there will be times when the ringfenced paperwork time cannot be used immediately after closing the call to the customer and other calls have to be taken. When on paperwork time, however, we are satisfied the need to "jump on to a call" as Mr Preston termed it was rare. On the occasions it did happen, we are satisfied that additional paperwork time was made available.

7.19 Another source of pressure in the role is the compliance obligations. There are a number of codes of practice to be complied with and a number of things Mr Preston would have to keep in mind when handling a complaint. These rules are set out in various documents. We are satisfied they were available both in paper and digital formats on the ASK system.

7.20 In his permanent directly employed role, his performance continued to be positive. Mrs Butler ceased to be Mr Preston's team leader in January 2017. By then, the centre of excellence reform was in place and teams were being organised according to preferred working patters as a means of keeping the groups of employees together throughout their working week. This was felt to be a better way of working and fostered better team dynamics support and understanding.

7.21 In January 2017 Mr Preston moved to a team lead by Justin Goosey. We have tried to identify where Mr Preston's stressors came from as there did not appear to be any particular indicators manifesting whilst working for Mrs Butler. We find that the fact Mr Preston was good at his job, a competent worker and those qualities had meant he secured permanent employment were all factors which may have masked the fact that this was not the sort of work he ideally wanted to be doing. On balance, it seems likely he did not derive much pleasure from the work itself and, as we have said, the nature of conflict resolution can be draining, even if one is good at it. His initial instincts about not taking up the role appear to have come to pass. The move to Mr Goosey's team was as part of the transition to the centre of excellence for complaints resolution. To add to the potential pressures, it was all new for everyone. The change of structure in itself could be a source of stress.

7.22 Mr Goosey had been a team leader prior to this appointment and had experience in the wider business. We find he adopted the same coaching sessions, side by side dialogue sessions and team performance dialogues used by Mrs Butler. In the 8 or 9 months the two worked together, we find he held the same positive view of Mr Preston's performance as Mrs Butler had. He may well have had a different management style to Mrs Butler which, again, can be a cause of stress for some, but there is nothing in the evidence we have seen to isolate any significant aspect of the relationship between him and Mr Preston that we could find to be a specific cause of stress.

7.23 We find Mr Goosey had no knowledge of Mr Preston's PRE when he took charge of the new team and nothing was further disclosed by Mr Preston. In fact, we are satisfied that he was not aware until after Mr Preston commenced his final period of sickness absence.

7.24 One effect of the restructure was that all the complaints calls across the country were now directed to the Leicester office. Whilst the number of complaint calls handled in Leicester obviously went up, we find, the number of staff dealing with complaints also increased commensurately. We find the ratio of staff to the expected volume of complaints was maintained and the aspirational expectation of the number of resolutions each resolution manager would aim for remained at 3 per day. The volume of calls itself does not seem to be a cause of stress although Mr Goosey did use that description in later investigations. We find this term to have been a broad shorthand for pressure of work, as opposed to the quantity of work.

7.25 Where we do recognise a change is in the nature of the complaints work. Mr Goosey's team expanded its lines of "demand". Whereas it had previously been dealing only with "change of supplier", it now expanded to other areas of demand such as billing and metering. This meant everyone on the team had to be conversant with the procedures and practices in

all those areas. There were therefore 4 sets of protocols to understand and 4 sets of compliance expectation to understand. The incoming calls could be on any of those four areas so the handlers had to keep on top of 4 times as many compliance protocols. Again, we find this to be a likely contributor to work related stress for an individual who was, at best, indifferent to this area of work but at least highly competent in his original demand area. The three additional demand areas were new to Mr Preston and, although there was thorough training, it must have felt to him like starting the job all over again.

7.26 Another implication of the centre of excellence was that there were a number of new duty managers who might not have been familiar with the previous culture of the Leicester centre. During Mrs Butler's time, the prospect of being asked to drop paperwork to take calls was extremely rare. We find that in the new structure, there was an increase in the frequency with which Mr Preston and others were asked to take calls during paperwork time. However, we find allotted paperwork time was treated differently to wrap time, that is the short period of time immediately following a call when the immediate information is written up. Whilst paperwork time could be eaten into in busy periods and reallocated at a later time, we are not satisfied that there was a practice of asking staff to take calls during wrap time. Mr Preston states he was asked to do so and ended up double wrapping two calls. We have seen text messages in June 2018 between Mr Preston and a colleague which suggest this was not happening. The person he messaged certainly said it had never happened to him. On balance, we find that if Mr Preston had been asked to take a call in those circumstances he must have agreed when ordinarily it would have been acceptable to state the adviser was still in wrap. We do not find there was a system of eating into wrap time and, in fact, this was contrary to the system. We find each adviser had to identify their status on the system and if an adviser had not set their status as wrap, they could be asked. If they were in fact still wrapping a previous call they were entitled to decline any request. We suspect Mr Preston's competence and cooperative nature is at the route of this. On the few occasions this happened, we find it must have been something he agreed to do.

7.27 We also accept that the number of cases open at any one time changed after the reorganisation. This is not to say there became an unmanageable number and we accept that the numbers remained within the acceptable range Mrs Butler had applied to the team before the changes. Similarly, the change did not appear to have an effect on Mr Preston's performance with individual cases. The reason we find there was a relative change was simply because under the previous regime, the team had been particularly successful at disposing of complaints that at any one time it was working to a particularly low number of outstanding cases.

7.28 We have been at pains to identify any further source of the pressure in Mr Preston's role. Despite the broadening "demand" lines potentially being a source of increased pressures, we find Mr Preston's performance in his role continued to be very good. We accepted Mr Goosey's evidence of how Mr Preston was often the team member to finish his paperwork within time and then offer to assist the other advisers, that he had a particularly good conversational style with customer's and he was never concerned about his performance dropping. As he had done when working for Mrs Butler, Mr Preston continued

regularly to do overtime during the week and Saturdays when calls would come in and also on Sunday mornings when calls were not coming in. This continued until as late as 17 August 2017, one month before he would commence his period of long-term sickness. When working overtime on Sundays, we find the customer resolution managers would be allocated any unresolved cases to conclude without the interruption of incoming phone calls. We find it was possible that when Sunday work was allocated a customer resolution manager could, coincidentally, be allocated an outstanding complaint from his own workload but that it was not the system that they could request their own, unresolved, caseload to work on. That is not to say that it never happened, but we do not accept Mr Preston's account that he worked Sunday's only to catch up with his own workload. We do not accept that was the purpose of the Sunday overtime and was never raised as the basis for him effectively needing an extra day to do a normal week's work. On the contrary, this was an opportunity to improve earnings and it is perfectly understandable why someone as competent in their role a Mr Preston would want to take advantage of it. Far from showing Mr Preston was not coping during the week, we have to conclude it shows he was coping very well in his role.

7.29 From winter 2016 and into 2017, Mr Preston encountered problems with his physical health. Firstly, he suffered three episodes of winter sickness and, secondly, he began to experience particular ergonomic issues with his workstation affecting a pre-existing back complaint. The episodes of winter sickness were described as "cold and flu", "sore throat, cough" and "cold and flu" taking 1 day, 5 days and 3 days off work respectively. This was enough to trigger the attendance management policy and led to a formal improvement plan being issued in March 2017. This set an initial target of 100% attendance for 3 months. We note that the record of the discussion which led to the improvement plan records a question "are there any adjustments required – how will these improve the attendance?" to which the answer recorded was that there were "No adjustments required". We find none of these issues had any link to PRE. We do accept that Mr Preston was then concerned about the prospect of additional time off and that, if this happened, that would lead to more formal sanctions and this added to his work-related stress. Indeed, in April Mr Preston had to take a day off sick to attend an emergency dental appointment and this meant he did not achieve the attendance improvement plan. This in turn led to a first formal warning issued following a formal hearing on 4 May 2017. All of these factors are work related stressors unrelated to PRE.

7.30 In anticipation of this formal hearing, Mr Preston had sought the support of his UNISON representative, Manjit Kaur. We accept that they discussed stress and it was her suggestion that Mr Preston ask his manager to undertake a stress risk assessment. We also find the context of this was driven by his back condition and his work-station and, for that reason, a Display Screen Equipment assessment was also proposed. When these issues were discussed alongside his recent sickness absences at the formal meeting on 4 May, they were set in the context of a detailed examination of health issues which might trigger absences. Mr Preston gave a great deal of detail about his health conditions. We find nothing in that touched on PRE at all.

7.31 Pausing there we need to note the relevant policy framework. The respondent operates a documented attendance management policy developed in the context of a unionised workplace. It is a detailed document setting out policy, procedure and guidance. Within it, there is an expectation that absent employees maintain regular contact with their managers during the period of absence and recognises such contact is key to providing support to facilitate a return to work. Employees are expected to remain contactable during absences. The policy also deals with disabilities and the respondent acknowledges its commitment to complying with the equality act and making adjustments which it notes "may include a higher level of sickness absence". It formalises the situations in which an employee's absence will be regarded as unauthorised. That includes failing to comply with the notification or certification requirements.

7.32 The capability procedure is similarly detailed. It sets out a process for dealing with underlying medical issues and the process for understanding the health issues, getting back to work or, ultimately, terminating employment.

7.33 There are minimum standards of conduct imposed on employees under the "employee rules" including hours of work, attendance and compliance with other policies. Finally, the respondent operates a disciplinary procedure which is typical of employers of this size and we are satisfied engages with the minimum requirements of the ACAS code.

7.34 Returning to the chronology, we find the stress risk assessment was completed on 3 May 2017. We find there was no explicit reference to PRE. We reject Mr Preston's contention it was raised. We find on balance that this would have jumped out of the context of that meeting to such a degree that we cannot accept it would not have then been noted. We do accept that some of the things Mr Preston raised may have been things he regarded as having a relationship with his PRE, but he did not make that link known. The nature of the issues that were discussed were of such general nature that there is no basis for concluding that Mr Goosey or anyone ought to have made the link to something they had no knowledge of.

7.35 We are satisfied the stress risk assessment process is well structured and usefully prompts both manager and employee to consider factors that could potentially give rise to stress in the workplace. It goes on to suggest the types of control measures that could be put in place to support stress reduction. It is significant that some of the examples appear to be relevant to the case as it is now put to us, but when the assessment was undertaken and discussed with Mr Preston, in some of those cases they did not prompt any plan of action. That does not mean to say they were not discussed, only that there was no plan agreed. One such example arises in the context of additional breaks. Mr Preston is critical of this as he says there was no scope to permit him to take additional breaks. We find that is not the case but we also found Mr Goosey's recollection was confused on the timing of when breaks were discussed, during the stress risk assessment or at a later date. We preferred Mr Preston's recollection that they were discussed at the stress risk assessment meeting which seems to us to be the obvious time they would be raised. We also accepted his recollection of the response from Mr Goosey which, aside from the timing, is agreed. His response was that additional breaks could be scheduled but the time would have to be "worked back". As we

mentioned already, we find this was scope in appropriate cases to supplement the existing *paid* breaks with additional unpaid breaks when needed. To complete the full shift without affecting pay, time taken out of the working shift for additional breaks would have to be added to the end of the shift. It is common ground that this was offered to Mr Preston. We find, however, that Mr Preston's response was that, based on those terms, he did not want the additional breaks. There was much examination of the reason why this was not recorded on the stress risk assessment form. We find the reason was the fact that the form records action points for future review and when Mr Preston declined the unpaid breaks, it was no longer a potential action point.

7.36 Another criticism is that the discussion explored what Mr Preston could do himself to relieve the stress. We find this does happen and is part and parcel of the totality of the stress risk assessment. We find Mr Preston engaged in that process at the time.

7.37 We find the risk assessment included a significant plan relevant to various factors potentially causing stress in the role. Mr Preston was reminded of the need to "stay in wrap" if he was wrapping calls, that is the way the system records the current activity or availability. More than that, there was explicit reinforcement of his right to refuse any requests by duty managers until he had finished wrapping a call and to report instances to his team leader.

7.38 Running parallel to the stress risk assessment was how to deal with Mr Preston's back complaint. There was discussion about how long standing this was, how it had not led to any time off and how Mr Preston had not needed to seek treatment for it. On that basis Mr Goosey accepted the issue so far as the workplace was concerned and set about organising a DSE assessment of Mr Preston's work station. Mr Preston raised the role of occupational health. Mr Goosey's response was that he had no business reason for referring Mr Preston so couldn't arrange an appointment, but informed Mr Preston that he could self-refer for advice. He did.

7.39 The DSE assessment was completed initially on 11 May 2017 followed by a side by side assessment with Sanjay Patel on 22 May. The initial assessment records the expected areas relating to posture and vision. It records that Mr Preston is able to take regular breaks away from the screen. We find it strange in the context of this case that there was a further formal process being undertaken with Mr Preston, the purpose of which was to consider any health issues arising from working with a display screen, all but synonymous with reading, in which PRE was not mentioned. The form provides more than adequate prompts for this to have been mentioned. There is a catch all question asking if the DSE risk assessment "has covered all the problems you may have working with your Display Screen equipment". Mr Preston answered "no" to that question but went on to criticise the fact that he attributed a failure to undertake a DSE assessment in the previous 3 years as the reason why he now needed to wear reading glasses when using the computer. This theme was continued in the DSE assessment report completed by Mr Patel and sent to Mr Goosey on 6 June 2017. It is a detailed report for the adverse effects Mr Preston was experiencing in the workplace related to his health. Those included the time spent working at a display screen without regular breaks, the long lasting back issues and the fact he has been visiting his doctor concerning headaches since around December 2016. It is, again, significant that such detailed

discussions should take place about matters touching the issues now before us and yet we are bound to conclude that had PRE been mentioned by Mr Preston, then Mr Patel would without doubt have recorded it in his DSE assessment report. There is absolutely no basis for Mr Patel to have gone into the detail that he did about the physical complaints, the headaches and the work-related stressors and yet to have omitted PRE if it had been brought to his attention. The only conclusion we can reach is that it was not brought to his attention. Beyond that we must also conclude that Mr Preston himself did not make any link between PRE and either his headaches or other symptoms arising from him reading from computer screens all day.

7.40 Mr Preston's self-referral to occupational health is the first of many consultations and assessments undertaken by various occupational health professionals. This referral took place by telephone only. Mr Preston spoke with Orla Cockram on 4 May 2017. The discussion was about his back pain. He was advised that a management referral would be required for there to be a face to face consultation.

7.41 Following the DSE assessments, Mr Goosey made that management referral in the context of Mr Preston's ergonomic issues and back complaints on 19 May 2017. On 6 June 2017, Mr Preston attended a face to face consultation with an occupational health adviser called Derek Milligan.

7.42 We find the reason for the referral, and the occupational health advisers understanding of the reason for it, was in relation to the back condition. During the course of the consultation we find Mr Preston did mention PRE. We find the summary notes fairly record the essence of what was raised. They state:-

> ***Primary reading epilepsy - identified when 16 years***
>
> ***Was on sodium valproate – for one year when aged 22 yrs***
>
> ***Has not had any seizures for several years and not waiting for any upward referral and no upcoming medical appointments and not on current medication.***

7.43 We find that PRE was not raised by Mr Preston in the sense that this was an issue he brought to the consultation, instead we find Mr Milligan asked standard, direct questions relating to the patient's health history. It is those questions about relevant past medical history, medication and treatment which prompted the answers that were given. The rest of the notes focus on the physical and vision issues and conclude that Mr Preston was fit and well. Mr Milligan identified the benefits of physiotherapy and noted Mr Preston had been recommended it by his GP the previous year but had not attended. Mr Milligan also noted "management issues" in respect of workload. He concluded Mr Preston was fit and well. He identified the underlying issue as being that Mr Preston: -

> ***"Feels workload is excessive – has had a stress risk assessment"***

7.44 The report that was sent following this consultation focused on the value of a DSE and stress risk assessment which was already in hand. A recommendation for physiotherapy was made if it could be funded. It made no reference to PRE. We accept the reason was as given by Mr Milligan when the following year he was asked to respond to Mr Preston's subsequent

grievance. He said how it was not a current problem and he did not regard it as related to the issues being raised by Mr Preston. He stated that the issues raised did not relate to reading but the job role and devising a plan related to addressing those stressors. He said he was asymptomatic at the time and he did not consider any adjustments were necessary. Mr Preston agreed in evidence that it was reasonable for the respondent to accept this as suggesting he was not suffering any issues relating to PRE at the time. This consultation was in the context of a medical professional recording a consultation with a patient. We find Mr Milligan recorded all relevant matters he was told about. We do not accept that had he been told about PRE and myoclonic seizures being triggered by his work, or being in anyway relevant to the issue before him, that this would not have been recorded or dealt with. Mr Milligan's explanation is the only reasonable explanation for why the report was written as it was.

7.45 Mr Preston and Mr Goosey met on 5 September 2017 as a follow up to the stress risk assessment undertaken in May. Mr Preston is critical of this stress risk assessment process and says that the recommendations were not followed. We find that is not the case. The form records the review in terms: -

> ***"no concerns, no additions to add either. Kevin is happy with everything that was previously discussed and will let me know if anything changes"***

7.46 In late summer 2017, the responsibility for the management of sickness absence was moved from team leaders to section managers. Mrs Hafeji took over from Mr Goosey.

7.47 On 18 September 2017 Mr Preston called Mrs Hafeji to say he had a GP appointment and would be in afterwards. He called later to say he had been signed off work for two weeks. Save for one brief attempt, Mr Preston would never return to work.

7.48 Mr Preston came into the workplace to meet with Mrs Hafeji and discuss his absence following the GP appointment. We find that he reported to her that his reason for absence was that he was suffering with anxiety and depression. However, we find that in this discussion he also disclosed to her his difficulties arising from PRE. We find Mrs Hafeji took his concerns seriously. The two completed a renewed stress risk assessment and made a fresh referral to occupational health which now also explicitly referenced PRE. We find Mrs Hafeji understood from what Mr Preston was telling her that some of the reason for his stress arose in his personal life.

7.49 The joint referral to occupational health states:-

> ***Kevin also explained that he has primary reading epilepsy. This impacts his reading, conversations and concentration. Kevin explained that he has discussed this with his manager and has the following coping mechanisms in place which work for him:***
>
> ***- using his whiteboard to remember information relating to the customer he is working***
>
> ***- looking away from the screen whilst speaking to customers so that he isn't constantly reading***
>
> ***- putting the customer on hold to regroup his thoughts to continue with his conversation***
>
> ***- using his customer guides to help him focus on his tasks***

7.50 We find the reference to “discussing this with his manager” refers to the stresses at work. We accept that Mr Preston has raised stress at work generally and specifically in relation to workload and the symptoms of headaches and physical effect of the workstation. We do not accept that there had previously been any discussion referencing these effects and PRE. We find Mrs Hafeji was genuinely concerned about Mr Preston’s mental well-being. She was sufficiently concerned about his state of mind that she asked him to call her before 2 PM for the first few days because of this. Mr Preston agreed. We do not accept this was a requirement existing throughout his sickness absence beyond the point at which he explained he felt that level of contact was unfair, after the first two weeks of his absence. We find Manjit Kaur supported Mr Preston throughout this and most of the stages that would follow. She encouraged him to maintain regular contact with Mrs Hafeji. We find the level of contact was at all times reasonable and necessary throughout and at times it was also necessary and reasonable to spend longer periods of times discussing the latest developments of issues arising. We note Mr Preston’s agreement with these propositions during his evidence.

7.51 Mr Preston’s first fit note expired on 2 October 2017. Mr Preston had been advised by his Unison representative to stay in touch with Mrs Hafeji. He returned to his doctor on 29 September 2017 was given a further fit note taking him through to 23 October 2017. The fit notes issued by the GP initially recorded depressive symptoms. The fit notes would continue to reference “depressive symptoms – work related stress” until he had been absent for over two months when, on 23 November, the fit note again described “Depressive symptoms, work related stress” over which had been written in hand “and primary inherited reading epilepsy”. In later fit notes that reference to PRE would be clarified as being that “PRE symptoms were worsened by stress”. We find it hard to understand why, if PRE was a feature of the initial causes of the absence as alleged, it was not reported as such on the fit notes. It can only be that this did not feature in any discussion between Mr Preston and his GP or, at least, that the GP did not regard it as causative. We note that when the GP was invited to contribute to the occupational health advisers reaching a final clinical assessment explicitly in the context of what was then known about his PRE, the GP still described the reason for absence as being “depressive episode secondary to work stress” and that he had been seen several times since to renew his sick note due to stress which he reports is caused by difficulties with occupational health”. The highest that it can be put is that being stressed can intensify his PRE symptoms which we entirely accept. We do not accept that PRE is a cause of his stress and depressive symptoms. We find, therefore, that PRE was not the reason for the absence. We find the reason for his absence was depressive symptoms arising from other causes.

7.52 The occupational health appointment was scheduled for on 18 October 2017 with an occupational health adviser called Shelley Cook. It was brought forward to 11 October but was aborted. Although the referral was made jointly it seems claimant disagreed with a line within it relating to his depressive symptoms which stated “his fit note confirmed this was work related however in discussion it appears that there are issues outside of work impacting him at work”. We find Mrs Hafeji had genuinely formed this view from the discussion she had with Mr Preston when he first went off sick. We note that it was around this time that Manjit Kaur herself first became aware of Mr Preston’s PRE according to her evidence to the later grievance investigation despite her earlier involvement with Mr Preston. A new referral was

completed and Mr Preston had a further consultation with Ms Cook again by telephone on 18 October 2017. Mr Preston was this time accompanied by Vilpa Lille, another trade union representative. Miss Cook described the symptoms he was experiencing at the time as being: -

> ***poor sleep – anxious, tearful – emotional, headaches, feels under pressure – and generally poor mental well-being.***

7.53 In terms of the work-related stress she recorded: -

> ***work-related stress – off – used to deal with one complaint – multi resolution work – time to deal with complaints reduced – started making mistakes – manager aware – pressuring performance dialogues – handling times was higher than colleagues.***
>
> ***scared to return to work as feels nothing changed – it's management pressure which need sorting out multiple management issues which need to be resolved and discussed which are fundamental to his work stress situation … needs to have direct conversation with management significant underlying management issues***

and in terms of the epilepsy condition she recorded: -

> ***gets forgetful – aggravated by stress etc.***

7.54 The recommendation by occupational health was that there were management issues underlying this reactive situation which unless they were sorted were unlikely to lead to Mr Preston's return to work. A direct meeting to allow discussion was recommended. With Mr Preston's consent, there was a short adjournment for Miss Cooke to broker a further discussion there and then with a senior manager, Imran Arif. Mr Arif was chosen because he was Mrs Hafeji's "section buddy". The buddy system was used across the workforce including Mr Preston's level to ensure service continuity. In fact, this was a system which could offer support to Mr Preston and, in evidence, he confirmed it would not have been reasonable to exclude him from the buddy system.

7.55 Almost instantaneously, we find there was unanimous agreement to look into the underlying workplace issues immediately after the consultation with occupational health. This lasted somewhere between 1 and 2 hours. Mr Arif did not have knowledge of the full occupational health consultation, only that gained from the summary provided to him when he joined the call. The focus of that was the need to resolve the barriers to Mr Preston's successful return to work, being "the negative perception he has formed regarding some workplace issues/employee relation issues. Clinical evidence suggests, that until this perception has been resolved one way or the other, the employee is likely to continue with their symptoms".

7.56 The brief for Mr Arif was to identify those issues. We find he genuinely, and reasonably, understood that to be something different to what he would term medical issues. We found Mr Arif was genuine in his engagement with Mr Preston and set about with the aim to develop a plan to support Mr Preston's future return to work.

7.57 Mr Arif's approach was along the lines of chairing a brainstorm session, with Mr Preston identifying any thoughts on what those management issues in the workplace were that prevented a return to work. He deliberately kept the topics raised at a headline level and

kept the process moving. He noted the issues as they arose on a flip chart. We find he chose to do that because one of the known issues for Mr Preston was a lack of trust in management and it was his intention that, by ensuring Mr Preston could see he was writing all the things raised, he would achieve greater transparency and trust. To adopt Mr Arif's words, it meant "everyone left the room on the same page". We find Mr Preston engaged with this process equally cooperatively and was able to identify a list of issues which were categorised as high, medium and low concern, measured against the extent to which he felt them to be an obstacle to his return to work. We accept that Mr Arif encouraged Mr Preston to lead. We are reinforced in that conclusion because Mr Arif's previous interactions with Mr Preston and his understanding of his situation were very limited. Consequently, what he learned about the situation and recorded on the flip chart can only have come from Mr Preston. We are therefore satisfied that all the issues raised by him were recorded.

7.58 We find there were some matters raised going to what Mr Arif understood to be outside his remit, these were the matters arising from what he called the medical matters. We find those matters were not ignored and that he understood those wider matters would be picked up with Mrs Hafeji as part of managing the wider and longer-term return to work and that included the issue of additional breaks within the working day. We accept Mr Arif's evidence that it was not for him to agree or disagree to any adjustments and whilst he did express views of where he thought certain adjustments were more likely or less likely to be able to be made, nothing was ruled out.

7.59 Aspects of the meeting are challenged. In particular, the physical stance of Mr Arif, literally insofar as he was standing up, his use of the flip chart to record the observations, and comments he made about some of the suggestions which are said to be dismissive. We find he was not dismissive. Any questioning was in the context of understanding the point Mr Preston was raising and keeping the discussion to what he understood the purpose was.

7.60 We find the list of items recorded on the flip chart were reproduced in an email sent by Mr Arif and that this fairly captures not only all the issues raised, but the plan for a return to work. It is clear PRE was recorded amongst the 12 factors. It was recorded as: -

> ***Stress risk assessment felt like a tick box I saw no output and my condition, "Primary Reading Epilepsy" was not recorded or responded to – High"***

7.61 We note the relevance of PRE is not directly stated as an obstacle to his return to work but indirectly as part of a criticism of the stress risk assessment process. We accept Mr Arif's evidence that neither Occupational Health nor the trade union representative raised PRE as a specific reason for Mr Preston's continued absence. We are unable to reach a finding that the relationship between stress and PRE was stated in the manner that is alleged. We do accept, however, that it was raised and was expressed as a potential symptom secondary to the work-related stress in that being stressed can aggravate the symptoms of PRE. We do not accept that Mr Preston put it the other way around, that is, that lack of adjustments for PRE was the cause of his mental health problems or reason for his absence.

7.62 Another specific challenge is put in terms that Mr Preston was threatened with disciplinary action and that if he was fit for work but did not return to work this will be class as

absence without leave. In that respect, we find the subject was discussed as Mr Arif responded directly to a question from Mr Preston asking what would happen if he did not feel ready to return to work after adjustments had been made. In answering this we find he explained where they were in the wider process and procedures which included the potential consequences if there was no solution. We except Mr Arif's explanation that his interest was to find a solution to avoid any of those potential consequences and he explained that his intention was to uncover what was stopping him returning to work. We remind ourselves this was a meeting at which at Mr Preston was represented by Vilpa Lillie. To the extent that it is necessary for us to make a finding that puts this discussion into context, we are entirely satisfied that the reference to the wider procedural landscape was relevant to the context of what they were trying to do and was not improper and was not a threat.

7.63 Mr Arif is also criticised for his reference to others being absent with work related stress. We are satisfied that Mr Arif did share his experience that where employees are absent due to stress at work, the longer they remain off work the harder they may find it to return to work. We are satisfied words to this effect were said as part of setting the context and urgency of doing what could be done as soon as possible to overcome the current obstacles to Mr Preston's return to work.

7.64 The outcome was a proposal for a series of adjustments including a four-week phased return to work commencing on Monday 23 October 2017 with various adjustments to workload and areas of work and other adjustments continuing thereafter. Mr Preston was scheduled to be on annual leave for weeks 2, 3 and 4 of what would have been the four-week phased return to work and there is some scope for misunderstanding Mr Arif's email and whether those three weeks would be pushed back or simply lost to the annual leave. We are satisfied that when read in context Mr Preston was not going to lose the benefit of the phased return to work because he had annual leave booked and this was later confirmed to Mr Preston. This is also restated by Miss Cooke in her report following the 18 October consultation which makes clear there was a need for additional support from the lead adviser throughout the four-week phased period. In any event, we find that the plan was not limited to a four-week phased period during which there would be reduced working time. Contrary to Mr Preston's assertion in evidence, we find Mr Arif also made clear the proposed adjustments that would continue once Mr Preston had returned to full time working including limiting the demand areas to "Change of Supplier" only, uninterrupted paperwork time for a further 4 weeks, an ability to "hand off" calls to another adviser and weekly reviews with the senior manager.

7.65 We find all those involved in the meeting on 18 October left believing there was a substantial plan to address Mr Preston's issues in the workplace and help him back to work. We find there was a discussion at the conclusion of the meeting in which Mr Arif asked Mr Preston whether he would be able to return to work if those issues they had identified were put in place, to which we find Mr Preston replied that he would.

7.66 On 23 October 2017 Mr Preston did not return to work. Mr Preston was advised by his trade union that the occupational health advice was that he was fit for work and that if he did not return to work he would be classed as unauthorised absence. He contacted Mrs Hafeji

and the two spoke about the plan. We find Mr Preston expressed his appreciation for all the support he had been given but felt that the trust had broken down. We find this to be a significant turning point in the case. It is a position that from this point onwards was maintained by Mr Preston in varying degrees in the face of a wide range of further efforts to adjust his working environment and support his return to work.

7.67 Mr Preston obtained another fit note taking him to the 22 November 2017

7.68 We find Mrs Hafeji's response was to set out to Mr Preston how they had agreed actions to overcome the issues in the workplace and that otherwise he was fit to return to work in line with the occupational health advice. Mr Preston disputed that he was fit for work and wanted to challenge that occupational health conclusion.

7.69 Mrs Hafeji met with Mr Preston on 31 October 2017. At that meeting she confirmed that the meeting with Mr Arif had captured the actions and gave Mr Preston opportunity to add anything else. He confirmed it was all covered. On that basis we find Mrs Hafeji explained that she expected Mr Preston to return to work and if he did not it would be treated as unauthorised absence. We find Mr Preston explained he was suffering from jaw jerking, migraines, memory loss/lack of concentration and low mood. We find this is not an employer blindly digging in its heels in the face of concerns from an employee. Mrs Hafeji listened to Mr Preston's renewed concerns. In response she agreed that Mr Preston could take regular breaks and that the activities in his return to work plan could be adjusted to support him. Once again, there appeared to be a sense of agreement for the way forward. The two discussed Mr Preston's upcoming annual leave. We are satisfied that Mrs Hafeji explored and explained the options to Mr Preston fairly and she genuinely left the choice to him whether he took that leave or not. We find he also took advice from his trade union and decided to take his annual leave. One implication of his decision was that his full pay was reinstated.

7.70 Later that same day, 31 October 2017, Mr Preston telephoned Shelley Cook in occupational health to express his disagreement with her report and conclusions. It was an unscheduled call but Ms Cook took the call between appointments. We find it was in this meeting that the concept of a 5 day letter was raised. That is a process where there is a dispute between the advice given by occupational health and the employee as to them being fit to return to work which provides a mechanism to involve the employee's GP. This procedure involves occupational health writing a letter to the GP setting out their position. We find this process was rarely used. That led to some uncertainty as to whether the procedure applied in Mr Preston's case. Over the next week it was clarified that the process did not apply. By the time the matter was raised again, there would no longer be a conflict between the occupational health and GP opinion.

7.71 It was also during this telephone call that Miss Cook is alleged to have likened Mr Preston's condition to her own dyslexia. It is important to note how this is put by Mr Preston during this short, unexpected phone call in which he was challenging her conclusion. It was not volunteered by Miss Cook out of the blue. It arose from a challenge by Mr Preston that "if you don't have my condition you will never understand what it feels like". We find it was in

responding to this challenge that Miss Cooke sought to demonstrate the empathy she was accused of lacking by disclosing her own dyslexia. In doing so we find she made reference to how difficult she sometimes had found it to go into work but just had to. We accept Mr Preston's evidence that she terminated the call saying words to the effect that she had other clients to see. We have deliberately adopted the words used in Mr Preston's own evidence that he referred to his "condition". Whether he had PRE in mind or not, he did not say PRE. Miss Cook of course knew of his PRE but we find it more likely than not that her focus in that moment was what she identified as the reason for absence which was his anxiety and depressive symptoms and the need to deal with the management issues creating obstacles to his return.

7.72 On 16 November 2017 Mr Lawden, Consultant Neurologist reported to Mr Preston's GP the results of the consultation he had with Mr Preston on 26 October 2017. He recorded the headaches which he felt were related to the work situation. In respect of his epilepsy, he reported: -

> ***He has not had any major seizures for many years and indeed has only ever had two in his life. He still gets the jaw jerks when reading and talking, perhaps associated with a very brief half second interruption of awareness. He can actually read much better on a screen than on paper as this seems to cause fewer jerks. He finds that taking a break from using the screen is a good way of settling this down, but apparently his employers aren't willing to allow him to do this.***

7.73 In respect of that last observation about the employer's resistance to breaks, that is clearly something Mr Preston told Mr Lawden and we find it not to be an accurate reflection of the case. Mr Lawden did however also write a "To whom it may concern" letter for Mr Preston. In that, he said of his patient: -

> ***He has an unusual condition called primary reading epilepsy, a form of epilepsy we're reading country the seizures, or more commonly can trigger jaw jerks and brief lapses of consciousness.***
>
> ***I am attempting to medicate this, but he does find that taking a break from reading on a screen helps his symptoms, and this is certainly very likely. I think it would be reasonable for his employer to allow him occasional breaks at work to help him manage his condition.***

7.74 Mr Preston was again expected to commence phase return on 20 November 2017. He phoned in sick. The reason given, he agreed was "flu like symptoms". He phoned in sick the following day and again on Wednesday 20 to November 2017. On that day however he indicated he would come in the following day.

7.75 Mr Preston did return to work on 23 and 24 November 2017. On 24 November he met with Mrs Hafeji to complete the return to work discussions. He indicated that he wished to raise a grievance and he set out eight points he was dissatisfied with. They were: -

a) Relating to his DSE assessments.

b) The issue about his GP challenging the occupational health decision.

c) Previous requests to see occupational health which have not been carried out.

d) That the latest OH report should confirm his primary reading epilepsy.

e) That he did not agree with some information on the September OH referral.

f) That he would have liked to have received private physiotherapy.

g) That he felt pressured and cornered during the meeting with Imran.

h) That the respondent has not put any adjustments in place for his PRE.

7.76 Mr Preston did not continue with the phased return to work plan beyond those two days. On Monday 27 November 2017, he telephoned in sick once again. He said he felt overwhelmed and that heightened his PRE. He described experiencing memory loss, migraine fatigue and lack of concentration. Mrs Hafeji had by then seen the consultant neurologist report and agreed to ask occupational health for a second opinion.

7.77 It is important to record what it was Mr Preston said in evidence before us that was by this stage missing, in other words what was necessary for him to have in place for him then to be able to return to work. He listed them as a Bluetooth headset, something that we find would come through access to work and would not be assessed until he was back at work, that the adjustments offered were made permanent and Dragon software, although we find this was not in fact raised by Mr Preston until December. We do not see evidence of what the perceived benefit of a Bluetooth headset or Dragon software would be insofar as neither seems to go to the issues of reading text. We note it is a significant leap from the limited adjustment proposed by the consultant neurologist.

7.78 On 4 December 2017, Mrs Hafeji sent an email to Mr Preston setting out the extent of the support offered to him, as was agreed. We find that the package of measures put in place was as follows:-

a) To have a four week phased return to work, starting with four hours per day and gradually building up, commencing after the holiday period

b) To take change of supplier calls only and work with the team manager to build this up over a period of time

c) Have an interrupted paperwork for a period of four weeks

d) For a period of four weeks for him to work only on your own actions (not his buddy's). After this four-week period, he had indicated he was happy to work his own and his buddy's actions.

e) For Mr Preston and Mrs Hafeji to review his service quality assessments to calibrate the feedback that he had been given following the completion of the return to work-plan).

f) Additional support from lead advisor over the four-week period and for Mr Preston to let Mrs Hafeji know how he'd like this to work.

g) Additional and flexible breaks over the four-week period and for this to be reviewed on completion of his return to work.

h) Opportunity to seek support for any difficult calls and for Mr Preston to discuss this with his team manager (She referred to Mr Preston and Mr Arif previously discussing the option of handing off a call to another adviser or lead adviser)

i) Weekly reviews with the section manager (At Mr Preston's request, it was agreed that they would be done with Mrs Hafeji)

j) As he starts building up the demand he took on, for him to take only that demand for a day before blending the calls

k) For him to catch up on briefings and emails missed and listen to calls only for week one of the RTW plan

l) To have a side-by-side DSE assessment (This has been completed on 23/11/17 and two further assessments have been booked for you for 05/12/17 and 11 12/17) as he gradually starts increasing his working hours as part of his return to work plan

7.79 In addition to restating these adjustments, Mr Preston and Mrs Hafeji also agreed that he would continue to use the strategies that worked for him in the past including: -

a) Using your whiteboard to remember information about the customer that you are working.

b) To look away from the screen while speaking to customers.

c) Putting the customer hold to regroup your thoughts

d) Using the tools that you have for example, your customer guides and document library to help you with following processes

7.80 Mrs Hafeji recorded, and we find as a fact, that Mr Preston confirmed he was comfortable with all of the actions that had been agreed and appreciated the support.

7.81 In a second email also sent on 4 December 2017, Mrs Hafeji also responded to each of the grievance complaints raised by Mr Preston on 20 for November 2017. In each case, we find Mrs Hafeji researched the concern and investigate it. The grievances were rejected.

7.82 On 6 December 2017 Mr Preston attended a further occupational health consultation with Shelley Cook. He was supported once again by Manjit Kaur his trade union representative. Mr Preston asked to adjourn the consultation. He said he was not comfortable to continue based on what had been said in the previous referral. He expressed his concerned about his PRE and showed Miss Cook both letters from is neurologist. By both, we find he was referring to the consultant's letter to his GP dated 16 November and the "to whom it may concern" letter of the same date that together set out the symptoms and effects of PRE. During this consultation we find Miss Cook encouraged him to consider elements of his obstacles to returning to work by analogy to her own dyslexia. In the course of this analogy, she again drew on her own circumstances and she shared with him her own coping mechanisms. We find the basis of this analogy is not completely out of place. We note one symptom or PRE relied on by Mr Preston is momentary alexia. We note the

neurologist did explain the difference in reading ability between screen or paper documents. We find either of these factors were likely to strike a chord with anyone who does manage with dyslexia. However, her use of the analogy would be the source of criticism later on. As before, we find this approach was adopted by Miss Cook purely as a means of showing empathy to Mr Preston and to engage with the adjustments that were then already in place for him to return to work. We are reluctant to make too much of the trade union's presence at this and many other meetings at which things are now alleged in the various claims as we have no evidence of the experience of Manjit Kaur or Vilpa Lillie. Nevertheless, we do think it relevant to gauging the situation as objectively as one can to take into account the fact that there does not appear to have any contemporaneous challenge to these situations by the trade union representatives.

7.83 It is also during this discussion that Mr Preston sought the adjustment of uninterrupted paperwork sessions be made on a permanent basis. We find there was always a plan to review the adjustments. We find Mr Preston interpreted that to mean that they were not permanent. We do not accept that interpretation was reasonable or accurate. The review was no more than a review to see what affect they had on any obstacles to Mr Preston's continued attendance at work.

7.84 Mr Preston visited his GP again on 7 December 2017 obtaining a fit note stating he was unfit for work for the period up to 4 January 2018. He discussed progress with Mrs Hafeji. Although she had not yet received Shelly Cook's occupational health report, he told her that Miss Cook was now deeming him unfit for work and would be requesting input from his GP. The response from the GP would not be received until late February 2018. We also find that, at Mr Preston's request, Mrs Hafeji agreed to backdate the sickness absence so as to create one continuous absence from 18 September and the three week's leave that he took would instead be returned to his holiday account. We find Mrs. Hafeji explained to Mr Preston that taking this course would have an effect on his pay as he had been paid full pay for the holiday at a time when he was now not entitled to full pay. We find Mr Preston understood this consequence.

7.85 The occupational health report arising from the consultation on 6 December 2017 was issued on 12 December. It reported that Mr Preston had a long-term neurological disorder, that he had been assessed by neurologist and treatment suggested. The disorder has an identified primary trigger in the act of reading. She suggested a workplace risk assessment to assess his role in respect of the amount of reading and sources of reading activity performed that is with a reading from a screen or from paper. She suggested that might lead to alternative ways of working to reduce the amount of reading required or change the source of reading or utilize adaptive technology. We find she recommended Mr Preston contact access to work for a workplace assessment in this regard. We find to Preston agreed. We also find the common understanding for the process of engaging access to work was for them to assess Mr Preston in his workplace, at an appointment that he would arrange for his convenience. For the time being, therefore, she altered her opinion to state Mr Preston was not fit for work. Shelley Cook was of the view that Mr Preston's condition would fall within the remit of the Equality Act 2010.

7.86 Understandably, Mrs Hafeji contacted Shelley Cook soon after receipt of the revised occupational health assessment to understand the reason for the change of position, a step Mr Preston agreed was reasonable.

7.87 It is around this time that Mr Preston's objection to the phased return to work crystallized into one expressed in terms that the adjustments that had been offered should be made permanent. He saw no value in embarking on a return to work during a phased return to work and there was not value in any future review of the adjustments. We found that to be an unreasonably inflexible position particularly in circumstances where he was not even prepared to try the adjustments during the initial phased return. In response to this, however, we find Mrs Hafeji did make clear to Mr Preston on 15 December 2017 that adjustments were permanent, including adjustment sought of uninterrupted paperwork and additional breaks, but she qualified this by saying that did not mean to say that there would never be any future review. Indeed, she insisted that there would be a review once he had completed the phased return simply for the reason that things may develop or change for him.

7.88 Mr Preston received no pay in December as a result of the recovery of the overpayment of the November holiday pay. Despite this having been explained to Mr Preston at the time he insisted on reverting to sick leave, we find Mrs Hafeji stepped in to make arrangements with H.R. so that he would not need to make any further repayments to the overpayment until he was back at work. He received his expected level of sick pay from January. He continued to be subject to a fit note, this one expiring on 2 February 2018

7.89 On 9 January 2018, Mr Preston had a further consultation with Occupational Health this time he met with the senior occupational health advisor, Ruth Howe. She reported that: -

> ***Kevin has been reviewed by his specialist and provided reassurance that his symptoms should settle when his stress levels improve. In my opinion, Kevin is fit to return to work at the end of his current fit note which expires on the 02.02.18. Considering the presentation of his condition I have suggested that he seek some external support in the next couple of weeks prior to his return to work, he may require some support with managing this process. His union representative, Manjit Kaur, has kindly offered to support him in contacting Be Supported for psychological support and also Access to work for a workplace assessment and understanding of what additional equipment may support him and managing his role, which may include reading software and assistive technologies***

7.90 We find that all parties knew at this time that access to work would be prepared to undertake a workplace assessment once Mr Preston was back in the workplace to assess his work and working environment. We find however at no time did Mr Preston make contact with the support body or access to work nor was he ever back in the workplace for that to take place.

7.91 We find Miss Howe accepted he was experiencing neurological symptoms affecting his concentration and fatigue. She advised that

> ***flexibility with his brakes my help him manage his symptoms. Please discuss with him whether he wishes to bank time to allow him to take additional breaks in the future.***

7.92 We find her reference to "bank time" relates to the concept of additional unpaid breaks we have already referred to. We also find that this report introduced for the first time the

additional concept of a readiness to work plan known as “work conditioning”. We find this to be a highly supportive scheme allowing an additional period of time during which Mr Preston would simply be “acclimatised” to the normal expectations of working life. We cannot over state just how basic these expectations were. This was a gradual plan to get Mr Preston used to nothing more than getting out of the house and to work; turning up on time; engaging with his colleagues; socialising; catching up on developments in the business and matters of that nature. It was a plan which would take place over four weeks **before** he then embarked on the original four-week return to work plan. It was a period during which it was understood the workplace assessments by access to work and others could take place. There was, therefore, a period of around eight weeks planned before any review would take place of the effectiveness, either way, of all the permanent adjustments that had by then been planned to be put in place. We find this was an extensive package of support for Mr Preston, that it was explicitly based on an understanding of where PRE affected him and the nature and extent of the symptoms Mr Preston encountered. It was proposed on the back of Mr Preston's specialist neurologist reassurance. Against that background, it does not surprise us that Miss Howe’s opinion was that with this package in place he was fit to return to work from 05 February 2018

7.93 The initial feedback to Mrs Hafeji from Mr Preston and Manjit Kaur was that Mr Preston was pleased with this occupational health review and the plan going forward. He acknowledged he and Miss Kaur had some actions to call access to work for technical support and ”Be supported”. He agreed to return to work the following Wednesday, 17 January 2018.

7.94 By the next day, 10 January, Mr Preston was expressing less positive sentiments about the prospect of returning to work. He wrote to Ruth Howe, stating: -

> ***Furthermore, I would like further clarification on all of the adjustments the business is putting in place for me, and if they are temporary or permanent, as this will impact my epilepsy, and my ability to return. I want to return, but do not feel comfortable until the adjustments have been made clear and I am satisfied with these as I do not want my epilepsy to be further impacted by the lack of adjustments. I understand that your suggestions around a rehabilitation involve just coming in for an hour etc. not taking calls, but I would like to know from when I start back full-time, what all the adjustments the business is going to put in place.***
>
> ***I had discussed with* [Mrs Hafeji] *about screen reading software and Bluetooth headset, but to date nothing has been done around this. I will contact access to work, but I would appreciate to know what the business is willing to put in place for me on a permanent basis, as I do not wish to start back on a rehabilitation only for the adjustments to be removed after four weeks, as if this then causes me further issues and I have to go off sick again as a result of my disability becoming a problem then this will get recorded a separate absence and impact me in a negative way.***

7.95 On 16 January 2018 Manjit Kaur informed Mrs Hafeji that Mr Preston was unlikely to be attending work the next day to begin his work conditioning. His change of position and renewed objection to returning to work could no longer be based solely on the permanency of the adjustments which had been clarified but was now focused on the fact that the source of the proposed adjustments was based on Imran Arif’s suggestions from the previous October. Despite what had been said he was still of the opinion that the adjustments were not going to be permanent and he insisted therefore that he was not ready to return to work.

7.96 We find that other than Mr Preston actually coming back to work, everything was in place, at least so far as was necessary for the initial 8 weeks of conditioning and phased return. Mr Preston agreed it would have been helpful to have that discussion with the employer but felt that by that time his mental health had deteriorated to the point that he could not come back to work at all. We find, therefore, that there was nothing that the respondent could then put in place that would have enabled him to return to work. Despite the absolute obstacle this created, Mr Preston agreed he had not raised this aspect with Occupational Health at the beginning of January

7.97 During January 2018, and in the face of an extensive plan to support Mr Preston return to work, we find he was in fact distancing himself further from the workplace. He was increasingly concerned about having any contact from Mrs Hafeji. He would later categorise this contact as having been excessive and intrusive but we find all of the interactions were necessary, supportive and reasonable, particularly at the early stages when Mr Hafeji was genuinely concerned for his well-being. As part of the grievance investigation, the employer analysed the points of contact, the results of which we accept show the employer contacted Mr Preston on average over the period less than twice each week and for a comparable number of times as Mr Preston had contacted the employer, each contacting the other around only 40 times in the whole period.

7.98 In a discussion on 18 January 2018 Mrs Hafeji confirmed with Mr Preston that the additional brakes provided would not have to be worked back throughout the initial return to work plan and that they would then agree what his working time and breaks would be for the future. Despite what was being said at the time by Mr Preston, in the evidence for us he excepted it was reasonable for Mrs Hafeji to ask him to come in for the phased plan, to see how he got on with the adjustments that were there to be put in place and then for them all to discuss his future needs.

7.99 At the end of January 2018, Mr Preston obtained another fit note from his GP stating he was unfit for work until 2 March 2018. We find Mr Preston's state of health had not changed since the last occupational health consultation, he simply hadn't got any better.

7.100 Faced with this continued sickness absence and despite the measures available and advised by occupational health, Mrs Hafeji returned to occupational health seeking confirmation as to whether the last occupational health report which had deemed Mr Preston fit to return to work on 5 February was still valid. Miss Howe of occupational health promptly replied that in her opinion Mr Preston was fit for work. Again, in evidence Mr Preston accepted it was reasonable for the employer to want to check back with occupational health.

7.101 On 20 February 2018, Mr Preston's GP responded to the occupational health request from the previous December. That may have been prompted by the fact that on 5 February 2018 Mr Preston had himself written to his GP enclosing the latest occupational health Report. In that correspondence he made reference to his stress levels affecting his anxiety and depression and that, in turn, affecting his PRE. This was in the context of having to stay in contact with his employer during his absence. In terms of the adjustments he stated: -

> ***I appreciate they are also offering adjustments that they feel are reasonable to aid my return, however I've also tried to explain to them that I feel there is more they can do with this instead of getting me to do all the running around putting adjustments in place for myself.***

7.102 We find the only element of this process which required Mr Preston to do anything that could be described as the "running around putting adjustments in place for myself" was in respect of the need for him to engage with access to work. He had previously not only agreed to do this, but had done so with the support of his trade union representative, Manjit Kaur.

7.103 The GP report itself was limited. In response to a question asking for details of the medical condition accounting for recent absences from work, Dr Davies wrote: -

> ***The patient was diagnosed with primary reading epilepsy, and idiopathic (genetically determined) focal epilepsy in November 2009. I enclose the clinic letters for your reference. The patient was seen at the GP surgery in September 2017 diagnosed with a moderate depressive episode secondary to work stress. He declined medication and opted for talking therapy. He has been seen several times since to renew his sick note due to stress which he reports is caused by difficulties with occupational health.***

7.104 In response to the further inquiries specifically concerning the PRE, the GP was unable to offer any meaningful input. In fact, we find the GP deferred to occupational health in so far as he was being asked about whether any restrictions where necessary in the workplace.

7.105 We find the respondent attempted to set up a dialogue between Occupational Health and Mr Preston's GP to further explore the obstacles to Mr Preston's return to work. This did not take place because the GP held the view that it was not a process an employer should adopt.

7.106 By this time, the respondent was beginning to question what more it could do. Some form of discipline or a sanction appeared to be a possibility. During February, Mrs Hafeji became concerned that she could not contact Mr Preston. On 23rd February 2018 she sent a letter regarding this lack of contact and reminding him that it was expected he would return to work on 27 February 2018 as part of the return to work plan previously agreed.

7.107 The two spoke again on 28 February 2018 when Mr Preston did not return to work. He stated his mental health had deteriorated further. They discussed the need to maintain contact but at a reasonable level for both parties' needs.

7.108 Upon receipt of Mr Preston's GP letter sent to occupational health, on 7 March 2018 Ruth Howe emailed Mrs Hafeji to update her opinion on Mr Preston's fitness to return to work. Her conclusion was that she did not feel there was any new medical information that would change her opinion that to Mr Preston was fit for work. She did however suggest for the meeting with him to discuss the issues raised. Mr Preston agreed in evidence that the GP report added nothing to the picture previously before occupational health and the employer.

7.109 On 12 March 2018 Mrs Hafeji and Mr Preston spoke on the telephone. Mr Preston make clear that he would not be returning to work and that he could not agree to the return to work arrangements. The prompted Mrs Hafeji to send a letter to him dated 13 March 2018. This letter set out the recent history and the previously agreed return to work plan together with the plan for exploring further support. It recorded the attempt to engage with the GP to

inform the occupational health position. It set out in detail the adjustments that had previously been agreed to support both a four-week phased return to work and the initial work conditioning. We record that the letter is the culmination of various points of face to face and written communication within which the respondent had informed Mr Preston that it was prepared to put in place measures of the nature that we are now tasked with assessing as failures to make reasonable adjustments, specifically including issues of additional and flexible breaks, uninterrupted paperwork time, focusing on limited areas of business, ongoing support and reviews to identify additional support. Against that background, Mrs Hafeji then set out the crux of the issue which was now a warning about what would happen in the future if he did not return to work. She said:–

> ***As reasonable attempts have been made to resolve the dispute regarding your fitness to work and no new medical information was presented by your GP in your medical report, you have been deemed fit to return to work with the above adjustments in place. It is therefore my expectation that you return to work on 19 March 2018 on the return to work plan previously agreed with you. Failure to return to work on 19 March 2018 would result in your absence being viewed as unauthorised and as a potential disciplinary matter.***

7.110 Mr Preston did not return to work on 19 March 2018. On 26 March 2018 Keira Peacock, the manager, wrote to Mr Preston inviting him to a formal disciplinary hearing on 5 April 2018. Set out a summary of the issue with his continued absence from work and warned him: -

> ***Please note that this is a serious matter and I need to let you know that dismissal without notice is one potential outcome.***

7.111 The letter went on to set out the disciplinary procedure and rules that would apply and enclosed copies of the same. Mr Preston was given the right to be represented and warned that should he choose not to attend the hearing may continue in his absence. He was invited to submit any written evidence he wished to rely on.

7.112 On 5 April 2018 the disciplinary hearing commenced as planned and Mr Preston attended. It did not conclude because it was at this hearing that Mr Preston presented an extensive grievance concerning the history of his absence. It is one of a number of documents we have been shown in this case which are of an exceptional length, typed in small font. The hearing was adjourned so that the grievance could be investigated. Manjit Kaur continued to support him.

7.113 Julie Williams, Customer Service Manager, was appointed to deal with both the grievance and disciplinary hearing. In a letter dated 13 April 2018 she set out the timetable and her plan. She reiterated that so far as the disciplinary allegations were concerned that they were serious and that dismissal without notice was one potential outcome. She planned to reconvene the following week.

7.114 On 20 April 2018 she met with Mr Preston and Manjit Kaur. They spent a substantial period of time reviewing Mr Preston's areas of dissatisfaction set out in his grievance. He was invited to set out what outcome he was looking for. His reply was that he was seeking substantial compensation. We can see from the notes of that hearing that Manjit Kaur sought to steer his answer back to the list of outcomes that had been included at pages 103 /104 of

his written grievance, a document which we find was substantially drafted by Mr Parsons. We find Mr Preston's voluntary response that he was seeking substantial compensation gives an insight into Mr Preston's present intention not to return to work and is consistent with the state of affairs that had existed over the previous five months whereby whenever it appeared that a plan had been agreed for his return to work, rather than test it, a new challenge create a new obstacle to any return to work. It also highlights a separation between Mr Preston's own thoughts and feelings and the complaints being expressed on his behalf through the grievance and other correspondence apparently originating from Mr Preston. It follows we find nothing that the respondent could do would have resulted in Mr Preston returning to work. It is inevitable that this employment relationship would have soon come to an end.

7.115 Further meetings took place on 23 and 24 April 2018. We find Miss Williams then embarked on a detailed investigation which took some time to conclude. We do not criticise the delay. The grievance was extensive and detailed and the matters raised we're not only complex in themselves, but touched on the actions and decisions of a number of individuals all of whom miss Williams had to investigate. There was a substantial volume of paperwork created in many respects not a great deal less than we have had to consider in these proceedings.

7.116 We are told by Mr Preston that he was told by his union that there was gossip about his absence in the workplace. We do not know what that alleged gossip was. During the time the investigation was taking place, Mr Preston and Mr Parsons visited a local pub at which other colleagues were already in attendance. They first bumped into a colleague called Dan. We find it was Mr Preston who asked him if he knew why Mr Preston was off work and he replied he had heard things. There is nothing more asserted about what it was that Dan had heard. At some point, Mr Preston and Mr Parsons bumped into other colleagues including one called Natalie. We find she was clearly not aware of any gossip as she had to ask Mr Preston why he was not at work and we find he told her that he was unwell and had raised a grievance. We find the reference to the grievance was not the reason why he was off work and suggests, on balance, that Mr Preston told her rather more about his dispute with the respondent that he has stated in evidence; a dispute which by this time had reached a point of seeking substantial financial compensation from the employer. These exchanges are explained by Mr Preston to put into context what he says then happened a few days later when Manjit Kaur asked him if he was in the pub as she had overheard someone, saying that they had seen him there getting drunk and that he was out to destroy E.on. We are satisfied that there was an enquiry about his presence at the pub by Manjit Kaur although it is said to have originated from someone else called Danni Beasley, a person not known to Mr Preston. The view taken of it by her is summed up in the fact that when he asked if she had challenged any comments she said she didn't want to get involved. We have accepted as much of Mr Preston's evidence as we are able to but we are extremely cautious about making findings of fact that are not properly there to be made for a number of reasons. The detail of what was actually taking place and being said is missing; the allegations were not explored further with any of the witnesses; what is asserted is being relayed through multiple hearsay where the context and accuracy can so easily be distorted; some aspects of what has been reported may have developed from what Mr Preston himself told his colleagues and, in any event,

there is nothing to say anyone who might have passed any comment about Mr Preston's absence had any knowledge of his disability.

7.117 On 4 June 2018 Miss Williams wrote to Mr Preston inviting him to attend a reconvened disciplinary hearing to be held on 8 June 2018. She set out the grievance allegations that have been summarised from Mr Preston's extensive grievance that she intended to discuss with him she also set out a reminder that the hearing was to consider the disciplinary allegation relating to on authorised absence. The same warning was given that the gravity of the allegation was such that dismissal without notice was one potential outcome but, for the first time it explicitly used the phrase "gross misconduct". Mr Preston was also sent a copy of Miss Williams grievance investigation report.

7.118 We find the grievance issues raised by Mr Preston were carefully considered by Ms Williams. Whilst the central allegation of a failure to recognise his disability and make adjustments was rejected, she did make findings supportive of Mr Preston's complaints in some respects and partially upheld them. One was in respect of Shelly Cook using her own disability by analogy. She found that she should not have done that and accepted those comments did upset Mr Preston but also accepted it had been used as a tool to demonstrate empathy to his circumstances. She also accepted that during the meeting with Imran Arif in October 2017, he may have felt uncomfortable because Imran was standing up when writing up the points on a flip chart but his behaviour was consistent with the role he was performing and that neither he nor his representative asked him to sit down. She did say she had recommended Imran deal with these situations differently. She also upheld the complaint arising from certain procedural matters including how referrals to occupational health were made and in relation to Mrs Hafeji and Shelley Cook's misunderstanding of the rules relating to the five day letter to challenge an occupational health assessment of fitness to work.

7.119 She rejected that there had been a failure to make adjustments. She noted that even taking into account the last of the reasons why Mr Preston stated he could not return to work in February, it had been made clear to him that the things he sought were part of the adjustments that would be applied. She rejected that the employer had failed to recognise his disability.

7.120 The format of the hearing on 8 June 2018 was changed at short notice so as to be held via telephone conference call at Mr Preston's request. He was once again supported by Manjit Kaur.

7.121 On 15 June 2018 Miss Williams wrote to Mr Preston with her decision. It is necessarily a lengthy document running to 22 pages. As to the disciplinary allegations, she found that Mr Preston was fit to return to work and that all the adjustments contended for were there to be implemented on his return and had been made clear to him that they would. She accepted that if there had previously been any doubt about that, it was put beyond doubt in the discussions on 12 March 2018 which had been put in writing on 13 March 2018. She expressed her concern that Mr Preston had not demonstrated a willingness to return to work and was concerned that his accounts of earlier discussions about PRE had not been supported by those he said he had spoken to about it. Her conclusion was that against that

background his continued absence amounted to gross misconduct and he was dismissed with effect from 15 June 2018.

7.122 The letter gave Mr Preston the right to appeal against the decision. He did not appeal.

8. Discrimination arising from disability

8.1 Section 15 of the Equality Act 2010 provides: -

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

8.2 To succeed in this form of discrimination, Mr Preston must establish that the something relied on arises in consequence of his disability. He must then establish facts from which the tribunal could conclude that the unfavourable treatment arose because of that something, in the sense that it played some material part in the reasoning. The respondent may then seek to defend the claim either by showing the unfavourable treatment was in no way whatsoever because of the something arising or that it did not have the necessary knowledge or that the treatment was itself justified, being a proportionate means of achieving a legitimate aim.

8.3 The respondent has relied on an aim of efficient absence management to ensure consistency and quality of service for the respondent's customers. We are satisfied that is a legitimate aim. The question of proportionality engages us in striking a balance between the needs of the business to achieve that aim and the effect on the individual disabled employee. Determining that balance will often be resolved by reference to where the parties were in any process to tackle disadvantages by making adjustments, what had happened by the time of the treatment and what more might have reasonably been deployed before deciding on the treatment in question. In other words, if the circumstances show it was reasonable to adopt a less discriminatory approach at the time of the treatment than the treatment itself, the treatment will not have been proportionate.

8.4 The something arising relied on in this case is sickness absence. There is no doubt that Mr Preston was absent from work. We have found the reason for that absence was his stress and depressive symptoms and not his PRE. Whilst Mr Preston's level of stress can have a bearing on how he experiences the symptoms of PRE, we are clear in our findings of fact that the absence did not arise in consequence of the PRE but because of other factors, including the changes to Mr Preston's work following the reorganisation of the business to a complaints centre That is a fundamental and fatal conclusion to claims of unfavourable treatment. Nevertheless, so far as it is possible to do so we have gone on to consider the remaining elements of each allegation.

(Allegation 1.a.) Dismissal

8.5 There is no question that dismissal is unfavourable treatment.

8.6 If we are wrong in our primary conclusion so that the sickness absence arises in consequence of the disability and was an operative reason for dismissal, we then turn to the remaining questions of knowledge, causation and justification.

8.7 We are satisfied that by the time of the dismissal the respondent had the necessary knowledge of disability.

8.8 Turning to the causal link, we have concluded that the treatment was not because of his sickness absence. The reason for his dismissal was the employer's view of his conduct in his refusal to engage with the measures put in place to assist in his return to work. That was in circumstances where the employer was not only of the view that it had made sufficient steps to set up the necessary adjustments to support him back to work to such an extent that made it reasonable to insist on him returning to work, but those steps had at various times during the absence apparently been agreed by Mr Preston. There were a number of stages during the 10 months' period of sickness absence where it appeared that there was agreement for a package of adjustments to support a return to work which he then felt unable to engage with. There was no sanction in October, or November or any of the other points before the respondent had reasonably satisfied itself that reasonable adjustments were there to be implemented. There is nothing that explains why sickness absence should be the reason at 10 months (or even 7 when the disciplinary process was started) but not 4,5 or 6 months. Something else was operating on the mind of the employer. In our judgment, it was the refusal to engage in the return to work process.

8.9 If we are wrong about all our conclusions so far, and if the causal reason for the treatment can be said to be the sickness absence, we are satisfied that the treatment of dismissal at that time was proportionate. It occurred after approximately 10 months; about 9 months after the meeting to explore barriers to return to work; for around 6 months or more the occupational health advice had been that he was fit to return to work with the package of adjustments; the employer and occupational health were alert to his PRE and took this into account and the decision to dismiss was reached only after a particularly thorough investigation into his grievances. Against that background, the alternative of simply allowing his sickness absence to continue indefinitely was not an adjustment we could say would have been a reasonable one to make, particularly as by then Mr Preston had expressed a negative view of returning to work on more than one occasion and his personal view, unadvised by Mr Parson's drafting or Miss Kaur's trade union advocacy, was that he wanted substantial compensation from the employer. For those reasons, if our primary conclusions are wrong, we are satisfied that the respondent had made available all reasonable alternatives to supporting Mr Preston back to work. We are satisfied that the treatment was therefore the least discriminatory and therefore a proportionate means of achieving the aim of efficient absence management to ensure consistency and quality of service for the respondent's customers.

8.10 For those reasons this allegation fails.

(Allegation 1.b.i.) Naseera Hafeji insisting on intrusive levels of contact with C during C's sickness absence, in particular: requiring C to report daily whether he was attending work even though C had sick notes throughout his sickness absence

(Allegation 1.b.ii) Naseera Hafeji insisting on intrusive levels of contact with C during C's sickness absence, in particular:contacting C on at least 40 occasions when he was off sick;

(Allegation 1.b.ii) Naseera Hafeji insisting on intrusive levels of contact with C during C's sickness absence, in particular: conducting lengthy phone calls with C several times a week;

(Allegation 1.b.ii) Naseera Hafeji insisting on intrusive levels of contact with C during C's sickness absence, in particular: holding lengthy meetings with C when he handed his fit notes to R;

8.11 We have dealt with these four together as they are nuanced limbs of the essentially the same complaint.

8.12 We are not satisfied on our findings of fact that these allegations has been made out. We are not satisfied the contact that there was is properly characterised as intrusive. At some points, the reason for the requirement to stay in touch was not the sickness absence but the stated nature of the ill health and Mr Preston's presentation to Mrs Hafeji which caused her concern for his well-being. At other times, it was necessary to keep updated frequently either because they were approaching a potential return to work date or because the state of affairs was changing. We have found that contact was made as was reasonably necessary and the levels of contact varied over the duration. There were broadly as many contacts from Mr Preston as from Mrs Hafeji. We are not satisfied the requirement to maintain contact can be said to be unfavourable.

8.13 In any event, the requirement to keep in contact formed a reasonable part of the ongoing sickness absence management, a point that was made even more pertinent by the ongoing development of the package of adjustments and the repeated referrals to occupational health. We are satisfied that if the level of contact can properly be described as treating Mr Preston unfavourably, then we are satisfied it was necessary and none of it was gratuitous or capricious. As such, the treatment of maintaining contact was a proportionate means of achieving the aim of efficient absence management to ensure consistency and quality of service for the respondent's customers.

8.14 For those reasons these allegations fail.

(Allegations 1.c.) Colleagues gossiping and spreading rumours about the reason for his sickness absence: C heard rumours, in or around June 2018, from Dhanesh Mistry (Dan) that Dan had heard things said about claimant - Manjit Kaur, called C in or around June 2018 and said Danni Beasley had been gossiping about C at work.

8.15 We have rejected this allegation on the facts. Mr Preston has not established on the balance of probabilities what has been said, by whom, and the circumstances of it in such a way that we can confidently reach a conclusion of fact capable of fixing the respondent with vicarious liability. There is simply too much hearsay and too much scope for misreporting.

We cannot say anything that might have been said was said because he was absent on sick leave. In any event, there are aspects of the alleged comments that, if said in the terms alleged, appear to arise not because of the sickness absence, but because Mr Preston has voluntarily disclosed elements of his grievance against the respondent. For example, the suggestion that someone made reference to Mr Preston going to destroy E.on, is not a comment that naturally flows simply from the fact of being off sick.

8.16 This allegation fails

(Allegation 1.d) Threatening C repeatedly that it would class his sickness absences as unauthorised leave if he continued to take leave, even though C had provided fit notes to R;

(Allegation 1.e) Classing C's absence as unauthorised leave from 5 April 2018;

8.17 These two allegations are closely connected and we consider them together.

8.18 We are satisfied a threat to class sick leave as unauthorised absence and to carry out that threat are both unfavourable treatment.

8.19 However, in identifying the operative reason for this allegation we need to look at what was happening around this time which introduces the reason as something which is separate to the sickness absence. First was the occupational health conclusion that Mr Preston was fit to return to work with the package of adjustments and secondly the package of adjustments which appeared at times to have been agreed by him. The reason for this treatment was not therefore the fact of sickness absence, but the fact of a reasonable basis for supporting his return to work. There is nothing in the evidence which separates the earlier sickness absence from the later sickness absence other than the conclusion that the medical opinion had settled and the package of adjustments were there to be implemented. It is his position in respect of those issues, and not the sickness absence itself, which is the cause for this treatment.

8.20 It may be that Mr Preston is seeking to apply a but for test to the test of causation as, clearly, without absence there cannot be unauthorised absence. It is not, however, causally because of the fact of sickness absence or the duration of it. Had that been the case, one would have expected it to have been unauthorised not only at an earlier stage but from the outset.

8.21 Finally, if we are wrong in our primary conclusions we are satisfied that the treatment was justified. There is no right for an employee to take time off on sick leave indefinitely without fear of reaching a point in time when some sanction is applied by the employer. That is the case whether that period of time is covered by a fit note or not. At the other extreme, we are satisfied such treatment could not be proportionate at the outset of a period of sickness absence and without the employer first going through a number of other steps being taken to reach a point where the action could be said to meet the necessarily high threshold of proportionality to justify the treatment. In this case we are satisfied that the steps engaged by the employer do meet that high threshold. Firstly, the decision is taken after obtaining an informed medical opinion as to Mr Preston's fitness to work. There is no trump card held by

the GP but it is an important piece of information for an employer to have regard to when it takes any employment decision. An employer that fails to consider, or ignores, the medical position, will likely to be found to have run off course when its actions are considered by a tribunal at a later date. This employer, however, did not ignore the medical position. It was grappling with it for some time and its occupational health advisers had sought to engage Mr Preston's GP to contribute to the clinical decision making and he had declined on the basis it was not appropriate. Thereafter, he did provide written input to the occupational health assessment which was considered but did not add to the clinical picture already before the them. All that was against a background of the consultant neurologists input suggesting a single limited adjustment, in terms of regular breaks away from the computer screen. Secondly, the decisions were not made in a vacuum. They were made in terms of addressing the known barriers to a return to work. Those factors provide powerful basis for the proportionality of the treatment as a means of achieving the legitimate aim.

8.22 For those reasons, and over and above the fact that we are not satisfied that the sickness absence arose in consequence of the disability, this claim fails.

(Allegation 1.f) Arranging repeated occupational health appointments for C

8.23 Mr Preston was made subject to repeated occupation health appointments. The first consideration is whether that is itself unfavourable treatment. Failing to do refer to occupational health where decisions were being made about an employee's health at work would clearly be unfavourable. We have struggled to understand why arranging occupational health appointments generally, and repeated appointments specifically, can be unfavourable in this case.

8.24 Mr Preston obviously disagrees with some of the clinical conclusions reached and criticises aspects of some of the individual interactions, but in terms of the unfavourable treatment being arranging repeated appointments, that in itself is not unfavourable treatment. The relationship with occupational health started with Mr Preston seeking a self-referral. The purpose of the referrals was to find a solution to his absence. The re-referrals all took place at times when there was a material change in circumstances which we are satisfied warranted the re-referral being made. On more than one occasion, that re-referral arose as a means of addressing the difference of opinion between the occupational health practitioner and Mr Preston. Mr Preston appeared to engage with the process save for times when he was unhappy with aspects of it, such as the content or quality of referral made to occupational health. Where he disagreed with the outcome he felt able to challenge it. Indeed, part of the reason for the number of appointments was in order to obtain second opinions or to review developments.

8.25 To the extent we are wrong and these referrals can properly be described as unfavourable treatment, we are satisfied they arose because of the absence from work or, more particularly, the understanding that the underlying reason for the absence was stress and depressive symptoms, that they were 'work related' and that there was an obvious need to address the factors which were causing those work related symptoms and preventing Mr

Preston from returning to work. We have already expressed our primary conclusion that that sickness absence did not arise in consequence of the disability of PRE.

8.26 Finally, to the extent we are wrong in those conclusions and there is a prima facie case made out, we are nonetheless satisfied that the treatment complained of was justified. Obtaining occupational health input to a case such as this is a step we would expect to be taken in just about every case. It is extremely artificial to seek to analyse justification for such an essential step. However, if repeated referrals to occupational health are otherwise discriminatory, it seems to us that they would not be proportionate if one or more of them were not reasonably necessary. As we have concluded they were reasonably necessary, we are also satisfied that the treatment complained of was a proportionate means of achieving the legitimate aim.

8.27 These allegations fail.

(Allegation 1.g.) Claimant told by Naseera Hafeji (222) on 23 October 2017, Shelley (OH), would send GP letter and he will have 5 days to take to GP. This letter was to enable claimant to challenge Shelley's decision, and so doctor could provide medical opinion. Claimant waited several days, called at least twice as not received (222), then told around 30 October letter doesn't apply to him so won't be sent.

8.28 The gravamen of this allegation is in the delay in receiving information on the "5 day letter" process and then being told it did not apply to him. We have some doubt that viewed in the round this matter can be said to amount to unfavourable treatment but to the extent that Mr Preston was given an expectation, albeit based on a misunderstanding of the procedure, we have concluded it can be.

8.29 However, we are unable to understand how it could be said that this arises because of his sickness absence. It might be that Mr Preston is again seeking to apply a but for test as opposed to a because of test. That is not the law on the necessary causation link in a claim under section 15 of the Equality Act 2010. In any event, one can envisage health related situations that might bring occupational health and GP opinion into conflict which did not require an employee to be absent on sick leave.

8.30 This claim fails.

(Allegation 1.h.) Forcing C to use 3 weeks of 'pre-booked' holiday as part of his return to work plan and then revoking the return to work plan?

8.31 We reject this allegation on its facts. We do not at all accept that Mr Preston was forced to take his annual leave. There was a discussion about his options at a time when he was represented and had opportunity to reflect on what he wanted to do. He chose to take his annual leave. He may have been influenced by a feeling that this was the right thing to do or alternatively, he may have been influenced by the financial effect it would have had. We are satisfied that it cannot be said that he was forced to take this leave and for that reason this allegation must fail.

8.32 Viewed in the full context of the case, we do not accept this option can properly be described as unfavourable. Particularly as after the event, when Mr Preston sought to undo the way the employer categorised the previous period of time, it readily accepted that it would give back the leave and class the period as sickness absence.

8.33 In any event, to bring the claim within the provisions of section 15 it is necessary for Mr Preston to establish at least a prima facie case that the reason why he was forced to take leave was because of the alleged something arising, that is his sickness absence. In other words, that the sickness absence was the impermissible motivating force which influenced a decision maker when forcing him to take the annual leave. The annual leave arose in the context of what was understood to be an agreed phased return to work plan. Had that not been the case, and had Mr Preston simply remained off sick we are in no doubt that the sickness absence would have overridden the pre-booked annual leave.

8.34 This allegation fails.

9. Reasonable Adjustments

9.1 So far as is relevant to the circumstances of this case, the duty to make adjustments arises under section 20(3) of the 2010 Act 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.***

9.2 In determining whether the duty has arisen, the Tribunal must identify each element of the section in turn, that is to identify the provision, criterion or practice ("PCP"); the identity of a non-disabled comparator (where appropriate) and the nature and extent of the substantial disadvantage suffered by Mr Preston. Only by breaking down those elements can a proper assessment be made of whether the adjustment contended for was reasonable or not. (**Environment Agency v Rowan [2008] IRLR 20 EAT**)

9.3 Whether a disadvantage is substantial or not is to be measured against the statutory definition of more than minor or insignificant. It is a low threshold, but a threshold nonetheless which we have to be satisfied is surpassed.

9.4 Paragraph 20 of part 3 of schedule 8 of the 2010 Act imports a requirement of knowledge on the employer in respect of both the employee's disability and that he is likely to be placed at the disadvantage created by the PCP. Unless there is or ought to have been the required level of knowledge of both elements, the duty to make a reasonable adjustment does not arise**. (Secretary of State for the Department of Work and Pensions v Alam [2010] IRLR 283)**

9.5 Whether an adjustment is reasonable or not is a question of fact for the Tribunal taking into account all the relevant circumstances and applying the test of reasonableness in its widest sense. Guidance similar to that which used to exist under s.18B of the repealed Disability Discrimination Act is now found in the code of practice.

Knowledge

9.6 We have considered this in isolation although we revisit the specific disadvantages alleged. We start with knowledge of the disability, PRE.

9.7 We are satisfied that the employer had actual knowledge of the disability from 18 September 2018 when Mr Preston raised this during the discussion with Mrs Hafeji. We are satisfied that what he told her about it meant there was sufficient information then known to the respondent to give it knowledge of the disability and the potential disadvantage. However, we have to consider whether knowledge of disability arose at any of the earlier points. We do so in this case particularly because 18 September 2017 is significant in that Mr Prestons last day in the workplace was 17 September 2017 and, save for an abortive attempt to return to work for 2 days in late November he would never return to the workplace. We have identified three parts of the relevant chronology when those questions appear to arise.

9.8 The first is at the appointment process prior to Mr Preston becoming directly employed in October 2016. There is an obvious point in the evidence which is that when completing the E-on Personal Details Form in September 2016, Mr Preston ticked the box asking “do you have any disabilities” indicating that he did. Whilst we have found as a fact that this was not noticed by Mrs Butler when she sent it on to HR, it was noticed by someone in HR because they sent the consequential health declaration form to Mr Preston as a result. He then did not complete that further form at all. We have to consider whether those facts show that the respondent knew or could reasonably be expected to know he was disabled.

9.9 Ticking the box alone does not establish disability status to give knowledge. It may be ticked in error. It may be ticked in the erroneous belief that the subject is disabled when they are not. However, it does place the spotlight on the issue which goes to the question whether the employer can say it could not *reasonably* be expected to know he had a disability. In this case the employer acted appropriately by seeking further information from Mr Preston which he did not complete. His failure to complete it does go to other relevant issues, not least of which the reasonable knowledge of disadvantage, but because the test is expressed negatively it seems to us that we are bound to conclude there was knowledge of disability from late September 2016.

9.10 Before considering the individual PCP’s, we are not at all satisfied that any further enquiry with Mr Preston at or around this time about his disability would have identified substantial disadvantage in the workplace. From both parties’ point of view, this was not the start of a new relationship, but the continuation of a very successful one from the previous few years and the work was not changing. Mr Preston was not raising any issues either in the workplace or when formally invited to provide details. Consequently, we are satisfied that there was not only no knowledge of disadvantages in the workplace, but the respondent could not reasonably be expected to know.

9.11 The next point in the chronology is the Derek Milligan occupational health consultation on 6 June 2017. In that consultation, Mr Preston was asked about his health history and gave answers in such a way that disclosed his history with PRE and current status. Mr

Milligan concluded that Mr Preston was not likely to meet the definition of disabled in the Equality Act 2010 and he did not report his PRE to the employer because he viewed it as clinically immaterial to the issues for which Mr Preston had been referred and based on what he had been told, was not itself giving rise to any issues in the workplace. Whilst this disclosure may well also have provided a sufficient basis for knowledge of disability, we are not satisfied there was anything in this which meant the respondent knew or could reasonably be expected to know there were disadvantages arising in any aspect of Mr Preston's work. In fact, this exchange seems to reinforce the conclusion that there were none.

9.12 The third is Mr Preston's alleged discussions with colleagues. We have found as a fact that he did not make any material disclosures and did not share in any respect any disadvantages he felt he was experiencing arising out of his work. Further, this is not a case where there were particular issues that might put anyone, be it colleague or a manager, on notice that there might be a particular difficulty for two reasons. Firstly, we found Mr Preston was a particularly competent adviser and well regarded by the managers and team leaders he worked under. Secondly, even when things did start to go wrong for Mr Preston in the first half of 2017, there were various opportunities taken to explore what was causing this and we find in none of those did he raise his disability in a way that ought to have put the respondent on notice. Indeed, the way this was explored with Mr Milligan is one such example. Moreover, these were not just tangential opportunities to raise disadvantage in passing, they were clear and relevant opportunities where the disability as we understand it now was potentially directly on point and one could reasonably expect any disability related disadvantage there was would have been raised. None was raised. This was not because Mr Preston was slow to criticise the employer where he felt it was appropriate. There was criticism raised in the DSE assessment of the delay in organising an assessment over the previous three years which had resulted in him needing to be prescribed reading glasses. We find it hard to imagine a situation in which it would be more appropriate to raise disability related disadvantages in the workplace than a formal sickness absence process, or a stress risk assessment or DSE assessments.

9.13 We then turn to the individual allegations of failures. Mr Preston advances his claim is engaged through the disadvantages arising from 19 different PCP's. We deal with each in turn as to whether such PCP is applied by the employer.

9.14 It follows that we are satisfied the necessary state of knowledge of both disability and any disadvantage arises from 18 October 2017. The significance of the continued sickness absence is such that what was thereafter put in place formed part of developing a managed programme of measures to assist Mr Preston return to work. As he never actually got to a point where he returned to work, where these adjustments could engage with any disadvantage caused by the disability itself, we are assessing the reasonableness of those measures as a whole and as part of a phased programme which was subject to review. We accept the thrust of Mr Gillie's submission, relying on **NCH Scotland v McHigh EATS 0010/06** that the time to consider the duty is when there is a clear return to work date but with some qualification. We take the view that where adjustments are part of the solution to

getting an employee back to work, there has to be at least a reasonable plan to implement the necessary reasonable adjustments.

9.15 We also accept Mr Gillie's submission that a trial period in itself may constitute a reasonable adjustment sufficient to fulfil an employer's duty, at least as part of a phased engagement with the apparent disadvantages (**Smith v Churchill Stairlifts Plc p2006] ICR 524**).

9.16 In assessing the reasonableness of the adjustments, **Linsley v Commissioners for Her Majesty's Revenue and Customs UKEAT/0150/18** is relevant insofar as it reminds us the test of the reasonableness of the adjustment is an objective one and the employer is simply under a duty to make a reasonable adjustment which addresses the disadvantage encountered by the convergence of the disability and the PCP. It is not required to select the best or most reasonable adjustment from a selection of possible adjustments nor is it required to make the adjustment preferred by the employee.

(Allegation 5a, 6a and 8a) A requirement to read constantly from a computer screen while simultaneously talking to customers on the telephone.

(Allegation 5b, 6b and 8b) requirement to type information into customer accounts at the same time as reading information and/or at the same time as talking to customers on the telephone.

(Allegation 5c, 6c and 8b) A requirement to read and use standard notes supplied in electronic documents and to copy, paste and edit those notes as required into customer accounts to ensure consistency.

9.17 These three allegations overlap sufficiently to amount to the same allegation in essence. We have therefore considered all three together.

9.18 It is not in dispute that this was a PCP applied by the respondent and relevant to Mr Preston's role although it is clearly conceded on the basis of taking a measure of realism about the point alleged, and not reading it too literally.

9.19 The disadvantage contended for is that any reading caused Mr Preston's PRE symptoms to flare up with a risk of a full seizure and reading constantly caused his symptoms to intensify over time which affected his ability to perform his role and caused him stress and anxiety.

9.20 We are not satisfied the evidence allows us to find reading caused his symptoms to "flare up". We accept that reading is a trigger for myoclonic seizures and may intensify when under stress. To the extent that these occur during any reading, they are momentary and are not said in themselves to cause any inherent disadvantage. To the extent these are a disadvantage of the PCP of reading in the workplace, we have concluded they do not pass the threshold of substantial. So far as the disadvantage manifest in the employment relationship, there was no material detrimental effect arising on Mr Preston's ability and performance in his role. However, so far as the disadvantage may manifest in a personal sense, the frequency and nature of myoclonic seizures is still transient but it serves as an

indicator to the prospect of a tonic-clonic seizure before it arises. We accept that a tonic-clonic seizure is a serious matter. Reading does not inevitably cause such a seizure but, by the very nature of the condition, it does increase the risk of such a seizure occurring. That is enough to amount to a substantial detriment.

9.21 We are satisfied that the respondent did not have knowledge of this disadvantage before 18 September 2017 nor could it reasonably be expected to.

9.22 As to the adjustments, Mr Preston contends for additional breaks; reducing the expectation of his performance; provide text reading software; giving extra time to do the work and providing a Bluetooth headset

9.23 We do not accept that the text reading software and the provision of a Bluetooth headset are reasonable adjustments. The question of reasonableness engages two scales. On one side are factors such as the cost or disruption to the employer of implementing the adjustment, the effect on others, and the extent to which it might create further disadvantages etc. We accept they carry minimal weight in this example. On the other side of the scale is the extent to which it would address the disadvantage in question, either to remove it or to substantially mitigate its effect. We have been unable to understand how this could remove reading altogether. As the trigger for myoclonic seizures could be found in shorter episodes of reading from screen and reading from paper, we have nothing to suggest that the text reading software would, in itself, have any meaningful effect. However, if the cost and disruption of implementing was minimal, the benefits also only have had to be minimal to make it an adjustment that was reasonable to make and it may have formed part of a wider package of adjustments, the sum of which was reasonable. In this case, the bottom line is that the respondent did not refuse to make this adjustment and was more than prepared to explore the scope for such auxiliary aids or technological solutions. Time was planned to be available to explore the efficacy of these measures with involvement from Access to Work during either the period of work conditioning or the phased return itself. Mr Preston never reached a point of starting his work conditioning and was never in the workplace at a time when the duty would otherwise have arisen. Ultimately, there has not been a failure to make the adjustment.

9.24 Similarly, we are satisfied that additional breaks, additional time to do work and reducing performance expectation were all ready to be in place on Mr Preston's return to work. Mr Preston never reached a point of starting his work conditioning and was never in the workplace at a time when the duty would otherwise have arisen due to his continued sickness absence for stress and depressive symptoms. He was therefore never exposed to the disadvantage at a time that the respondent was under the duty to make the adjustments.

9.25 Ultimately, there has not been a failure to make the adjustments.

(Allegation 5d, 6d and 8c) The requirement to follow paper based customer guides to aid customer service and to follow procedures throughout the day.

9.26 We do not accept this is a PCP applied by the respondent. The customer guides are printed in hard copy but are also available to Mr Preston and others in his position on the

"ASK" system in electronic form. It therefore follows that he had available to him the alternative digital version which is the adjustment he contends for. There is therefore no failure to make a reasonable adjustment and we have not had to engage with the issue of whether there is any material difference in the measure of disadvantage caused by the medium on which the writing in found.

9.27 In any event, notwithstanding there was no duty engaged to make an adjustment, for the reasons set out above we are satisfied that if this was a PCP, any disadvantage was immediately overcome by the presence of the alternative medium for these documents. There is no failure to make a reasonable adjustment.

(Allegations at 5e, 6e and 8a) A requirement that employees work on other colleagues' actions from their customer complaints trackers as and when required.

9.28 It is not in dispute that this was a PCP applied by the respondent and relevant to Mr Preston's role however, we cannot see that it adds anything of substance to the other claims as the only reason this PCP has any relevance to the disability of PRE is because of the need to read from screen and or paper documents. There is nothing inherent in this PCP alone that is not addressed in the other allegations and the package of adjustments put in place.

9.29 In any event, we note Mr Preston's acceptance that it was not reasonable to exclude him form dealing with incoming work to the call centre at busy times. The adjustments contended for are those set out in respect of the first PCP and as we have concluded there was no failure to make those adjustments, there can be no failure in respect of this additional PCP even if there is any further disadvantage arising from the fact that the work being done was that of a buddy. Over and above that, we note that there was a specific adjustment offered as part of the return to work that Mr Preston would not initially work on a "buddy's" caseload but only his own work. Curiously, that is not now contended for as an adjustment but it illustrates the fact that we are satisfied the employer in this case was looking seriously at measures that would assist in supporting him back to work, whether they related to the PRE or the other factors preventing his return to work.

9.30 This allegation therefore fails.

(Allegations at 5f, 6f and 8d) A practice of allowing employees 2 hours when they did not answer phone calls to manage complaints and to return calls to customers and requiring that employees assist with answering phone calls during those 2 hours at busy times.

9.31 It is not in dispute that this was a PCP applied by the respondent and relevant to Mr Preston's role. This relates to what was termed the daily "paperwork" time. For all such staff, the allocated time was intended to be set aside but did not necessarily occur in one single two-hour block. It may have been broken into two, one-hour blocks. To that extent we are not entirely convinced the PCP as advanced is actually made out although the gravamen of this allegation is not the block of time itself, but the fact that in busy times an employee otherwise logged as being on paperwork could be asked to help with calls. When that happened, we found the paperwork time would be given back.

9.32 It is difficult to identify the disadvantage that arises from the interruption of the allocated paperwork time, as opposed to the task of doing the paperwork itself. IT is suggested it causes a flare up which we do not accept on the evidence. It is also suggested that it affected Mr Preston's memory and concentration meaning he was unable to return to paperwork efficiently. None of these are made out on the evidence and in any event, do not make out the link between PRE and the PCP to establish the stated disadvantage. Any comparator interrupted from his paperwork to take calls is likely to return to that paperwork less efficiently than if they had continued on it uninterrupted. There is nothing to explain why PRE adds to that.

9.33 In any event, for the reasons given above we are satisfied that the adjustments contended for were there, ready to be put in place upon Mr Preston's return to work. In particular, the concern that there would not be any uninterrupted paperwork time is clearly stated as one of the adjustments that was identified as early as the October 2017 meeting and was later made clear that it was a measure that would continue beyond the initial phased return period. That was one of the adjustments that Mrs Hafeji repeated in the various communications with Mr Preston when seeking to support his return to work.

9.34 This allegation fails.

(Allegations at 5g, 6g and 8e) Requiring employees to check, read and write emails to colleagues, customers and other departments throughout the day.

9.35 It is not in dispute that this was a PCP applied by the respondent and relevant to Mr Preston's role. We cannot identify anything inherent in this PCP which adds to the first PCP. The adjustments contended for a those we have already found to be ready for implementation upon him returning to work and as we have found there was no failure to make those reasonable adjustments in respect of the earlier alleged PCP, this allegation must also fail.

(Allegations at 5.h., 6.h. and 8f) The practice of having to write letters to customers on a computer using standard templates provided in electronic form.

9.36 It is not in dispute that this was a PCP applied by the respondent and relevant to Mr Preston's role. Again, we cannot identify anything inherent in this PCP which adds to the first PCP save to the extent that he seeks an additional adjustment of providing dictation software for writing the emails. As we have found there was no failure to make reasonable adjustments in respect of that PCP, this allegation must also fail so far as it overlaps.

9.37 The contention for an adjustment to provide dictation software is not something which we can see goes to the ameliorate the disadvantage. There is nothing we have before us arising from Mr Preston's PRE that in itself gives rise to a disadvantage when composing emails. The issue is, of course, that one cannot meaningfully do that without at the same time reading what one is preparing. There is nothing we have been taken to which would reassure us that any dictation software was available that could be used without some need for read back. The dictation in itself therefore does not address the disadvantage.

9.38 Having decided it is not a reasonable adjustment to make in any event, it was nevertheless something which had not been refused by the employer and nor had they acted in a manner inconsistent with making that adjustment. It was an issue which was positively open to be explored with Access to Work had Mr Preston returned to commence the work conditioning and undergo the workplace assessment. The fact remains that Mr Preston was never at work and exposed to any such disadvantage at a time when the respondent was under any duty to make reasonable adjustments. It had put in place a reasonable package of measures to at least embark on a trial of their effectiveness but that never arose due to the fact Mr Preston did not return to work.

(Allegation 5i, 6i and 8g) The practice of duty managers approaching employees at busy times and asking employees to take calls when they were due to take a scheduled break.

9.39 It is not in dispute that this was a PCP applied by the respondent and relevant to Mr Preston's role.

9.40 There is nothing in this PCP which presents a substantial disadvantage to Mr Preston compared to none disabled employees over and above that which has been identified already above when performing the role. The gravamen of this allegation is that the opportunity for breaks is itself one of the control measures and therefore a reasonable adjustment for any disadvantage that might arise from the convergence of the disability and the PCP. To that extent, this is something the employer addressed in the package of adjustments including explicitly asserting his right to refuse to take additional calls during wrap, to protect the allocated paperwork time and to report matters to a team leader to reinforce the measures. The adjustments contended for relate only to protecting his time on breaks and lunch. We are satisfied that protections existed within the package of measures planned by the respondent for his return to work and it cannot be said that the respondent has failed to make this adjustment.

9.41 This allegation fails.

(Allegations at 5 j, 6j and 8h) The practice of using a whiteboard to take notes.

9.42 We do not accept this is a PCP applied by the respondent. It is true that small white boards are available to employees in Mr Preston's position and may be used by them if they wish to jot notes about the call. It seems that the reason they are whiteboards is likely to go to the respondent's data protection obligations. They do not have to use them. It was common ground these were provided as a means of assisting all staff including Mr Preston. There was no sanction if an individual chose not to use them.

9.43 Even if it can be said that the availability of such an aid was a PCP, the fact that it was entirely at the choice of the individual employee whether they used it or not means we have been unable to identify any disadvantage arising. The specific disadvantage alleged is that "*the whiteboard could end up full of information which Mr Preston needed to read to type notes into customer accounts. This reading caused C'sPRE symptoms to flare up and put him at risk of a seizure and stress and anxiety*".

9.44 This allegation fails on the basis that the duty to make adjustments was not engaged and in any event the adjustments contended for are addressed in the other PCP's alleged and are either adjustments that were not reasonable to make or were adjustments that were in place.

(Allegation at 5.k., 6.k. and 8.i.) The requirement to meet certain performance standards and targets.

9.45 It is not in dispute that this was a PCP applied by the respondent and relevant to Mr Preston's role. We do not go behind that concession, but we regard the requirement as stated as putting the measure higher than it actually was. Nevertheless, although this was not a hard target, those who met it were celebrated and those who did not would discuss the caseload at an individual performance session. These are not at the extremes of rewards or sanctions, but they are sufficient to establish a PCP.

9.46 As a fact, however, we are not satisfied that Mr Preston has established he suffered a disadvantage arising from the convergence of PCP and his disability of PRE. He was always regarded as a positive contributor at team and individual dialogues and was a good performer. We have not accepted his performance was failing and to the extent that he perceived there was any deterioration in his performance, we have not been able to conclude that was in any way due to PRE as opposed to other factors in the workplace. Overall, Mr Preston was always someone who met the employer's expectations whether that was in respect of the daily expectations or the level of open caseload.

9.47 Not satisfied there was a duty to adjust this PCP.

9.48 In any event, the adjustments contended for are to reduce the volume of cases open to Mr Preston at any one time, and to reduce the expectations on his performance. We are satisfied that both of those formed part of the package of adjustments ready to be implemented on Mr Preston's return to work and to remain subject to review going forward. Consequently, if we are wrong about the duty arising, there is in any event no failure to make the adjustment.

9.49 This allegation fails.

(Allegation at 5.l., 6.l. and 8.j.) A practice of discussing team performance and targets in performance in team meetings and sharing and comparing different individuals' performance in those meetings where individuals were given suggestions about how to perform their performance.

(Allegation 5.m., 6m. and 8Displaying each day's individual and team performance statistics on notice boards around the contact centre.

9.50 We have considered these two allegations together. They each raise the same point in a slightly different way relating to the employer's publications and discussion of individual and team performance.

9.51 It is not in dispute that both PCP's were applied by the respondent and relevant to Mr Preston's role at work.

9.52 We do not accept that these PCP's placed Mr Preston at a substantial disadvantage compared to employees without his disability. We do not accept there is any disadvantage beyond the fact that these processes included a potential source of reading but this is not the point of this allegation and no adjustment is sought to the manner of publishing team statistics per se. The issue in this allegation is that it is suggested it highlighted Mr Preston's poor performance. We are not satisfied as a fact that it did. He was not a poor performer.

9.53 When reaching our findings of fact, we were unable to accept Mr Preston's contention that these processes subjected him to the embarrassment or self-consciousness alleged. We found he was consistently a positive contributor to group performance discussions and was consistently regarded as a god performer himself. The processes themselves, particularly the individual meetings with the team leader, were systems he himself accepted were beneficial. These were measures which offered opportunity to raise issues affecting performance and the absence of such discussions is itself reinforcement for our conclusions.

9.54 Moreover, we note the alternative adjustments contended for is to only publish Mr Preston's statistics after adjustments had been made to his targets. For the reasons given above, there is no failure to make reasonable adjustments in that regard. That conclusion flows through in this allegation and we are not satisfied there has been a failure to make reasonable adjustments. In any event, he was never at work and producing any performance measures at a time when the respondent was under a duty to make any adjustment.

(Allegation 5n, 6n and 8l) The requirement to log and retain between 10 to 50 unresolved or ongoing customer complaints using a complaints tracker on a computer during busy periods.

9.55 We are not satisfied that all aspects of the PCP as alleged have been established as fact. We accept that each resolution manager would have a number of open cases at any time but the thrust of this allegation goes to the volume of open cases, not the fact of open cases. We do not accept that there would be as many as 50. We found that the ongoing number of open cases was typically maintained between about 10 and 20 and that if that number rose to 35 or beyond it would be a trigger for intervention and review. To that quantitative extent, the PCP alleged is not made out. Nevertheless, we consider the implications of the PCP that we find was in fact applied.

9.56 We are not satisfied any substantial disadvantage has been made out. We do not accept the assertion that his disability meant he was unable to deal with the volume of complaints open at any one time. The effect of PRE arises in respect of the interaction with the individual case being worked on at that moment in time. On the basis that there has always been sufficient workload for Mr Preston and others in his capacity to be fully occupied, the presence of absence of other cases waiting to be dealt with does not in itself give rise to any disadvantage related to the disability. Any disadvantage there is arises in the moment of working on anyone particular case. We do accept that there is a professional pride in dealing with cases to resolution stage efficiently and that knowing there are unresolved cases may be

a source of pressure. We accept this was something Mr Preston would have been concerned about. This did not, however, lead to any detrimental effect on the quality of his work or on the output of his work.

9.57 However, we proceed on the alternative basis that there was pressure from knowing he had more unresolved cases than he had previously held and that this made him more susceptible to experiencing the myoclonic seizures arising from PRE. Even on that basis, the claim would also fail for two reasons. Firstly, we are not satisfied there was the necessary knowledge until after the point in time when he was off work due on sick leave. There was no duty arising before that time. Thereafter, we are satisfied that the implications raised by this allegation and the actual adjustments contended for at 8.l. of the list of issues were reasonably addressed by the respondent within the adjustments proposed as part of the return to work which included easing the volume of work as well as the nature of work undertaken at a time when his return to work would have necessarily meant he returned to start from a position of having no outstanding cases.

9.58 We are therefore not satisfied there has been a failure to make these reasonable adjustments.

(Allegation at 5o, 6o and 8m) Being required to take ownership of another colleague's customer complaints if other colleagues have not followed the correct processes or if their customer has called to get an update on a complaint.

9.59 It is not in dispute that this PCP was applied by the respondent in the ordinary operation of Mr Preston's role and was applied to him whilst he was in work.

9.60 We are unable to identify any substantial difference between this allegation and the alleged PCP to work on other colleagues' actions set out above at allegation 5e. As with that allegation, the impact of any disadvantage caused by the convergence of the PCP and PRE is not made out. The highest that it can be put is that all actions in the role required some reading and that this may present the disadvantage to Mr Preston we have identified elsewhere.

9.61 We note Mr Preston accepted that the buddy system was a reasonable way of maintaining customer service. It is also a two way process and it is not at all difficult to conceive a situation where the presence of the buddy system could itself be of assistance to him generally, and specifically in respect of his stress and any effects of his PRE.

9.62 In any event, the adjustment contended for is to be allowed to either not do it or only to do it when he was comfortable to do so based on his own workload. In that regard, one of the explicit adjustments forming part of the return to work plan was that Mr Preston would work only on his own cases and, in discussing the way forward, there was an agreement, subject to review, that he would after four weeks then be comfortable to take on colleagues cases. We conclude therefore that even if the duty is engaged, there has not been a failure to make this adjustment.

(Allegation at 5p, 6p and 8n) A requirement to attend training sessions for a set amount of time in which employees were required to read from paper and/or on a computer.

9.63 We have not heard evidence on this specific matter. We are not satisfied that Mr Preston has established the facts of this allegation. We also note that the allegation has, in reality, reduced to one example of a situation simply requiring him to undertake some reading through any medium. That is, the criticism levelled elsewhere that Mr Preston had to read from a screen without the option of paper or, as the case might be, was required to read from paper without the option of reading it digitally is not seen in this allegation.

9.64 We cannot conclude this specific requirement is made out but, at a general level we are satisfied that there was a requirement to undergo training from time to time and that would, necessarily, require the delegates to undertake some reading. We are satisfied that reading is a trigger for Mr Preston to experience myoclonic seizures and would give rise to a disadvantage at that personal level. However, we have no basis to conclude that he was expected to undertake any training session during the time of the work conditioning or the subsequent phased return to work and to that extent he was not subjected to such disadvantage as there might be at any time when the respondent was seized of knowledge such as to engage a duty to make adjustments. That in itself means this allegation fails.

(Allegation at 5q, 6q and 8o) Being asked by duty managers to 'wrap up' several calls at the same time in busy periods, rather than after each individual call, so as to remove calls from the call queue quicker.

9.65 This has not been established as a PCP. It is something which the established systems meant should not happen. The fact it may have happened on a rare occasion, or that an individual may have asked an operative in a busy moment, and the operative not object is not something of substance and frequency as to turn it into a PCP. In reaching that conclusion we recognise we should approach the question of the PCP with a real world view (see **Carrera v United First Partners Research *UKEAT/0266/15*)** and had we been concerned that there was something of an unofficial practice to do this, the fact it was contrary to the formal system would not prevent us finding it was a PCP. That is not the case here. In any event, we also have to approach it with a view to where the limits are as was explained in **Ishola v Transport for London [2020] IRLR 368**: -

> ***"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 treats an 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".***

9.66 This claim fails but in any event, the process of putting in place the package of measures to assist Mr Preston's return to work were of a nature that recognised the need to provide protected time for him to focus on the task in hand. Whilst the agreed package of adjustments did not include protected time during wrapping calls, it did address the similar contention as it applied to paperwork time. Indeed, it is partly due to the very fact that the

adjustments were drawn in this way that we are reinforced in concluding where the limits of the PCP's were. Had there been a practice of interrupting wrap time, we are confident that the list would have included that, as it did with paperwork time. In any event, the package of adjustments also empowered Mr Preston to refuse certain types of work or work in certain situations. We are satisfied that even if we are wrong in our conclusion of the existence of such a PCP, the package of measures was reasonable to prevent any disadvantage that might arise from such a PCP.

(allegation at 5r, 6r and 8A practice of having individual side by side coaching sessions with a manager where targets are discussed.

9.67 We accept there was such a PCP. It was a reasonable PCP as Mr Preston accepted. It was useful for both manager and employee. It is a process of observing the performance of work, listening in, and discussing practice. Had it not been in existence as a PCP, it is not difficult to imagine a set of circumstances in this case where it could have been argued as an adjustment that ought to have been made to assist him.

9.68 We see no basis on which the convergence of this PCP and Mr Preston's disability put him to a substantial disadvantage compared to a non-disabled employee. To the extent that this is part of his complaint that it was either embarrassing or caused him to worry about his performance, we found no evidential basis for that. On the contrary, Mr Preston was always regarded positively and an example to others.

9.69 Finally, the adjustment contended for does not "fit" the PCP alleged. Mr Preston contends that the performance expectations should have been reduced which is not an adjustment to the PCP alleged which, in itself, demonstrates the lack of disadvantage arising from the PCP as asserted. To the extent that there should be a PCP of set performance standards, we have dealt with that at Allegation 5k above.

(Allegation 5s, 6s and 8g) Including disability related sickness absence alongside normal sickness absence.

9.70 This allegation is argued in the abstract. We are not aware that any of the facts of this case engage this allegation. The only time Mr Preston was subject to a sanction in relation to sickness absence itself was when he was subject to the attendance warning in early 2017. The reasons for those absences were not related to his disability. If there was such a PCP, he would not have suffered any disadvantage and, in any event, the adjustment contended for in discounting disability related absences would not have engaged. All that is fatal to this allegation without considering the effect the absence of knowledge of disadvantage has on the duty in the first place. To the extent it is alleged in the context of his final period of sickness absence, we are unable to identify any disadvantage such a PCP would have put Mr Preston to. This is not a case where Mr Preston returned to work from sickness absence prematurely in order to avoid the consequences nor was he dismissed for capability reasons relating to sickness absence.

9.71 In any event, the respondent's attendance management policy explicitly engages with this point and recognises that the duty to make reasonable adjustment may include accepting

a higher level of sickness absence. For that reason, we dismiss the claim on the basis either that the structure of the policy is such that there is no such PCP or, to the extent that it is, that adjustments are made in appropriate cases. This case did not engage those appropriate circumstances.

10. Harassment Related to the Protected Characteristic of the claimant's disability

10.1 Section 26 of the Equality Act 2010 provides: -

> ***(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 of 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 in subsection (1)(b), each of the following must be taken into account-***
>
> ***(a)The perception of B;***
>
> ***(b)The other circumstances of the case;***
>
> ***(c)Whether it is reasonable for the conduct to have that effect.***

10.2 We are required to consider separately the discrete elements of this provision, namely whether any conduct found to have taken place was unwanted, had the proscribed purpose or effect and was related to the relevant protected characteristic (**Richmond Pharmacology v Dhaliwal [2009] IRLR 336**). That case is also relevant to the threshold of when conduct amounts to harassment, Underhill P said at para 22: -

> ***"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."***

10.3 Whilst that passage focused on dignity as a prohibited purpose or effect within s.26(1)(b)(i), we take the view the essence of a threshold applies similarly to the other prohibited purposes or effects in s.26(1)(b)(ii) and that threshold is regulated by the concept of the reasonableness or not of the conduct having the prohibited effect as set out in in s.26(4)(c). Similarly, the meaning of the statutory words is itself a measure of the threshold and, as the Court of Appeal stated in **Grant v HM Land Registry & Another [2011] IRLR 748**, the significance of the words must not be cheapened. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

10.4 Against those directions, we turn to consider each of the 15 alleged acts of harassment.

(Allegation 9.a.) Imran Arif held a meeting with C on 18 October 2017 before Shelley Cooke (OH advisor) had concluded her OH report on C's fitness for work.

10.5 We have some doubts that this allegation is capable of getting past the first hurdle of establishing unwanted conduct. The conduct alleged is that Imran Arif acted to convene the meeting on 18 October 2017 before he knew the full extent of Shelly cook's report. But that doesn't fairly represent the sequence of events on that day nor does it capture the fact that, at face value at least, Mr Preston was part of that decision making process together with his trade union. If we are to take Mr Preston's stated view at the time as being an accurate reflection of his attitude to returning to work, he wanted this sort of meeting to resolve the things he was saying the respondent was not doing to eat his return to work. Shelley Cook, Mr Preston and Imran Arif all had a preliminary discussion during which Mr Arif was apprised of what had just taken place during the occupational health consultation. Nobody objected to this meeting taking place there and then. It is significant not only that Mr Preston did not object but he was represented at this meeting Manjit Kaur his trade union representative who also did not object. We do not except that the conduct alleged was in fact unwanted.

10.6 To the extent that what took place could be set to be unwanted conduct, we must consider in what way that conduct was related to the protected characteristic. In the context of what is typically understood to be an act of harassment, there is nothing in the timing of this meeting which we can identify as being relating to PRE, the relevant protected characteristic. The highest that can't be said is that PRE arose in the factual mix of issues that lead Shelley Cook to recommend this course of action. It is a thin connection to bring it with in section 26 of the equality at 2010 but, we think, sufficient for this stage of the analysis. The quality of the relationship is assessed at the next stage when considering the proscribed consequence.

10.7 Turning to the proscribed consequences, we have absolutely no doubt whatsoever that there was no deliberate intent for the timing of this meeting to cause any of the proscribed consequences. We then consider whether it was nevertheless reasonable that the timing of this meeting had the prescribed consequences. Part of that is an assessment of fact as to whether we except Mr Preston did in fact feel any of the prescribed consequences. We are not so satisfied, applying the threshold for these types of consequences. However, even if he did when, when we apply the full provisions of section 26(4), we are not satisfied it would be reasonable that the timing of this meeting should have such a consequence.

10.8 Consequently, this claim fails.

(allegation 9.b.i) In the meeting of 18 October 2017 Imran Arif Threatened to treat any future sickness absence from C as "absence without leave".

And

(Allegation 9.b.vii) In the meeting of 18 October 2017 Imran Arif insisted that OH would deem C fit for work and said that even if C had a further sick note and did not return C would be classed as absent without leave which would result in disciplinary action and dismissal.

10.9 These two allegations substantially overlap and we address them together. We were not able to reach finding a fact that supported the allegations as they are set out. We did accept that there was reference made to the consequences of the employee's sickness absence procedures particularly in the context of being absent without leave was something that was discussed. We found that was said as part of a discussion explaining why Mr Arif was keen to find a positive solution to assist Mr Preston's return to work. It was a matter of fact that, at that moment in time, the occupational health advice was that he was fit to return to work, subject to this management adjustments being addressed.

10.10 To the extent that this is unwanted conduct, there is nothing inherent about the conduct relates to the protect a characteristic of Mr Preston's disability. It does however arise in the context of his absence. At that time that was for stress and depressive symptoms and the fit notes had not yet begun to add PRE. It is not reasonable for Mr Arif to have any sense, knowledge or belief that the absence was because of PRE. The most that can be said is that PRE was by then raised with Mrs Hafeji and occupational health it did, therefore, form part of the surrounding context but we cannot accept it was related to the conduct.

10.11 We then turn to the proscribed consequences. There is nothing in the evidence we heard that would properly permit us to conclude that there was any intent on the part of Mr Arif to cause the proscribed circumstances. Stepping back and looking at all the circumstances of that meeting, we could not properly infer such intent. The question then becomes whether it had actually had that effect and it was reasonable for it to have that effect. Once again we draw on our findings of fact as to the state of affairs at that moment in time. Mr Preston was at the times publicly stating he wished to return to work subject to adjustments being put in place. This meeting was a positive step towards identifying the necessary adjustments arising at the time, at least he was giving the impression to Mr Arif thought this was a positive step in the right direction. Neither he nor his trade union representative raised any issues and we have to come to the conclusion that we are not satisfied the prescribed effect was in fact something Mr Preston felt at the time. To the extent that he may have acquired that sense on reflection at a later time is something we would also factor into the wider circumstances when assessing whether, if there was such prescribed consequence actually felt, whether it was reasonable for that to be so.

10.12 As to that question of reasonableness within section 27(4)(c), we are not satisfied that it was reasonable for the comments actually made by Mr Arif to have the prescribed affect. The focus of the meeting was explicitly to look at what occupational health described as management obstacles to his return to work as a means of addressing his work-related stress. Mr Arif understood that to be the focus. We are not dealing with a disability of stress or depressive symptoms. As we have indicated this was a supportive meeting that in the presence of the trade union representative was seeking to find a positive solution and, on the day, appeared to have done so. Having regard to the authorities on nature and quality of

harassment and the threshold that must be achieved we are not satisfied this claim is made out

(Allegation 9.b.ii) In the meeting of 18 October 2017 Imran Arif dismissed C's concerns about how his work was affecting his PRE and that a lack of adjustments was leading to mental health problems.

10.13 We were not able to reach a finding of fact that supported the allegation as it is put here. We do not accept as a fact that Mr Arif was dismissive of any aspect of the matters raised during or arising from the meeting on 18 October 2017. That conclusion is fatal to this particular claim. In any event, we are equally not satisfied that the reference to PRE was put to Mr Arif in the terms suggested here to the extent that what is meant by this allegation is that a lack of adjustments for PRE is what caused the mental health problems.

(Allegation 9.b.iii) In the meeting of 18 October 2017 Imran Arif Hurried C when C tried to explain in detail about his PRE, stress, anxiety and depression and said to C that he (Imran) 'did not need to know the ins and outs, just list them, what next'.

10.14 We are not satisfied that there was a time in that meeting when Mr Preston tried to explain those matters and Mr Arif responded as the allegation suggests. However, we interpret the allegation as paraphrasing a general state of affairs rather than a specific exchange. On that basis we are satisfied that Mr Arif did engage with Mr Preston in a way to keep the discussion moving and not to dwell too much on the detail of each or any particular issues. To that extent the essence of what is alleged, if not the actual words, is something we accept on our findings. As we have also found, we were not satisfied the meeting could be described at any point as dismissive which is the thrust of this allegation. Again, the overall picture is drawn from the purpose of the meeting, the way it was conducted, the participants and the apparent agreement at the conclusion of a way forward, all of which leads us once again to real doubt this could be said to be unwanted conduct. To the extent Mr Preston perceived any dismissiveness in Mr Arif, we would accept that would be unwanted. We accept such conduct is related to a protected characteristic only insofar as one of the 12 topics raised did relate to PRE.

10.15 We maintain our assessment that this was not done with the intention of causing any of the proscribed consequences. For harassment to be made out it must have actually caused the proscribed consequence and be reasonable that it had that effect. We are not satisfied that is the case for the reasons previously given.

(Allegation 9.b.iv) In the meeting of 18 October 2017 Imran Arif Stood up in front of C and wrote C's concerns in bullet points on a flip chart and focussed on business practices, which were not C's main concern.

10.16 We have found Mr Arif did stand up, if for no other reason than he was writing on a flip chart as the three of them were exploring the list of concerns about the workplace that were barriers to a return to work. We have also found the reason for him doing this was partly a matter of style of how he conducted this type of quick moving, brainstorm meeting but also to ensure there was transparency and trust in that Mr Preston could see all that was being

recorded. We have also found he understood from occupational health that the focus was on what the claimant has called business practices. To that extent, the conduct is made out. We repeat our earlier concern that this was no unwanted conduct. It was part of an agreement with occupational health as a way forward to helping Mr Preston return to work. He was, publicly at least, giving the impression that this was a course he wanted to take. His trade union representative did not demur either. At all times that this was the proposed way forward, we have found Shelley Cook was explicit in her opinion that the obstacle to Mr Preston's return to work were management issues, not medical issues and that was the basis on which the meeting was held.

10.17 However, we continue on the alternative basis that it was unwanted conduct either because we might be wrong in our conclusion, or because Mr Preston subjectively felt it but did not express it, or because elements of the manner of the meeting were unwanted, even if the meeting itself was not.

10.18 That takes us to the question of whether it was related to the protected characteristic. The allegation is not inherently related to the protected characteristic. It is, however, within a wider context where the protected characteristic does form part of the picture of why this meeting took place. To that extent we are satisfied it can just about be said to be related to it.

10.19 We turn finally to the proscribed consequences. We are not satisfied they were intended or it was reasonable for them to have the effect and repeat our observations set out above.

(Allegation 9.b.v) In the meeting of 18 October 2017 Imran Arif Suggested adjustments that he (Imran) thought were reasonable on a temporary basis over 4 weeks and suggested including 3 weeks of C's pre-booked holiday as part of C's phased return to work.

10.20 The conduct complained of in this allegation is not that Mr Arif came up with a list of reasonable adjustments or that he proposed them over a 4 week phased period, it is that the manner in which he drafted the email following the meeting left some room for ambiguity as to whether 3 of those 4 weeks were lost within the 3 week period of leave. We found Mr Arif did not intend that meaning and whilst his email could be read that way, it could also be read in the way we found he intended it. Once again, the way in which it is related to the disability is, as already stated, no more than that PRE was one issue raised within a range of issue relating to Mr Preston's work and workplace.

10.21 For the same reasons as already given, we are satisfied that there was no intent to cause the proscribed consequence. We do accept Mr Preston read the email in this way but his understanding in part does not stand scrutiny of what was actually stated would happen after the period of annual leave. For example, the concern that there would not be any uninterrupted paperwork time is clearly stated as one of the adjustments that would continue beyond the phased return period.

10.22 Even if it is right to characterise Mr Arif's plan as amounting to unwanted conduct relating to a protected characteristic, we are satisfied this plan was neither intended to have the proscribed consequences nor, if it actually did have such consequence subjectively, was

it reasonable for it to do so for the reasons already given about the circumstances of this meeting.

(Allegation 9.b.vi) In the meeting of 18 October 2017 Imran Arif Refused to make adjustments that C requested.

10.23 We have not accepted the premise of this allegation as a matter of fact. We are satisfied that the process during the meeting did capture the essence of the issues being raised.

(Allegation 9.b.viii) In the meeting of 18 October 2017 Imran Arif Said that in his (Imran's) view people off with stress get a bad view of things and don't want to come back to work.

10.24 We have not found the statement as alleged was said. We have found that Mr Arif shared his opinion that the longer someone was off work with work related stress, the harder they might find it to return. We do not accept that that is related to PRE.

10.25 In any event, we found the reference was in the context of the urgency of identifying the issues necessary to help Mr Preston. We are satisfied there was no intent to cause the proscribed consequences and against the context in which it was said and all the circumstances of the case, we do not accept that it would be reasonable for such a statement to have the proscribed consequences even if Mr Preston did in fact feel them.

(Allegation 9 ix) In the meeting of 18 October 2017 Imran Arif was argumentative and told C he had a week to decide what choice he wanted to make about returning to work.

10.26 We do not accept the premise of this allegation as a matter of fact. We do not accept Mr Arif was argumentative. Further, there was no choice to be made about wanting to return to work or not. The respondent's understanding at the time was that Mr Preston did want to return to work. That proved to be wrong but there was no deadline to make his mind up. The meeting on 18 October concluded on the understanding that a plan had been agreed.

(Allegation 9.c.i.) During a telephone conversation with C on 31 October 2017, OH advisor Shelley Cooke Compared her dyslexia to the Claimant's PRE;

(Allegation 9.c.ii) During a telephone conversation with C on 31 October 2017, OH advisor Shelley Cooke Told C that she still managed to go in to work and so he should be able to as well and said that 'sometimes you just have to deal with these things'.

10.27 We have dealt with these two allegations together as they form part of a theme of alleged to have been repeated on 6 December 2017. In our findings of fact, we have found that the essence of this comparison was made during this phone call. We were not able to make the finding in the way that the allegation is put at 9.c.i that the comparison was made with PRE as opposed to "his condition" and we found on the balance of probabilities that at that time the "condition" was more likely to be related to his work related stress which had been identified as the cause of the absence and directly related to the plan that arose from the consultation on 18 October 2017, about which Mr Preston was challenging her in this call.

To that extent we are not satisfied that this conduct can be said to be related to a protected characteristic.

10.28 To the extent that it is, we are completely satisfied it was not said with the intention of causing the proscribed consequences. We accept that Mr Preston's view of most interactions meant the threshold for feeling afront was much reduced and we take that into account but in the circumstances of the case, and particularly the fact that Miss Cook was responding to an accusation that she lacked empathy by not having his condition, it is not reasonable for her response to have the effect of causing the proscribed consequences. The circumstances do not meet the threshold required to amount to harassment.

(Allegation 9.c.iii) - During a telephone conversation with C on 31 October 2017, OH advisor Shelley Cooke Told C she should not be conversing with C then as she had other clients to see

10.29 We are unable to see anything in acts and statement encapsulated in this allegation that is anything other than a statement of fact about the state of affairs at that moment in time. There is nothing which can be said to render this comment related to a protected characteristic. We note there was nothing in Mr Preston's evidence of this phone call to Shelly Cook that explicitly raised PRE.

10.30 In any event, this is a medical practitioner who we know was working to an appointments diary. For her to end an unscheduled call that she did not need to take for this stated reason would make a mockery of the situations that section 26 is there to protect. We are entirely satisfied that this was not said with the intent of causing the proscribed consequences and it would be wholly unreasonable for it to have that effect.

(Allegation 9.d.i) During an OH assessment on 6 December 2017, Shelley Cooke said that the symptoms of C's PRE set out in a letter from C's neurologist were similar to her dyslexia

(Allegation 9.d.ii) During an OH assessment on 6 December 2017, Shelley Cooke said that she had the same symptoms of C with her dyslexia and that she was able to manage.

(Allegation 9.d.iii) During an OH assessment on 6 December 2017, Shelley Cooke said that She would not be offered half of the adjustments that the business had offered C and said that C should be able to manage because she could manage with her dyslexia.

10.31 We have considered these three allegations together. There is a clear theme which was repeated over the two interactions. We accepted as a fact that during this consultation Ms Cooke did draw on her own dyslexia when engaging with Mr Preston during this session. The events of 6 December differ to those of 31 October insofar as we can be satisfied the topic of discussion was by reference to PRE, as opposed to a condition and as such the conduct complained of does relate to a protected characteristic.

10.32 We then turn to the proscribed consequences. We are satisfied the comments were meant to be illustrative, supportive and encouraging. They were made in the context of an employee who appeared to be saying he wanted to return to work only to have second thoughts when steps were put in place for him to embark on that phased return. They were

meant to demonstrate that the employer does put adjustments in place and to give Mr Preston confidence in his employer. We are satisfied therefore that there was no intent to cause the proscribed consequences.

10.33 We are satisfied Mr Preston was upset by her use of the analogy in a context where he was already frustrated and at times angry with the employer and occupational health stance. Beyond that, we are not so satisfied we can find he did in fact suffer the effects of the proscribed consequences as they are termed in the legislation but to the extent that he did, once again putting everything into context and having regard to the necessary threshold to give the words of s.26 their intended force, we are not satisfied it is reasonable that the comments of Ms Cook should have the proscribed effect.

11. Victimisation

11.1 Section 27 of the Equality Act 2010 provides: -

> ***(1)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.***
>
> ***(2)Each of the following is a protected act—***
>
> ***(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 A or another person has contravened this Act***

11.2 In lay terms, this form of prohibited conduct can be reduced to three parts. An act which is capable of amounting to a protected act; a subsequent detriment and a causal link between the two. In other words, that the reason why Mr Preston was subjected to the detriment was because he had done the protected act (or that he believed Mr Preston had done, or may do a protected act). The protected act need only be part of the reason why the detriment is imposed, all that matters is that it has some material causal link.

11.3 In this case it is common ground that Mr Preston's grievance dated 5 April 2018 is a protected act. The two detriments that are alleged to flow from this act are the decision to dismiss Mr Preston and the decision to categorise the disciplinary allegations as gross misconduct. Both of those matters occurred and are sufficient to amount to detriments. The key question is whether those detriments arose because of the protected act.

11.4 We are satisfied that the protected act was in no way whatsoever causally the reason why those two detriments occurred. We reach that conclusion for the following reasons.

11.5 The first is the timing of the protected acts and where they fit in the overall chronology. It was late in the day and the process that led to Mr Preston's dismissal had already begun. Secondly, whilst it is true to say the phrase "gross misconduct" was not used in the first letter setting out the disciplinary charges, that letter did make clear that "the possible outcome

could be dismissal". We are satisfied this related to the employer's perceived sense of gravity, as opposed to any procedural "totting up" towards dismissal which did not apply but which, had it, might have otherwise explained the risk of dismissal. Thirdly, the issues within the protected act are so closely related to the whole process being undertaken that we are unable to detect any potential in the evidence before us for it diverting the course that would otherwise have been taken. The matters labelled a grievance could have been labelled his response to the disciplinary allegations. Putting it another way, had Mr Preston not raised his grievance, we cannot reasonably see that the outcome would have been any different.

11.6 For those reasons the claim of victimisation fails.

EMPLOYMENT JUDGE R Clark

DATE 6 July 2020

JUDGMENT SENT TO THE PARTIES ON

……...…….

.

AND ENTERED IN THE REGISTER

……...…….

.

FOR SECRETARY OF THE TRIBUNALS

APPENDIX

AGREED LIST OF ISSUES

R has conceded C's disabled status.

R does not concede knowledge of disability and/or substantial disadvantage which remain live issues.

Disability discrimination (section 15 EqA 2010)

1. Did R subject C to the following unfavourable treatment:

    a. Dismissing him;

    b. Naseera Hafeji insisting on intrusive levels of contact with C during C's sickness absence, in particular:

        i. requiring C to report daily whether he was attending work even though C had sick notes throughout his sickness absence;

        ii. contacting C on at least 40 occasions when he was off sick;

        iii. conducting lengthy phone calls with C several times a week;

        iv. holding lengthy meetings with C when he handed his fit notes to R;

    c. Colleagues gossiping and spreading rumours about the reason for his sickness absence: C heard rumours, in or around June 2018, from Dhanesh Mistry (Dan) that Dan had heard things said about claimant. Manjit Kaur, called C in or around June 2018 and said Danni Beasley had been gossiping about C at work.

    d. Threatening C repeatedly that it would class his sickness absences as unauthorised leave if he continued to take leave, even though C had provided fit notes to R;

    e. Classing C's absence as unauthorised leave from 5 April 2018;

    f. Arranging repeated occupational health appointments for C;

    g. Claimant told by Naseera Hafeji (222) on 23 October 2017, Shelley (OH), would send GP letter and he will have 5 days to take to GP. This letter was to enable claimant to challenge Shelley's decision, and so doctor could provide medical opinion. Claimant waited several days, called at least twice as not received (222), then told around 30 October letter doesn't apply to him so won't be sent.

    h. Forcing C to use 3 weeks of 'pre-booked' holiday as part of his return to work plan and then revoking the return to work plan?

2. If so was any unfavourable treatment done because of C's sickness absence which commenced in September 2017?

3. If so, did that sickness absence arise in consequence of C's disability?

4. If so, was any such treatment a proportionate means of achieving a legitimate aim? R relies on the legitimate aim of managing sickness absence and ensuring the appropriate staffing of its teams to meet customer and client demand.

Failure to make reasonable adjustments (sections 20/21 EqA 2010)

5. Did R apply the following PCPs?

    a. A requirement to read constantly from a computer screen while simultaneously talking to customers on the telephone.

    b. A requirement to type information into customer accounts at the same time as reading information and/or at the same time as talking to customers on the telephone.

    c. A requirement to read and use standard notes supplied in electronic documents and to copy, paste and edit those notes as required into customer accounts to ensure consistency.

    d. The requirement to follow paper based customer guides to aid customer service and to follow procedures throughout the day.

    e. A requirement that employees work on other colleagues' actions from their customer complaints trackers as and when required.

    f. A practice of allowing employees 2 hours when they did not answer phone calls to manage complaints and to return calls to customers and requiring that employees assist with answering phone calls during those 2 hours at busy times.

    g. Requiring employees to check, read and write emails to colleagues, customers and other departments throughout the day.

    h. The practice of having to write letters to customers on a computer using standard templates provided in electronic form.

    i. The practice of duty managers approaching employees at busy times and asking employees to take calls when they were due to take a scheduled break.

    j. The practice of using a whiteboard to take notes.

    k. The requirement to meet certain performance standards and targets.

    l. A practice of discussing team performance and targets in performance in team meetings and sharing and comparing different individuals' performance in those meetings where individuals were given suggestions about how to perform their performance.

m. Displaying each day's individual and team performance statistics on notice boards around the contact centre.

n. The requirement to log and retain between 10 to 50 unresolved or ongoing customer complaints using a complaints tracker on a computer during busy periods.

o. Being required to take ownership of another colleague's customer complaints if other colleagues have not followed the correct processes of if their customer has called to get an update on a complaint.

p. A requirement to attend training sessions for a set amount of time in which employees were required to read from paper and/or on a computer.

q. Being asked by duty managers to 'wrap up' several calls at the same time in buys periods, rather than after each individual call, so as to remove calls from the call queue quicker.

r. A practice of having individual side by side coaching sessions with a manager where targets are discussed.

s. Including disability related sickness absence alongside normal sickness absence.

6. If so, did any of those PCPs put C at a substantial disadvantage compared to people who did not share his disability? C contends he was put at a substantial disadvantage in the following ways (sub paragraphs reflect the respective PCP in the order above):

a. Reading caused his PRE symptoms to flare up with a risk of a full seizure. Reading constantly caused his symptoms to intensify over time which affected his ability to perform his role and caused him stress and anxiety.

b. Reading while typing or talking to customers at the same time caused his PRE symptoms to flare up with a risk of a full seizure, which affected his ability to perform his role and caused him stress and anxiety.

c. This caused his PRE symptoms to flare up with a risk of a full seizure, which affected his ability to perform his role and caused him stress and anxiety.

d. This caused faster onset and intensity of his PRE symptoms to flare up with a risk of a full seizure, which affected his ability to perform his role and caused him stress and anxiety.

e. This caused his PRE symptoms to flare up with a risk of a full seizure, which affected his ability to perform his role and caused him stress and anxiety.

f. This caused his PRE symptoms to flare up with a risk of a full seizure, which affected his ability to perform his role and caused him stress and anxiety. The requirement to jump between paperwork and being on the phone affected his memory and concentration and meant he was unable to return to work on paperwork efficiently.

g. This caused his PRE symptoms to flare up with a risk of a seizure.

h. This caused C's PRE symptoms to flare up with a risk of a seizure and caused him stress and anxiety.

i. The delay in C taking breaks caused his PRE symptoms to flare up with a risk of a seizure and caused him stress and anxiety.

j. The whiteboard could end up full of information which C needed to read to type notes into customer accounts. This reading caused C's PRE symptoms to flare up and put him at risk of a seizure and stress and anxiety.

k. The expectation that C should deal with a certain amount of complaints put pressure on C which caused C's PRE symptoms to flare up and put him at risk of a seizure and stress and anxiety.

l. The open discussion about C's performance with other colleagues and the requests to other colleagues to give him advice to improve his performance made C worry that he was underperforming without knowing he had PRE. C often had to share his PRE condition a reason why he was unable to meet targets which was embarrassing.

m. C experienced embarrassment when his targets were not met because of his PRE and he was concerned that other colleagues in other departments may judge his performance unfairly because they were unaware of his PRE.

n. C was unable to deal with the pressure caused by a high level of complaints. His PRE caused difficulty in managing high volumes of calls during busy periods and when he had to do paperwork. This caused C's PRE symptoms to flare up and affected his ability to perform his role.

o. C was unable to deal with the pressure caused by a high level of complaints. His PRE caused difficulty in managing high volumes of calls during busy periods and when he had to do paperwork. This caused C's PRE symptoms to flare up and put him at risk of a seizure and affected his ability to perform his role and caused him anxiety.

p. The expectation that C would complete any reading during training sessions in particular time period put pressure on C and caused his PRE symptoms to flare up, putting him at risk of a seizure and making him stressed and anxious.

q. This put C under pressure and caused confusion and memory problems which meant that C could forget information. Noting up several accounts caused C's PRE symptoms to flare up, putting him at risk of a seizure and making him stressed and anxious.

r. Pressure to perform at the same level as colleagues without a disability and comparing C's targets with those of others caused C to worry about his PRE.

s. This made C worry about being sick because of PRE symptoms.

7. If so, did R know, or ought it to have known, that such PCPs would have placed C at a the alleged disadvantage?

8. Did R take such steps as was reasonable to have to take to avoid any such disadvantage? C contends that it would have been reasonable for R to taken the following steps:

    a. In relation to the PCPs at 6 (a) and (e) above:
        i. Giving C additional breaks
        ii. Reducing R's expectation of C's performance
        iii. Provide text reading software to read out information on screen
        iv. Giving C extra time to do work
        v. Providing C with a Bluetooth headset.

    b. In relation to the PCPs at 6 (b) and (c) above:
        i. Giving C additional breaks
        ii. Reducing R's expectation of C's performance
        iii. Provide text reading software to read out information on screen
        iv. Giving C extra time to do work

    c. In relation to the PCP at 6 (d) above:
        i. Giving C additional breaks
        ii. Reducing R's expectation of C's performance
        iii. Provide text reading software to read out information on screen
        iv. Giving C extra time to do work
        v. Providing him with electronic customer guides.

    d. In relation to the PCP at 6 (f) above:
        i. Giving C additional breaks
        ii. Provide text reading software to read out information on screen
        iii. Providing him with electronic customer guides.
        iv. Allotting C dedicated paperwork time without the risk of having to help with calls
        v. Giving C longer to complete paperwork

    e. In relation to the PCP at 6 (g) above:
        i. Giving C additional breaks
        ii. Provide text reading software to read out information on screen
        iii. Giving C dedicated time to catch up and read his emails
        iv. Providing him with dictation software for writing emails and letters.

    f. In relation to the PCP at 6 (h) above:
        i. Giving C additional breaks
        ii. Provide text reading software to read out information on screen
        iii. Giving C extra time to do work
        iv. Providing him with dictation software for writing emails and letters.

    g. In relation to the PCP at 6 (i) above:
        i. Not exposing C to the risk that he was expected to take extra calls when he was due to on breaks or lunch.

    h. In relation to the PCP at 6 (j) above:
        i. Provide text reading software to read out information on screen
        ii. Giving C extra time to do work

iii. Providing him with dictation software for writing emails and letters.

i. In relation to the PCP at 6 (k) above:
   i. Reducing the volume of cases open to C at any one time
   ii. Reducing expectations of C's performance in relation to his targets.

j. In relation to the PCP at 6 (l) above:
   i. Considering that C had a disability before discussing his performance in front of his team.
   ii. Not asking colleagues for advice on how C could improve his performance during the 'performance dialogue' part of team meetings.

k. In relation to the PCP at 6 (m) above:
   i. Not displaying his performance on the notice boards, or only displaying his performance if adjustments had been made to his targets.

l. In relation to the PCP at 6 (n) above:
   i. Reducing the volume of complaints C was expected to manage and reducing C's workload overall.

m. In relation to the PCP at 6 (o) above:
   i. Not requiring C to take ownership of other colleague's complaints and/or giving c the ability to decide if he wished to do so based on the volume of his own workload.

n. In relation to the PCP at 6 (p) above:
   i. Provide text reading software to read out information on screen
   ii. Giving C extra time to do work
   iii. Providing any paper training to C in electronic form.

o. In relation to the PCP at 6 (q) above:
   i. Allowing C to deal with one call at a time instead of taking multiple calls and wrapping them up at the end.

p. In relation to the PCP at 6 (r) above:
   i. Reducing C's performance expectations overall.

q. In relation to the PCP at 6 (s) above:
   i. Allowing C to take separate leave relating to his disability or increasing his sick leave allowance.

Disability related Harassment (section 26 EqA 2010)

9. Did R subject C to the following conduct?

a. Imran Arif held a meeting with C on 18 October 2017 before Shelley Cooke (OH advisor) had concluded her OH report on C's fitness for work.

b. In the meeting of 18 October 2017 Imran Arif:

i. Threatened to treat any future sickness absence from C as “absence without leave”.

ii. Dismissed C’s concerns about how his work was affecting his PRE and that a lack of adjustments was leading to mental health problems.

iii. Hurried C when C tried to explain in detail about his PRE, stress, anxiety and depression and said to C that he (Imran) ‘did not need to know the ins and outs, just list them, what next’.

iv. Stood up in front of C and wrote C’s concerns in bullet points on a flip chart and focussed on business practices, which were not C’s main concern.

v. Suggested adjustments that he (Imran) thought were reasonable on a temporary basis over 4 weeks and suggested including 3 weeks of C’s pre-booked holiday as part of C’s phased return to work.

vi. Refused to make adjustments that C requested.

vii. Insisted that OH would deem C fit for work and said that even if C had a further sick note and did not return C would be classed as absent without leave which would result in disciplinary action and dismissal.

viii. Said that in his (Imran’s) view people off with stress get a bad view of things and don’t want to come back to work.

ix. Was argumentative and told C he had a week to decide what choice he wanted to make about returning to work.

c. During a telephone conversation with C on 31 October 2017, OH advisor Shelley Cooke:

i. Compared her dyslexia to the Claimant’s PRE;

ii. Told C that she still managed to go in to work and so he should be able to as well and said that ‘sometimes you just have to deal with these things’.

iii. Told C she should not be conversing with C then as she had other clients to see.

d. During an OH assessment on 6 December 2017, Shelley Cooke said that:

i. the symptoms of C’s PRE set out in a letter from C’s neurologist were similar to her dyslexia.

ii. she had the same symptoms of C with her dyslexia and that she was able to manage.

iii. She would not be offered half of the adjustments that the business had offered C and said that C should be able to manage because she could manage with her dyslexia.

10. If so, was any such conduct unwanted?

11. If so, was it related to disability?

12. If so, did it have the proscribed purpose or effect?

13. If it caused the proscribed effect, was it reasonable for such conduct to have that effect?

Victimisation (section 27 EqA 2010)

14. Did R subject C to the following detriments?

    a. Accusing him of gross misconduct;

    b. Dismissing him.

15. If so, were those detriments done to C because he had done a protected act or R believed that he had done, or may have done, a protected act? Was act on which C relies, namely, submitting a written grievance dated 5 April 2018, a protected act?

Jurisdiction

16. Are any of the C's complaints out of time such that the Tribunal lacks jurisdiction to hear them?

17. If so, do any such complaints form a course of continuing conduct such that they are in time?

18. If not, would it be just and equitable to extend the time limit to hear any such complaints?

Remedy

19. What compensation, if any, should the Tribunal Order for:

    a. Injury to feelings?

    b. Financial loss?

20. Should the Tribunal make any declarations or recommendations?