# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs S Olivia**

**Respondent:** **Rotherham Metropolitan Borough Council**

**Heard at: Sheffield** **On: 15, 16, 17 and 18 September 2020**
**19, 20 October 2020 (in Chambers)**

**Before:** **Employment Judge Brain**
**Mrs J Lancaster**
**Mr A Senior**

**Representation**

Claimant: Mr R Lees, Counsel
Respondent: Mr K McNerney, Counsel

# RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's complaint brought pursuant to sections 20 and 21 and section 39(5) of the Equality Act 2010 that the respondent failed to comply with its duty to make reasonable adjustments succeeds in part.
2. The claimant's complaint brought under section 15 and section 39(2) of the Equality Act 2010 that the respondent treated her unfavourably because of something arising in consequence of her disability succeeds.

# REASONS

***Introduction***

1. After hearing the case over five days on 15, 16, 17 and 18 September and 19 October 2020 the Tribunal reserved judgment. The Tribunal deliberated in chambers on 20 October 2020. The Tribunal now gives its reasons for the judgment that has been reached.
2. The claimant presented a claim form to the Employment Tribunal on 20 July 2018. The claim form was in fact rejected by the Tribunal as the claimant's name on the claim form was given as Sally Olivia whereas the

name given on the early conciliation certificate (obtained by the claimant pursuant to the Employment Tribunals Act 1996) was given as Sally Taylor. After the claimant clarified that Olivia was her married name the claim was accepted and was treated as having been presented on 31 July 2018.

3. Her grounds of claim are set out (with admirable brevity) in section 8.2 of the claim form as follows:

"*Disability discrimination contrary to the Equality Act 2010.*

*Failure to make reasonable adjustments.*

*Discrimination arising from a disability.*

*The claimant suffers from a progressive condition namely Huntington's Disease. The claimant made a request for reasonable adjustments which were unreasonably refused. There was a provision criterion practice namely the requirement to attend court which placed the claimant at a substantial disadvantage as she was unable as a result of her condition. As a reasonable adjustment the claimant requested that she be allowed to continue in her role without having to attend court as other colleagues would have been able to deal with the court work. A further reasonable adjustment would have been to keep the claimant's pay protected permanently. The claimant was treated unfavourably where the respondent gave her the option of either her contract of employment terminating or accepting re-deployment. The claimant contends that the above were not proportionate means of achieving a legitimate aim and therefore amounts to discrimination.*

*The most recent incident follows the rejection of the reasonable adjustments request on 6 March 2018. The claimant further contends injury to feelings as a result of the respondent's discrimination."*

4. The respondent presented its notice of appearance on 27 September 2018 resisting the claim. The grounds of resistance focused wholly upon a point taken by the respondent that the Employment Tribunal did not have jurisdiction to consider the claimant's claim because it was presented outside of the limitation period provided for by section 123 of the Equality Act 2010 *('the 2010 Act'*).

5. The matter benefited from a case management hearing which came before Employment Judge Lancaster on 3 January 2019. He gave directions for there to be an open preliminary hearing in order to decide the limitation point. The open preliminary hearing was listed for 11 February 2019.

6. On 11 February 2019 the matter came before Employment Judge Little. The open preliminary hearing did not proceed that day. He gave further case management directions and re-listed the matter to be heard on 16 April 2019.

7. Pursuant to Employment Judge Little's directions, the claimant presented amended grounds of claim. This step was taken on 4 March 2019. The respondent then filed amended grounds of resistance on 25 March 2019 as directed by Employment Judge Little.

8. The open preliminary hearing listed for 16 April 2019 was postponed and adjourned to 21 June 2019. Unfortunately, the respondent had not

received the relevant notice of hearing and did not appear. The case was therefore adjourned again.

9. The matter then came before the Employment Judge on 31 July 2019 for a case management hearing. It was recorded (in paragraph 6 of the case management summary) that the respondent did not take any point that the grounds of claim presented on 4 March 2019 constituted an amendment of the claim and conceded it to be further information of the extant claim (as opposed to an amendment to it).

10. The respondent also confirmed (as recorded in paragraph 7 of the case management summary) that no point was being taken under section 123 of the 2010 Act.

11. Further, the respondent confirmed (as recorded in paragraph 9) that no issue was taken that the claimant is and was at all material times a disabled person for the purposes of section 6 of the 2010 Act because of Huntington's Disease (which is both a mental and physical impairment). If confirmation was needed of the fact that Huntington's Disease has both physical and mental manifestations, this may be found in the document introduced by the claimant in to the hearing bundle at pages B62 to B65. This is a print out from the NHS website which gives an overview of Huntington's Disease. Symptoms of it include difficulty with concentration and memory lapses, anxiety, communication problems and impaired movement.

12. At the hearing on 31 July 2019, the opportunity was taken to clarify the issues in the case. These will be considered further later in this judgment. The essence of the case is captured in the succinct grounds of complaint referred to in paragraph 3 above.

13. The Tribunal heard evidence from the claimant. She produced two witness statements (at pages B254 to B258 and B264 and B272: we shall refer to these as the *'first statement'* and the *'second statement'* respectively). On behalf of the respondent, the Tribunal heard evidence from:

    13.1. Steven Ward. He is employed by the respondent as the operational manager of the accounts management department within the Revenues, Benefits and Payments Service. As Mr Ward says in paragraph 1 of his witness statement, "*This involves the management and collection of a range of debts owed to the council".*

    In the course of his career with the respondent, Mr Ward has worked as a technical officer (which is, as we shall see, the claimant's substantive role).

    13.2. Sharon Coombes. She is employed by the respondent as a team leader of the account management department within the Revenues, Benefits and Payments Service.

    13.3. Sean Beesley. He is employed by the respondent as a team leader of the account management department within the Revenues, Benefits and Payments Service. He has held this position since 28 February 2019. Prior to that, he was employed as a technical

officer from 18 September 2017 to 27 February 2019 and acted up as team leader between April 2018 and February 2019.

13.4. Robert Cutts. He is employed by the respondent as the head of service for the Revenues, Benefits and Payments Service. He has held this role for around nine years.

14. The Tribunal refused an application made by the respondent upon the first day of the hearing for permission to call evidence from Sarah Bennett. She is currently employed by the respondent as a team leader in the local taxation team within the Revenues, Benefits and Payments Service. She has held that position since July 2018 prior to which she was employed in the account management department within the service between January 2011 and July 2018. For the majority of that time (between January 2011 and July 2018) she worked as a technical officer. The Tribunal refused permission for the respondent to call evidence from her upon the basis that the witness statement from her had not been served in compliance with the directions given by the Employment Judge on 31 July 2019. It had only been served very shortly before the hearing. Therefore, this was a serious breach of the Tribunal's directions for which there was no good reason or explanation. The admission of a witness statement served so late in the day would be prejudicial to the claimant.

15. The Tribunal will set out its findings of fact. We shall then look in further detail at the issues in the case and the relevant law before going on to set out our conclusions.

***Findings of fact***

16. The claimant has worked for the respondent from 24 August 1998. At the time of the events with which we are concerned she held the post of technical officer in the respondent's Revenues, Benefits and Payments Service. She has held this post from 2008.

17. The role of technical officer (which we shall now refer to as *'TO'*) is also referred to as court officer. The parties use the names interchangeably.

18. The role of a TO is a Band G role within the respondent's salary scale. It is at *'M1 manager level.'*

19. There is a *'person profile'* for the TO role within the bundle at pages B25 to B28. The TO's duties are set out in the document at pages B29 to B30(b).

20. The list of TO's duties in the document commencing at B29 sets out eleven key duties/areas of responsibility. The second of these is, "*to represent the council at Magistrates Court hearings, making applications for council tax and non-domestic rates liability orders, committals and prosecution for failing to supply income information."* The eleventh key duty is "*to deputise for the role of team leader."*

21. In the document at page B30, the duty of the TO is said to extend to "*the recovery of council tax, non-national non-domestic rates, housing benefit overpayments and sundry accounts in accordance with the current government legislation and the policies and procedures of the council."* Attendance at the Magistrates Court is then listed amongst the eleven duties set out on that page.

22. Before being able to represent the respondent in court, the TO has to be granted delegated powers. Effectively, this amounts to the granting of rights of audience to appear before the Magistrates Court on behalf of the council when representing the council in the kinds of cases dealt with by the TOs. Acquisition of delegated powers is a process which may take several months. Mr Beesley in fact was granted delegated powers on 18 October 2017, exactly a month after he commenced work as a TO. In evidence given under cross-examination, Mr Beesley said that "*others can take longer."* Mr Beesley first exercised his rights of audience using his delegated powers on 7 November 2017.

23. It will be recalled from the claimant's grounds of claim cited in paragraph 3 above that as a reasonable adjustment (in the circumstances to which we shall come) the claimant requested that she be allowed to continue as a TO without having to attend court. She wished to be relieved of hone of the eleven key duties. The amount of time spent by a TO preparing for and attending court and the need for the TO who had prepared a case to do the advocacy connected with it was a key issue between the parties.

24. Mr Beesley referred in his witness statement to different kinds of cases which TOs are responsible as part of their duties. These are:

    24.1. Liability order hearings (paragraph 5 of his witness statement).

    24.2. Committal hearings (paragraph 11 of his witness statement).

    24.3. Contested case hearings (paragraph 13 of his witness statement). (These are also known as disputed cases).

25. Mr Beesley also referred in his witness statement to insolvency work and other kinds of hearings such as for case management and dealing with applications to set aside liability orders. These references are at paragraphs 12 and 13 of his witness statement.

26. That said, the focus of Mr Beesley's evidence was upon the three kinds of hearings referred to in paragraph 24 above. Indeed, the focus of the evidence before the Tribunal was principally around these three kinds of proceedings.

27. In due course, we shall set out the chronology of events. Suffice it to say at this stage that the claimant raised a formal grievance about matters pursuant to the respondent's grievance procedure. She did this on 27 March 2018. The claimant's grievance was investigated by Andrew Sheldon (team leader) supported by Sharon Stead (HR officer). Their report dated August 2018 is in the bundle at pages C207 to 211. The report refers to appendices 5a and 6a. These appendices are the record of an interview Sarah Bennett held on 9 July 2018 and what was described as a *"flowchart/bullet point of court duty for the technical officer post"* respectively.

28. Unfortunately, although appendix 6a is partly copied into the bundle at pages C212 and 213 a complete copy of appendix 6a and a copy of appendix 5a was not included in the bundle. These were produced by the respondent on the fourth day of the hearing on 18 September 2020. The late production of these documents necessitated an adjournment and the convening of the fifth day of the hearing on 19 October 2020.

29. Appendices 5a and 6a are significant documents. Appendix 6a sets out in bullet point form a description of the TO's duties when dealing with liability order, committal and contested cases. There is also a flowchart for liability order cases. That no equivalent documents were produced for the other kinds of cases mentioned by Mr Beesley in paragraphs 12 and 13 of his witness statement (and referred to in paragraph 25 above) reinforces the Tribunal's conclusion that it is the three kinds of hearings referred to in paragraph 24 which form the preponderance of the TO's court related workload.

30. Liability order cases are those where the respondent is pursuing a council tax payer who has defaulted upon payment. These cases are block listed in the Magistrates Court.

31. Committal cases are those where the respondent is seeking the committal to prison of those who fail to comply with liability orders.

32. Contested cases are those where there is a dispute about liability. Mr Beesley said that the contested cases predominantly arise in the commercial sector around the levying of business rates. Mr Beesley said that the preparation for court and the advocacy necessitated by contested cases will be dealt with by an external firm of solicitors. They in turn will frequently instruct counsel to represent the respondent before the Magistrates Court. The TO's role is to instruct the solicitors. The TO will also be expected (in contested cases) to attend court in order to act as a witness for the respondent.

33. Mr Beesley said that the TO will represent the respondent when dealing with committal cases. He fairly accepted that it was possible in such a case for one TO to prepare the matter and liaise with another TO who will undertake the advocacy before the Magistrates Court. Quite properly, Mr Beesley said that the presenting TO, before appearing in court upon a committal case, would need to check "*the foundation of the case and that the reasons* [for seeking committal] *remain valid*." Having said that, he said, "*I'm not saying it* [the undertaking of advocacy upon a committal case by one TO where the matter has been prepared by another] *cannot be done. I agree with the claimant that it could be done."*

34. Mr Beesley told us that a TO will attend in order to represent the council in liability order cases before the Magistrates Court. It is common ground that these are block listed. In appendix 5a, Sarah Bennett was asked about the complexity of the cases before the liability order courts. Sarah Bennett replied, "*it varies all the time. A liability order court with the just liability order applications you would not know the history of each case."* She went on to say that, *"on the court date if a customer attends court the case is dealt with on the day. These can sometimes be disputed outside of court but resolved by a discussion which can take time. If they are complex they may involve the customer being admitted inside the hearing to discuss the case with the Magistrates.*"

35. This appears to chime with the claimant's evidence given under cross-examination. She said that around 30 cases may be block listed upon a liability order day. She said, "*not all, for instance 30, will attend court. You may adjourn 20. You may only deal with four or five."*

36. The claimant did not take issue with Sarah Bennett's assessment (in appendix 5a) that committal courts and contested cases are much more complex than liability order cases.

37. Upon the first page of appendix 5a, Sarah Bennett informed the investigating officers that between June 2017 and July 2018 there were 35 liability order courts. In June and August 2017 and March, June and July 2018 there were four courts. There was one court in December 2017. Upon all other occasions listed there were two courts. She said that, "*throughout the main recovery months June to August the courts are generally weekly and the rest of the year generally fortnightly."* From this, the Tribunal infers that only one TO would be in attendance at court at a time. There was no evidence that the Magistrates Court would run two concurrent block lists for Rotherham MBC liability order cases entailing the attendance of two TOs.

38. In appendix 5a, Sarah Bennett said about committal courts that,

*"This financial year we have committal courts scheduled so far up to September 18 and dates beyond that are just being organised with the court. There has been a committal court scheduled in April 18, June 18 and two further dates in August and September. These courts are for any ongoing committal cases but procedures changed in approx. September 2017 whereby any new cases we will be bringing in front of the magistrates if needed as part of a liability order court."*

39. About disputed cases, Sarah Bennett said that,

*"These are generally business rate cases but can also be for council tax and have had a separate court date which is set by court and are set as when needed throughout the year. From memory I dealt with 3 or 4 business rate cases in the last financial year in the period September to November last year but attended court multiple times on some of these cases. Another technical officer dealt with many other cases prior to this but I do not know the actual times they attended."*

40. We shall see that the claimant's grievance hearing (at stage 1) was adjourned from 5 July 2018 to 18 September 2018. (It was in fact then adjourned again to 4 October 2018). As part of her subsequent appeal at stage 2 of the respondent's grievance procedure, the claimant analysed "*the 16 month period of evidence as provided by Steven Ward in [the] grievance hearing dated 18 September 2018."* The claimant's analysis of this is at pages B74l and B74m.

41. The Tribunal was not presented with minutes of any of the grievance hearings. It is not entirely clear what is meant by "*the 16 month period of evidence as provided by Steven Ward in [the] grievance hearing dated 18 September 2018.*" Mr Ward's witness statement is silent about the matter. We come back to his later in paragraphs 112 and 113.

42. At all events, the claimant in her analysis at pages 74l and 74m considers the evidence furnished by Sarah Bennett to the investigating officers on 9 July 2018 (appendix 5a) and Mr Ward's evidence (mentioned in paragraphs 40 and 41).

43. The claimant considers both preparation time and attendance time at court for each of the three kinds of hearing which we are principally concerned. She has conducted an analysis of liability order and committal courts together and separated out the contested cases. This is logical as it accords with Sarah Bennett's evidence in appendix 5a where she said (at the top of the second page) that committal cases and liability order cases will generally be dealt with *"as part of a liability order court."*

44. Page B74I is the claimant's analysis of attendance and preparation time for non-complex liability order courts and committal courts. She has worked upon the basis of there being 41 courts over the period of analysis. This appears to be based upon Sarah Bennett's evidence in appendix 5a of 35 liability order courts (dealing with liability order and committal hearings) and six committal courts (per the evidence in the bottom half of the first page of appendix 5a). The claimant has then analysed the amount of time attributed by Sarah Bennett to preparation time and attendance time. She worked out, based upon what Sarah Bennett had said, that the total preparation time was 46.5 days to be added to the total court attendance time of 41 days. This is a total of 87.5 days. Over the 16 months' period under analysis, the claimant calculated that this amounts to 25% of one TO's working time of 340 working days. (That is to say, 87.5 days out of 340 working days over 16 months).

45. At full complement, there are 4 TOs within the team. The claimant therefore calculated that the amount of time spent preparing for and attending court would equate to 6.25% of each TO's workload: (that is 25% of one TO's time divided by four). Thus, she said that if she were to be relieved of court duty, this would increase the other TOs' workload by 2.08% of working time: (that is 'her' 6.25% of time divided between the other three TOs).

46. The claimant carried out a similar analysis of contested cases. She arrived at an assessment of 13.4% of working time being taken up by preparation for and attendance at Magistrates Court upon contested cases for one technical officer. When divided by four, this is 3.35% of each officer's workload and therefore, relieving her from dealing with contested case workload would increase the other TOs' workload by 1.15%.

47. The total therefore, upon the claimant's reckoning, of preparation for and attendance at court dealing with the three principal kinds of court cases occupies 9.6% of one TOs time. This is a little under 2.5% of each TO's time when divided equally amongst each member of the team. Relieving the claimant of her court duties would increase the other TOs' workload by 3.2% each.

48. A difficulty for the Tribunal is the paucity of the evidence from the respondent about the breakdown of the TO's role. The Tribunal derived no assistance upon this matter from the respondent's witnesses in their printed witness statements. Mr Beesley was asked by the Employment Judge if he could make an assessment of the percentage of time taken up by court work when he performed the TO role. He said it was "*not a small part of the job*" but felt that he was unable to "*give a percentage.* He went on to say that court work *"covers a good proportion of the job"* and that *"contested hearings absorb a lot of time.*"

49. Mr Cutts said, in evidence given in answer to a question posed by the Employment Judge, that he did not dispute the claimant's figures set out in pages B74l and 74m. The claimant's evidence is the best evidence (in fact, the only evidence) that the Tribunal has of the percentage breakdown of the time expended by a TO upon court attendance and preparation. Mr Ward and Mrs Coombes did not prepare a breakdown of the TOs' duties on a percentage basis.

50. Pages B1 to 16 is a copy of the respondent's guidelines for making reasonable adjustments for disabled employees. Section 4 (commencing at page B4) contains the heading "*How to consider reasonable adjustments for disabled employees.*" It goes on to say that "*the first step is to assess whether there is a need to make any changes to the duties and responsibilities of the post, the way in which it is done (methods and procedures) or the actual working environment.*" It goes on to say that *"the line manager together with the disabled employee should analyse the requirements of the job, breaking them down into tasks. It is important to examine how each task is to be done and to what standard. The aim is to identify those tasks which will present barriers in the way of the disabled person doing the job effectively."* The guidance then provides that, "*once those tasks or ways of doing the job where adjustments will be needed have been identified, you will need to decide what type of adjustment is best."*

51. In evidence given under cross-examination, Mr Ward accepted that he had not analysed the TO role as required by the respondent's policy. Mrs Coombes conceded that she too had not done so.

52. Mr Cutts maintained, when he gave evidence, that he was aware of the reasonable adjustments policy. He accepted that the policy was not presented to those attending the stage 1 grievance hearing which he chaired and which was held on 5 July 2018. It does not feature in the index for that hearing at page C35 (which also appears at page C115). Mr Cutts accepted that the TO role had not been broken down by the respondent. He said however that the claimant herself had identified the barrier (namely, attending court).

53. The claimant's calculations at pages B74l and 74m may be contrasted with the assessment of Sarah Bennett at appendix 5a. The penultimate question asked of her by the investigator was an assessment of the percentage of court work to preparation work (based upon there being four TOs in the team). Sarah Bennett said that, "*preparation work and attendance at court has to be done by the court officer so that they know the case in depth. This is approximately 50% or higher therefore the remaining 50% or less would apply to non-court related duties. The 50% or more court work does not include preparation of a committal summons which could take up to a full day for each case."*

54. Sarah Bennett was asked (in the penultimate question of her interview recorded in appendix 5a) about the percentage of court work to preparation work. The answer which she gave (at least on one reading) would seem to be an assessment by her of the percentage of time taken with dealing with court work (both attendance and preparation) in comparison to non-court work. The question raised of her by the

investigator was pertinent. It was not the claimant's case that she wished to be relieved of doing any court related work at all. She wanted only to be relieved of the obligation to attend at court.

55. In the light of this observation, the claimant's analysis at pages B74l and 74m is if anything one which is slightly weighted against herself. As far as contested cases are concerned, Sarah Bennett's analysis was that there were only five days of attendance time. The claimant's assessment that there would be a 1.15% increase in colleagues' workload were she to be exempt from contested case court work would in fact be significantly lower than that if only the five days of attendance upon contested cases were to be counted.

56. A difficulty that presented itself for the claimant is that, by reason of the respondent's failure to effectively adduce evidence from Sarah Bennett, her counsel was denied the opportunity of cross-examining her upon her assessment of the total amount of time spent preparing for and attending court hearings and putting to her the claimant's analysis at pages 74l and 74m. The claimant was also deprived of the opportunity of exploring with Sarah Bennett the ambiguity referred to in paragraph 54 arising from the penultimate question asked of her by the investigating officers within the interview of 9 July 2018 (appendix 5a).

57. From all of this, the Tribunal concludes that if only one TO was doing court work (both attendance and preparation) just under 10% of his or her time would be taken up with that work: see paragraph 47. Therefore, if there were to be a full complement of four TOs all of whom could do that work and the work were to be split evenly this is 2.5% of time will be taken up with such duties. Of this 10% of the time, less than half would be spent actually attending court.

58. The attendance at court of the TO who prepares the case is necessary for contested hearings (as they will be acting as a witness for the respondent). However, such cases are much less common than for liability order and committal hearings. For the latter two, it is not necessary for the TO who prepares the case to attend court and undertake the advocacy. Mr Beesley accepted that it was practical for one TO to prepare a committal case in which the advocacy is undertaken by another. Sarah Bennett said, in appendix 5a, that the TO doing the advocacy for block listed liability orders would not need to know the history of each case.

59. The Tribunal prefers the claimant's evidence about the amount of time taken up with court work. Hers is the only detailed analysis that was before the Tribunal. The claimant's analysis was in fact based upon the data (provided by the respondent through Sarah Bennett) in appendix 5a and the claimant's analysis of Mr Ward's evidence presented as part of the grievance process. The respondent failed to comply with its own policy and conduct an analysis and breakdown of the TO role. The respondent failed to assist the Tribunal by providing any evidence about the breakdown in the printed witness statements. The anecdotal evidence from Mr Beesley fell some way short of being a reliable basis upon which for the Tribunal to determine that court work formed such a significant part of a TO's role that it is not a reasonable and practical possibility for any court work upon the cases prepared by the claimant to be performed by another TO.

60. We now turn to the chronology of events.

61. In paragraph 3 of her second witness statement, the claimant says that she was "*genetically diagnosed with the gene associated with Huntington's Disease in 2015.*" She then goes on to say in paragraph 5 of her second witness statement that, "*I first became aware that I had stage 1 of Huntington's Disease around January 2017 when I had noticed subtle changes eg lack of confidence (I would constantly double check everything, believing I must have done it wrong), anxiety, anxiety attacks and depression. I didn't tell anyone at work at that time as my work was not affected*." In paragraph 4 of her second witness statement, the claimant says that, "*In June 2016, I was removed from the court rota when I agreed to concentrate my efforts on the recovery of housing benefit overpayments and the new implementation of recovery of sundry accounts (a new debt type to collect). I last attended court on behalf of account management on 27 April 2016 when I was part of the technical officer's court rota.*"

62. In paragraph 3 of her witness statement, Mrs Coombes refers to the work re-organisation that took place in May 2016. She says that at that time, "*the workload of the sundry debtors department within the Revenues, Benefits and Payments Service migrated to the account management department. In consideration of increased workloads, managers sought volunteers from the account management department to be included in a pilot team on a temporary basis, initially for 12 months. The team would be responsible for housing benefit overpayments, former tenant arrears and sundry debts. Sally was the most experienced in housing benefit overpayment work therefore she was approached informally by the operational manager (Steven Ward), myself and fellow team leader Gillian Leivers) and asked if she would consider temporarily supporting the team leaders as part of this pilot.*" Mrs Coombes goes on to say in paragraph 4 of her witness statement that, "*It was explained to Sally that she would move away temporarily from the council tax court role to concentrate on the set up of the pilot with a view to then attending court on various legal cases. It was also explained to Sally that she would be required to cover any absences of their fellow technical (court) officers in attending all court hearings. Sally accepted the temporary role on those terms. This was offered and accepted verbally.*"

63. In October 2016 Rotherham Magistrates Court was closed. The court cases which feature in this case were then dealt with in Sheffield Magistrates Court.

64. In paragraph 6 of her witness statement Mrs Coombes tells us that, *"In June and July 2017 two of the four employed technical (court) officers left the council. One of the remaining two technical (court) officers was on a phased return to work following a long-term sickness absence. Sally had also been absent from work due to sickness, two periods of bereavement leave and a period of annual leave. Due to these absences I temporarily covered court duties.*"

65. We can see from page C188 (which is a record of the claimant's sickness absence) that she was absent from work on 9 and 10 May 2017 and between 16 June and 23 July 2017. The claimant's account, given in

evidence under cross-examination, was that when she was temporarily assigned to the sundry debtors department in the May 2016 re-organisation there remained three TOs. These were Sarah Bennett, Sarah Duke and Vivienne Wordsworth. The claimant agreed with Mrs Coombes' evidence that Sarah Duke and Vivienne Wordsworth left in or around June or July 2017. She said that Sarah Duke had resigned from her position in order to go into the police service and Vivienne Wordsworth had retired.

66. Mrs Coombes says in paragraph 7 of her witness statement that, *"this arrangement [of her temporarily covering court duties] was not sustainable and upon her return from annual leave in August 2017 Sally was approached informally by the operation manager (Steven Ward) and myself to ask her to cover the duties of the absent officers but she stated she did not think she could do it. Sally had not attended court in Sheffield prior to this and it was agreed that she would attend court on 24 August 2017 to shadow the remaining technical (court) officer."*

67. In paragraph 12 of her second witness statement the claimant says that, "*On 24 August 2017, as previously agreed, I attended court to observe. I felt it was a dreadful experience and upon my return to the office Sharon Coombes requested an email detailing my reactions (page B31 of the bundle)."* The claimant said in paragraph 10 of her witness statement that she considered that the respondent's request for her to attend court on 24 August 2017 in an observation role was reasonable.

68. The claimant's account of the events of 24 August 2017 is at page B31. She accompanied Sarah Bennett to court. The claimant gives an account of being acutely anxious beforehand. She then says that, "*when entering court, I felt completely overwhelmed and frightened by it all. I sat behind Sarah and tried to sink into the seating. A barrister had attended court to argue a business rates case and as the exchange was in progress, including the court clerk giving directions, I had racing heart palpitations, felt light headed and nauseous. I had to leave court, I went outside to get away from everyone and the situation feeling very panic stricken and tearful."*

69. In paragraph 13 of his witness statement Mr Ward says that following the claimant's report of 30 August 2017 (page B31), "*Following consultation with human resources colleagues an appointment for the employee to attend an occupational health assessment was arranged for September 2017.*"

70. The occupational health report is at pages C57 and C58. (It also appears at pages B32 and B33). The report is dated 27 September 2017 and was prepared by Paula Jackson, specialist nurse practitioner. It is worth setting this report out in full:

*"<u>Background</u>*

*Sally works full-time as a technical officer and has been referred for support at work. In 2015 Sally was diagnosed with having the gene associated with Huntington's Disease. Sally has also experienced two family bereavements recently and developed stress and anxiety symptoms.*

*Current situation*

*The current symptoms have affected Sally and her feeling on ability to attend court as part of her role. She discussed that this is due to the unknown elements, accuracy required and the relocation of the court to Sheffield has taken away the reassurance of when it was very close to work.*

*Sally acknowledges she is very upset about this change in her reactions but she does feel something has changed recently in her health, particularly with cognitive aspects, focus, concentration, memory and reaction/multi-tasking. Sally worries about the effect this could have on her performance and how this affects overall outcomes.*

*Huntington's Disease is an inherited condition that damages certain nerve cells in the brain. Huntington's Disease gets progressively worse over time and may emerge later in life. It can affect movement, cognition, (perception, awareness, thinking, judgment) and behaviour. Symptoms vary greatly among affected people. Sally will be monitored at the Sheffield Clinical Genetics Service. Specific counselling is also available should Sally wish to engage with this. At this time Sally has good family support.*

*Specific questions*

*Is Sally fit for all duties she is employed to undertake?*

*Sally is fit for work and may benefit from consideration to reasonable adjustments to allow her to continue at work and care for her health and current symptoms.*

*Are there any modifications/adjustments likely to alleviate symptoms/minimise impact of work in the person's health or vice versa?*

*Sally has reported changes in her ability with some aspects of concentration/memory and focus which may impact on performance and affect confidence in a court setting.*

*Not participating in court as a reasonable adjustment under the Equality Act 2010 is likely to help manage anxiety levels with regard to symptoms and the ability to sustain a productive presence at work.*

*Would any tasks to be avoided/or adjustments be temporary or permanent? Will Sally contribute fully in the post on return to work or at any stage in the future?*

*Likely to be permanent.*

*There could be changes to health in the future."*

71. On behalf of the respondent, Mr McNerney accepted that the respondent had knowledge of the claimant's disability (for the purposes of both the complaints brought under section 15 and section 20/21 of the 2010 Act) from August 2017 at the latest and had, for the purposes of sections 20/21 of the 2010 Act, acquired knowledge of the disadvantage caused to her by her disability (by reason of the requirement for her to attend court as part of her TO duties) at around the same time. Had the matter been in dispute, then the Tribunal would have concluded that by 27 September 2017 at the latest the respondent was fixed with actual knowledge of the claimant's

disability, the disadvantages caused to her by reason of the TO role requiring court attendance and the link between the disability and that disadvantage caused to her by it following receipt of the occupational health report.

72. On 17 October 2017, a meeting was held. This was attended by the claimant, Gill Leivers (team leader of account management), a HR consultant and the claimant's trade union representative. The purpose of the meeting was to discuss the occupational health report. The claimant requested that the respondent act upon the occupational health recommendation allowing her not to participate in court hearings.

73. On 24 October 2017 Gill Leivers wrote to the claimant (pages B34 and B35). She said that, "*having carefully considered the occupational health assessment and the duties of the technical officer role which you undertake, I explained that it would not be possible to remove the court aspects of your role. I explained that attendance at court is a fundamental duty and responsibility of the technical officer job and which forms a significant and substantial part of the role. Attendance at court is a core element of the role in ensuring service delivery and is vital to the service and the council in terms of achieving priorities and objectives in relation to income and collection."* She went on to say that, "*you have been working on reduced duties pending receipt of the occupational health assessment and the subsequent exploration and discussion of options, adjustments and support. It was confirmed at the meeting that this would be accommodated on a short term temporary basis pending conclusion of these discussions."*

74. It was recorded that the claimant had felt "*unable to continue with the meeting [of 17 October 2017] before we could discuss any possible alternative options or adjustments or support, therefore we agreed to adjourn the meeting with a view to reconvening at a later date."*

75. The adjourned meeting took place on 1 November 2017. It was chaired by Mrs Coombes who says in paragraph 10 of her witness statement that,

    "*The decision not to accommodate the reasonable adjustment was reiterated to Sally."*

    At the meeting, the possibility was raised of the claimant moving to a Band E Revenues and Benefits Officer position. This would be accompanied by pay protection at her Band G salary for a period of two years.

76. A letter was sent to the claimant to confirm the position by Mrs Coombes. This is dated 1 November 2017 and is at page B36. Arrangements were made for the parties to meet again on 7 November 2017 to discuss the matter further.

77. In paragraph 15 of her second witness statement, the claimant says that Dawn Cullen (the respondent's HR consultant who attended the meeting of 1 November 2017) "*advised me that if this issue was not sorted out I would be served with a 12 week notice period.*" The claimant goes on to say that she was *"very taken aback by this comment and immediately felt upset. My union representative intervened on my behalf and said, "there was some ground to cover before we got to that stage.""* In evidence given

under cross-examination Mrs Coombes fairly accepted that Dawn Cullen had made this remark.

78. About the meeting of 7 November 2017, the claimant says in paragraph 17 of her second witness statement that she "*attended a meeting with my union representative Andy Turner, my team leader, Sharon Coombes and HR. My union representative asked if any reasonable adjustments had been considered by my managers. This has never been the case as at no time have my managers made any suggestions or explored other possibilities of any type of reasonable adjustments. Only the offer of re-deployment has ever been made. My union representative requested that enquiries could be made to accommodate a sideways move to another technical officer role where attendance at court hearings was not such an issue. This again met with resistance but after further discussion, the meeting ended to enable management to consider this request.*"

79. Mrs Coombes appears to concur with the claimant's evidence. She says in paragraph 11 of her witness statement that the claimant and her representative suggested a TO role within local taxation which does not require attendance at tax tribunal hearings. She says that, "*it was agreed that other officers of the same grade would be approached and asked if they would be interested in swapping roles with the employee.*" She says that Mr Ward made this approach. However, this was to no avail. On 27 November 2017 Mr Ward informed the respondent's human resources department that no other officers had expressed an interest in effectively swapping roles with the claimant.

80. When this issue was raised during the cross-examination of Mr Ward, it was noted that there was no material within the bundle evidencing the efforts made by him to make this enquiry of others. During the course of the hearing, the respondent gave some disclosure which required Mr Ward to be recalled for further cross-examination. This material showed that on 22 November 2017 Mr Ward had emailed the operational managers of the other departments within the Revenues, Benefits and Payments Service to ask if there was any interest from their TOs in a transfer into the claimant's role. The email which Mr Ward asked to be circulated to this effect called for expressions of interest by 12 noon on 24 November 2017. The email to the operational managers of the other departments were sent by Mr Ward at 10.49 on 22 November 2017. Assuming that this was acted upon immediately by their line management, prospective candidates were therefore given effectively only around 48 hours or so within which to respond. Mr Ward said the deadline had been extended over the weekend of 25 and 26 November 2017. Mr Ward said in evidence that he was satisfied that the information had been disseminated to all of the TOs within the Revenues, Benefits and Payments Service albeit that he acknowledged that there to be a paucity of written evidence to corroborate his account.

81. The claimant commenced a period of absence from work on 13 November 2017. According to the absence summary at page C188 this was attributable to IBS, depression and anxiety. The claimant was absent from work until 23 January 2018.

82. On 30 November 2017 Andy Turner, on behalf of the claimant, emailed Dawn Cullen (page B37). He said, "*I'm emailing on behalf of our member Sally Olivia to accept the post of Band E Revenues and Benefits Officer with a salary protection at her current Band G grade. During the protection period Sally will continue to seek employment at her Band G level of responsibility. We trust HR will continue to support Sally by making her aware of any Band G posts that become available.*" Mr Turner recorded that the claimant had agreed that her new role was to commence with effect from 1 January 2018.

83. On 12 December 2017 the claimant emailed Dawn Cullen, Mrs Coombes and Mr Turner. The email is at page B38. She said that, "*having given the matter further thought, and having taken advice on board, I write to withdraw my agreement to the move from my role as a Band G technical officer to a Band E Revenue and Benefits Officer, as I do not feel that enough consideration has been given to my request that reasonable adjustments are made to my Band G role to enable me to stay in post, notwithstanding my health issues. Please arrange a further meeting so I can explore this further with you in the new year.*"

84. On 20 December 2017 Dawn Cullen wrote to the claimant (pages B39 and B40). She acknowledged receipt of the claimant's withdrawal of her acceptance of the offer to undertake the Band E role and invited the claimant to attend a meeting to be held on 10 January 2018.

85. The meeting went ahead that day, chaired by Mr Ward. Mrs Coombes was also in attendance along with Dawn Cullen, the claimant and Andy Turner. The claimant says in paragraph 21 of her second witness statement that, "*I advised them that I believed I was being discriminated against and treated unfairly as a direct consequence of my disability. I did not agree that the requested reasonable adjustment to my technical officer post was, as described, "unsustainable" and asked for evidence. I supplied a written statement reiterating these points (see page B45 of the bundle). The meeting was adjourned to enable the points to be addressed.*"

86. The document at page B45 presented by the claimant at the meeting of 10 January 2018 says that in her opinion "*the court element can be removed from my "key duties" as a reasonable adjustment.*" She went on to say that, "*in my opinion there is other work available for account management technical officers that can be done without the necessity of attending court. In essence I am only asking for a re-distribution of the workload for account management and technical officers.*"

87. On 29 January 2018 Mr Ward completed the respondent's "*consideration of reasonable adjustments form*." This is at pages B58 to B60 and also at pages C63 to 65.

88. Mr Ward noted that the relevant disability was Huntington's Disease. He made reference to the occupational health report of 27 September 2017. The third section of the form poses the question as to whether the employee was placed at a substantial (that is to say, not minor or trivial) disadvantage compared with non-disabled employees as a result of employment arrangements or with physical features of the premises. Mr Ward completed this box *"not applicable".* When asked why he had replied

in the negative to this question, Mr Ward said that the physical features of the premises were not applicable to the case. He is of course correct to say so. However, he then went on to say that "*my take* [about what was being said in the occupational health report] *was that it wasn't a substantial recommendation."* It is difficult to understand the basis upon which Mr Ward reached that conclusion in the light of what was said by Paula Jackson in her report of 27 September 2017 cited in paragraph 70 (particularly in light of Mr Ward's concession that he is not possessed of any medical qualifications).

89. Mr Ward concluded (in the form) that the re-distribution of the claimant's duties to another officer "*would place the service and income to the council at a significant risk and would be impracticable to implement"* and that "*the re-distribution of work to other technical officers would have a substantial negative impact on delivery of the service and leave it exposed to reduced income collection.*"

90. Mr Ward appears to have formed the impression that the claimant was seeking to remove preparation as well as advocacy work from her role. The difficulty for Mr Ward upon this issue is that he did not interview the claimant in order to fully explore with her the nature of the substantial disadvantage caused to her by her disability when comparing herself to non-disabled TOs and the adjustment that she was seeking.

91. On 7 February 2010 Mr Ward wrote to the claimant (page B61). He sent to the claimant a copy of the *"consideration of reasonable adjustments"* form and declined the adjustment that she was seeking. He said to her that "*with effect from 12 March 2018 you will be required to undertake the full duties required for the role of Band G technical officer."* He arranged a further meeting to be held on 28 February 2018 "*to discuss with you the mechanisms to be put in place to enable you to fulfil all elements of this role.*"

92. Due to inclement weather, the meeting was postponed to 6 March 2018. It was attended by Mr Ward, Mrs Coombes, Dawn Cullen and Mr Turner as well as the claimant. It was recorded by Mr Ward in the final paragraph of a letter sent to the claimant on 7 March 2018 (page C95) that, *"during the meeting Andy Turner spoke on your behalf and explained that you felt you were unable to undertake the court element of your role, therefore, with effect from 12 March 2018 you wanted to transfer to the Band E Revenues and Benefits Officer role. This was agreed at the meeting and therefore arrangements were made for you to transfer into this post from that date. You will receive a variation to contract confirming this transfer.*"

93. Mrs Coombes helpfully gives some detail about the claimant's new role in paragraph 17 of her witness statement. She says that, *"on 12 March 2018 the employee was transferred into the accepted pay protected role within the re-merged team. This role was dealing with the collection of council tax, housing benefit overpayments and sundry debts. It involved dealing with telephone calls from the public in respect of the debts owed, making arrangements to pay, dealing with queries. Reviewing accounts which would result in issuing attachments to earnings and direct earnings attachments, attachments to benefit, referring debts to enforcement agents/collection agents, dealing with correspondence. This led to liaising*

*with employers, enforcement agents, collection agents and other departments within the council. It also involves on occasion going to court in order to help with customers outside court before the liability order hearings, Sally only did this once on 18 December 2018. This was a Grade E role and the protected salary was at Grade G for two years.*"

94. The respondent was unable to assist the Tribunal with the question of the value to the claimant of the pay protection. However, this would appear to be a benefit with a value of just short of £400 per calendar month. The Tribunal refers to the payslip dated 18 September 2019 at page B273. Included within the claimant's gross salary is an amount of £398.75 said to be for pay protection. The Tribunal, doing the best it can, therefore infers that the difference in salary between a Grade E and a Grade G role is just short of £400 gross per calendar month. There will of course be additional costs to the respondent by way of additional employer's national insurance contributions and pension costs.

95. On 27 March 2018 the claimant raised a formal grievance. This is at pages B69 to B71. The claimant said, *"I wish to raise a formal grievance under the council's grievance procedure. The grounds for my grievance are as follows: the council has failed in its duty to make reasonable adjustments under the Equality Act 2010, in particular;*

    95.1. *Failed to take steps to remove or reduce or prevent the obstacles I face as a disabled worker by adjusting the rota for the need for me to make appearance at court on behalf of the council;*

    95.2. *Failed to provide justification for the removal of an adjustment already in place that removed the need for me to make appearance at court on behalf of the council": [emphasis added].*

96. The Tribunal notes that the claimant was here referring only to an adjustment around the need for the claimant to appear in court. She was not asking, by way of adjustment, for the removal from her duties of any work connected with preparation for court. The second limb of the grievance (cited in paragraph 95.2) was a reference to the fact that as an adjustment she had been relieved from appearing in court after the unhappy experience of 24 August 2017 for several months until she was required, on 12 March 2018, to resume the full range of her TO duties. Albeit that for some of that period she was absent through ill health (referred to in paragraph 81) she had for the majority of it been attending at work in order to fulfil her other duties as TO and the respondent had had to make provision for other TOs to appear in court over this time.

97. Mr Ward was permitted by the Tribunal to give supplementary evidence in order to clarify the number of TOs within the account management department following the departure of the two TOs in June and July 2017 referred to in paragraph 65. He said that in or around August 2017 Sarah Bennett was the only TO undertaking court work. A second TO was recruited in September 2017 and started doing court work in November 2017. (Although the employee was not named, we presume Mr Ward was here referring to Mr Beesley). Mr Ward also said that Mrs Coombes had delegated authority and there were other team leaders within the rest of the department who were in the same position. Mr Ward said that he had recruited further TOs in April 2018. It may have been helpful for the

respondent to have led evidence of the department's resources particularly from June 2017. Doing the best that it can, the Tribunal infers that there were sufficient resources (by a combination of the technical officers with delegated authority and the team leaders) to cover the court cases after June 2017.

98. The Tribunal is fortified in this conclusion by the success which the respondent enjoyed in its debt recovery. On 13 April 2018 Mr Ward emailed all members of the team (B73) about the results for the 2017/18 financial year. Mr Ward said in this email that, "*We have finalised the collection figures from 2017/2018."* He went on to say that "*the results of in year collection are as follows:*

    - *Council tax = 97%*

      *This is 0.3% down on 2016/2017 however has achieved the target of 97.0%*

    - *Non-domestic rates = 98.5%*

      *This is 0.2% up on 2016/2017 and is 0.5% over the target of 98%.*

    *Although the council tax collections are down on last year the target has been met, which considering the high level of staff turnover and subsequent vacancies we have experienced throughout the year is a great achievement. Despite the slight fall in the collection percentage to put this in real money terms we collected £113.5 million pounds council tax for 2017/2018 bills which is up £6.1 million on last year. Non-domestic rates collections have improved again which is a brilliant achievement especially considering it was substantially below last year's only a few months ago. The revaluation for 2018/2019 meant that the overall value of non-domestic rates in Rotherham fell this year however we will still collected £76.8 million*."

99. Mr Ward said in the penultimate paragraph of this email that, "*National results are usually released in June. It is likely that these will compare favourably with other metropolitan councils. For 2016/2017 we were ranked fourth best metropolitan council for collection of council tax and eighth best for non-domestic rates which are both excellent and we would hope to be in a similar position when this year's national figures are released. I will let you know the outcome when the national figures are available."*

100. On 22 January 2019 Mr Ward sent an email to the team concerning the interim collection rates for the financial year 2018/2019. He said this:

    *"Council tax – despite being 0.4% down on the same time last year (equating to approx. £472k for in year collection) we have collected £6.7 million more this year of the total collectable debit of £126.1 million (which had increased by over £9 million)."*

    He then made reference to housing benefit, overpayments and sundry debtors which need not be set out here. He concluded, "*altogether, some impressive results and evidence that our procedures in a very challenging environment reflecting the good work that you all do.*"

Mr Ward told us that in monetary terms, the decline of 0.3% in council tax collection for 2017/18 mentioned in paragraph 98 equated to around £350,000. Mr Cutts described this as "*a big loss to the council.*" In answer to a question raised by Mrs Lancaster, he said that this would equate to a loss of around £300,000 to £400,000. This was very much in the same ball park as that attributed to the reduction by Mr Ward. Mr Cutts fairly accepted that the reduction of 0.3% in council tax collection in financial year 2017/18 could not be attributed to the claimant not attending court. The respondent did not seek to attribute the reduction in the collection rate to the claimant not attending at court. Indeed, it would be very difficult, in our judgment, for the respondent so to do given that we have found as a fact that the respondent has sufficient resource to cover all court attendances in any event. Notwithstanding that there was a reduction of 0.3% in the collection rate, the fact remains that the respondent had met its target of a collection of 97%.

101. The respondent's grievance procedure is in the bundle commencing at page B17. The grievance policy provides for an informal stage. This need not concern us as the claimant did not avail herself of it. There is then a formal stage 1. Should the matter not be resolved at formal stage 1 it is open to the employee to appeal under formal stage 2. In cases where the employee is not satisfied at stage 2, the employee may appeal to the director of human resources within seven days of being notified of the stage 2 outcome for the grievance to go on and be heard by appropriate members of the council at formal stage 3.

102. As we have seen, the claimant's grievance was investigated by Andrew Sheldon and Sarah Stead. The grievance was heard at stage 1 by Mr Cutts. The grievance was heard on 5 July 2018 and was adjourned for further investigations. It resumed on 18 September 2018. It was then adjourned again and resumed on 4 October 2018.

103. Mr Cutts concluded that each part of the claimant's grievance should not be upheld. He took the view that the respondent had complied with the duty to make a reasonable adjustment by allowing the claimant to move to a Grade E post with two years of pay protection.

104. Mr Cutts reached his conclusion based upon the evidence presented to him both by the respondent and the claimant. There is a helpful schedule of the documents that were before Mr Cutts at the hearing that took place on 5 July 2018. The schedule is at page C115. The management statement of the case prepared by Mr Sheldon and Miss Stead commences at page C119.

105. The claimant was interviewed by Mr Sheldon and Sarah Stead on 16 May 2018 (pages C125 to C127). Mr Ward was interviewed on 15 May 2018 (pages C129 to C131). Mrs Coombes was interviewed on the same day (pages C113 to C135).

106. On 15 May 2018 Mr Ward supplemented the evidence that he had given to the investigators in the form of an email (at pages C147 and C148). In the email, Mr Ward confirmed that he first became aware of the claimant's condition in early 2015. He then referred to extracts from "*PDR's re health and welfare from then*".

107. There is an entry in this document which appears to be dated 1 May 2015 (the date is obscured by the hole punch) which records the claimant having been diagnosed with a genetic medical condition which is causing some stress and anxiety for her. Entries of 2 November 2015 and 3 June 2016 refer to her managing her condition without medication. There is a reference on 20 March 2018 to her having been diagnosed with Huntington's Disease and that she was aware of the employment assistance programme available for employees. None of these entries detract from the Tribunal's earlier findings in paragraph 71 as to the date of knowledge on the part of the respondent of the claimant's disability.

108. Sarah Bennett was interviewed by Mr Sheldon and Ms Stead on 22 May 2018. The record of this interview is at pages C161 and C162. Sarah Bennett was asked the proportion of her working time taken up with court work *"ie at court and preparation".* She said that "*it was difficult to say, possibly 50% up to 80%. However, I feel this is difficult to assess because due to officers leaving, I felt the majority of the work I was undertaking surrounded court work".* By way of reminder, there was a period between June 2017 and October 2017 when Sarah Bennett was the only TO attending at court. This appears to provide an explanation for the evidence given here about the amount of time that she was spending undertaking court work. In our judgment, for the reasons given earlier in paragraphs 44 to 57 Sarah Bennett overestimates the amount of time spent upon court work.

109. Sarah Bennett was asked whether "*another officer [could] do the preparation work for someone else to attend court."* She said *"no, no chance, you need to know the case particularly in committal and contested cases. You have to check your preparation, paperwork. If you are asked questions you have to be able and confident in responding. If I don't know the case or haven't prepared the paperwork on the main liability order hearing, I wouldn't be confident or comfortable in responding. It is important and you are responsible.*"

110. Sarah Bennett was interviewed for a second time, as we have seen, on 9 July 2018. This is at appendix 5a. Upon this occasion (as we have observed) she said that it was not necessary to know the history of each matter when dealing with liability order cases but it was necessary to know the committal cases. The live evidence that we heard from the respondent (through Mr Beesley) was to the effect that the preparation and advocacy work for committal cases could be undertaken by different TOs.

111. The Tribunal accepts the respondent's case that the same TO would have to deal with contested hearing preparation work and appear in court upon those cases given that the TO acts as a witness for the respondent.

112. Mr Sheldon and Ms Stead prepared a supplemental report in August 2018. This is at pages C207 to C211. This refers to further enquiries being required following the hearing held on 5 July 2018. In particular, further clarity was sought from Sarah Bennett in relation to the time spent in court. This is what led to the interview with Sarah Bennett at appendix 5a. Mr Sheldon and Ms Stead then carried out an analysis of the work following the information furnished to them by Miss Bennett. This report makes reference to data provided by Mr Ward (in addition to that provided by Miss

Bennett). At page C209, the report provides that Mr Ward's data *"has been collated … for the period October 2016 (when court services transferred to Sheffield) to March 2018."* This data was not provided to the Tribunal. (The data is to be found in appendix 7a of the report- for reasons unexplained, the Tribunal only received appendices 5a, 6a and 11 of the report prepared by Mr Sheldon and Ms Stead).

113. The report says that during this 16 months' period there were 46 court hearing including eight committal hearings and five contested hearings. (It was this information that was analysed by the claimant in her documents at pages B74l and B74m). The authors of the report then conclude that upon the basis of their only being one TO available to attend court, the TO would be in court once every 1.48 weeks. Contrariwise, if there was a full complement of TOs then attendance would only be required every 5.91 weeks. If there were two TOs this would require attendance every 2.97 weeks and three TOs every 4.44 weeks.

114. It is, as we have said, unclear from Mr Ward's evidence how many TOs with rights of audience were available to the department over the various periods with which we are concerned. The Tribunal accepts that there was only one TO attending court between August and November 2017. Mr Beesley then was granted delegated rights effectively giving him rights of audience. There were therefore two TOs at least with effect from November 2017. In addition, the respondent was able to call upon the team leaders (including Mrs Coombes) to attend court.

115. Given that there were only five contested hearings (which the Tribunal accepts would require the attention of the same TO from the start of the case to its conclusion in court), and given that the other 41 court hearings may be presented by a different TO from the one undertaking the preparation work, the Tribunal is fortified in its conclusion that it would not be significantly onerous for the advocacy work upon the cases being dealt with and prepared by the claimant to be undertaken by others in circumstances where (even with only two TOs being available) court attendance was required only once every three weeks or so. This is all the more so when taking into account that it was within the scope of a TO's duty to deputise for the role of team leader. Accordingly, the claimant could have no complaints if she was expected to pick up Mrs Coombes work (or for that matter the work of any other team leader) when the team leader was attending court nor was there any evidence that she was unwilling so to do.

116. The claimant appealed Mr Cutts' decision at stage 1 of the respondent's grievance process. Her appeal is at pages B74d to B74f.

117. The claimant's grievance was dealt with, at stage 2 by Judith Badger, strategic director, finance and customer services. The grievance appeal hearing was held on 22 November 2018. Mr Turner represented the claimant. Mrs Badger was accompanied by Kay Wileman, HR business partner. Mr Cutts presented the respondent's case.

118. Mrs Badger concluded that, it was not considered reasonable to remove court attendance from the role of technical officer as this was deemed as an essential duty. She said that an alternative post had been considered

and she concluded that to be a reasonable adjustment. Her decision letter dated 12 December 2018 is at pages C171 to C175.

119. On 18 December 2018 the claimant appealed against Mrs Badger's decision communicated in the letter of 12 December 2018. This came before the members at stage 3 of the respondent's grievance procedure. The hearing took place on 24 January 2019.

120. The management's statement of case for that hearing may be found in the bundle commencing at page C179. On 28 January 2019 the claimant's stage 3 appeal was refused

121. On 12 August 2019 the claimant took up a new role upon a temporary basis. She now works as a homelessness, prevention and assessment officer. This is a Band G role. Plainly, the claimant took up this role within two years of her commencing the Band E role in March 2018. The claimant has therefore effectively been paid a Band G salary from the time that she relinquished her substantive role as a TO. (There is some suggestion of the claimant having suffered a modest loss of earnings presumably because of the operation of spinal points on the salary scale. This is a matter which the Tribunal may revisit at the remedy hearing). There is a possibility of her new role being made permanent. This appears to be dependent upon external funding.

***The law***

122. We turn now to a consideration of the relevant law. The statutory provisions as to the conduct prohibited by the 2010 Act are to be found in Chapter 2 of Part 2. The relevant sections for our purposes are: section 15 (discrimination arising from disability); and sections 20 and 21 (duty to make reasonable adjustments). The prohibited conduct is made unlawful in the workplace pursuant to the provisions set out in Part 5 of the 2010 Act. The complaint of unfavourable treatment for something arising in consequence of disability is unlawful within the workplace pursuant to section 39(2). A failure to make reasonable adjustments is made unlawful in the workplace pursuant to section 39(5).

123. By section 136 of the 2010 Act the initial burden of making out a *prima facie* case of discrimination rests with the claimant. If she succeeds in so doing then the burden shifts to the respondent to prove that the matters complained of are in no way tainted by the discrimination. It is for the claimant to prove that she suffered the treatment complained of and not merely to assert it. It is only after hearing all of the evidence, including the respondent's explanations, that the Tribunal can decide whether the claimant has shown primary facts that could give rise to an inference of discrimination. If she does so then it is for the respondent to show that the matters complained of are in no way tainted by discrimination. If the Tribunal does not accept the reasons put forward by the respondent then the Tribunal must find that the claimant was discriminated against unlawfully.

124. We shall deal firstly with the reasonable adjustments claim. An employer's duty to make reasonable adjustments arises where a "provision, criterion or practice" *("PCP"*) (which means broadly, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions

and actions) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with those who are not disabled. The employer must then take such steps as it is reasonable to have to take to avoid the disadvantage.

125. Having identified the relevant PCP, the Tribunal must then go on to consider the nature and extent of the substantial disadvantage suffered by the claimant in comparison with non-disabled comparators. "*Substantial"* in this context means *"more than minor or trivial"*.

126. There must be evidence of apparently reasonable adjustments which could be made. The claimant must therefore identify in broad terms the nature of the adjustment that would ameliorate the substantial disadvantage and having done so the burden will then shift to the employer to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

127. The duty to make adjustments only arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The test of reasonableness in this context is an objective one. As the reasonable adjustments provisions are concerned with practical outcomes rather than procedures, the focus must be on whether the adjustment itself can be considered reasonable rather than on the reasonableness of the process by which the employer reached the decision about a proposed adjustment.

128. It is unlikely to be reasonable for an employer to have to make an adjustment that has little benefit for the disabled person. However, there does not necessarily have to be a good or real prospect of an adjustment to removing a disadvantage for that adjustment to be a reasonable one. It is sufficient for a Tribunal to find simply that there would have been a prospect of it being alleviated.

129. A significant change brought about by the 2010 Act is the omission of specific factors to be considered when determining reasonableness. The Disability Discrimination Act 1995 (when it was in force) stipulated that in determining whether it was reasonable for an employer to have to take a particular step in order to comply with the duty, regard should be had to a number of factors. Those factors are not mentioned in the 2010 Act.

130. However, paragraph 6.28 of the Equality and Human Rights Commission's Employment Code gives examples of matters that a Tribunal might take into account. The Code stipulates that what is a reasonable step for an employer to take will depend on all of the circumstances of each individual case. The factors to have in mind include for example the extent to which taking the step may prevent the effect in relation to which the duty was imposed, the practicality of such step, the cost that would be incurred by the employer in taking that step and the extent to which it would disrupt any of its activities. Other factors that need to be taken into account include the extent of the employer's financial and other resources, the nature of the employer's activities and the size of its undertaking.

131. Paragraph 6.33 of the Code lists a number of adjustments that might be reasonable for an employer to make. This includes the allocation of some of the disabled person's duties to another worker and assigning the disabled worker to a different place of work. The examples given at 6.33 of the Code also extend to the modification of performance related pay arrangements for a disabled worker.

132. The duty to make reasonable adjustments only arises where the employer knows or ought to know that the employee is disabled and that the employee would be placed at a substantial disadvantage by reason of the application to him or her of the PCP in question. The issue is whether the employer knew or ought to have known both of the disability and the likelihood of the disability placing the employee at a disadvantage by a reason of the application of the PCP. The question therefore is what the employer knew or what objectively the employer could reasonably have known following reasonable enquiry. As has been said, no issue of knowledge arises in this case upon either of the claimant's complaints.

133. We next turn to the complaint of discrimination for something arising in consequence of disability. This is a complaint which may be raised where an employer treats an employee unfavourably because of something arising in consequence of the employee's disability and which the employer cannot show to be a proportionate means of achieving a legitimate aim. An employer facing a complaint of discrimination arising from disability has a defence of lack of knowledge: that is to say, there will be no discrimination if the employer shows that the employer did not and could not reasonably have been expected to know that the employee had the disability. Again, no issue of knowledge arises in this case upon the section 15 complaint.

134. Upon a consideration of unfavourable treatment, there is no need to compare a disabled person's treatment with that of another person. Unfavourable treatment means in this context putting the employee at a disadvantage. The consequence of the disability which gives rise to that disadvantage includes anything which is the result, effect or outcome of a disabled person's disability. The question for the Tribunal is what the reason (or the *"something"* to use the statutory language) for the unfavourable treatment was and whether that *"something"* arose in consequence of disability. In identifying what caused the treatment or what was the reason for it, it is sufficient for the disability to be a more than minor or trivial reason. It does not have to be the main or sole reason for the unfavourable treatment.

135. It is accepted by the claimant that the respondent had a legitimate aim in mind when dealing with her case. The legitimate aim was the efficient running of the department with a view to ensuring the proper collection of revenues due to it. Therefore, should the claimant establish that she was unfavourably treated for something arising in consequence of disability, the issue is whether the treatment was a proportionate means of achieving that legitimate aim such that the respondent can justify the unfavourable treatment of her.

136. The EHRC Code provides guidance upon the objective justification defence available to employers. The legitimate aim in question must be legal and should not be discriminatory in itself. It must also present a real objective consideration. Where the employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it will be very difficult for them to show that the treatment was objectively justified. Even where an employer has complied with the duty to make reasonable adjustments in relation to the disabled person, the employer may still subject a disabled person to unlawful discrimination arising from disability. This can arise where the adjustment is unrelated to the particular treatment complained of.

137. To be proportionate, the measure has to be both an appropriate means of achieving the aim and reasonably necessary in order to do so. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. This is an objective test. It is not enough that a reasonable employer might think that the action is a proportionate means of achieving the legitimate aim. The Tribunal has to weigh the real needs of the undertaking against the discriminatory effects of the requirements. It is necessary to consider the particular treatment of the employee in question in order to consider whether that treatment was a proportionate means of achieving the legitimate aim in question.

***The issues in the case***

138. The issues that arise for determination upon the reasonable adjustments claim are as follows:

    138.1. Did the respondent have in place a relevant PCP;

    138.2. If so, did that PCP place the claimant at a substantial disadvantage in comparison with persons who are not disabled;

    138.3. Was that substantial disadvantage more than minor or trivial;

    138.4. Was that substantial disadvantage caused by the disability in question;

    138.5. Should the claimant establish that a relevant PCP placed her at a substantial disadvantage by reason of disability, did the respondent fail to comply with the duty upon it to make reasonable adjustments.

139. Upon the complaint of unfavourable treatment for something arising in consequence of disability, the issues that arise are as follows:

    139.1. Did the respondent subject the claimant to unfavourable treatment;

    139.2. If so, was that unfavourable treatment because of something arising in consequence of disability;

    139.3. If so, can that unfavourable treatment for something arising in consequence of disability be justified by the respondent as a proportionate means of achieving a legitimate aim.

***Discussion and conclusions***

140. Upon the reasonable adjustments claim, the claimant's case is that the respondent had in place a PCP which caused her a substantial disadvantage by reason of her disability. The relevant PCP is the requirement for Band G TOs to carry out *"court attendance"* work (as it is put in paragraph 41.a of the claimant's amended grounds of claim. The claimant says that she was substantially disadvantaged by reason of this PCP because those without a disability were able to carry out the court attendance element of the TOs core duties. The claimant says that accordingly a duty arose for the respondent to make reasonable adjustments.

141. The claimant contends the following to be reasonable adjustments:

    141.1. Allowing the claimant to work as a TO without attending court as other colleagues would have been able to deal with court work.

    141.2. Failing to follow occupational health advice and allow the claimant to be office based working on a non-court attendance basis.

    141.3. Failing to keep the claimant's pay protection permanent (as opposed to for just a period of two years).

142. These adjustments were suggested in paragraphs 42(a),(b) and (c) of the claimant's amended grounds of claim.

143. We now turn to our conclusions. It is plain that the respondent had a PCP that the Band G TOs must carry out court attendance work. The job profile for the TO role at page B29 has, as the second listed duty, the requirement to represent the respondent at the Magistrates Court hearings. The claimant did not dispute that this was part of the role. Indeed, she had been undertaking court advocacy as part of the role until 27 April 2016.

144. The Tribunal concludes that this PCP did place the claimant at a substantial disadvantage in comparison with persons who are not disabled. The claimant was able to satisfactorily manage her duties (including court attendance) until 27 April 2016. There was no suggestion (from either her or the respondent) that she was not doing so and was not performing her role in anything other than a satisfactory manner. The reason why she ceased undertaking court role in April 2016 was in connection with the departmental re-organisation which took place in May of that year.

145. Unfortunately, between May 2016 (when she ceased appearing in court) and August 2017 (when she was required to resume so doing) the claimant started with Huntington's Disease at Stage 1. This developed in January 2017 (paragraph 61 above). The medical evidence before the Tribunal is that Huntington's Disease can affect movement, cognition and behaviour and induce anxiety: (paragraphs 11 and 70). There was a clear link between the onset of Huntington's Disease on the one hand and the claimant's inability to undertake court advocacy on the other as evidenced by the occupational health report at pages B32 to B33 dated 27 September 2017.

146. The claimant was therefore substantially disadvantaged in comparison with persons who are not disabled. For example, Mr Beesley is not a disabled person for the purposes of the 2010 Act. The evidence is that he was able to perform the court advocacy role perfectly well. There was evidence that Sarah Bennett likewise is not a disabled person and she too was able to perform that element of the role. Before the claimant became a disabled person for the purposes of the 2010 Act she also was able to perform that aspect of the role. Therefore, there is ample evidence from which the Tribunal concludes that the relevant PCP to attend at court and represent the respondent before the Magistrates Court placed the claimant at a substantial disadvantage by reason of Huntington's Disease when compared with non-disabled comparators.

147. On any view, this was a more than minor or trivial disadvantage. Her disability caused the claimant severe anxiety on 24 August 2017 (paragraphs 67 and 68) and OH recommended that she be relieved of this aspect of her duty such was the impact upon her of being required to attend court: (paragraph 70). The disadvantage was attributable to Huntington's Disease. The OH report cited in paragraph 70 is clear upon causation. No other cause of the disadvantage is cited by OH.

148. There being no issue that (by 27 September 2019 at the latest) the respondent knew both of the claimant's disability and the substantial disadvantage caused to her by it by reason of the application to her of the relevant PCP, the issue is whether there were reasonable adjustments open to the respondent which carried a prospect of alleviating the substantial disadvantage. The claimant suggested that the court attendance aspect of the TO role be removed from her. Altering the work undertaken by a disabled person and assigning parts of the disabled person's role to others are within the scope of the reasonable adjustments contemplated in the EHRC Code of Practice.

149. The Tribunal must therefore consider whether, objectively, such an adjustment was a reasonable one for this employer to take. The Tribunal considered paragraph 6.28 of the EHRC Code. Plainly, in our judgment, the removal of the court attendance aspect of the TO role would be effective in preventing the substantial disadvantage. There was no suggestion that the claimant was not performing the other aspects of her TO role satisfactorily between August 2017 and March 2018. During that period the respondent made an adjustment relieving her of advocacy duties. Albeit that she had a period of absence over this time, the claimant appears to have been able to sustain a reasonable level of attendance and there was no evidence from the respondent that she was not otherwise satisfactorily performing her role.

150. The taking of this step was clearly practicable. The respondent took the step of removing court advocacy from the claimant. Between August 2017 and March 2018, the claimant's court attendance was delegated to others. There was no suggestion that this had any deleterious effect upon the respondent's performance. On the contrary, financial targets were met: see paragraph 98.

151. There was no evidence of any financial or other cost to the respondent of making the relevant adjustment (of removing court attendance work from the claimant). As has been said, the respondent's collection targets were met. There was no suggestion that the 0.3% reduction in council tax collection in financial year 2017/18 was attributable to the claimant's inability to perform advocacy services. The department was able to function very satisfactorily between August 2017 and March 2018. From this, the Tribunal infers that the claimant was able to undertake the office based tasks of those TOs who were undertaking work at court which the claimant would otherwise have done. There was certainly no evidence to the contrary.

152. Furthermore, we have seen from the claimant's analysis of the advocacy work at pages 74l and 74m that attendance at court was in fact (in percentage terms) not a significant amount of the TO's role. The excellent performance of the team notwithstanding the adjustment made for the claimant demonstrates that even with the adjustment standards were maintained. Even if the tribunal is wrong in its assessment of the percentage breakdown of the TO's role, the department was still able to function to a high standard with the adjustment made for the claimant. Financial targets were met and Mr Ward was hopeful that the respondent would be placed high up the league table for the financial year 2017/18 as it had been for 2016/17.

153. In paragraph 42(a) of her grounds of complaint, the claimant said that the respondent was in breach of the duty to make reasonable adjustments by reason of the failure to allow the claimant's application to work at the office as a TO without attending court. At paragraph 42(b) the claimant contends that there was a failure upon the part of the respondent to follow OH advice and allow her to be office based working on a non-court attendance basis. It seems to the Tribunal that paragraph 42(b) is simply a different way of putting the suggested adjustment at paragraph 42(a).

154. In the final analysis, the Tribunal concludes that the respondent was in breach of the duty to make reasonable adjustments by failing to allow the claimant's application to work at the office as a TO without attending court. Such an adjustment had a prospect of alleviating the substantial disadvantage to the claimant. Indeed, the adjustment made after August 2017 until March 2018 had that alleviating effect. The department continued its excellent performance. Giving the court advocacy work to other TOs and the team leaders was not unduly onerous and not deleterious of their performance or the department's performance. There was no evidence to the contrary. Given these circumstances, taking the step of relieving the claimant of court advocacy work was practicable, incurred no cost to the respondent and was not disruptive of its activities.

155. We now turn to the second reasonable adjustment contended for by the claimant in paragraph 42 (c). This is to make an adjustment to allow her to move roles in a lower band and keep pay protection upon a permanent basis. Objectively, the Tribunal does not consider this to be a reasonable adjustment. We accept that the taking of that step would be effective in preventing the substantial disadvantage. The claimant worked satisfactorily in the Band E role after 12 March 2018. At any rate, there was no evidence to suggest otherwise. She was relieved of the court

advocacy work which caused her much anxiety Subjectively, from the claimant's point of view, paying her a Band G salary for undertaking a Band E role would come with a substantial prospect of alleviating the substantial disadvantage caused to her by reason of the application to her of the relevant PCP in her substantive role.

156. However, the financial cost of making such an adjustment is a significant one for the respondent. We consider there to be much in Mr McNerney's point that the on-costs of paying the claimant a Band G salary for undertaking a Band E role are not insubstantial. We have referred to the payslip within the bundle showing the value of pay protection to the claimant in the sum of just short of £400 per calendar month. That is £4,800 per annum or thereabouts on top of which the respondent will incur increased national insurance costs. When computed over the rest of the claimant's working life this is a significant cost to the respondent. There will also be a significant on-cost in pension provision.

157. Upon this issue, the Tribunal was referred to the case of **G4S Cash Solutions (UK) Limited v Powell** (UKEAT 0243/15). Taking the facts of this case from the headnote:

*"After the claimant became disabled through a back injury the respondent gave him work in a new role ("key runner") at his existing rate of pay and led him to believe that the role was long term. The following year, however, it said that it was only prepared to employ him in this role at a reduced rate of pay, and when the claimant refused to accept these terms he was dismissed."*

158. The Employment Tribunal in **Powell** found that the respondent had discriminated against the claimant in that case by failing to make a reasonable adjustment by extending pay protection and by dismissing him. The Employment Appeal Tribunal upheld this aspect of the Employment Tribunal's decision that the employer was in breach of the duty to make reasonable adjustments. At paragraph 47 of **Powell**, HHJ Richardson said,

*"I can see no reason in principle why pay protection, which is no more than another potential form of costs for an employer, should be excluded as a "step". Suppose, for example, that there is a choice between keeping an employee in an existing role, paying for support and assistance, or transferring the employee to a new role where no support or assistance is required but the pay is lower, such that an Employment Tribunal considers it reasonable for the employer to have to protect the employee's pay. I see no reason in principle why the one should be a "step" within section 20(3) but the other should not be. The latter may indeed sometimes be less costly for the employer than the former."*

159. HHJ Richardson then considered the provision in the EHRC's Code of Practice to which we have referred of an adjustment entailing a modification (in the employee's favour) of performance related pay. He said at paragraph 49 that,

*"…the underlying assumption of the illustration is that it may be reasonable, as a component of an adjustment, to ensure that the employee is paid in respect of time when she was not working. In my*

*experience this is not unusual when an employee is permitted additional absence for illness, rehabilitation or training. All this seems to me to be in accordance with the policy of the 2010 Act, and that I do not think it offends against any of its provisions."*

160. HHJ Richardson then rejected a contention that **O'Hanlon v Commissioners for HM Revenue & Customs** (2007) ICR 1359 CA, is authority for the proposition that pay protection may be excluded as a reasonable adjustment falling within the ambit of section 20(3) of the 2010 Act. When **O'Hanlon** was before the Employment Appeal Tribunal, Elias P (as he then was) accepted that the duty to pay money to an employee who was absent sick was in principle capable of falling within the duty to make adjustments but that would be a rare and exceptional case. This is because the purpose of the legislation is to assist the disabled to obtain employment and to integrate them into the workforce. Elias P said that,

*"The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the Tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work."*

Elias P recognised that there may be single claims turning up on their own facts where the cost would be relatively limited in which a duty to make reasonable adjustments may require the employer to pay monies to an employee absent on sick leave. *(Mr Beesley's remark in paragraph 18 of his witness statement (to the effect that allowing the claimant to work as a TO without doing court advocacy work may have a deleterious impact upon other TOs who may feel undervalued as a consequence) may be considered to be unfortunate in the light of this aspect of Elias P's judgment. The point of the reasonable adjustments regime is to tilt the playing field in favour of those who are disabled in order to enable them to participate fully in the workplace).*

161. It is upon that basis that the EAT in **Powell** refused the employer's appeal against the Employment Tribunal's decision that there had been a failure to make reasonable adjustments when not extending the pay protection to the employee. It was significant that in **Powell** a job had been created for the claimant and the claimant had been led to believe that the role was long term at his existing rate of pay in his substantive role. The Tribunal consider Mr McNerney's submissions to the effect that the instant case is factually distinct from **Powell** to be well-founded.

162. Mr McNerney urged caution upon the part of the Tribunal before upholding this aspect of the claimant's case. He submitted that, in contrast to **Powell**, a role had not been created for the claimant and the claimant had not been led to believe that she would enjoy salary indefinitely at the same rate as in her substantive role while undertaking work at a lower grade. He said that there was nothing out of the ordinary for a public sector employee to find himself or herself unable to perform a substantive role and then being re-deployed into a lesser graded role as a reasonable adjustment with pay protection. He said that to uphold the claimant's case that it would be a reasonable adjustment for an

employer to be required to maintain permanent pay protection in such circumstances would be to open the floodgates to like claims from similarly affected disabled people working in the public sector

163. In our judgment, there is much in Mr McNerney's submissions. In **Hanlon**, Elias P plainly had in mind single claims turning upon on their own facts as those which would potentially engage a reasonable adjustment of the kind urged upon the Tribunal by the claimant in paragraph 42(c) of her grounds of claim. Although this would be a significant outlay for the respondent in and of itself, we do accept that when viewed in the context of this employer's financial resources, affording the claimant pay protection upon a permanent basis with the on costs for her pension would be a relatively small outlay. However, endorsing such as a reasonable adjustment would have a potentially huge implication for local authority finances if the principle were to be extended to all employees. On any view, objectively, such is not a reasonable adjustment and the second limb of the claimant's reasonable adjustments complaint must therefore fail.

164. Mr McNerney submitted that the respondent had complied with the duty to make reasonable adjustments by allowing the claimant two years of pay protection in a Band E role from March 2018. He submitted that this had the effect of ameliorating the substantial disadvantage caused to her by the application to her of the PCP within her substantive role. He said that this effectively discharged the duty to make reasonable adjustments and therefore the first limb of the claimant's reasonable adjustments complaint (being the removal of the court advocacy work from her substantive role) was not engaged. He submitted therefore that both aspects of the reasonable adjustments complaint should fail.

165. Upon this issue, the Employment Judge drew the party's attention to the case of **Home Office (UK Visas and Immigration) v Kuranchie** EAT 0202/16. In this case, the EAT described the approach taken by the court of appeal in **Burke v The College of Law and Another** [2012] EWCA Civ 87 as a *"holistic approach".* **Burke** was a case in which the consideration of the reasonableness of adjustments arose in circumstances where a number of adjustments working in combination may ameliorate the substantial disadvantage suffered by the claimant. In **Kuranchie**, the EAT ruled that it had been open to an Employment Tribunal to find that the employer had failed to make a <u>further</u> reasonable adjustment to remove the disadvantage caused by the claimant by her dyslexia/dyspraxia even though other steps have been taken to this end. The Tribunal had concluded that those other steps had failed to ameliorate the relevant disadvantage, whereas the additional step identified by the Tribunal would have done so (or at least would have had a real prospect of doing so).

166. Mr McNerney drew the Tribunal's attention to material within **Harvey on Industrial Relations and Employment Law** at division L3 paragraph B403.01. In paragraph 404, one finds authority for the proposition that it is proper to examine, against an objective test, the question of reasonable adjustments not only from the perspective of a claimant but also that of an employer taking into account wider implications including operational objectives. This reinforces the Tribunal's judgment that the

second PCP contended for by the claimant of permanent pay protection is not a reasonable one for the respondent to make due to the wider implications that would be entailed.

167. **Burke** and **Kuranchie** are cases concerning the making of a number of adjustments which in combination may serve to ameliorate the substantial disadvantage. The instant case does not in fact come within that category. The claimant's case is that amelioration of a substantial disadvantage may be achieved either by removing the advocacy work from the substantive TO role or re-deploying her to an alternative role with permanent pay protection at Band G (which would as a matter of course relieve her of her court advocacy work). The two are therefore mutually exclusive. The claimant either, on her case, benefits from a reasonable adjustment in order to carry out her substantive role or enjoys salary at the level of her substantive role in an alternative Band E position. The instant case is not one of a blended or holistic approach where a combination of adjustments may serve to ameliorate the disadvantage caused by the disability.

168. We have held that the pay protection adjustment is not a reasonable one for the respondent to have made. We have also held that it would be a reasonable adjustment for the respondent to remove the court advocacy work from the claimant's substantive role.

169. We hold that the two years' pay protection in the band E role does not go far enough in ameliorating the disadvantage to the claimant. Objectively, the Tribunal does not consider it open to an employer to effectively say to an employee "*you must take a role at a lower grade and after a relatively short period of time of two years accept a lower salary*" in circumstances where a reasonable adjustment was open to that employer to keep the employee in the substantive role at the higher paid band.

170. In our judgment, just as it is not a reasonable adjustment for an employer to be expected to sustain indefinitely an employee at a higher pay band for doing lower grade work so too is it not a reasonable adjustment for a well-resourced employer to effectively re-deploy an employee into a lower pay band (albeit with some pay protection) where there is available a reasonable adjustment which would keep that employee in his or her substantive role at the higher band. The financial impact upon the employee of the employer being able to satisfy the duty to make reasonable adjustments simply by re-deployment with temporary pay protection may be substantial from the perspective of the employee. It would serve to weaken the protection given to disabled employees to allow an employer to discharge the duty to make reasonable adjustments by alighting upon one which may be cheaper for the employer but costly for the employee. This is all the more the case in circumstances such as present themselves here where the employer was able to function very well and with apparently no additional cost with the adjustment.

171. In the circumstances therefore, the Tribunal's judgment is that the first limb of the claimant's complaint of a failure to make reasonable adjustments as set out in paragraph 42a of the grounds of complaint succeeds. The second limb are set out in paragraph 42c fails.

172. We now consider the complaint of unfavourable treatment for something arising in consequence of disability. In the Tribunal's judgment, the claimant was unfavourably treated. She was required to move from her substantive adjusted TO role to a Band E role with two years' pay protection at Band G salary. Indeed, the claimant was told in November 2017 that unless she did so she would be served with notice to terminate her contract of employment: (paragraph 77). On any view, removing a disabled employee from an adjusted role which was working well to a role at a lower pay band (with pay protection for a two years' period) is unfavourable treatment. It is reasonable for the claimant to consider that to be to her disadvantage.

173. The unfavourable treatment was materially caused by and attributable to the claimant's disability. In essence, that was really the whole point. It was the claimant's disability which prevented her from undertaking the full range of her TO duties and which led to the respondent taking the steps that it did requiring her either to return to them in full (which was medically contra-indicated) or be re-deployed into another role. Therefore, the claimant has succeeded in establishing that she was unfavourably treated for something arising in consequence of her disability. The 'something' that arose was her inability to attend court in order to undertake advocacy or act as a witness for the respondent and that arose in consequence of her disability.

174. The claimant fairly accepts the respondent to have a legitimate aim for that unfavourable treatment. The question therefore is whether it was proportionate for the respondent to have treated the claimant unfavourably in the way in which it did.

175. It will be very difficult for an employer to justify unfavourable treatment as a proportionate means of achieving a legitimate aim where the unfavourable treatment may have been avoided by the making of a reasonable adjustment. We have determined there to have been available to the respondent a reasonable adjustment which ought to have been made (and indeed was made for a period between August 2017 and March 2018). The legitimate aim of maximising revenue collection was in no way prejudiced by the claimant's inability to undertake court attendance. The respondent's department was successful. It was meeting its targets. It was one of the best departments in its field in the country. The small percentage drop in council tax revenue could not be attributed to the claimant's position.

176. Therefore, the legitimate aim in question was being met in any case during the period of the temporary adjustment that was made relieving the claimant of the court attendance duties between August 2017 and March 2018. In those circumstances, it was not proportionate for the respondent to require the claimant either to resume doing court attendance work (which was medically contra-indicated) or to move departments. There was no need for the claimant to do either of these things in order for the respondent to achieve its aim. The aim was being met in any case with the adjustment relieving the claimant of doing court advocacy between August 2017 and March 2018.

177. Neither of the steps of requiring the claimant either to resume doing court attendance work (which was medically contra-indicated) or to move departments would assist the respondent to meet its aim. It was not proportionate to require the claimant to do the court advocacy work to meet the aim. It was being met in any case without her doing so. The disadvantage to the claimant of going to a Band E role with limited pay protection or undertaking the full range of her substantive role contrary to medical advice considerably outweighs any advantage to the respondent gained by the implementation of either of these steps. It was disproportionate for the respondent to impose the steps. The justification defence therefore fails.

178. In the circumstances, the claimant succeeds in her claim that she was unfavourably treated for something arising in consequence of disability. The claimant's complaint of a failure to make reasonable adjustments also succeeds in part.

179. The matter shall now be listed for a remedy hearing. The parties are required to write to the Tribunal within 21 days of the date of the promulgation of this Judgment indicating:

179.1. Whether the matter would benefit from a case management preliminary hearing before the Employment Judge;

179.2. A time estimate for the remedy hearing together with dates of availability over the next four months' period.

**Employment Judge Brain**

Date: 3 December 2020