EMPLOYMENT TRIBUNALS

Claimant	*Respondents*
Mrs Ann Hamilton	**Commissioners of Her Majesty's Revenue and Customs ("HMRC")**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE ON 25-28 October 2021

EMPLOYMENT JUDGE GARNON
Members: Ms D. Winship and Mr K. Smith
Appearances
For Claimant Mr D. Robinson-Young of Counsel
For Respondent: Mr T. Wilkinson of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:
(a) the name of the claimant is amended to that shown above
(b) her claims of unfair dismissal contrary to the Employment Rights Act 1996 (ERA), harassment, victimisation, discrimination as defined in sections 15 and 20/21 of the Equality Act 2010 (EqA), are not well founded and are dismissed.

REASONS (Bold print is our emphasis ,italics are quotations and numbers in brackets pages in the bundle)

1. Introduction and Issues

1.1. The claimant was born on 6 May 1959 and presented her claim on 7 April 2019 after Early Conciliation. There have been preliminary hearings (i) before Employment Judge (EJ) Buchanan on 7 June 2019, when the claimant was unrepresented, further particulars were ordered and the case set down for hearing for 5 days in April 2020 (ii) before EJ Green on 9 October 2019 (iii) before EJ Aspden on 3 April 2020 when it was postponed due to the pandemic (iv) before EJ Green and members on 9 February 2021 when the postponed hearing by CVP was abandoned due to technical issues and relisted for now. The claims are unfair dismissal, discrimination contrary to s15 EqA, failure to make reasonable adjustments under s20/21, harassment s26 and victimisation s27. The respondent admits the claimant had a disability as defined in section 6 only from 5 September 2018 and knowledge of that from 17 September. The claimant having married since issuing her claim wished her name to be amended from Ann Hall.

1.2. The suggested list of issues is thorough, but can be abbreviated and still show the real liability issues, broadly framed, which are: -

Unfair Dismissal
Does the respondent show a potentially fair reason for dismissal namely capability?
If so, was dismissal fair applying the test in s 98(4) ERA?

Disability and Knowledge
At what point in time did the claimant become disabled and did HMRC know, or should they reasonably have been expected to know, she was (a) disabled and (b) placed at a substantial disadvantage by the application to her of its PCP's?

Section 15
Were any acts or omissions of HMRC, at least in part, because of something arising in consequence of the claimant's disability, in particular (a) inability to do telephony work (b) sickness absence? If so, was its treatment of her a proportionate means of achieving a legitimate aim?

Section 20/21
Did any PCP applied by or on behalf of HMRC, put the claimant at a more than trivial disadvantage in comparison with persons who are not disabled? In so far as it did, what steps would it have been reasonable to take to reduce that disadvantage and did HMRC take them?

Section 26
Was any unwanted conduct by HMRC related to disability, and did it have the purpose or effect described in section 26. If the latter only, was it reasonable it should have that effect?

Section 27
Did HMRC subject the claimant to any detriment because she had done a protected act or it believed she had or might?

Section 123
In respect of any acts or omissions found proved under the EqA, does section 123 prevent the claim being dealt with?

2. Findings of Fact

2.1. We heard the claimant and her husband Mr Andrew Hamilton. For the respondent we heard Mr Paul Curry, Ms Denise Wilson, Ms Karen Blades, Ms Georgina Walker, Mr David Moody and Mr Brodie Rutherford. We had an agreed document bundle.

2.2. The claimant was employed as an administration officer (AO) from **7 June 1999**. Her duties included filing, sorting post, computer work and, after temporary promotion, case work. She had an unblemished disciplinary record. Following spinal surgery in 2011 and June 2013, she has an ongoing physical impairment which HMRC concede is a disability. For this, HMRC introduced adjustments at work, in place for many years successfully, a special chair and footstool. She was permitted to take exercise every 30 minutes, being unable to sit or stand for extended periods of time. By 2018 her working pattern was 4 days per week, 6.25 hours per day in a team known as CIS Team 2. CIS stands for Construction Industry Scheme. For much of the time she was processing refund payments. It did involve some outbound telephone work.

2.3. **Mr Rutherford** started on 21 January 2001 for what is now HMRC. He joined Delivery Group 2 (DG2) **in March 2018** as Senior Delivery Manager (SDM). DG2 is a multi-skilled workforce handling customer claims and enquiries, including CIS repayments. He is responsible for ensuring an efficient service to customers whilst providing value for the Taxpayer. His statement includes:
In recent years HMRC has been transforming the way it provides its services.. driven by the necessity of HMRC having to deliver its services more efficiently. As part of this process, there has

been upskilling across the teams. This has involved processing teams, such as CIS, having to become much more involved with the telephony side of the business along with Employer Helpline. Becoming multi skilled allows HMRC to manage its workflows more effectively, .. allows us to handle customer enquiries in a “once and done” environment rather than calls being handled by “helplines” and then being referred to back office, which can cause delays to the customer.
These changes ..were rolled out across many different teams over a reasonably lengthy period. At the time I joined DG2, there were a number of teams going through this transition and Peter Curry’s team, including Ann Hall, were already going through this process change.
This was a cultural change for our people, and they needed to be supported appropriately with training, coaching, mentoring, live listening, floor walking, along with Personal Development & Wellbeing conversations.
*.., **I recognise not everyone will be able to take calls due to disability, and we would support them accordingly.** There will be others who could take calls, but would need additional support or an Occupational Health report that might provide suggestions on how to support the jobholder.*

This shows the need to decide if an employee **cannot** do telephony, for whatever reason, or simply **does not want to,** because as Mr Curry said, most, if not all, of his team were reluctant to change. If everyone who **said** they **“could”** not do telephone work was accepted as **not able** to do it, the whole scheme to improve efficiency would collapse.

2.4. Mr Curry started on 2 November 1987 for a department now merged with HMRC. He and the claimant started working together in about 2012, when he became her Line Manager. They had a good working relationship. Processing teams becoming more involved with telephony was rolled out over a reasonably long period. CIS teams would have to spend more time dealing with telephone enquiries, as part of the CIS helpline. There was resistance to this. As manager, he was to **encourage** team members to be open to the changes, help them with their confidence and be supportive. Inevitably, team members (including the claimant) would have heard experiences of others who had already made the transition, some probably negative. He says that seems to have influenced the claimant into deciding, well in advance, she **did not want to do** telephony work. He recalls a discussion, before Christmas 2017 and before they started the transition, when she said words to the effect ‘*when telephony arrives, that will be me leaving the office. I’ll be walking’.*

2.5. Training was both (a) computer module learning staff could complete at their own speed (b) ‘live listening’ to trainers already experienced on the CIS telephone helpline who would take live calls, with team members listening in. Afterwards, they and the trainer would discuss the call. Training for CIS 2 began around mid-January 2018. Whilst the computer based learning seemed to go well, there was criticism of the live learning training, which many staff felt was not fit for purpose. After training, staff were **encouraged** to take calls **but the decision to take a call was left to each member of staff.** When this first occurred, trainers were listening in and providing one to one support. In mid February, the claimant began to take calls with a trainer present.

2.6. The claimant says in January 2018, when her job changed existing adjustments were removed, as the new role prevented her leaving her work position. We reject this totally. We accept that is what she feared might happen. Later on, call handling volume would be monitored and targets set, which could be adjusted for disability. She says she did not receive adequate training struggled to cope mentally for weeks, often breaking down at work. **EJ Garnon asked for what reason she did not want to do telephone work, physical or psychological? She said both.** She says she raised with Mr Curry, *on numerous occasions* her mental health was deteriorating **during her training period. He says, and we accept, her concerns were stress, not sitting for too long, though both may be linked.**

2.7. Mr Curry says on Monday 19 February the claimant told him she was not confident with telephony. Due to the experience of other teams, HMRC already had a Managers Checklist in place for staff struggling with the changes and, weeks earlier, he told staff of the checklist and its purpose. He provided a copy that day to the claimant who completed part one. He then completed part two, discussing the situation with her whilst going through the checklist (99-107). He recorded she felt unable to perform telephony due to a "*fear of the unknown*" causing emotional distress. The checklist form contained a question about adjustments in place due to her back condition remaining. His answer was "*Yes for underlying physical condition. (Regular breaks away from desk/DSE /OH Specialist chair). For anxiety condition -no performance targets set and the offer of continued live listening/buddying/one-to-one support."* A stress reduction plan (SRP) was not completed as she went sick shortly after she finished live listening sessions but the checklist covers many aspects of a formal SRP and was completed immediately. **She did not think** these adjustments would enable her to perform the role. She stated *"I need medication and not more stress*",which he recorded on the checklist. She confirmed she was seeking a GP appointment.

2.8. On Tuesday 20 February, she was visibly upset. Mr Curry suggested they went to the conference room to talk. As he recalls, she said she could not concentrate, could not perform the telephony role, was not sleeping and intended to see her doctor. He denies suggesting she '*had to do the new role or simply leave*'. He actually said "*If I send you home, my fear is that you will not come back to work*". That concerned him because he did not want her to leave as others had , which conveys the opposite of what is alleged. He denies he "*declined her request for redeployment"*. Those decisions are above his paygrade. Back in the office, he said words to the effect "*health comes before work*" and suggested she go home. She appeared relieved she did not have to stay and do telephony work. Later the same day, at 2.45 pm, he made a referral to Occupational Health (OH) as part of a protocol, based on the experience of individuals in other teams. Confirmation he did this is in a screenshot from the OH portal (108). 21 February was her non-working day. On 22 February she did not come into work due to anxiety/stress. It was the beginning of a long period of sickness absence.

2.9. The claimant's version is very different. She says he told her she, and everyone else, had to do telephony or "*walk out the door like others before you*" and failed to involve OH. She says it is unlikely OH were contacted because Mr Curry did not confirm of any progress with OH until 8 weeks later in his letter of 16 April (145). Also, he left a telephone message in early March 2018 stating he "intends" to contact OH which indicates he had not yet done so. The documents satisfy us he did make an OH referral on 20 February, and what follows explains why he first wrote about it in April and what he "intended" to do when they spoke on 6 March. After going home at 10.00am she was signed off on sick leave by her GP on 21 February with low mood, depression and anxiety and prescribed anti-depressant medication.

2.10. We prefer Mr Curry's account because it fits with the background that he had no problems with the claimant, or she with him, before this day, but that does not imply we think the claimant is lying. We find in her emotional state she read into what he said more than she should. He did say everyone in the team was expected to give telephony a **try** with more support for longer than she had given it and there may come a point where if she tried to cope and could not she may be offered another role in HMRC so he did not want her walking out the door like others had . HMRC were acting fairly in not accepting everyone who was initially unhappy should be allowed to opt out. The claimant says stress and anxiety brought on by the difficulties at work and HMRC's failure to address these, caused her to have a phobia of telephony. We accept she felt that, but nothing anyone from HMRC did or said reasonably caused that anxiety or fear.

2.11. Mr Curry has been told her anxiety and depression has since been recognised by HMRC as a disability. At this stage he did not know this and could not have been expected to. She had only been off work for one day and he no medical information about her condition. HMRC received a call from Mr Hamilton, at approximately 7.30am on 22 February, saying she would not be coming in that day or the next and if they needed to speak to her they should call after 9.00 am. Mr Curry tried calling on several occasions that day, without success. She did not return these calls. This is confirmed in an email he sent to Les Kerr, his manager, on 22 February (109). Mr Kerr, partially retired, only worked on Thursdays and Fridays. EJ Garnon asked if Mr Curry was under instructions from above him to **ensure** everyone did convert to telephony. He was not told to put pressure on any staff , only to **encourage everyone to try**.

2.12. HMRC has an attendance management procedure (AMP) which involves ongoing contact between managers and employees who are absent. Mr Curry filled in a 'keeping in touch' (KIT) form, recording her absence (110),spoke to her on 26 February and affirmed HMRC's desire to support her with as much live listening/buddying as required. She said she was very emotional and struggling to think/absorb information. He says he told her he had made an OH referral and recorded details of the conversation on the same KIT form used earlier (112).

2.13. On 27 February, Mr Curry was emailed by the OH providers, Duradiamond Health. A telephone appointment was scheduled for **28 March 2018** (114). On 1 March 2018, he spoke to Les Kerr mindful that under AMP a meeting was likely to be required soon (115). He spoke to the claimant on **6 March**. She said she was feeling no better and had a fit note. He reiterated he would support her and put appropriate adjustments in place to allow her to return, her colleagues wished her well and wanted to see her back (119). HMRC received a fit note dated 5 March describing her condition as "*low mood and stress"* (116). Mr Curry told her he intended to try to get a quicker OH appointment and did for 16 March. He left a message on her answerphone and tried a couple of times to call about this, but was unable to speak to her. OH also tried to contact her unsuccessfully (122). As the 16 March appointment could not be confirmed, it had to be cancelled, which Mr Curry did by email on 15 March confirming he wanted the original appointment retained (124). Around this time, the claimant suffered a bereavement, so HMRC decided it was best not to try to make further contact (123). Mr Curry did not know Duradiamond Health had cancelled the appointment for 28 March and allocated it to someone else as they confirmed in an email of 18 March (129). A new appointment was scheduled by email of 19 March (131) for 23 April, subject to confirmation from the claimant . **This was the first "breakdown of communication" of many**.

2.14. HMRC still needed to have contact with her. Linda Carter, a Higher Officer (HO) – the same grade Mr Kerr, became briefly involved and tried to make contact on Mr Kerr's non-working days. On 20 March, Ms Carter spoke to Mr Hamilton asking the claimant call her back (132). She did not. Ms Carter left her another message on 21 March (133). On the same date, Ms Carter emailed Mr Rutherford, manager of her and Mr Kerr, describing the efforts she had made and how the claimant had not been returning calls (134). After the claimant had been absent for a month, Mr Curry wrote to her on 22 March wanting to meet, in accordance with AMP, to explore what HMRC could do to help a successful return to work, with details of what he wished to discuss (135). HMRC did not receive a reply so Mr Kerr tried to speak to her by phone on 29 March. She did not answer, so he left an answerphone message requesting she make contact (138). She did not.

2.15. The claimant sent **on 3 April 2018** (140-141) to Ms Carter, whose name we find she had been given by Mr Hamilton after Ms Carter had spoken to him, what she now calls a grievance about Mr Curry's attitude on 20 February. Ms Carter did not reply because she was only standing in for days Mr Kerr was not working. Mr Kerr received a copy, sent an email on 13 April to Mr Curry

and showed him the letter. Mr Kerr noted her perceived reluctance to talk and was considering having the matter moved out of the management chain, but they still needed to write about the OH appointment arranged for 23 April. Mr Kerr started to write but, as he stated in his email, he had a thought his involvement, as an HO, may be perceived as undue pressure, so asked Mr Curry her line manager to write, as it is normal practice but told him to say (144). Mr Curry sent a letter dated 16 April acknowledging receipt of her earlier letter and Fitness for Work statements and confirmed the OH telephone appointment for 23 April (145). Contrary to the claimant's belief it was never the case Mr Curry would deal with a complaint against himself. His letter does not mention it.

2.16. Mr Curry does not believe the claimant wrote the letter dated 3 April. The style and content did not fit with her character or writing style, which he had come to know over the years. He never had a bad working relationship with her and always tried to support her during previous absences. There was no suggestion of unhappiness about how he had dealt with her when he spoke to her on 26 February and 6 March 2018. He says it was a personal attack against him. **The reason no-one recognised this as an "informal" grievance is, as seen later in the evidence of Ms Walker, the complex terms in which HMRC define such complaints.**

2.17. The claimant sees her grievance as being passed to the very person about whom she had raised it and him ignoring it. **The truth is neither Mr Kerr, Ms Carter nor Mr Curry dealt with it purely because it was not recognised as a "grievance" and it "fell between" changing managers none of whom took responsibility for dealing with what was a complaint .**

2.18. On 17 April Mr Curry emailed OH specific questions (150) (i) whether she was capable of working with telephony (ii) what adjustments would enable and support her to participate in telephony work (iii) whether she was likely to be covered by the EqA and for which conditions? These questions were on the management checklist he had used earlier (107).

2.19. On 25 April he received an email from OH following the telephone appointment saying she would not answer any verbal questions, but wanted to communicate in writing. OH said they do not perform written assessments. They recommended HMRC offer a face-to-face OH appointment (161-160). Later that day he received another email from OH proposing HMRC obtain a report from her GP (163). He wrote to the claimant on 26 April acknowledging she had not wanted to answer questions verbally, proposed HMRC got a report from her GP and enclosed a consent form (164). She replied by letter dated 4 May, enclosing the signed consent form but expressed her "*disappointment*" with OH (166).

2.20.Around mid-May 2018 Mr Curry joined another team. He did not deal further with her sickness absence. **Denise Wilson** started on 9 October 1995 at what is now is HMRC. She is a Front Line Manager of Team 8 and became involved when Mr Curry transferred. She knew the claimant, having worked on the same floorplate as her for a while.

2.21. On 16 May she called OH for an update. As she was not registered with them as manager, they would only tell her a letter had been received on 9 May and they had prepared a letter, which would be sent to the claimant's GP the next day (170). She called on 25 May. OH would not give further information until Mr Curry or the claimant provided authorisation (171). **On 29 May** Mr Curry sent an email giving them authority. Following that OH said they were still waiting for the consent form (178). Ms Wilson called the following day, as it conflicted with what she had been told on 16 May. She was told OH would investigate (179). She received an email from OH on 30 May confirming they had the signed consent form, were writing to the GP and apologising for the delay (180). The following day OH confirmed they had written (181).**This was the second "breakdown**

of communication". Nearly all of May, when progress could have been made, was lost by administrative confusion between HMRC and OH.

2.22. On 4 June 2018 **Donna Bulman**, the HO who oversees the CIS teams, wrote to the claimant introducing herself and explaining management changes which were occurring. She said she would be overseeing her absence and wanted to arrange an informal meeting between them and the new manager for her team, Phil Morgetroyd, to see how she was and explore what HMRC could do to support her return to work. She requested the claimant contact her (182). **This was not a standard template letter but written specifically for the claimant and could not have been more understanding in content and tone.**

2.23. On 5 June 2018 Ms Wilson received an email from OH, they now had a GP report which was first being sent to the claimant and would be released to HMRC as soon as they were able (184). Ms Bulman followed up her letter with a telephone call to the claimant, there was no answer so she left a message to contact her. The claimant did not return the call (188). Ms Wilson contacted HR on 14 June, asking what step she should take next. It was agreed to invite the claimant to a formal meeting given procedures state one should occur after 28 days absence, she had been absent for over three and half months and HMRC had not spoken in any detail to her in all of that time. She was told if she did not attend, she would be referred to a Decision Maker (191, 195-6). **This was a standard template letter** sent on **14 June** saying they had no reply from her to Ms Bulman's letter, it was difficult to support her continued absence without any contact, so HMRC **may** need to make a decision about her continued employment. She was invited to a formal meeting on 26 June with a right to be accompanied , provided the phone number of Workplace Wellness (192) who may have been able to provide additional support and given a copy of the AMP (439-462).

2.24. Ms Wilson has been told the claimant asserts her letter of 14 June 2018 was "unfavourable treatment" and "harassment". It was **intended** to help and hear what she had to say, before having to make any decisions and to discuss what Ms Wilson could do to help her return to work. Intention is not needed for harassment , reasonable effect is, but no objective reading of this letter can fairly criticise it. The claimant had to be told the **potential** consequences of her continuing non-communication and absence from work. Ms Wilson with Ms Bulman had done all they could. In submissions, Mr Robinson-Young said any ostensibly obstructive and unco-operative behaviour was something arising in consequence of the claimant's disability. Some mental impairments cause sufferers to "*bury their heads in the sand*" and/or not want to communicate and/or write confrontational letters, and/or see the worst in everyone and everything. However, we cannot **assume** such symptoms affected the claimant without better evidence, especially as she and Mr Hamilton say she was angered by HMRC's conduct rather than acting out of character. Even if her disability caused such behaviour, HMRC could not possibly have known it did.

2.25. On 22 June, HMRC received an OH report, dated 13 June, based on information received from her GP but it did not provide answers to the three questions Mr Curry had sent on 17 April. It concluded *"In order for us to provide you with the appropriate Occupational Health advice, I feel it would be best for us to have an opportunity to speak with Mrs Hall to assess her current health and fitness for work. I would ask that you liaise with our Administration team to make further arrangements. Further advice will follow once we have been able to carry out an assessment on Mrs Hall."* (189-190). Around this time Ms Wilson received a letter from the claimant dated 21 June objecting to attending a meeting on 26 June, stating she was not fit (198). **The claimant accepts Mr Hamilton wrote this and other letters with her sitting next to him approving the content.**

2.26. On 27 June Ms Wilson called HR. She asked about a stress reduction plan. HR said this was formed as part of a two way conversation and as the claimant was not wishing to communicate verbally, it could be seen as mechanistic to send one in the post (200). As the claimant declared she would not attend the formal meeting, Ms Wilson referred the matter to a Decision Maker, on HR advice. Her reasons are recorded in a form completed on 27 June. The claimant had been absent for four months and was not complying with the AMP. She had been given the opportunity to engage with management, but **chosen** not to, so they knew of no reasonable adjustments to aid a successful return to work in the foreseeable future. When making the referral she stated *"The jobholder will see the department as overlooking the issue of why they went absent from work, this would have been dealt with earlier in her period of sickness absence should she have verbally been able to speak to OH and management*". She says it is difficult to address concerns if someone is not speaking (199). She wrote on 28 June, telling the claimant Karen Blades would decide whether she should be dismissed, downgraded, **or her sickness absence could continue to be supported (204)**.This was a perfectly reasonable step proportionate to HMRC's aim to seek a solution to the claimant's absence and, as Ms Wilson confirmed, referral to a Decision Maker does not mean dismissal will follow. The claimant said, due to her mental state, **all she read were the words "dismiss" and "downgrade".** No objective reading of the letter could sustain the view either were inevitable, and they would not have been, had she co-operated.

2.27. Karen Blades started working for the DHSS on 18 March 1985, now HMRC. She began by reviewing the file and could see no informal or formal meeting had occurred because it appeared the claimant was **refusing** to meet or discuss matters with management. The obvious question is whether the words "chosen" in the last paragraph and "refusing" in this accurately describe the claimant's motivation. She may have been unwell rather than being deliberately awkward. **Ms Blades confirmed she was initially open to that possibility**.

2.28. At the outset, on about 9 July, Ms Blades sought advice from HR. She proposed putting in writing the questions she would normally ask. HR advised she should still invite the claimant to a meeting, whilst sending the questions and suggested she first explore any possible adjustments with the claimant's manager. She then met Ms Bulman who told her the claimant would not be returning to her previous team as she had missed the period of consolidation and would need to be retrained. If she returned to work, she would do clerical only, not telephony, duties. This would involve making some outbound calls (209). The claimant had no problem with these, as anyone making a call knows what they wish to discuss, inbound calls to a helpline could raise anything.

2.29. On 12 July Ms Blades wrote to the claimant "*Denise told you I would* ***consider*** *whether you should be dismissed or downgraded,* ***or whether your sickness absence should continue to be supported at this time****."* She invited the claimant to a meeting to discuss her sick absence and the circumstances of her case on 23 July. She enclosed a list of questions and asked she answer these in writing, should she still feel unable to attend a face to face meeting (210). The questions were prepared without input from OH who had not been able to discuss matters with her either. Among them was when she might be able to return **with support/adjustments**,and told her, if she was able to return, she would on a processing/post team. She also wrote **" *I must make you aware all teams will be expected to do a blend of telephony and post at some point"* (212). No-one reading this would gain an assurance she would permanently be excluded from telephone work, which is what the claimant accepted before us she wanted to hear. Equally, no-one could reasonably conclude such a role would not be offered in due course, or that she would be forced to do something which any disability she had made really difficult.**

2.30. Crossing with this, the claimant sent Ms Wilson a typed letter dated 13 July 2018 (216), drafted by her solicitor which said she was willing to meet with OH face to face (214). **This is a good letter which left no doubt her letter of 3 April was intended to be read as a grievance. At last, the impasse created by lack of communication was on the way to being resolved.**

2.31. Ms Blades then received a letter from the claimant dated 18 July saying she was willing to meet her too but requesting the meeting scheduled for 23 July be postponed until her solicitor returned from holiday on 30 July (216). As she had confirmed she was now willing to meet with OH, Ms Blades contacted them to arrange a referral, wrote to the claimant on 31 July OH would be in contact and put forward a new date for their meeting of 10 August. She stated she **would defer** any decision if she had not received OH advice (220). She received a reply dated 6 August requesting they postpone the meeting until a report from OH had been received (222). On 9 August she received an email from OH a face to face meeting had been arranged at Benfield Road, Newcastle, which requested HMRC inform her of this appointment (223). Ms Blades wrote on 10 August providing details of the appointment **for 16 August 2018 at 8.30 am** (224)

2.32. On 13 August 2018 **at 17.49**, another email from OH was sent to Ms Blades stating there had been a booking error and supplying a different address (225). **When Ms Blades attended work the next morning she wanted to telephone the claimant about it, but was under strict instructions from the claimant not to call her home** and did not have a mobile number to send a text so had to write (226). She passed the letter to the post team with a verbal instruction to arrange for it to be delivered urgently. The post team provided the Royal Mail tracker number, this item of post was classed as special delivery. These are normally collected from the onsite central post team at 3.30pm every day and delivered by Royal Mail the following day but this item of post did not leave the central post team until 3.30pm on Wednesday 15 August (227). The claimant lived in South Shields and to get to Newcastle by 8.30 would need to leave by 7.30 am so she did not get the new address in time. **This was the third "breakdown of communication".**

2.33. On 16 August, Ms Blades received a call from OH, the claimant had arrived at the original address. As the claimant was present, Ms Blades spoke to her, apologised, said she would arrange another appointment and obtained her mobile number, suggesting she text her the details. She arranged another appointment for 24 August and confirmed it by text (228). The claimant wrote on 16 August, expressing her **anger** and referring to her ***grievance***. Ms Blades says this was the first time she had used that word (230). Ms Blades had explained and apologised for something she could not have prevented, and neither she nor HMRC had done deliberately.

2.34. The grievance procedure has a section on grievances which overlap with other procedures stating "*where an employee raises a grievance during another procedure, such as poor performance, attendance or discipline, the ongoing process will continue."* (428). After seeking advice from HR, Ms Blades considered the AMP should continue regardless of whether the claimant chose to raise a formal grievance**.** The claimant was inferring what happened on 20 February caused her absence. The ACAS Code Para 46 recommends if matters overlap they should be dealt with together, so do HMRC's procedures when read properly. We find this was an error by HMRC which stemmed from their mis-reading of a written policy so long and confusing that none of the managers, **or HR**, properly understood the concept of "overlap".

2.35. Ms Blades replied on 24 August, apologising again for what had happened and asking if the claimant could supply an email address, or other form of contact should HMRC need to contact her urgently in the future. As for her grievance, she reminded her she had invited her to meetings on 23 July and 10 August, giving her the opportunity to talk through **events leading to** her sickness

absence and, if she wished to raise a formal grievance, she should collate all of her issues in one letter. Ms Blades would then arrange for a Grievance Decision Maker to be appointed (231). A reply dated 29 August did not collate all her concerns into one letter, so the claimant says because earlier letters had. Instead she continued forcefully to express dissatisfaction (236). Ms Blades decided to have no further correspondence until she had received an OH report when she would then attempt to arrange another meeting, at which she would try to explain the grievance process (237). The emboldened words reveal her common sense view there **may be some overlap** between the matters in her grievance and her absence, but she followed HR advice. Asking the claimant to put all her concerns in one letter was sensible because it avoids trawling through earlier letters and ensures everything she wants to cover actually is. Also, anyone reading the claimant's confrontational letters could easily miss any allegations of discrimination and see only someone looking for revenge on managers rather than someone affected by poor mental health.

2.36. On 14 September, Ms Blades went on annual leave for two weeks. On 17 September HMRC received the OH report of 5 September, after it had gone to the claimant first. Ms Blades saw it on 1 October. It referred work and personal stressors, said the claimant was temporarily unfit to work and no adjustments could be made at present to allow her to return. Doctor O'Reilly was "*of the view that the disability provisions of the Equality Act 2010 are likely to apply to this case*". This was the first time HMRC received medical information she was potentially disabled. The report went on to state HMRC should **consider trying** a role which did not involve telephony but with training and support she may feel more confident doing telephone work (238-9). **This was a good report and needed action. From the claimant's perspective she, and it were, ignored for many weeks.**

2.37. Ms Blades sent a text message to arrange a meeting (240) and received a letter from the claimant dated 5 October which did not propose a date to meet, said she did not know the purpose of the meeting, despite the letters on 12 and 31 July (242). This crossed in the post with one Ms Blades sent, dated 5 October asking they meet on 17 October. It stated "*I am willing to meet you at a mutual venue away from work*" but should have said "*neutral*" or "*mutually agreed*" venue. It asked who she would like to bring to the meeting at which she would have the opportunity to put forward **any new information** she would like Ms Blades to consider. It enquired whether she would be prepared to accept a lower grade job, as an alternative to dismissal, **if this were to be offered** and reminded her of the enclosure sent on 12 July, which outlined points for discussion. It said if she did not attend, or provide written answers/ representations, Ms Blades would make a decision based on the information available (241). This was a standard HMRC letter, **and we find nothing wrong with it.** The claimant's statement she did not know the purpose of the meeting must have appeared simply obstructive, as no-one could have doubted what it was meant to cover, ie on what basis and when she could be helped to return to work. By this time, having had legal advice, the claimant must have realised her continued absence with no end in sight was unsustainable. Mr Robinson-Young said the tardy handling of her grievance had destroyed her trust and confidence in HMRC, as she said herself in evidence. Employees have the right to have grievances dealt with promptly and W M Goold (Pearmak) Ltd-v-McConnell held they may resign and claim constructive dismissal if they are not. **She did not do so. We must decide the fairness of the actual dismissal which happened, not a constructive dismissal which did not. Also, a key part of the definition of a breach of the implied term of mutual trust and confidence is the conduct of the employer must be " without reasonable and proper cause " and that must be objectively judged. There is no evidence her failure to either resign, or obvious failure to co-operate with the AMP was something arising in consequence of her disability.**

2.38. On 15 October Ms Blades returned from several days leave to two letters from the claimant proposing meeting at her house **but** saying she had CCTV externally and internally. She wanted to

meet either in the evening or at the weekend, to accommodate Mr Hamilton who she said was not available for 17 October. She proposed 11 or Saturday13 October, which had already passed by the time Ms Blades received her letter (243 and 245). Although received in HMRC on 15 October, Ms Blades did not see it until 16 October. Over 5000 staff work at Benton Park View and the post would have been signed for by a member of the onsite post team before being delivered to one of the internal post rooms where Admin Support would have collected it and passed it to Ms Blades by hand if possible. Although she was in the office on 15 October she attends meetings throughout the day and may not have been available when the item of post arrived in her room.

2.39. Ms Blades was not comfortable with what was being proposed as reflected in the file notes on 15 and 16 October (249). Ms Blades spoke to HR on 15 October and was going to propose yet another meeting during office hours but decided not to after reviewing her letter of 10 October saying she had CCTV both inside and outside home. HR said (275) she was only obliged to reschedule a formal meeting once, she invited her to 3 meetings and was considering inviting her to a fourth. The claimant's lack of co-operation was making the process complex and a lot longer than it needed to be. **We agree**. At 2.15pm on 16 October Ms Blades checked her personal mobile and saw a message the claimant had sent at 12.17pm asking if Ms Blades was attending the next day at 10.30am as per Ms Blades' letter dated 5 October 2018. The claimant's letter dated 13 October had said her companion was unable to attend so Ms Blades had not planned to go. Ms Blades had already started to reply when she received another text at 14.24pm, stating the claimant was **expecting her** on 17 October at 10.30am. Ms Blades responded by text at 14.26pm she had sent a letter that day and would not be attending the next day (254 and 253).

2.40. Ms Blades wrote on 16 October she could only meet Monday to Friday, during office hours. She reminded the claimant she had written on three occasions to arrange a meeting 12 ,31 July and 5 October. Ms Blades decided she said would not arrange a further meeting but invited her to provide written answers to her questions she enclosed. She said her written grievance was a separate process from AMP, would not impact her decision regarding her continued absence and enclosed guidance which explained the grievance process. If she wished to raise a formal grievance, she should provide the information outlined in the grievance template enclosed. Ms Blades would then arrange for it to be taken forward (255 and 258). Ms Blades was now effectively saying the claimant had been given three opportunities to meet but only proposed times outside Ms Blades working hours to meet at her home where a CCTV recording could be made. She would be given no more opportunities for a face to face meeting.

2.41. Amongst the written questions included, Ms Blades informed the claimant if she was able to return within a reasonable timeframe, she **would be** placed on a processing team and not have to do telephony. It went on to ask if she could provide a date when she could return, if that adjustment was implemented (257). There was no guarantee the adjusted duties would last indefinitely, without her being **asked to try** telephony again, but no indication she would be forced to do it if it was causing her stress. Had the claimant returned and been "put on the phones" regardless, she would have had a strong case for **constructive dismissal, but she did not.**

2.42. On 18 October Ms Blades received another text **which was abrupt and accusatory in tone.** and chose not to reply (259A). The next day she sent a letter to clarify matters following the exchange of letters and texts and asking for her written representations by 2 November (259B).

2.43. On 25 October HMRC received two letters from the claimant, one without prejudice (not in the bundle), to which she referred repeatedly in later correspondence, the second accusing Ms Blades of trying **deliberately to mislead her**, which we find she was not. Whilst signed by the

claimant, the wording suggested it was not written by her "*From the point of reading, this I request you cease contacting Ann Hall via text message".* Ms Blades read this as yet more obstruction from the claimant to meaningful progress. Mr Robinson-Young said in closing submissions HMRC "***buried***" her grievance due to it containing allegations of breach of the EqA. Had they done so, it may well have constituted some form of unlawful conduct under the EqA, but we find they did not bury it at all. They failed initially to recognise it as a grievance under their procedures and later when they did, failed to handle it as they ideally should, a point to which we will return. Mr Robinson-Young agreed if we were satisfied HMRC made genuine mistakes it would not be acting because of anything arising in consequence of her disability or any actual or anticipated protected act. It could be harassment if the claimant reasonably perceived it to be so. Mr Robinson-Young added if there were genuine mistakes there had been a lot of them. EJ Garnon had asked HMRC witnesses whether this case was "jinxed" by breakdowns of communication and they agreedit had (see later what Mr Moody said) However, the claimant and Mr Hamilton by their correspondence and answers before us left us in no doubt they felt justified in not co-operating with HMRC managers **in retaliation** for what they perceived as deliberate mishandling of the grievance. Even if that were true, two wrongs do not make a right.

2.44. Ms Blades replied on 29 October noting the claimant had not responded to her questions summarising the questions again **and extending the timescale** in which to answer but if she did not respond by 5 November, Ms Blades would make a decision about her continued employment based on the available information. She said she was arranging for her formal grievance to be investigated separately (267). After sending the letter, she noticed it contained an error in one of the questions so wrote again on 30 October, correcting this. She made clear that as an adjustment she **would be placed on a processing team and not be performing telephony duties**. She also included a further copy of the questions sent 16 October (269).

2.45. Ms Blades received a reply dated 1 November which did not answer the questions (271). The claimant's letters were confrontational and would leave HMRC in no doubt she felt so aggrieved she would never do what she was being asked to.

2.46. Ms Blades felt she needed to make a decision about her ongoing employment, had tried to meet and discuss matters with her without success, considered the claimant had not co-operated at all, constantly challenged the AMP and the wording of standard HMRC letters. Her decision and the reasons for it are recorded in section two of the form she completed, section one having previously been completed by Ms Wilson. It referred to OH advise no adjustments would allow the claimant to return to work at present. The claimant did not appear to accept the business could not sustain her absence indefinitely. Ms Blades concluded her employment should be ended (281).

2.47. She also needed to make a **recommendation** about what percentage award the claimant should receive under the Civil Service Compensation Scheme. There are various criteria to be met to receive compensation, including co-operation by the absent employee. She recommended the claimant should receive 0% (286) as her view, not unreasonably, was she had not co-operated at all, but HR awarded **70%**. Ms Blades notified the claimant of the decisions in a letter dated 13 November. She could appeal the decision to end her employment by writing to David Carr within 10 working days, setting out her grounds of appeal. She could appeal the compensation awarded, by writing to the Civil Service Appeal Board (293).

2.48. When Ms Blades wrote on 13 November the claimant says **clerical work was widely available and formed a large part of the operation. The claimant could have carried out**

clerical work only, such work being required of all employees should telephony work be quiet. That is exactly what Ms Blades had proposed.

2.49. After sending her decision Ms Blades received a letter from the claimant dated 20 November 2018 quoting the extract about telephony from the letter sent on 12 July. Ms Blades considers she had ample opportunity to discuss this concern at the proposed meetings she did not attend and did not raise it until over four months later. Roll out of telephony to processing staff is ongoing and delivered to groups of staff not one to one. **There are staff who are unable to undertake telephony for health reasons. If the claimant had been able to return to work, a decision by her Manager about whether to revisit her telephony training, would only be taken after seeking up to date OH advice, with her consent**. This is corroborated by Mr Moody, see below.

2.50. The letter from the claimant asked about the Civil Service Compensation Scheme (301). Ms Blades replied on 30 November 2018, enclosed guidance relating to the compensation awarded and, as she had disputed the decision, forwarded her letter to the Appeal Officer (314).

2.51. Ms Blades has recently been shown a letter dated 27 November 2018, addressed to Gina Walker (305). Ms Blades says she amended the questions in her letter sent on 16 October to take into account OH advice which was not available when she had written on 12 July. Again, had the claimant attended the meetings she would have explained this to her. Ms Blades rejects the allegation HMRC were attempting to dismiss without guidance from OH. We find it is clear from correspondence they were seeking input from OH via Mr Curry, Ms Wilson and Ms Blades who, on 1 October, did receive Dr O'Reilly's guidance released to HMRC on 17 September 2018, before making her decision. She texted about it on 1 October and referred to it when she wrote on 5 October 2018. She disputes the allegations of harassing her or victimising her. We find she was trying to follow procedures, which involved making contact with and providing information to her.

2.52. **Georgina Walker** started work in October 1984 for an organisation now part of HMRC. She was appointed grievance Decision Maker in early November 2018. HMRC has a detailed grievance procedure (420-438) which encourages employees to try and resolve matters informally first. It did not appear the claimant had attempted to. Managers tried to meet or speak with her unsuccessfully and she made it very difficult for managers to contact her. **We agree** .On 19 November, HMRC wrote telling her a grievance Decision Maker had been appointed (299). On 20 the claimant wrote about the dismissal letter(301) and on 27th appealing the dismissal(305).

2.53. Part of the grievance procedure is that the matter should also pass a threshold known as the grievance test (430-432). If it does, a formal investigation occurs, if not the matter should be dealt with by "management action". Ms Walker reviewed the file and spoke to Mr Curry on 12 November. She did not consider there was evidence of "**bullying",** which is an imprecise term. When EJ Garnon asked, Ms Walker accepted a single act may be the subject matter for a valid grievance under the part of the policy at page 430-2 whereas the provisions on " bullying" are at page 434. The requirement for ***repeated*** *negative actions or practices,* is in the latter part and not what the complaint was really about. On 19 November, Ms Walker spoke to HR to establish what action to take, as no grievance template had been completed. HR thought an informal discussion with the claimant should have occurred back in April 2018. It was agreed Ms Walker should arrange a meeting (298). She wrote that day proposing they meet on 5 December 2018 (299).

2.54. The claimant on 23 November (302) requested they meet at her home address with her husband. Ms Walker knew the house had CCTV externally and internally from the earlier letter to Ms Blades. She spoke to HR on 30 November and wrote, on that day, saying she did not think it

was appropriate to meet at her house but proposed an alternative venue, such as a café near her home. She confirmed she was happy for her partner to be present. If this suggestion was not acceptable she would accept a written representations, based on specific questions which she would to send (310). That letter was sent to the postroom by Ms Walker that day, but was not actually posted until 4 December. **This was the fourth "breakdown of communication".**

2.55. By the beginning of January 2019, Ms Walker still had not received a reply, so contacted HR for advice (342). They suggested she write again which she did on 8 January proposing to meet at a café on 21 January. She stated her initial view was her complaint had not satisfied the grievance test (346). She received a reply dated 10 January saying the claimant **did** respond to her earlier letter, by letter dated 7 December 2018 and enclosed proof of receipt. HMRC's post area who are responsible for receiving post and passing it on is in a different building to her own, the letter of 7 December was signed for but it was not passed to her (318). **This was the fifth "breakdown of communication".** Having read it, she thought it was not very friendly and some comments were threatening and blunt. The parts which demonstrate the claimant's annoyance were in relation to a letter written on 30 November about a meeting on 5 December not being posted until the day before the meeting and her earlier reply going astray. **The claimant's case to us is she was so mentally ill she could not function, meet or discuss by telephone matters she needed to address. With Mr Hamilton's assistance, or perhaps at his instigation, she was able to send confrontational and accusatory letters in abundance.**

2.56. They had the meeting on **Monday** 21 January 2019 **during working hours** , at Café Nero with Mr Hamilton (348A-C) and Iain Robison as a minute taker. Ms Walker explained this was an investigatory interview to establish the facts, showed her the grievance procedure and discussed the grievance test. She explained it did not appear to pass the threshold, as there was no evidence of there being ***repeated negative actions or practices*** by Mr Curry so informal management action would normally have taken place. She asked if the claimant was able to provide any further examples of Mr Curry treating her unfavourably, she did not, could not recall any other issues she had with him and there were no witnesses to what she alleged Mr Curry had said. Based on this (342) Ms Walker explained it did not meet the grievance test and would not be formally investigated (358 -360). While this point by Ms Walker is invalid, her point about the claimant not pursuing her concerns informally is not,as she had two conversations with Mr Curry between 20 February and 3 April, when she expressed no concerns about his earlier behaviour and chances to raise it with Ms Carter and/or Mr Kerr. Not reflected in the minutes is how everyone was behaving during the meeting. Mr Hamilton was forceful, did a lot of the talking and was very forthright in his views. The claimant was hardly speaking and would often give one word answers. Ms Walker had say to Mr Hamilton this was the claimant's meeting and she needed to hear from her. Despite her telling Mr Hamilton not to, he would still interrupt with what he wanted to say.

2.57. Ms Walker received from the claimant dated 25 January 2019 (364) **a long but blunt letter.** On 14 February she sent a short text keeping her in the picture about what was happening. The reply was abrupt and rude (398A). **Three weeks had passed without the claimant hearing anything and she was alleging plots to harm her.** Ms Walker wrote on 22 February (405) with her conclusions. She said a meeting should have been set up to discuss her complaint and apologised this had not occurred. That appeared to stem from a change of management at the time. Ms Bulman had written on 4 June. **It had been her intention to hold an informal management meeting, although that was not specified in her letter**.

2.58. We accept Mr Robinson-Young's point put to Ms Walker as " *the road to hell is paved with good intentions*". HMRC should, once they recognised the possible link between what happened,

allegedly, on 20 February and the absence since then of an employee with a good absence record and no previous history of any mental illness, have handled matters better. However, the claimant's refusal to talk to them understandably meant their prime objectives were to get her to communicate, as required under AMP, get her back to work then address her concerns. HMRC did not see the significance the claimant attached to 20 February or that she was complaining of a breach of the EqA, as opposed to being forced into a role she did not want . HMRC could not be expected to until June at the earliest. The claimant reads Ms Walker's outcome letter as accepting HMRC did not handle the matter correctly and management agreed "lessons will be *learned*". The claimant said to us she was happy with what Ms Walker did. What she always wanted, and expressed in her letters, was for HMRC to admit they were wrong **in everything, including asking her to try telephony**. When they were wrong, they did admit it. The claimant is of the view the failures of Ms Carter, Ms Wilson and Ms Blades, was an orchestrated attempt to "cover up" Mr Curry's wrongdoing and achieve dismissal by a lengthy sustained campaign. **We totally disagree**.

2.59. **David Moody** has worked in the Civil Service since 28 February 1984 now at HMRC. He was appointed as the Appeal Officer after the original one, David Carr, transferred out. Mr Moody wrote to the claimant on 6 December 2018, reminding her of aspects of Ms Blades' letter dated 13 November that she should write to the Appeal Officer with details of her appeal, within 10 working days of the decision. He said having read the case papers, he could not see a written appeal addressed to David Carr and requested she send him the grounds of her appeal, as well as the outcome she was seeking (315), thus waiving the 10 day rule and giving her more time in recognition of the change of appeal manager. He received a reply dated 12 December 2018 saying she had written to David Carr on 23 November 2018 and referred to a second letter sent to him. She enclosed copies of both letters (327,329 and 332). On 21 December he emailed David Carr asking if he had received the letters. He replied the same day he had not (334 and 333). Mr Moody accepted this could be another "postroom" failing. When EJ Garnon put to him they appeared to be a frequent occurrence he humorously replied "*Tell me about it!"* .One point of HMRC's reforms was to reduce the scope for mishaps inherent in a system where paper travels around a huge site.

2.60. When Mr Moody reviewed the claimant's letters it was clear she was appealing the level of compensation, but not clear if she was appealing the dismissal decision. We do not doubt she was appealing, as Ms Blades letter said she should appeal the dismissal to Mr Carr and the compensation decision to the appeal board, but her initial letter was not clear on the grounds for saying Ms Blades had done her stage wrongly. Mr Moody wrote on 2 January 2019, asking her to clarify. If she was, he would arrange an appeal hearing at a mutually convenient time (341). She replied on 8 January she was appealing the dismissal decision(347). He wrote on 17 January, offering some dates and times (354). She replied on 19 January, requesting they meet at her home, with Mr Hamilton present (356). He agreed (356A). He was not uncomfortable with CCTV, but understands why Ms Blades and Mr Walker might be, as do we. Prior to meeting the claimant provided further information in support of the appeal (382A).

2.61. They met on **Monday** 28 January 2019 at **11 am**, with Mr Hamilton present (which shows the earlier demand to Ms Blades to meet at weekend or after 6 pm was not a necessary pre-condition) and Aidan Parker as note taker (383-4). At the outset, Mr Moody says he told Mr Hamilton the claimant herself needed to answer his questions, not him to answer for her, but he realised she was anxious and nervous, so, with her agreement did not stop Mr Hamilton answering on her behalf. The claimant says Mr Moody was told Ms Blades **had not been truthful** with the events leading up to and inclusive of her decision to dismiss. The claimant confirmed she had received Ms Blades' letter dated 30 October 2018, which offered a non-telephony position. Mr

Hamilton referred to the letter of 12 July stating **all staff** would be expected to take on telephony duties. It actually said **all teams** would. Mr Moody explained Ms Blades would originally have been quoting HMRC's high level strategy, but HMRC always made exceptions to this. Mr Moody asked, "*If the 30 October letter did not advise you to refer to the letter and questions of 12 July, would you then view this as a genuine offer?*" Mr Hamiliton replied, "*That could well be a genuine offer but the fact is the offer letter advises Ann to focus on 12 July questions, therefore the offer is not genuine*".

2.62. Mr Moody stated the letter of 30 October superseded it, the offer was genuine and clear, commented the OH report stated the reason for absence was due to a change in duty to telephony work and asked why she had not sought to return. Mr Hamilton answered he felt there had been an attempt to hoodwink her. Mr Moody asked if any reasonable adjustments had been offered, **the claimant replied** she had only been offered a role which would **potentially still include telephony**. When asked by EJ Garnon,Mr Moody agreed **she may have been asked to try again at some future date, but there was no cause for her to think it would have been imposed on her, ever.** He asked her if she had thought of ringing anyone at HMRC to get clarification of what was being offered. She said no. He went on to ask if he now offered a non-telephony role, would she return. **She said no**.

2.63. Mr Moody then gave some replies to EJ Garnon which showed the flaws in the claimant's case. He accepted what Mr Curry had said that his whole team, like others, were not enthusiastic about the change to telephony duties and said if HMRC simply accepted every protestation from staff who said they "could not" cope with it the whole plan would have collapsed. What happened in fact was that some staff who were initially reluctant became, in a fairly short time , positive about telephony and , with better training which did occur, by about May most were competent and happy. He gave an example EJ Garnon had used earlier of a member of staff being truly unable to do telephony if profoundly deaf but could lip read colleagues. Mr Moody said he had two deaf ladies on his teams. One was very competent with IT and gladly embraced special equipment which connected to her hearing aids and enabled her to take calls, which she now did and was proud of so doing. The other was not technically minded and still, nearly four years on, was in a non-telephony role with no downgrade involved. All HMRC's witnesses recognised some staff could not do telephony, one example being someone with a bowel condition requiring urgent unpredictable visits to the toilet, could not be given telephony work. Had the claimant been caused pain in her neck and back despite her chair and footrest by her physical impairment, which as she said was exacerbated by stress, she too would have been permitted not to do inbound calls. As a last resort she may have been re-deployed within HMRC only with her agreement.

2.64. A possibility no-one raised' but we feel we should, is that if employees are required to add skills to their role which they do not have, the requirement of the employer for people with only her skill set diminishes- a redundancy situation. In BBC-v-Farnworth 1998 ICR 1116 an employee had worked as a radio producer. The BBC required a producer with higher skills, and therefore its need for a producer at the employee's level had diminished. Accordingly, she was replaced and made redundant. While everyone agrees the claimant's "fear of the unknown" was genuine, had she returned to work, she objectively had nothing to fear. She said when taking a call, she might not know the answer to the query and have to scroll through the computer in front of her to find it so the call could take longer than the 30 minutes she could comfortably sit without moving around. Mr Moody said the average call length is 7-8 minutes , but if one was complicated she could (i) put the customer on hold (ii) transfer him to someone more senior or (iii) use the accepted arrangement to call him back. We have insufficient evidence her fears, still less her reluctance to attend meetings or communicate orally with HMRC was something arising in consequence of her disability. We see a lady who foresees the worst case scenario as likely to happen, without having discussed her

“fear of the unknown” or given telephony more than a day’s trial. Such pessimism can be a personality trait, or a feature of some mental illnesses. **We have no evidence it is the latter**.

2.65. At the appeal the claimant and Mr Hamilton feel Mr Moody was attempting to convince them Ms Blades had always acted in good faith, which they did not accept , **but we do**. He sent her the notes to sign to confirm she agreed with them and said if she did not sign, it would be deemed she agreed. The claimant signed "***I Disagree***” (397A- C) without saying what parts she disagreed. She accepts notes do not have to be word for word, but says up to 80% of what was discussed was omitted. The notes covered 2 sides of A4 paper, the meeting lasted 20 minutes but she says these notes would not cover 5 minutes. As notes, not a transcript, they are adequate. She feels Mr Moody’s decision was to protect Ms Blades and believes he formed this view prior to arriving. **We disagree. His aim was to get her back to work by looking to the future, not dwelling on the past but, by now, she was making no effort to return, or give a date when she might. She simply wanted various managers to be reprimanded.**

2.66. Mr Moody wrote on 6 February 2019 (386), informing her the appeal against the dismissal decision was unsuccessful. His reasons are contained in the appeal deliberation document (387-9): “*My decision in the main is based on the fact that the jobholder was offered a non-telephony post if she returned to work. OH reports clearly state that this was the reason the jobholder was absent. However, despite the Decision Maker offering a reasonable adjustment of a placement on non-telephony work, the jobholder has declined to return. I again raised this at the appeal hearing but the jobholder said she would not return.”* He looked at whether procedures had been followed correctly, noted Ms Blades made three attempts to meet and, when these were declined, sending written answers to questions was offered. Her decision continuous absence, with no end in sight, was unsustainable was consistent with HMRC’s policies and other similar cases. Offers of reasonable adjustments had been made and OH advice followed. The claimant had been absent since 22 February 2018 with no prospect of a return. OH had stated no adjustments would facilitate a return apart from non-telephony work which was offered and had been declined. With regard to her appeal against the compensation awarded, the percentage was increased to 90%.

2.67. Mr Hamilton believes since the claimant reported Mr Curry to Ms Carter, HMRC managers closed ranks, ignored her distress and hoped she would leave. She signed a 4 year lease on a car on 5 March 2018 as transport for work. She believed HMRC would not tolerate Mr Curry’s behaviour and a return to work would be possible soon but Ms Carter and others took no action. We accept, during 2018 the claimant’s mental state deteriorated. She was prescribed medication increasing in strength. She says she felt let down badly by the managers causing feelings of **anger and distrust**. **We find that caused her to dwell on the past and not consider moving forward**. Mr Hamilton confirms what happened at the dismissal appeal grievance investigation meetings. He says Mr Moody on leaving took her ID card and car pass, then asked, “*If I decide to give you your job back would you take it* ?“ The claimant was anxious and distressed throughout, and unable to answer. Mr Hamilton thought it was odd to ask that question as saving the job is the whole and purpose of the appeal. It was not odd at all to ask again, he was giving her a second chance to answer “Yes”. Her refusal of the job is odd.

<u>3. Relevant Law</u>

3.1. Section 98 of the ERA provides:
“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or if more than one the principal reason) for dismissal

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it
(a) relates to the capability.. of the employee for performing work of the kind he was employed by the employer to do,
(3) In subsection (2) (a) –
*(a)" capability" , in relation to an employee , means his capability assessed by reference to skill, aptitude ,**health or any other physical or mental quality**.*

3.2. Section 98(4) says:
"*Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
(a) depends on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee
(b) shall be determined in accordance with equity and the substantial merits of the case."

3.3. If we accept the reason for dismissal was absence due to ill health, which falls under the heading of "capability", the next question is whether HMRC acted reasonably in treating that as a sufficient reason. Helpful cases are Spencer-v-Paragon Wallpapers and East Lindsay DC-v-Daubney which focus on whether it would have been reasonable to wait longer and do more to help her to return. The next question is whether the claimant was given a fair opportunity to show a real prospect of improvement in her health to enable a return to work. As said in Polkey-v-AE Dayton *in the case of incapacity the employer will not normally act reasonably unless he gives the employee fair warning and **an opportunity** to .. show .. he can do the job…* Iceland Frozen Foods-v-Jones and other cases held we must not substitute our view for that of the employer unless the latter falls outside the band of reasonable responses on either substantive or procedural matters.

3.4. At the heart of the claimant's case is her view the respondent **caused her absence and prevented her return** .In McAdie-v-Royal Bank of Scotland, where the ET found as a fact the Bank was responsible, and culpably so, for the employee's ill-health, Lord Justice Wall said
It seems to us there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to "go the extra mile" in finding alternative employment for such an employee, .
However, … it must be right that the fact an employer has caused the incapacity in question, however culpably, cannot preclude him for ever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work.
it is important to focus … on the statutory question of whether it was reasonable for the Bank "in the circumstances" (which of course include the Bank's responsibility for her illness), to dismiss her for that reason. On ordinary principles, that question falls to be answered by reference to the situation as it was at the date the decision was taken. Thus, the question which the Tribunal should have asked itself was "was it reasonable for the Bank to dismiss Mrs McAdie on 22 December 2004, in the circumstances as they then were, including the fact that their mishandling of the situation had led to her illness?"

3.5. The definition of disability is in section 6 and schedule 1 to the EqA. Section 6 includes

(1) A person (P) has a disability if—
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
(2) A reference to a disabled person is a reference to a person who has a disability.

Section 212 defines "substantial" as "more than minor or trivial"

Schedule 1 includes
(1) The effect of an impairment is long-term if—
(a) it has lasted for at least 12 months,
(b) it is ***likely to last*** *for at least 12 months, or*
(c) it is likely to last for the rest of the life of the person affected.
(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be ***likely*** *to have that effect.*
(2)"Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

3.6. SCA Packaging-v-Boyle 2009 ICR 1056 held the word "likely" in these contexts meant "**could well happen**".Goodwin-v-The Patent Office 1999 IRLR 4 emphasised the definition is concerned not only with things people cannot do but things they can do only with difficulty. Vicary-v-British Telecom made clear the decision as to whether a person is disabled is one for the Tribunal to make and not for any medical expert. Smith-v-Churchills Stairlifts held *"There is no doubt that the test required by section 6(1) is an objective test.*

3.7. In Banaszczyk-v-Booker Ltd 2016 IRLR 273 a worker's back condition meant he was disabled from his job because it required heavy lifting, but the condition was not so severe as to have a substantial adverse effect on normal day-to-day activities. HH Judge David Richardson says: "*It is to my mind essential, if disability law is to be applied correctly, to define the relevant activity of working or professional life broadly; care should be taken before including in the definition the very feature which constitutes a barrier to the disabled individual's participation in that activity*." He added "*The effect of the claimant's long-term physical impairment was that he was significantly slower than others – and significantly slower than he would himself have been but for the impairment – when carrying out the activity of lifting and moving cases.*" Accordingly, the EAT made a declaration the claimant had a disability at the relevant time.

3.8. In J-v-DLA Piper 2010 EAT/0263/09 Underhill P. (as he then was) considered the distinction between 'clinical depression' and reactions to stress or other 'adverse life events' that can produce similar symptoms. His Lordship said the latter are not usually long term. In Richmond Adult Community College-v-McDougall, the Court of Appeal held the determination of disability where there is disputed long term effect should be done by putting oneself back in the position at the time of the alleged discrimination and asking what a properly informed person with medical advice would have predicted at that time. Disability is assessed as if medication was not being taken.

3.9. As for knowledge, Schedule 8 includes:

20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(b) .. an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

3.10. Secretary of State for Work and Pensions-v-Alam said the issues on a s20/21 claim are:
1. Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out (in s 20)? *If the answer to that question is: "no" then there is a second question, namely,*
2. Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out (in s 20)?
If the answer to that second question is: "no", then the section does not impose any duty to make reasonable adjustments.
What an employer does know is called "actual knowledge". What it did not, but ought to have known is called "constructive knowledge".

3.11. Section 15 (2) says*" Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.* City of York Council-v-Grossett 2018 IRLR 746 held the respondent does not have to know the "something" arose in consequence of the disability. A Ltd-v-Z 2019 IRLR 952 gives a helpful summary of the proper approach to the issue of knowledge including

(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between it and its effects which led to the unfavourable treatment, (Grosset)
(2) The employer need not have constructive knowledge of the diagnosis but ***has the burden*** *of proving on balance it was unreasonable for it to be expected to know a person (a) had a physical or mental impairment (b) that impairment had a substantial and long-term effect*
(3) Reasonableness is a question of fact and evaluation but we must be adequately and coherently take into account all relevant factors and not take into account those that are irrelevant.
(4) When assessing constructive knowledge, what an employee says can be of importance because (i) a reaction to life events may fall short of a disability (J-v-DLA Piper) and (ii) without knowing the likely cause of an impairment, it becomes much more difficult to know whether it may well last for more than 12 months, if it has not already

3.12. The EqA requires an **act (or omission)** made unlawful and a **type** of behaviour made unlawful. The acts include dismissal and subjection to detriment which means doing anything which places her at a disadvantage. There are six **types** of unlawful conduct relating to disability (a) direct discrimination (s13); (b) discrimination because of something arising in consequence of disability(s15); (c) Indirect discrimination (s19); (d) Failure to make reasonable adjustments (s 20/21) (e) harassment (s26); (f) victimisation (s 27). The Tribunal may only rule on the complaint made not upon acts not included in the claim Chapman-v-Simon 1994 IRLR 273 or other types of unlawful conduct, Office of National Statistics-v-Ali. The claimant rightly does not allege (a) or (c).

3.13. Section 15 (1) says
(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably ***because of*** *something arising in consequence of B's disability, and*

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

3.14. Pnaiser-v-NHS England 2016 IRLR 170 held the "something" must arising in consequence of the disability, and that "something" must be an operative cause (it does not have to be the sole or main cause) of the unfavourable treatment. I.Force-v-Wood EAT/0167/18 says tribunals should adopt a broad approach when determining whether the 'something' had arisen in the consequence of a disability. The burden of proving, on balance of probability, the " something" arose, at least in

part, in consequence of back pain or depression rests with the claimant. She has to do more than say she felt there was a link or that it is **possible** there was. She must be able to elevate possibility to the standard "more likely than not". In Sheikholeslami-v-University of Edinburgh, the tribunal said the issue was whether the claimant's refusal to return to her existing role was because of her disability or some other reason, such as her having been badly treated in the department. However, the EAT said this was not a binary question - both reasons could have been in play if her disability caused her anxiety, stress and an inability to return to where she perceived the mistreatment and hostility, leading to her refusal.

3.15. The second causative link is whether "the reason why" unfavourable treatment was afforded was the "something". Malicious motive is not a requirement. Unreasonableness **does not** show why acts were done, nor does incompetence (Glasgow City Council-v-Zafar and Quereshi-v-London Borough of Newham). As Sir Patrick Elias said in the EAT in a direct race and sex discrimination case Law Society-v-Bahl "*The reason for this principle is easy to understand. Employers often act unreasonably, as the volume of unfair dismissal cases demonstrates. Indeed, it is the human condition that we all at times act foolishly, inconsiderately, unsympathetically and selfishly and in other ways which we regret with hindsight. It is however a wholly unacceptable leap to conclude whenever the victim of such conduct is black or a woman then it is legitimate to infer that our unreasonable treatment was because the person was black or a woman".*

3.16. Section 136 says
(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court ***could*** *decide, in the absence of any other explanation, a person (A) contravened the provision concerned, the court must hold the contravention occurred.*
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

3.16.1. This so called "reversal of the burden of proof" was explained in Igen-v-Wong. A claimant must prove on balance of probabilities facts from which the tribunal **could** conclude, in the absence of an adequate explanation, the respondent has committed an unlawful act. In Royal Mail Group Ltd-v-Efobi, the Supreme Court held s.136 does not change the requirement on the claimant to prove such facts, on balance of probabilities. Tribunals should then be free to draw, or decline to draw, inferences using their common sense.

3.16.2 In Ladele-v-London Borough of Islington Elias L.J. gave an excellent summary of the current law at paragraph 40 which applies to s15 and victimisation s 27. It includes
(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in Nagarajan v London Regional Transport [1999] ICR 877, 884E – "this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.
(2) If the tribunal is satisfied the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient it is significant in the sense of being more than trivial..
(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test .. set out in Igen v Wong. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:

"Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer."
If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination
(4) The explanation .. does not have to be a reasonable one; it may be the employee has treated the claimant unreasonably. ... So the mere fact the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne Wilkinson pointed out in Zafar v Glasgow City Council [1998] ICR 120 :
"it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances."
Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation… and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself .. but from the failure to provide a non-discriminatory explanation for it. But if the employer shows the reason for the less favourable treatment ***has nothing to do with the prohibited ground,*** *that discharges the burden at the second stage, however unreasonable the treatment.*
(5) ***It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test: see .. Brown v Croydon LBC [2007] ICR 897 paras.28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.***
(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in Anya v University of Oxford [2001] IRLR 377 esp.para.10.

3.16.3. Sedley LJ said in Anya a finding an employer would behave as badly to people of all races should not be based on the hypothetical possibility it might, but on evidence it does. There is evidence not of “bad” behaviour but HMRC having frequent “ postroom” problems.

3.17. The respondent will say dismissal was a proportionate means of achieving its legitimate aim (which used to be called “justification”) the aim being having a workforce able to attend work regularly and perform their job. Pill LJ in Hardys and Hanson-v-Lax said*“The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make* ***its own judgment,*** *upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary****….*** *The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise .. in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action.”* Pill LJ cited Sedley LJ in a sex discrimination case Allonby-v-Accrington and Rossendale College 2002 ICR 1189 who stated:

27. The major error, which by itself vitiates the decision, is that nowhere, either in terms or in substance, did the tribunal seek to weigh the justification against its discriminatory effect.
28. Secondly, the tribunal accepted uncritically the college's reasons ...
29... Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.

3.18. Section 27 of the EqA says
(1) A person (A) victimises another person (B) if A subjects B to a detriment ***because***—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act
(d) making an allegation (whether or not express) A or another person ***has contravened this Act.***
Section 39 (4) then says an employer must not victimise an employee by dismissing her or subjecting her to any other detriment.

3.19. Victimisation occurs where an employer subjects a person to a detriment or dismisses her, **because** that person (a) does a protected act, or (b) the employer believes he has done, or may do, a protected act. Those do not have to be the main cause, only a significant part of it . In Chief Constable of West Yorkshire Police-v-Khan 2001 ICR 1065 Lord Nicholls stated the causation issue is not legal, but factual and again all the points made above about determining the "reason why" apply. We should ask: '*Why did the alleged discriminator act as he did? What,consciously or sub consciously, was his reason"* Where a protected act is preceded, accompanied or followed by behaviour on the part of the employee which is unacceptable to the employer Martins-v-Devonshires Solicitors the EAT upheld a Tribunal's finding an employer did not victimise an employee by dismissing her **because** she made allegations of sex discrimination when number of **related and separable** features of the allegations, not the allegations themselves, were the reason for the dismissal and similar behaviour was likely to occur in future.

3.20. In the remaining two types of discrimination alleged the "reason why" test does not apply. Section 39 (5) imposes the duty to make reasonable adjustments, s 21 makes it a form of discrimination and section 20 explains it imposes 3 requirements.
(*3) The first requirement is a requirement, where a* ***provision, criterion or practice*** *of (the employer) puts a disabled person at a* ***substantial disadvantage*** *in relation to a relevant matter* ***in comparison with persons who are not disabled****, to take* ***such steps as it is reasonable to have to take to avoid the disadvantage****.*

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

Provision, criterion or practice is commonly abbreviated to PCP.

3.21. The duty was explained by Lady Hale in Archibald-v-Fife Council

57. … the Act entails a measure of positive discrimination, in the sense that ***employers are required to take steps to help disabled people which they are not required to take for others****. It is also common ground that employers are only required to take those steps which in all the circumstances it is reasonable for them to have to take.*
58. The control mechanism lies in the fact the employer is only required to take such steps as it is reasonable for them to have to take. ***They are not expected to do the impossible.***

3.22. In Newham Sixth Form College-v-Sanders 2014 EWCA Civ 734 Laws L.J. approved the earlier EAT decision of Environment Agency-v-Rowan 2008 ICR 218 which we must identify (a) the PCP applied by or on behalf of an employer, or (b) the non-disabled comparators (or group where appropriate) and (c) the nature and extent of the substantial disadvantage suffered by the claimant and continued " *In my judgment these three aspects of the case -- nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments -- necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important* ***since an adjustment which is either excessive or inadequate will not be reasonable".***

3.23. What an employer "provides" **should** happen (**provision**) or a standard it says should be met (**criterion**) may differ from what in **practice does** happen or the standards which are in **practice** expected to be met . Any one may trigger the duty.

3.24. Langstaff P said in Nottingham City Transport Ltd-v-Harvey EAT/0032/12 *…"Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability.* In Ishola-v-Transport for London, the Court of Appeal held an employment tribunal was entitled to conclude requiring an employee to return to work without a proper and fair investigation of his grievances was not a PCP, as it was a *'one-off act in the course of dealings with one individual'*. HH Judge Shanks said in Carphone Warehouse-v-Martin EAT/0371/12" *lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer.*

3.25. In Griffiths-v-DWP Elias LJ said *"Thus, so far as reasonable adjustment is concerned, the focus ..is upon the practical result of the measures which can be taken. It .. is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment.* In Spence-v-Intype Libra His Lordship said:*The issue…, is whether the necessary reasonable adjustment has been made; whether it is by luck or judgment is immaterial "* adding the legislation "*envisages . that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work.* ***It is not concerned with the process of determining which steps should be taken.***

3.26. Elias LJ also said in Griffiths *"An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment - say allowing him to work part-time - will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified".* However, if it has done all that is reasonable and

the effects of the disability have not been alleviated there is usually little more needed to justify dismissing. **Reasonableness under s 20 and "proportionate means of achieving a legitimate aim" under s15 both involve striking a balance.**

3.27. Section 26 of the EqA includes:
(1) A person (A) harasses another (B) if—
(a) A ***engages in unwanted conduct related to*** *a relevant protected characteristic, and*
(b) the conduct has the purpose ***or*** *effect of—*
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

Section 212 says if conduct constitutes harassment, it cannot also be a detriment within section 39, so if acts or omissions falling within s15 or s20/21 or s 27 subject an employee to detriment short of dismissal but also constitute harassment, it is section 40, not 39, which is infringed. Before harassment was a separate statutory tort, if a person engaged in conduct towards another which was related to a protected characteristic but did not do so **because of** it , there was no direct discrimination see Porcelli-v-Strathclyde Council**.** Under s 26, the link is now between the protected characteristic **and the conduct not the "reason why" the conduct occurred**

3.28. Harassment can arise regardless of intent and regardless of whether the alleged harasser knows the victim has a particular protected characteristic. Noble-v-Sidhil Ltd EAT 0375/14 held even where an employer had no reason to know an employee was depressed, it could still be liable for harassment by comments he was 'weird', 'a fucking idiot' and 'not well in the head'.In Private Medicine Intermediaries-v-Hodkinson EAT /0134/15 Eady J said "*The ET's reasoning would seem to be limited to a finding this was "unwanted conduct in circumstances of ". I think the Respondent is probably right this might not of itself be sufficient: "in the circumstances of" refers to the context; it is not necessarily the same as "related to." "**Related to**" is. not a test of causation".*

3.29. The Equality and Human Rights Commission's Code of Practice on Employment (EHRC Code) notes unwanted conduct can include a wide range of behaviour. **An omission or failure to act can constitute unwanted conduct as well as positive actions**. In Marcella-v-Herbert T Forrest Ltd ET Case No.2408664/09 failure to provide female toilet facilities on a building site for an employee who was the only woman in a team of skilled bricklayers and in Owens-v-Euro Quality Coatings Ltd ET Case No.1600238/15, failure to remove a picture of a swastika for some weeks, amounted to unwanted conduct. This reflects s 212(2) and (3).

3.30. Unwanted conduct will often arise from a series of events. The EAT in Reed-v-Stedman 1999 IRLR 299 counselled against carving up a case into a series of specific incidents. Instead, it endorsed a cumulative approach quoting from a USA Federal Appeal Court decision: '*The trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes*' (USA-v-Gail Knapp (1992) 955 Federal Reporter). This was approved by the EAT in Driskel-v-Peninsula Business Services Ltd and, although both cases were decided before the EqA, there is no reason not to apply the same approach.

3.31. This case is brought on "purpose" and 'effect'. Richmond Pharmacology-v-Dhaliwal 2009 ICR 724 gave guidance as to how the 'effect' test should be applied. In Pemberton-v-Inwood 2018 ICR 1291, Lord Justice Underhill, President of the EAT in Dhaliwal, revised his guidance. In deciding whether conduct has the effect referred to in s 26(1)(b) each of the claimant's perception; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect must be taken into account. The test has both **subjective and objective** elements. The subjective part involves looking at the effect the conduct had on the claimant bearing in mind different people have different tolerance levels. Conduct that might be shrugged off by one person might be found much more offensive or intimidating by another. The objective part requires the ET to decide if it was reasonable for the conduct to have had that effect on the particular claimant. 'Other circumstances' will usually shed light both on the claimant's perception and on whether it was reasonable for the conduct to have the effect. The EHRC Employment Code notes relevant circumstances can include those of the claimant, such as mental health. It can also include the environment in which the conduct takes place The context is very important. Underhill P said Dhaliwal '*Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question*.'

3.32. There is often need to look at the employer's purpose in assessing reasonable effect, even if the purpose was not to harass. In HM Land Registry-v-Grant 2011 ICR 1390 Elias L.J. said " *It is not importing intent into the concept of effect to say intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable*.'

3.33. Section 123 EqA includes:

(1) Proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of ***the act to which the complaint relates****, or*
(b) ***such other period as the employment tribunal thinks just and equitable.***
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

3.34. "Extending over a period" has been considered in many cases notably Cast-v-Croydon College 1998 IRLR 318 Hendricks-v-Commissioner of Police for the Metropolis 2003 IRLR 96. Matuszowicz-v-Kingston-Upon-Hull Council 2009 IRLR 289 held failure to make reasonable adjustments is an omission, not an act, and time starts to run when an employer says it will not take a step or fails for a longer time than reasonable to do anything positive. Guidance on exercising the "just and equitable", discretion was given in British Coal Corporation-v-Keeble 1997 IRLR 336. On 15 January 2021 in Adedeji-v-University Hospitals Birmingham NHS Foundation Trust Underhill L.J. said Keeble might help 'illuminate' the ET's task by setting out a list of potentially relevant factors, but the list should not be applied as a checklist as this could lead to a mechanistic approach to what is meant to be a very broad general discretion. We say no more about this because having considered everything the claimant alleges, if none of her claims succeed on their merits there is no point prolonging the reasons by considering time issues which cannot change the outcome.

4. CONCLUSIONS

4.1. Starting with unfair dismissal, the **only** reason HMRC dismissed the claimant related to her capability, namely her non-attendance and there being no prospect of a return to work. It took reasonable steps to ascertain the medical position, discuss her health and a return to work. Its efforts were rejected. She was given the opportunity to answer written questions but did not. She had been absent for nearly 9 months and no face to face or telephone meeting happened after 6 March 2018. She was twice in writing offered a non-telephony role to get her back and again at the appeal. She wanted a permanent non-telephony role but had she agreed to such a role temporarily, though she may have been asked later to try telephony for longer than the one day she gave it, a permanent non telephony role may have been offered if she could not cope. Unlike in McAdie, we do not find HMRC were culpably responsible for her ill health but, even if errors in handling the grievance contributed to it, we must decide the fairness of the actual dismissal for incapability, not a potential constructive dismissal which never occurred.

4.2. We find no fault with the dismissal procedure followed. Breakdowns of communication were admitted by HMRC and allowed for in the sense it took many more months than usual for them to come to the point of deciding nothing further she would accept could be done. HMRC could see no light at the end of the tunnel in terms of the prospect of her returning to work. It was clearly within the band of reasonable responses to dismiss in all the circumstances.

4.3. HMRC accepts disability (depression) as of 5 September 2018, and knowledge of the same from receipt of the OH report on 17 September**.** The claimant says her mental impairment arose in February 2018 so she became disabled then. Her Impact Statement does not detail her symptoms between February and September 2018, nor their extent. The OH report in June refers to panic attacks, worsening anxiety and medication. No GP notes have been supplied though she saw the GP each time she obtained a fit note. We doubt they would have helped. The prescription of anti-depressants does not prove a long term depressive illness. When GP's see effects lasting they often refer to a psychiatrist. The claimant was not as far as we were told.

4.4. J-v-DLA Piper distinguished 'clinical depression' and reactions to other 'adverse life events' that can produce similar symptoms, the latter rarely lasting long term. Richmond College-v-McDougall resolved a conflict between two EAT decisions, one of Lindsay P. Latchman-v-Reed Business Information Systems, the other of HH Judge Peter Clark Greenwood-v-British Airways. Latchman held where there is a disputed long term effect disability should be decided by putting oneself back in time in this case to pre September 2018 and asking what a properly informed person with medical advice would have predicted at that time. Greenwood had indicated one could have the benefit of hindsight and look at what had happened since then. The former was right.

4.5.There is now evidence the claimant's mental health was bad before September so she might have been disabled earlier, but not even she can say when. She spoke to Mr Curry on 26 February , leased a car on 5 March and spoke to Mr Curry again on 6th. By about June she was suspicious of other people's motives and not replying to even the kindest of letters from Ms Bulman. She was reading only the words in letters which were a "worst case scenario" as if they were the inevitable consequence. She complained of poor concentration. Having done hundreds of cases about depression, we recognise these as possible symptoms but there is no medical support for this. It is for her to prove more than minor predictably long term adverse effects before 5 September. By then, she had been experiencing depressive symptoms for just over six months which were likely to last six months more or recur and Dr O'Reilly was of the view she was disabled. There is insufficient evidence as to when, if at all, prior to September 2018, her condition progressed from a

reaction to life and work events into a predictable long term impairment. Following McDougall, we cannot find she was disabled earlier.

4.6. Even if she was, HMRC could not reasonably have known that before it saw the OH report in September because the one dated 13 June 2018 did not suggest adverse effects which could well be long-term nor did any fit notes. The claimant believes as soon as the GP report had been sent (in June) someone with authority, competence and understanding of disability should have issued guidance to the managers involved, presumably to treat her as disabled. We disagree, but HMRC were making allowances to the way it operated the AWP to take account of her ill health anyway.

4.7. **Turning to the s20/21 claim,** the claimant's list of PCP's is at (a) to (g) at page 80 and 81. The last, that employees are required to *"attend work / achieve a certain level of attendance at work",* was applied to the claimant .The AMP itself and its requirements for KIT are a PCP. The others alleged are failings and as Mr Rutherford says*" We try to avoid such things happening"* **.** Applying Ishola and Carphone Warehouse-v-Martin no other PCP than those and that **everyone** in the team should give telephony **a try** was applied to the claimant.

4.8. Mr Rutherford says **"***When employees suffer from health issues, HMRC does make reasonable adjustments for them".* We agree. The AMP does include an expectation to attend meetings but in **her** case, telephone contact or written submissions would have been accepted. HMRC extended time for her to co-operate by communicating with them, assured her existing adjustments for her physical disability would remain in place, she could return to a non-telephony role and, if she was ever asked to try it again, there would be more training, no targets and nothing would be imposed on her without her agreement. It is not reasonable to expect any employer to keep an employee in employment indefinitely if they cannot attend work, but the claimant was given much longer to show a prospect of return than usual. In short, in so far as the duty to take such steps as were reasonable to avoid any PCP , physical feature or absence of an auxiliary aid placing her at substantial disadvantage applied, HMRC took all such steps even before knowing she had a mental impairment too . Following Spence, whether by luck or judgment, all reasonable steps were taken. The s 20 claim fails.

4.9. There is factual overlap between the s15, s26 and s27 claims, though the legal tests are very different. She was dismissed because she had ceased coming to work. Being able to monitor and manage the attendance of staff is a legitimate aim, as is having staff that can provide regular and reliable attendance. The AMP of HMRC is a reasonable means of achieving that. She was dealt with fairly under it and did not co-operate so dismissal was **the only option left** and a proportionate means of achieving it. As regards victimisation, while we agree with Mr Wilkinson the claimant has failed to establish the grievance on 3 April (140) is a 'protected act' in itself the contents of that and other letters, with the use of the word 'discriminatory', was sufficient to alert HMRC to the likelihood she may or would do a protected act. The victimisation claim falls at the next hurdle. She was not dismissed subjected to detriment **because** she had or might further complain of discrimination.

4.10. As for "unfavourable" treatment and detriments short of dismissal, we adopt the method approved in paragraph 40 (5) of Ladele and focus on the reasons given by HMRC. We also adopt the broadest approach to what is meant by "something arising in consequence of her disability". The claimant's case is HMRC started to make **threats** about downgrading/dismissing her on 14 and 28 June via Denise Wilson (192-193) and via Karen Blades on 12 July (210-213), on 31 July (220), on 5 October (4 days after she received an OH report 242- 243) and 16 October (255- 257). A letter saying " *if you do, or not do, X consequence Y is likely to follow*", is not a "threat", but a

warning which, if not given in advance, would provide fertile ground to challenge the later imposition of that consequence as unfair. It is hard to see this as unfavourable treatment, but even if it is, in our view, it is a proportionate means of achieving the legitimate aim of getting the claimant to see the importance to her of engaging with her managers to save her job She was not subjected to this, or any detriment, **because** she had or might further complain of discrimination.

4.11. The claimant also says her grievance and 6 reminders were "***ignored"*** by Linda Carter on 3 April; Denise Wilson on 21 June and Ms Blades herself on 18 July, 16 and 29 August, 25 October and 1 November. Ms Blades gave an assurance on 24 August the complaint was being taken seriously but did not forward the Grievance Policy and Procedure until 16 October. The policies in question are easily accessible electronically by people at work, but not from home. However, if the claimant had ever asked for paper copies they would have been sent. Ms Blades requested the claimant submit a grievance in accordance with the procedure and the claimant accepts she did not because, in her view, HMRC had the relevant information and reminders. HMRC then accepted the original and appointed a Grievance Investigator only after dismissal notification. Our findings of fact explain why all this happened. Her grievance was not initially recognised, when it was she was asked to collate her complaints to ensure none were missed. Again , it is hard to see this as unfavourable treatment, but even if it is , in our view, it is a proportionate means of achieving the legitimate aim of getting the claimant's complaints dealt with properly . Nothing of this was done **because** she had or might further complain of discrimination.

4.12. The claimant refutes HMRC's suggestion she refused to participate in verbal communication saying it was used **initially**. Ms Carter called on 20 and 21 March. Les Kerr "bombarded" her with calls despite being aware of her mental health and she was on sick leave because of this. As a result, she "politely requested in writing" on 3 April all communication be in writing. HMRC did not object to this method of communication at the time. Mr Kerr did not "bombard" her, in fact no-one did more than try to keep in touch. This was not unfavourable treatment, it was for her own good that HMRC find out what they could do to help her back to work and verbal communication was a better means of her doing this than the confrontational letters she sent, as shown by the fact her grievance meeting and even the appeal meeting got her further than any letters did.

4.13. The claimant says Ms Blades, twice, on 12 and 31 July, attempted to decide the case though she had not received the OH report. The claimant instructed a solicitor to send a letter to Ms Blades on 13 July saying the outcome of such a meeting would clearly be prejudged without the OH report. The meeting was then deferred. Ms Blades gave an instruction for a meeting on 23 July during which the claimant could be dismissed again without an OH report. On 18 July the claimant wrote expressing concerns at HMRC's failure to address her grievance (216). Ms Blades then attempted to hold a second meeting on 10 August, again without a OH report. She was sent a solicitor's letter on 6 August 2018 saying without the OH report it would be difficult to proceed in a constructive and informed way. This meeting was deferred. This was not unfavourable treatment either. There is no reason not to have a meeting before the OH report, provided no decision is made without one and the claimant having a chance to comment on it, which is exactly what Ms Blades proposed. The claimant's sick pay was about to drop to half pay, there had been delays and Ms Blades was trying to get the claimant back to work as soon as possible for her sake as well as HMRC. It is simply not the case anyone at HMRC tried to, or did, proceed without OH advice.

4.14. The claimant says when Ms Blades sent a text message asking the claimant make arrangements for a meeting, she did without delay asking for Mr Hamilton, to be in a supportive role as per the OH recommendation. Ms Blades did not reply. The claimant fails to mention the conditions she demanded as to time and place of the meeting. She says she did not reply with

written representations to queries raised on the advice of ACAS because she understood these were to be discussed at a face to face meeting Ms Blades ***failed to attend***. We do not accept this either. We agree with Ms Blades it unreasonable for the claimant first to say she was unable to meet because Mr Hamilton was unavailable then text with less than 24 hours' notice to say she could go ahead. After the claimant knew there would be no face to face meeting, she still did not reply to the questions. She says in the October letter, Ms Blades made reference to her of 12 July letter in which she stated, "*All teams will be expected to do telephony at some point*". The claimant believes this was attempted trickery and the 12 July letter would have been used if she had returned on that basis, the adjustments for her physical impairment would not work and her mental impairment would not improve. We cannot find her interpretation was because of something arising in consequence of her disability because Mr Hamilton wrote her letters, though she approved them, and it appears to be his view which the letters convey. To the limited extent Ms Blades lost patience it was entirely due to her refusal to co-operate with the AWP and unsupportable allegations that errors were not errors and breakdowns of communication but a deliberate campaign to get rid of her. Nothing could be further from the truth. She was not subjected to this or any detriment **because** she had or might further complain of discrimination.

4.15.The claimant says on 29 October Ms Blades decided to make her decision on available information while not dealing with the claimant's complaint. The claimant authorised the letter on 16 August expressing concern her grievance was being ignored and regarding their errors arranging an OH appointment (230) which did not take place until 24 August because she was sent to the wrong venue. **The claimant says HMRC could not wait to get rid of her. None of this can reasonably be read into the documents we have seen.**

4.16. As for harassment, the claimant's account of what was said by Mr Curry on 20 February 2018 is inconsistent with the supportive nature of the relationship between him and her. She did not raise any complaint until 3 April despite having had KIT discussions in between. The alleged comment was not 'related' to disability. We have found her version is not a lie but an over-sensitive mis-interpretation of a comment which may have mentioned others leaving but did not suggest she should even if she could not do telephony. The claimant said herself of the letters she was sent mentioning the possibility of dismissal or downgrade, those were the only words which registered with her at the time due to her poor mental state at the time which included not only fears about the changes at work but a bereavement. The letters of 12 and 31 July and 5 October do not state she **was to be** dismissed or downgraded.

4.17. We find no-one at HMRC had the purpose of harassing her at any time. **The issue for us is whether the claimant was reasonable in her "take" on these exchanges. We find she was not.** We accept she passes the subjective test of feeling she was in a hostile and intimidating environment but falls far short of the objective test it was reasonable for her to perceive she was. Failure to do things may be harassment eg deal with the grievance promptly just as "burying" it would be victimisation. However, as soon as she intimated she wished it to be formally treated as a grievance, it was and she has no complaint about Ms Walker .In any event, that HMRC did not deal with the grievance as well as it might, is not "related to" disability. The claimant in our judgment was not reasonable in viewing any act or omission of HMRC as having any effect referred to in s26 . This is so of all specific acts she mentions eg. informing her a decision was going to be made on her continued employment ,mentioning dismissal or downgrade, failing to meet with her on 17 October or at her home where she was recording on CCTV.

4.18. Although we accept there are grounds to criticise HMRC's handling of letters, it is not a reasonable inference they did so **because** of anything arising in consequence of her disability or

because the claimant had made a complaint. There were errors of interpretation and judgment by the people who read the letters which became a constant stream of accusations of dishonesty and improper motivation by her managers rather than discrimination. Mr Robinson-Young submits any misperception by the claimant arose in consequence of her poor mental health. Not only is there no medical evidence to support that, but Mr Hamilton was also reading the same as she was and writing the letters. They both gave evidence their reason for writing and acting as they did was because of how they felt about HMRC's handling of the grievance and breakdowns of communication. The claimant is a long serving civil servant who must have understood how HMRC works, its administrative failings and how managers who are busy will not always receive and be able to deal with written communications the day after they are sent.

4.19. We think we have considered all the ways in which the facts could be fitted into the legal definitions of s15, s26 and s27. None of them work. Under section 20/21 for every PCP applied by or on behalf of HMRC which put the claimant at a more than trivial disadvantage in comparison with persons who are not disabled all reasonable steps were taken to reduce that disadvantage. Under section 15 no acts or omissions of HMRC which have been shown to be, even in part because of something arising in consequence of the claimant's disability were not a proportionate means of achieving a legitimate aim. Under section 27 HMRC did not subject the claimant to any detriment because she had done a protected act or it believed she had or might. Under section 26 no unwanted conduct by HMRC which was related to disability, had the purpose or reasonably had the effect proscribed by section 26

4.22. Sadly, if the claimant had had a union representative or work colleague who understood what the reforms were and why they were important, the misunderstandings causing conflict between her and HMRC could have been cut through easily. Mr Hamilton as her husband could see the effects on her and he and she reacted by blaming HMRC for everything. The loss of objectivity at the time could not be corrected by anything her solicitor or Counsel did later.

EMPLOYMENT JUDGE T M GARNON

AUTHORISED BY THE EMPLOYMENT JUDGE ON 1 NOVEMBER 2021