EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105790/2016

Held in Glasgow on 1, 2, 3, 4 and 9 October and 5 and 28 November 2018 (Members' Meetings).

Employment Judge: Mrs M Kearns
Members: Mrs J Ward
Mr AB Grant

Mrs L Runcie — **Claimant**
Represented by:
Mr R Byrom
Solicitor

IBM United Kingdom Limited — **Respondent**
Represented by:
Mr A Hardman
Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal was that:-

(1) the claims under sections 13, 20 and 21 Equality Act 2010 are well founded; The respondent is ordered to pay to the claimant compensation including interest amounting to: **Twenty-Five Thousand, Nine Hundred and Eighteen Pounds (£25,918);**

(2) the claim under section 15 Equality Act is dismissed;

(3) the respondent unfairly dismissed the claimant and is ordered to pay to her additional compensation for unfair dismissal amounting to **Five Hundred Pounds (£500).**

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The Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996 do not apply to this award.

REASONS

1. The claimant who is aged 51 years was employed by the respondent as a senior staff subject matter expert until her dismissal on 5 August 2016. On 30 December 2016, having complied with the early conciliation requirements, she presented an application to the Employment Tribunal in which she claimed direct disability discrimination, discrimination arising from disability, discrimination by breach of a duty to make reasonable adjustments and unfair dismissal.

Issues

2. The respondent accepted that the claimant was at all relevant times a disabled person as defined by section 6 of the Equality Act 2010 ("EqA") by reason of fibromyalgia. The parties had agreed a list of issues for the Tribunal in the following terms:-

"Jurisdiction

(i) Pursuant to the time limits set out at section 123(1) (a) Equality Act 2010, does the Tribunal have jurisdiction to consider the Claimant's complaints brought under the provisions of the Equality Act 201 0?

Direct Disability Discrimination

(ii) Pursuant to section 39(2) (c) Equality Act 2010, the Claimant relies upon her dismissal (on 5 August 2016) as an act of direct disability discrimination.

(Hi) Does the matter set out above at paragraph (ii) amount to a detriment within the meaning of section 13(1) or 39(2)(d) Equality Act 2010? The Respondent admits that it dismissed the Claimant on 5 August 2016 within the meaning of section 39(2)(c).

(iv) By dismissing the claimant and/or subjecting her to the above alleged detriment, did the respondent thereby treat the claimant less favourably than a comparator?

(v) Who was the claimant's comparator?

(vi) Was the claimant subjected to such less favourable treatment because of the claimant's protected characteristic of disability?

Discrimination arising from disability

(vii) Did the respondent treat the claimant unfavourably by:

a. Placing her in a pool of one;

b. Dismissing her?

(viii) What unfavourable treatment did the claimant suffer as a consequence of her disability?

(ix) Can the respondent show that the unfavourable treatment is a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

(x) Was the respondent under a duty to make reasonable adjustments?

(xi) If the respondent was under a duty to make reasonable adjustments, was there a provision criterion or practice ("PCP") which put the claimant to a substantial disadvantage because of her disability?

(xii) Did the PCP put the claimant to a substantial disadvantage because of her disability?

(xiii) Were the changes requested by the claimant reasonable?

Unfair dismissal

(xiv) Was there a redundancy situation within the meaning of section 139 Employment Rights Act 1996?

(xv) What was the principal reason for the claimant's dismissal? The respondent contends that the claimant's dismissal was by reason of:

(i) Redundancy within the meaning of section 98(2)(c); or

pp *A restructuring amounting to some other substantial reason within the meaning of section 98(1) ERA 1996 (a "SOSR").*

(xvi) Was *the decision fair or unfair within the meaning of section 98(4) ERA 1996? In particular, did the respondent act reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissal, having regard to equity and the substantial merits of the case?*

(xvii) *What were the procedural defects in the claimant's dismissal?"*

Evidence

3. The parties lodged a joint bundle of documents ("J") and referred to them by page number. The claimant gave evidence on her own behalf and called her husband Gregor Runcie. The respondent called the following witnesses: David Baillie, their Global Sales Out Reporting Manager and the claimant's 'Blue Pages' manager; Susan Bruce, Director, Business Partner Experience/Relationship, Global Channel Management and Transformation; Carter Dodd, Global Business Partner Disbursement and Sales Reporting Leader, the claimant's task manager; Susan Zante, now Global Business Partner Q2C Transformation Project Lead, who was the claimant's 'Blue Pages' manager prior to Mr Baillie; and Carol Bruce, Director, Q2C UKI Market and Client Success Leader who investigated the claimant's grievance.

Findings in Fact

4. The following facts were admitted or found to be proved:-

5. The respondent is IBM UK Limited, the UK subsidiary of International Business Machines Corporation, a multi-national information technology company based in the USA. The claimant joined the respondent in 1996 as a PRG & Inventory Planner, having previously worked for them as an intern. From around 1999 the claimant worked in 'Business Partner Sales Reporting' ("BPSR"). The claimant worked at the respondent's facility in Greenock at all relevant times. She progressed from a team lead to a project lead. She held various positions within the BPSR team including that of manager.

6. On 28 January 2011 the claimant had a hysterectomy. From that time her health began to deteriorate. By 2014 her symptoms included poor sleep satiety, easy fatigue, ringing ears, painful veins, spasm in the jaw, buzzing in the spine, discomfort in the throat and profound sensitivity to various substances and, on occasion, difficulty walking and talking. The symptoms were exacerbated by stress. When she felt under pressure, for example, when taking the lead in a conference call, she would sometimes have difficulty speaking or recalling something. She found this difficult and upsetting and conference calls became a particular trigger for it.

7. The claimant's job title at all relevant times was 'Sales Out Reporting Subject Matter Expert'. The title reflected her knowledge and experience rather than referring to a specific role. Part of the role the claimant undertook latterly was to review sales out reporting processes, that is, measures of sales to customers by the respondent's business partners/distributors. Sales out reporting involves the collection and analysis of this data in order to determine problem areas and drive action plans to resolve any issues identified. From around March 2015 the claimant carried out these functions alongside her colleague Kirsten Shaw-Aspin. The claimant was responsible for Latin America and Ms Shaw-Aspin was responsible for Europe. The claimant and Ms Shaw-Aspin were part of 'Operations' but were required to support the 'Transformation' team's sales reporting initiatives at regular meetings and workshops. Although the claimant worked on different projects, her job title did not change. The claimant was involved with different projects and geographical regions. In 2013 the claimant worked on the respondent's worldwide Blue Harmony project which was being tested in Germany. This was a major project within the respondent which involved the integration of enterprise systems from the point of ordering through to delivery using software. The claimant worked alongside the project leader to introduce the process change.

8. So far as relevant for the purposes of this case the respondent had two value streams of server products; HVEC (High Volume Easily Configured) x86 and

CHW (Configured Hardware). These involved two different management systems and products and required different expertise. There were different methodologies and rules about how business partners reported and measured in relation to the two systems. HVEC was the lower end product, involving smaller units that could be easily manufactured at high volume. The HVEC units were lower cost and aimed at a different market than CHW. For SOR ("sales out reporting") purposes HVEC products were processed through a system called Worldwide Business Partner Sales Monitoring ("WWBPSM"). CHW is a high-end bespoke product with units specially configured to a customer's requirements. CHW units are much higher cost and tend to be ordered in lower volume than HVEC units. CHW SOR data is processed through a system called Sales Out Reporting Tool ("SORT"). The claimant was well versed in both systems. At the time of the divestiture to Lenovo referred to below she was working principally on HVEC products. However, for the two years preceding that she had worked solely on CHW. In 2015 and 2016 part of her work involved CHW and the ongoing requirement for integration of software and analytics. She was also working on ERP (Enterprise Resource Planning system), Cloud and software.

9. In 2014 the respondent largely divested the HVEC part of its business to Lenovo. Prior to her work on Blue Harmony the claimant had been working principally in the area of the respondent's business which was transferred to Lenovo. Before the divestiture she received an email indicating that she would transfer. However, this was later retracted, and she was the only person from the divested area to remain with the respondent. She was told by her manager Jennifer Caitens at the time that the email saying she would transfer had been sent by mistake and that she was being retained by the respondent for her extensive BPDM expertise. This did not surprise the claimant because she was the only person in the CHW area with knowledge of the Blue Harmony/SAP solution for Germany.

10. The respondent has two different management structures for each employee. One structure involves the matrix management of day to day work tasks. There is a separate line of management in the employee's home country for welfare and remuneration purposes. This second line of management is known as 'Blue

Pages'. Following the divestiture and with effect from 25 November 2014, Susan Bruce, Director of Business Partner Experience/Relationship became the claimant's ultimate task line manager. For a few weeks Ms Bruce was also the claimant's direct task manager. However, from about December 2014, Carter Dodd was interposed to become her direct task manager. Mr Dodd in turn reported to Susan Bruce. Both Mr Dodd and Ms Bruce were based in the USA. Prior to the divestiture to Lenovo the claimant's task manager and Blue Pages manager had been Jennifer Caitens. Ms Caitens transferred to Lenovo on 24 November 2014 at which point Susan Zante took over as the claimant's Blue Pages manager.

11. The respondent carries out annual performance assessments on staff at the end of each year. These are called PBC (Personal Business Commitment) reviews. By the end of 2014 the claimant had worked for the respondent successfully for nearly two decades. Her PBC reviews up to and including 2013 had always been good, despite her health difficulties from 2011. There is an interim assessment around the mid-point of each year. The rationale for the interim assessment is that there should be no surprises and staff should be aware if there are any issues they need to work on. In mid-2014 the claimant's Blue Pages manager, Jennifer Caitens carried out her interim review. Ms Caitens did not raise with the claimant at that review any issues or concerns about her performance. The claimant discussed her health with Ms Caitens during the review to check whether the respondent felt that her health had impacted her performance and was reassured by Ms Caitens that this was not the case. The claimant asked Ms Caitens to let her know if the position changed and she would then go down the formal Occupational Health route. Ms Caitens told the claimant she should not worry about it and that the respondent recognised what she brought to them.

12. From around 2014 when the claimant was feeling under pressure, she would sometimes experience difficulty with words or recalling something on the spot. She found the need to do it but being watched and struggling very stressful. Sometimes it would happen, and she could not come up with the answers and people could not understand why as she was known for being competent and

articulate. Being the lead on conference calls was a particular trigger for this happening. Jennifer Caitens was both the claimant's task and Blue Pages manager and the claimant made Ms Caitens aware whenever she was having difficulty communicating if she was supposed to be leading a conference call. Jennifer Caitens sat next to the claimant and if this happened, Ms Caitens would sometimes take the call. Working from home was not really permitted at Greenock even before the divestiture to Lenovo as the site director did not like it. However, Jennifer Caitens allowed the claimant to work from home when she needed to because of her medical issues. This was, however, an informal arrangement, which was not organised through OH or recorded in a Reasonable Adjustments Agreement Document ("RAAD").

13. On 13 November 2014, the claimant experienced a severe jaw spasm which lasted until around 24 November. During that time the claimant was initially unable to talk or eat as she could not open her mouth more than 1.5 to 2cm and was in significant pain (J347). Ms Caitens allowed the claimant to work from home for that time and recognised that she was unable to lead conference calls. Ms Zante and David Baillie were also made aware of the claimant's predicament. On 24 November 2014 Ms Caitens transferred to Lenovo and accordingly left the respondent's employment. As from 25 November 2014 Ms Bruce took over as the claimant's task manager and Ms Zante took over as her Blue Pages manager. As part of the handover Ms Caitens informed Ms Bruce, Mr Dodd and Ms Zante about the claimant's health problems. Ms Caitens did not raise with them any performance issues relating to the claimant.

14. On 25 November 2014 Susan Bruce began task managing the claimant. Ms Bruce visited Greenock initially and thereafter managed the claimant from the USA. Ms Bruce's main remit was the Operations leg of the overarching Sales Transaction Support ("STS") team. Transformation was a different leg within STS. When she took over the claimant's management Ms Bruce set her the principal objective of fixing an operational issue in making payments to the respondent's business partners in the Latin American region, tasking her with various projects as part of an in-house team. The project was known as "SOR LA" ('Sales Out

Reporting, Latin America'). This was an important task. It was also a task upon which others had failed to deliver. On this project the claimant worked alongside Meredith Harp whose team was a transformation arm in the organisational structure. Ms Harp was involved with a project to centralise operations which involved transferring the support function from Hortolandia in Brazil to Greenock and moving towards data analytics rather than data quality checks. Thus, part of the claimant's work linked to the Project Transformation Team. However, the claimant did not work for transformations, she worked for operations. There were weekly meetings for the team working on this to discuss progress in the project, workload, strategies etc. The claimant found herself excluded from these meetings.

15. Not long after the divestiture to Lenovo, in late 2014 Carter Dodd took over as the claimant's direct task line manager. At this stage, the claimant was the only member of her team who had not divested to Lenovo and she was accordingly unsure what her role would be going forward. At her initial meeting with Mr Dodd the claimant asked about strategy, business requirements of her and what she would be doing.

16. In early 2015 the claimant was again having difficulty with conference calls because of muscle spasms in her jaw. She took a period of sick absence from 8 to 16 January 2015 because she was unable to talk and could not commit to conference calls. When she returned from sick leave the claimant had a discussion with David Baillie (who was, at this stage still a contractor rather than an employee). He said to her "By *the way, there's a new site director and you can't work from home".* Jennifer Caitens had allowed the claimant to work flexibly from home when she was the claimant's Blue Pages manager and the claimant had been relying on the ability to work from home in order to keep going. When Mr Baillie indicated to her that the new site manager would no longer allow this, she spoke to Susan Zante about contacting Occupational Health.

17. On 22 January 2015 the claimant received her PBC end of year assessment for 2014 from Mr Dodd (J75). The rating given was *"PBC 3: among the lowest*

contributors this year, needs to improve" (J77). As part of the justification for this Mr Dodd had written: *"There were several occasions where Lynn asked for guidance on what she should focus on in her role. At her level and job role, the expectation was that she would lead projects and take the initiative to drive decisions and influence other team members. Lynn has had the autonomy to do this for the last few years. I would not expect her to need a manager to assign work".* He had also said that her contribution in 'leading meetings and driving issues' was lower than that of others. The review was signed by Mr Dodd and Susan Bruce as reviewer. Under the respondent's procedures it is mandatory for a manager to set performance improvement objectives for any employee who has received either a PBC3 or PBC4 rating. In the comments section the claimant wrote: *"This rating is not only disappointing but also a surprise. At no time in the last year was I made aware that my performance had fallen to this level, no interim PBC nor informal discussion .....I do accept that recent absence due to health issues has impacted my performance in recent months and unfortunately I do not have any control over these events. However, I don't believe the PBC process has been followed appropriately in this case as I would have expected (at least as part of good managerial practice) to have been advised of the situation and given the opportunity to change this perception or seek HR/Occupational Health support if this was not possible. "*

18. In assigning the claimant an unsatisfactory 3 rating for her 2014 PBC the respondent did not follow its normal procedure. A PBC3 rating should not have been given out of the blue as a final rating because such a rating leads on to a performance improvement plan ("PIP"). If the claimant had been at risk of receiving a 3 final rating there would have been an indication of that given to her at the interim PBC in June. The claimant had never received a 3 before even with her health issues. The respondent's normal procedure requires that any issues which may lead to a PBC rating of 3 or 4 would be documented and fed back to the employee well in advance of such a rating being given in order to give the employee an opportunity to correct any issues. That procedure was not followed in this case and the claimant was given the rating out of the blue without any documentary foundation.

19. Shortly after receipt of the PBC3 the claimant called the respondent's Occupational Health provider ("OH") and asked if she could self-refer to them. She said that she had previously asked her managers for help. She was told that the referral must come from a manager. The claimant then sent an email (dated 22 January 2015) to OH requesting guidance in the following terms: *"I'm looking for guidance please. I've recently had health issues which have affected my work and now my performance and I'd like to understand what support, if any, is available to help me."* (J81). The claimant received a reply from OH the following day advising that her first action should be to raise her issues/concerns with her manager. On 26 January 201 5 the claimant forwarded her email exchange with OH to Susan Zante under cover of the following message: *"Susan, Jennifer and I discussed this many times and I asked her to let me know if there were any performance/employment issues and I would formalise the situation with HR. It is extremely upsetting for me to be in a situation where I cannot contribute as I would like, and my performance to be reviewed in such a manner without recognition of the ongoing issues I face. It is clear that this situation cannot continue and now is an appropriate time to ask for HR support, whilst on-going medical tests continue."* The claimant told Susan Zante that the PBC did not seem right as a normal process would be for a 3 rating to be pulled up at the interim PBC stage. This would then allow for improvement and be documented up to the final PBC. Ms Zante told the claimant she understood her concerns. The claimant also arranged a call with Susan Bruce about it around the same date. During the call Ms Bruce told the claimant she fully understood her concerns but that she was not to worry about it. She reassured the claimant that although there would be a performance improvement plan, it was almost a 'tick box exercise' that would last around 4 to 6 weeks. She said she was confident all would be well and that they would work through it together. Susan Bruce was aware of the claimant's health problems and their effect on her ability to lead conference calls from late 2014.

20. In or about February 2015 the claimant consulted Professor David Marshall, Consultant Rheumatologist, who raised the possibility that the symptoms she had been suffering might fulfil the criteria for fibromyalgia (J82).

21. As a result of the PBC3 rating for 2014 Ms Bruce and Mr Dodd placed the claimant on a performance improvement plan ("PIP") from 1 March 2015. Normally, a PIP lasts four weeks. The claimant's PIP duration was nearly nine weeks. The end date of the plan was set as 30 April 2015. The reviewing manager was Carter Dodd. A PIP document was created (J84). The respondent's pro forma PIP document contains guidance for managers which states so far as relevant:

"The purpose of the PIP document is to record:

- *"the areas of an employee's performance which need to improve*
- *the level of improvement required*
- *the relevant time frames for improvement*
- *the employee's progress against the objectives*
- *the outcome of the PIP (pass/fail). "*

22. The PIP objectives were set by Mr Dodd. The claimant challenged some of them as not within her role to deliver. For example, one objective entailed process improvements in China and certain transformation projects. These were part of Meredith Harp's remit and not the claimant's. When the claimant went back to Mr Dodd he removed these objectives, but this was then put down as a reasonable adjustment by the respondent. The PIP process required that the claimant be reviewed against the PIP objectives at least fortnightly. Mr Dodd told the claimant she was doing well at his PIP reviews but in contravention of the PIP procedure he did not keep written review records.

23. On 12 March 2015 the claimant asked Susan Zante In an email (J89J: *"regarding occupational health involvement what do l/we need to do".* Ms Zante replied: *"you did email the occ. Health team a few weeks ago didn't you? Just looking back for*

your email". The claimant said in response that she needed to understand the best way forward and that there had been not much to support her if she took unwell again. She went on: *"obviously hoping not to but it is a constant fear at the moment that is not helpful."* Ms Zante replied: *"I think we take each week as it comes. If you get specific news from doctor/consultant that you want to share/discuss then let's discuss it if and when that happens."* Later in the same conversation the claimant said: *"No matter the formal diagnosis I have medical issues that have and are likely to affect my performance at some point... and the current PIP process to be honest is an added stress that isn't helpful. So I'd like to understand what I need to do to make IBM aware so that this current situation doesn't reoccur".* Ms Zante referred to the OH information and picked out the sections on 'health and performance' and 'medical case management'. She said that *"in other words, we can move to requesting an OH referral now".* She suggested they both read through the sections and put a meeting in the diary to go through it together. She referred the claimant to the section on 'making a referral' (J92). They met on 16 March and read through the OH pages together. The claimant had another meeting with Susan Zante on 15 April 2015. At that meeting the claimant informed Ms Zante that she had been given a diagnosis of fibromyalgia and wanted a referral to OH. Ms Zante had had no training in dealing with disability related issues and was unsure how or when to do an OH referral.

24. Meanwhile, on the morning of 16 April 2015, Mr Dodd held a PIP review with the claimant. The claimant's main feedback at that review was that delays caused by other teams had had a knock-on effect on her performance, and that time management issues were being caused by the fact that she had responsibility for multiple projects. Mr Dodd's response was to re-emphasise her priorities and to offer assistance in the areas where she had identified issues impacting on her progress, such as the need for other teams to work faster and for extra resource on low priority projects to enable her to concentrate on high priority matters.

25. The same day at 12:38pm the claimant emailed Susan Zante and Carter Dodd (copied to David Baillie, who was to take over from Susan Zante as the claimant's Blue Pages manager in May 2015) in the following terms (J94):

", . . I've been diagnosed with Fibromyalgia. Apparently, there is a neurological subset of this condition which presents with similar symptoms & neurological signs. At this stage we are unsure if Fibromyalgia is an addition to or instead of diagnosis, but I have been prescribed medication to hopefully ease some of the symptoms and will be monitored closely over the next couple of months.

Although not a progressive condition it is unfortunately complex to manage, as each person can be affected differently and to varying levels of disability. The biggest problem I have at the moment is constant insomnia and widespread pain, and even on a good day it's a struggle quite frankly. The condition causes a huge array of symptoms and in my case it causes blood pressure and heart irregularities which I cannot control.

The key to managing the condition is education and understanding what triggers a worsening or easing of symptoms for me. Stress is clearly a driver, as is hormonal fluctuations (docs believe this was triggered by my hysterectomy 3 yrs ago). There is also an autoimmune element which means it will flare when there are other viruses going round. They have also discussed the possibility that some of the symptoms can be linked to structural issues with my spine (narrowing of cervical arteries, curvature & cyst) - but these will be explored later.

Unfortunately there is no magic pill available to fix it completely but I remain positive that if I can address the sleep issue it will be a huge step forward. I will start the medication tonight and have been advised not to drive and take it easy for a few days as it has a significant sedative effect. I had thought about delaying the start of the meds until after the workshop but to be honest I cannot survive any longer on my current level of sleep - it is seriously affecting my ability to work (and home life).

I have shared this with David in the interests of ensuring we have my responsibiiities covered should it be necessary.

*I would appreciate your support in the coming days/weeks. **

26. Later, on 16 April 2015 at 1:33pm Mr Dodd sent the claimant an email with his one and only written update about her PIP review (J93). In that email he stated:

"Here is my update based on our discussion today.

You provided status of where we are on the SOR LA process improvements as weII as the plan for addressing Maria Caulderon's questions. We *reviewed the status of your resource model support for the upcoming PE Session and we discussed the work related to identifying CAMSS related revenue (still in its infancy).*

The actions I see coming out of this.

1) I re-emphasized that closing the LA SOR process issues and managing the closure of the 2014 revenue is the number one priority. I need you to have a concrete plan of what the 2014 revenue universe is (to the best of your ability), what actions need to be taken to close it and the ability to communicate the plan to our executive team and the other stake holders.

2) I need you to define the CAMSS revenue SOR plan, in conjunction with Andrew Brotherton. We need that project defined and communicated to STS and channel sales teams.

3) You identified that despite progress with the BTIT team, we still need more aggressive actions from them on the Business ENT x fix and the Pre Bill IT fix. I asked you to put together the list of what you need so

that I can address it with Jim Varian and team to increase the velocity on these action items.

4) You also identified that the multiple projects that you are working are making time management an issue. I offered to get you help in defining the resource models for the PE Session if needed so that you can focus on LA SOR.

Please let me know if there is anything I missed or miss represented. "

27. The next day (17 April 2015) Mr Dodd asked the claimant to engage OH to get a management referral done "so *that we can understand your work limitations".* This was followed up by Ms Zante, who sent the claimant a referral form and asked her to arrange for them to meet and complete it. The claimant advised Mr Dodd and David Baillie that she was struggling with her new medication which had made her sleep problems worse. On 23 April 2015 Mr Dodd and Ms Zante extended the PIP end date to 1 June 2015. On 24 April 2015 the claimant went off sick due to the side effects of her new medication. She kept Ms Zante and Mr Dodd updated by email and reported that these effects included insomnia, constant nausea, headache and drowsiness. She remained off until 1 May 2015.

28. On 5 May the claimant sent an email to Mr Dodd and Ms Zante with the subject heading: *"Employee information regarding a referral to OH"* asking: *"Susan, Carter, As outlined in this guidance, can you please explain the reason and purpose of this referral. Thanks."* Ms Zante responded with a link to the relevant intranet page. She stated: *"Hi Lynn, As per our discussion this morning, here's the employee information page that describes the OH referral process and purpose".* Mr Dodd replied to the claimant later that day in the following terms: *"Hi Lynn, The reason behind the OH referral is due to your continued absence from work for health reasons. We are looking to find out if we need to implement medical case management support to better help you and IBM work through the issues. As this absence impacts both our ability to complete projects and affects your performance relative to your peers. We want to ensure that we have implemented*

all possible support for you and IBM as we come to conclusion on a plan moving forward. " Ms Zante and the claimant then met later that day to go through the referral materials together,

29. On 6 May 2015 Ms Zante sent the referral to Occupational Health. In the section entitled 'Impact on the business' the referral stated: *"Lynn's absences are impacting the progression of the LA SOR model project. This project of improving LA SOR model has aspects which are significantly overdue due to team inheriting the operational process with open issues. Impact of project issues are affecting revenue reporting and BP satisfaction."*

30. Until 14 May 2015 Mr Baillie had worked for the respondent as an independent contractor. On 15 May 2015 he was taken on as a band 8 employee. His job title was Global Sales Out Reporting Manager. He was taken on within the Sales Transaction Support (STS) Team. Mr Baillie reported to Carter Dodd and ultimately, Susan Bruce. Prior to November 2014 Mr Baillie had reported to Jennifer Caitens as a self-employed contractor. On 14 May 2015 the Blue Pages management of the SOR department in Greenock transferred from Ms Zante to Mr Baillie and he became the claimant's Blue Pages manager. As such, he would have attended any PIP meetings the claimant had by conference call with Mr Dodd. However, no PIP meetings took place between 14 May and the extended end date of 1 June 2015.

31. The task Ms Bruce had given the claimant when she had taken her on in November 2014 was important. As mentioned previously, it was also a task that others had failed to deliver upon. The claimant delivered good work in relation to this task during the PIP period and received no negative comments from Mr Baillie, Mr Dodd, Ms Zante or Ms Bruce regarding it. Under the PIP procedure, Mr Dodd ought to have been documenting his weekly or fortnightly PIP objective reviews with the claimant. He ought to have been setting out in writing how she was progressing against the objectives and what she still needed to do. However, apart from the email of 16 April 2015 he did not do so. The only other feedback

the claimant received from Mr Dodd during the PIP was verbally that she was 'doing well'.

32. As the PIP process continued beyond its original timescale ending 30 April 2015 the claimant found it increasingly stressful. She felt she could see no end to it and that she was being asked to do things over and above the objectives which had been set. She felt that she was not being supported.

33. On 22 May 2015 the claimant was assessed by Gill Hickling, OH Adviser. During the consultation Ms Hickling told the claimant she should have raised a grievance about the PBC 3 rating for 2014, telling her she should not have been given a 3 in the circumstances, when she had underlying health conditions. Ms Hickling produced her OH report on 23 May (J108). Under 'reason for referral' the report stated: *"Business requested specific advice re Lynn ability to perform in her current role, are there any health issues related to poor performance and advise on reasonable adjustments.* "The report went on:

"Potential barriers to RTW/ successful working

Lynn is fit and able to work, however it is likely that intermittent acute episodes will occur in the future and if Lynn is to remain at work during these episodes she will need flexibility. It is difficult to predict when and if these episodes will reoccur but it is more likely to re occur if she sustains a normal virus or infection. Lynn will experience symptoms of chronic pain every day this condition is unlikely to improve long term. The recent diagnosis and her long term symptoms, along with the stress of moving house and being placed on a PIP will have most likely aggravated her symptoms. The business should be supportive and give Lynn any help she needs to pass the PIP as further stress and anxiety may aggravate her symptoms which could lead to further absence.

Recommendations

Lynn is aware that she needs to remain healthy and although physical cardiovascular exercise is impractical in her condition she needs to exercise her muscles and adopt good posture by working on her core muscles with Yoga and Pilates. Her work station needs to be set up correctly and OH will organize a special assessment to meet her needs.

It is very likely the reason for her poor performance this year was due to ill health and to avoid this moving forward she will require flexibility and adjustments. I have encouraged Lynn to complete the reasonable adjustments with her manager as she will require long term support/ [1]

34. On 25 May 2015 the claimant emailed David Baillie (copied to Mr Dodd and Ms Zante) to say that she was having a jaw spasm which had left her unable to talk or eat freely. She said she had been advised to try strong painkillers, massage and complete rest for 2 - 3 days. She explained: *Tm ok to work (analyse & work via email) but I've not to talk at all. To ensure I do this I need to work from home and you'll need to find someone else to lead the LA calls this week in Dugald's absence. Sorry for the inconvenience but I need to do this to ensure this Jaw issue doesn't become a permanent one."* On 27 May the claimant advised Mr Baillie that she would not be able to work at all that day because the medication was making her drowsy.

35. On 2 June 2015 Mr Dodd sent Susan Bruce an email (J107) attaching the claimant's OH report. The email said:

"Below is the file that we got from OH regarding Lynn. All they really told us was: The business should be supportive and give Lynn any help she needs to pass the PIP as further stress and anxiety may aggravate her symptoms which could lead to further absence. I need to close out her PIP as it ended as of the 1st of June. I think her performance is at a 2 or better level when she is available to work. She has the capability to work from home. So I would like

to set up a plan with her to ensure that she can be as productive as possible as well as informing us, as she has been, when she has Dr appointments that will cause her to be out. What are your thoughts?"

36. After a discussion with Susan Bruce, Mr Dodd then engaged OH for further assistance and they assigned a case manager, who recommended on 8 June 2015 that a 'Reasonable Adjustments Agreement Document ("RAAD") be put in place. This is an internal IBM document which sets out an employee's needs and any adjustments the respondent has agreed to make. Mr Dodd agreed with Ms Bruce that the PIP would meantime be placed on hold and that the claimant would not be given a rating based on her performance from 1 March to 1 June.

37. On 16 June 2015 Mr Dodd sent the claimant and Mr Baillie a meeting invite update regarding a meeting fixed for Friday 19 June 2015 (J1 11) with the subject heading *"Information update - Subject has changed: Lynn Runcie PIP and Reasonable Adjustments".* In the 'Description' section he included a message in the following terms:

"Hi Lynn

HR has suggested that we pause the current PIP that we were working through and take the time to complete a Reasonable Adjustments Agreement and move on in that environment before making a permanent decision.

Here is the template for the Reasonable Adjustments Agreement: [hyperlink shown] *Please review and we can discuss on this call.*

I would also like to remind you of the details of the confidential Employee Assistance Programme (EAP) at this link, as it may be helpful to you. [hyperlink shown].

We *will put the reasonable adjustments in place and then determine whether we continue the PIP or start a new one based on the reasonable adjustments."*

38. On Monday 22 June 2015 the claimant sent Mr Baillie an email (J1 16) to say she would be working from home the next day and had an appointment in the afternoon to have her blood pressure checked. She asked: *"The PIP/reasonable adjustments call was cancelled on Friday. Can you let me know if I should go ahead and complete the form. Any guidance available?"* Mr Baillie replied by return to say that there was no problem about her working from home and that she should fill out the reasonable adjustments form per the instructions, send it to Mr Dodd and himself and that they would review it and fix a time to discuss it with her. On 25 June the claimant sent Mr Baillie the completed reasonable adjustments form ("RAAD") (J160) with a message saying: *"Attached is reasonable adjustment form. The guidance isn't great so not sure if this is ok so let me know. "*

39. The RAAD 'Process Steps' are set out on the first page of the RAAD form (J160) as follows:

"1. Employee to complete Employee Section

2. Manager to complete Sections A & B of the Manager's Section - manager to review whether any of the Disability Guides on the OH Portal could be helpful or whether OH input is needed if it hasn't already been sought.

3. Discussion between employee and manager - manager to review all suggested adjustments in the context of the business requirements and ascertain whether any additional input is required. …

4. Manager documents discussion with the employee outlining what adjustments can reasonably be put in place in Section C and documents these in Section D…."

40. In the employee section of the draft RAAD (J162) the claimant set out the impact her disability was having on her in the workplace. She reported difficulty sitting and typing for long periods, sleep difficulties and fatigue, reduced ability to handle stress, a need to relieve circulation problems by raising her legs, difficulty with concentration and word-finding in stressful situations and an inability to work during significant flares (which might be triggered by a virus, stress or a combination of the two). The claimant completed the section entitled *"If appropriate, I would like the following adjustments to be considered:"* (J163) as follows: *"Doctor has recommended a phase of education and adjustment to allow me to understand my condition and develop personal strategies to allow me to best manage the condition. A general adjustment/allowance over the next 6 months would be appreciated as new medication is tried and assessed.*

Ability to work from home including Wednesday & Friday - to allow me to take yoga/pilates exercise program as recommended by doctor (only available Wed/Fri morning in my area).

Flexible working day - Shorter working day in office with balance made up by WFH in the evening for an hour or so, e.g. start at 9am (to accommodate morning difficulties) and leave office at 3 with addition hours worked later in the day. This may suit business as it ties in with US day.

Workstation adjustments - Laptop stand, keyboard and adjustable, supportive chair

Minimise conference call situations where there is expectation/pressure to lead discussion.

May need to consider a change of role if medication, exercise and flexible work strategies are insufficient to allow me to contribute at expected levels." [Note; the last two sentences have been crossed out].

41. In the Section of the draft RAAD entitled *"MANAGER TO COMPLETE"* (J164) the following words were added *inter alia* by Mr Dodd: *"Lynn is expected to deliver work results commensurate with her current band level and job responsibilities, including leading calls with management when required. Lynn will be given time and management support to properly prepare for these calls in advance."* In section D of the draft under the heading 7 *have agreed to the following adjustments..." the* words: *"Reduced LA SOR status calls from weekly to monthly"* appear crossed out under the heading 'Adjustment'. The words: *"Lynn will not have to lead calls as often as she had to in the past, which should relieve some of her stress"* appear crossed out under the heading: *"How this assists with the impact of the disability"* and *"July 23, 2015"* appears crossed out under the heading *"Date implemented'.*

42. On 29 July 2015 the claimant sent Mr Baillie a message to say that she was struggling due to a jaw spasm but was available to work from home. The message also contained information about work issues. Later that day she sent a message to Mr Baillie and Mr Dodd saying that she needed to rest her jaw and would appreciate them rescheduling her interim PBC to early the following week. Mr Dodd replied the next day to say that he had rescheduled it to Tuesday. The RAAD had still not been finalised.

43. On 3 August 2015 the claimant sent a message to Mr Baillie, copied to Mr Dodd saying that she was not able to work for a couple of days as dental treatment had 'sparked a flare' and she was struggling. On 6 August she reported that she was still struggling but that she thought it was being made worse by the worry and stress about being off sick again. She asked if she could take the time as leave if possible.

44. Shortly before 18 August 2015 Mr Dodd and Mr Baillie spoke together about the claimant. Mr Dodd explained that he had arranged a meeting with the claimant for 18 August in order to formally close off her PIP and confirm to her whether she had passed or failed. He said he was going to discuss the claimant's performance during the PIP period with Susan Bruce and then reach a decision. Mr Dodd had

the discussion with Susan Bruce. She told him that her view was that the claimant had not successfully completed the PIP and that she should be given a PBC4. Mr Dodd did not agree. However, after further discussion with Ms Bruce he changed his mind and agreed. At this stage, the RAAD had still not been agreed by the respondent, and adjustments the respondent was duty bound to make were not in place. Neither Mr Baillie, Mr Dodd, nor Ms Bruce remembered that the PIP was in fact on hold pending them making adjustments. No PIP review meetings had been held with the claimant since 16 April.

45. On 18 August 2015 the claimant attended the meeting with Mr Dodd and Mr Baillie by conference call to Mr Dodd in the USA. The claimant and Mr Baillie were in Greenock. At this meeting, Mr Dodd told the claimant that his and Susan Bruce's view was that she had not hit the targets in the PIP and on that basis, he was issuing her with an unsuccessful PBC4 rating. He explained that this would 'kick off a further procedure which could ultimately lead to her dismissal. Mr Dodd's stated reasons for the 4 rating were firstly, 'asking for direction', as described in the 2014 PBC; and secondly, that the claimant was working from home without Mr Baillie knowing where she was. The claimant replied that she and Mr Baillie sat opposite each other in the office, so it was clear when she was working from home. Moreover, she would be sending emails and signed into the system. She also said that on a day to day operational basis she did not report to Mr Baillie in any event and she would tell people when she was working from home. She explained that it was actually an advantage working from home as she was working with people in different time zones and it meant she could be more flexible with her time. (Working from home was also one of the adjustments the claimant had requested in the RAAD document she had submitted to the respondent which they had not yet responded to). Mr Dodd replied that there was no issue and that he worked from home full time. The claimant was aghast at being given a 4 rating for the PIP when she had had no negative feedback, had performed well during the period and had been told by Mr Dodd that the PIP was on hold. The claimant became upset. She pointed out to Mr Dodd that she had been told by him that the PIP was on hold pending the agreement of reasonable adjustments and she asked him why he was now saying he was closing it with a 4

rating. Mr Dodd said that he had never put the PIP on hold, but the claimant said that he had and that it was in the calendar invite he had sent her in June. She told him she had it with her. Mr Baillie had been looking uncomfortable since the start of the call and Mr Dodd went ashen at this point. The claimant felt that she was being 'stitched up'. The implication of the 4 rating was that the claimant would be placed under the disciplinary procedure with a view to dismissal.

46. After the call the claimant said to Mr Baillie *'What's going on? What more could I have done?" Mr* Baillie replied: *"Nothing Lynn. I'm sorry." The* claimant asked Mr Baillie again to tell her what was going on. She had Mr Dodd's note in front of her saying the PIP was on hold. Mr Baillie admitted to the claimant that he had said to Mr Dodd after the meeting that he should 'be careful of Lynn because she's clever'. The claimant replied that this was a strange thing to say considering the circumstances she was in. She asked him: *'Why are you telling Carter to be careful and why are you as my manager not supporting me? You just said there's nothing more I could have done from a performance perspective during the period, my results were good. We did what we set out to achieve. Yet I'm in this situation. What support are you offering me as your employee in any capacity?"* Mr Baillie was unable to comment. The claimant told Mr Baillie that she would have to do something about the situation and would speak to Carol Bruce. Mr Baillie said: *"No, it's Carter".* The claimant disagreed saying that it was an in-country matter and that besides, the grievance she was raising would be involving Carter.

47. At 14:37 on 18 August 2015 the claimant emailed Mr Dodd attaching the comments he had made in the meeting invite update on 16 June. She said: *"Attached are the comments you added when you cancelled the meeting schedule (16th June). They are very clear and lead me to the understanding that the PIP was on hold. There has been no further discussions since this, although I have asked. I forwarded the reasonable adjustments form many weeks ago and asked if these have been agreed. With no feedback I sent a note to David saying I would work on the assumption that these adjustments were acceptable. David confirmed today (verbally) that Susan has signed the RA which asks for a*

"general adjustment/allowance over the next 6 months would be appreciated as new medication is tried and assessed. " in light of these facts I am totally shocked to learn today that you have officially closed the PIP (without my prior knowledge) with an unsatisfactory 4 rating. I cannot believe that this is actually possible. I will need to seek independent legal advise." The claimant attached the message. The claimant's reference to the RA was a reference to the draft RAAD she had sent in June (J 163).

48. Mr Dodd responded by email the next day, 19 August (J128): *"Hi Lynn, You are correct in that we did not review the RAAD. I will correct that oversight and schedule a review for Tuesday. I am not sure that I understand where you are coming from with the statement "general adjustment/allowance over the next 6 months would be appreciated as new medication is tried and assessed". That sounds to me like your doctor wants to get your medication correct, however you appear to be interpreting it differently. We can discuss on Tuesday. We will also correct the PIP as I see your point. Here is the RAAD that we will review. "*

49. The claimant replied on 20 August (J139): *"Carter, I have been advised by HR that Occ Health and RA issues should be handled by my in-country Blue Pages Mgr. I find it concerning that an employee has to seek clarification on such a matter, and find again that HR protocols are not being followed. I have therefore declined your invitation to discuss the Reasonable Adjustments and expect David to handle. Regards".* This elicited a message from Susan Bruce (who had been copied in) in the following terms: *"Lynn, I'd ask that you please stop sending these negative emails. I understand that you are unhappy. I've scheduled time for us to talk. There is no need for this tone and it is not productive... we will work this out together, I'm looking forward to our discussion on Monday."* The claimant replied: *"Susan, I am not unhappy. I am distraught! At the beginning of this process I trusted I would be treated with fairness and given the opportunity to improve my health and performance but sadly this has not been the case. Instead I'm presented with a PBC 4 rating which is heading towards disciplinary action and dismissal, so I know you will understand why I have felt the need to seek legal*

advice and document everything. I sincerely hope we can work this out. I look forward to Monday and will send nothing more."

50. Shortly after the meeting of 18 August the claimant raised a grievance. Carol Bruce, Global SW Product Introduction Leader, a senior manager also based in Greenock was appointed to investigate it. Ms Bruce met with the claimant on 26 August 2015 and noted her concerns. Carol Bruce then emailed Susan Bruce (no relation) the following day (J142) setting out the claimant's concerns:

"1. Lynn believed that PIP had been paused given meeting notice she received for 19th June which was subsequently cancelled by Carter. The mtg notice said PIP was paused in order to complete the RAAF. Lynn said Carter denied this and then apologised. She said she never had any further communication on this until 18th Aug when she was told she had failed the PIP and rated a 4 performer despite her requesting updates.

2. Lynn has lost all trust in her relationship with Carter and does not want to have PIP reviews with him going forward. She feels no matter what she were to do it would not change his view of her. When he spoke with her on the 18th Aug ref failing the PIP he referred back to why she was a 3 in January and gave no new reasoning.

3. The medical condition she has (fibromyalgia and hypertension) is under control at this time and she feels positive about the future. She wants to work and has been recommended to work by her doctors. She can have intermittent acute episodes that will need some flexibility on our part as they are difficult to predict. She is ready to drive towards performance improvement and to add value as a Band 8.

4. Going back to last year she told me she had no interim PBC discussionthat indicated she was driving toward a 3 performer.

51. After setting out the claimant's grievance Carol Bruce then stated in the same email: 7 *have also spent some time today going thru various documents, note exchanges, timelines and general communications that have been sent to me in the last 48 hours. Here are my personal thoughts as a neutral mgr:*

1. *The PIP was started March 1st thru to April 30th. The first mtg was 5th March setting the scene. Lynn provides updates on the 19th March, 7th April within the PIP document. Carter provides a mtg minute for the 16th April session which is also the same day I see a note from Lynn updating on her Diagnosis from her doctor. Lynn provides further PIP updates on the 7th and 19th May but I have not yet seen any documented updates from Carter on how he is assessing her performance although this was no doubt verbal. I think we need clear documentation in writing on the PIP progress. I will ask Carter for any further documentation he has that supports the failing of the PIP.*

2. *OH are engaged and their report is issued on May 25th which is when the RAAF discussions happen. I have not seen a note so far that says the RAAF is officially agreed and we are ready to move forward.*

3. *The next mtg is 18th Aug where she is told she failed the PIP.*

Here is what I think we should do:

1. *Schedule a meeting to formally complete and agree and minute the RAAF.*

2. *Restart the PIP and manage myopically with formal documentation throughout. I am not sure how we stand on her not wanting to deal with Carter - 1 will ask HR position.*

8 f fhmfc she needs to *be more engaged with the business- she told me she does not attend a staff mtg or have 1 to 1s which I think should be*

in place especially with an employee who has a performance and health issue.

I hope you are ok with me being candid here Susan. Please let me know what you think and I will support at this end."

52. On 31 August 2015 Carol Bruce emailed the claimant advising that she had now met with her global task leaders and UK HR and that they were in agreement to rescind the PBC 4 rating; finalise and document the RAAD and then to continue with a new PIP once the adjustments were in place for a 4 week period. She said that Mr Dodd, supported by Mr Baillie and herself would run weekly PIP progress/update calls. On 1 September 201 5 the claimant emailed Carol Bruce to say that she was concerned about the process continuing with the same team and without any acknowledgement, explanation or apology for the recent events. She said she had no trust that the same would not happen again in future and thought she needed to escalate further. She said that management comments added to the draft RAAD stated that *'Management has accommodated up to this point, and agrees to continue to support the workplace flexibility adjustments Lynn has requested'.* The claimant went on: "*I don't believe this is the case specifically when feedback used to substantiate a 4 rating included the fact that I was working from home! My request for 6 months "allowance" was requested during an acute period of illness and just after the first medication failed. I don't believe given the severity and length of time I have been affected, that it was unreasonable to ask for this time (to try alternative meds and assess their side effects...). The fact that it was rejected without any discussion and understanding of my condition suggests there was a time-deadline/agenda to be met rather than a genuine willingness to support me back to performance. My health has improved. I would now agree that a general 6 month allowance is no longer required and I believe I am already demonstrating the capability to deliver to "band expectations". The RAAD is therefore out of date and I would like to take a short time to refresh it. I think this is reasonable given the fact that it has taken over 2 months for the original to be reviewed."* The reference to the claimant's request for a 'general 6 month allowance' was a reference to the first paragraph of her original draft

RAAD (paragraph 42 above). She had wanted a period of respite from the application to her of the respondent's performance improvement procedure or threat of this while she got used to her new medication and developed some coping strategies. Mr Dodd was opposed to this and it became an area of disagreement between the parties. Carol Bruce told the claimant in a meeting that the respondent was not prepared to accept this adjustment and that both parties needed to *"move this process forward*.*

53. On 2 September 2015 Mr Dodd and Carol Bruce met with the claimant for a grievance meeting. Mr Dodd told the claimant that he could have managed the RAAD completion and PIP more effectively. He confirmed that he had incorrectly said the PIP was not on hold and apologized for this breakdown in communication. The claimant said she would review and update the RAAD for a meeting the following Monday, 8 September 2015. On 7 September 2015 the claimant emailed Carol Bruce, copied to Mr Dodd and Mr Baillie saying: *"Carol, I've revised the RA request - main change is the removal of the 6 month period of adjustment. Hope this is now acceptable.* We *can discuss tomorrow. Thanks"* (J176). The RAAD was finalised at the meeting on 8 September 2015. The claimant was told that if she agreed to sign the RAAD with the respondent's compromised set of adjustments then they would restart the PIP process and she would be given a clean slate. The final adjustments were those set out at section D of the RAAD Agreement (J185). That Agreement records that workstation adjustments (laptop stand, keyboard and adjustable, supportive chair) had been provided to the claimant in June 2015. Section D also said that "Ability to work from home" and "Flexible working day" were agreed. It stated that these respectively assisted the claimant with the impact of her disability by in the case of home working supporting her ability to implement the doctor recommended exercise program; and in the case of flexible working additionally allowing her to make doctor's appointments. That Agreement suggested (retrospectively) that both home working and flexible working had been introduced as adjustments on 1 January 2015. Although listed separately in the RAAD, they are effectively one adjustment since the flexibility is dependent on the home working.

54. With regard to the PIP process, the claimant requested clear objectives to work on including those already discussed with Ms Bruce. Mr Dodd said he would document the PIP and weekly review sessions would be scheduled in the diary copied to Carol Bruce and David Baillie. Mr Dodd prepared fresh PIP documentation (J188) with a PIP start date of 15 September 2015. When the claimant got the PIP documentation she felt devastated and extremely stressed. The performance improvement process had started in January and she was now in September facing another PIP. OH had advised that placing her on a PIP would exacerbate her symptoms and so it did. The need for conference calls was almost daily during this period, which was not the norm. Ordinarily the claimant would speak on the phone to people or contact them through email or same time messaging but because of the specific objectives she had been given during the PIP it required pulling different people from different geographical areas together and more frequent conference calls which the claimant started to struggle with. There were also extra conference calls with Susan Bruce from an executive point which the claimant felt Mr Dodd should really have been doing. The claimant became more and more exhausted. She was only able to work, and unable to sleep or spend time with her family. She became allergic to her medication. She felt under immense pressure. She found that she was struggling more and more articulating during conference calls, which happened when she was stressed. There were originally leads put on conference calls, but they were removed which meant the claimant was doing it all.

55. PIP reviews with the claimant were held by Mr Dodd but also attended by David Baillie and Carol Bruce. They were then documented in confirmation emails to the claimant copied to Carol Bruce and David Baillie on 18 September (J209); 24 September; 2 October; 12 October and 26 October. The PIP meetings were positive and the claimant performed well against her targets. At the end of the PIP process the claimant was told she had passed the PIP with a 2 rating. During this period the claimant was struggling with her articulation during conference calls which she put down to stress. The new PIP contained objectives the claimant had already fulfilled, and she felt the objectives generally were less challenging than those in the original PIP.

56. At the end of year PBC review on 12 January 2016 the claimant received a 2 rating in respect of her performance for the year 2015 (J213). This was decided by Susan Bruce and Carter Dodd. However, Mr Dodd did not actively engage with the claimant on day to day management after that and did not invite her to staff meetings. The claimant had to proactively set up time to have calls with him. The claimant also found that David Baillie, her direct Blue Pages manager was physically distancing himself from her. An example of this was a follow up workshop for Meredith Harp's project. Instead of sitting beside the claimant Mr Baillie sat at the back. The claimant was very unwell on the day and struggling to speak. A colleague of Mr Baillie's said he could not hear her and then piped up: *"Why would we want to hear you?"* It was Meredith Harp who stood up and said: *"Give her a break. Can't you see she's struggling?"* Mr Baillie did not intervene, nor did he go and see the claimant afterwards or ask if she was ok. The claimant began to feel very isolated, especially from Mr Baillie, given that he was her manager. This was picked up by some German colleagues who had attended the meeting. They asked the claimant what was going on. The claimant told Mr Baillie afterwards how she had felt and how she had been looking for his support. She said other people had commented on this. Mr Baillie did not respond by offering support. Instead he asked who? Who has been saying things?

57. On 1 March 2016 the claimant was invited to join a call with Steve Briggs at which Mr Briggs read out a redundancy script (J220). This stated that an exercise was taking place across STS in the UK affecting the business areas; Sales Support, Global Execution, Transformation, Supply Chain & Asset Management. The script advised that the total number of employees affected would be 13 across all STS areas and that employees affected would be notified by their managers on 21 March.

58. In early March 2016 Susan Bruce discussed with Carter Dodd, Carol Bruce and David Baillie the possibility of identifying the claimant's role as potentially redundant. The final decision to do this was Susan Bruce's and she made it in or before early March 2016. Ms Bruce's final decision predated any consultation with

the claimant. The claimant was the only person to be made redundant out of Susan Bruce's UK Operations. One other person decided to retire.

59. Meanwhile, the claimant's feelings of isolation and exclusion were impacting on her self-worth. She began to struggle further and suffered a recurrence of her neurological problems. She developed numbness in her face and was sent for a scan. The claimant began to be bad-tempered and short with her children at home. During the whole period from the first PIP through to the end of the redundancy process the claimant did not have a holiday and was unable to spend quality time with her family. She was either working, hospitalised, ill or sleeping. The claimant felt that rather than supporting her and making up for the PIP, the opposite was happening. From the beginning of the first PIP through to the end of the redundancy process the claimant felt there was no let-up in the stress on her. She had been advised by her doctors that she needed to stay in employment for the benefit of her health. She therefore thought of reducing her hours or looking to move to another role in the respondent.

60. On 10 March 2016 the claimant was missed out of a staff social walk invitation (J221). By email to Mr Baillie (copied to Mr Dodd and Carol Bruce) on 11 March 2016 (J225) the claimant said she had been diagnosed with new symptoms and the reappearance and progression of old ones and advised by her GP to consider reducing her hours and/or changing her job role in the short term at least. She cited 'months of unrelenting stress last year[1] as having taken their toll. She asked whether this was an adjustment that would be considered reasonable and possible in the short and potentially longer term. The respondent did not respond to this request. On balance, it was the application to the claimant of the PIP process in 2015 and the failure to make reasonable adjustments in a timely fashion that caused the claimant to make the request to reduce her hours temporarily on 11 March 2016. Had she not been subjected to this treatment, it was likely she would have been happy for the foreseeable future to continue full time with the ability to work from home when necessary.

61. On 21 March 2016 Mr Baillie sent the claimant an invite to an 'at risk of redundancy' meeting. The effect of this on the claimant's health was significant. Her blood pressure went 'through the roof and she was rushed into hospital with a suspected stroke. The claimant's husband informed Mr Baillie the following day that the claimant had become unwell and had been admitted to hospital. Mr Baillie agreed to postpone the 'at risk' meeting. Mr Baillie rescheduled the 'at risk meeting' to Monday 4 April. When the claimant was too ill to attend the call, Mr Baillie rescheduled to 7 April. The claimant was also unable to attend this call. On Friday 8 April Mr Baillie advised the claimant that he was rescheduling her at risk meeting to Friday 15 April by conference call. The claimant was unfit to attend this meeting. Following scans, the claimant was told she had not had a stroke. On being discharged from hospital the claimant was signed off sick until 14 April 2016. On Monday 18 April 2016 Mr Baillie sent the claimant a letter by recorded delivery mail advising her that she had been provisionally selected for redundancy with effect from 5 August 2016. The letter informed her that the respondent would now enter into an individual consultation process with her to try and identify practical ways to avoid redundancy including possible suitable alternative employment. The letter requested the claimant to advise Mr Baillie what additional support she required given her current medical circumstances and sickness absence.

62. On 27 April 2016 the claimant, accompanied by her husband, Mr Gregor Runcie attended a conference call with Mr Baillie. The claimant asked Mr Baillie why she was being made redundant. Mr Baillie replied that there were changes to the business and her "transformation role" was no longer required. The claimant asked him: *"What transformation role?".* She explained that she was *"operations in support of transformation".* Mr Baillie told her that it was a transformation role that was no longer required. The claimant again pressed him: *"What transformation* ro/e?"The claimant probed and asked what part of her role was no longer required. Mr Baillie replied that it was *'the transformation piece'.* The claimant asked Mr Baillie who was going to perform the work she was doing but did not get a clear response. The claimant asked what steps the respondent had taken to avoid the redundancy but again, did not receive a clear response. Mr

Baillie referred to the announcement by Mr Briggs initially and said there was a directive to reduce overall headcount. The claimant asked how the specific roles had come to be selected. Mr Baillie said the claimant ought to have received this information, but it was never provided. Initially Mr Baillie told the claimant that her "transformation role" was to be carried out by other members of the team. He later came back to the claimant and said that the role was to be carried out by the US team. The claimant recorded this in an email to Mr Baillie dated 3 May 2016 (J286).

63. The claimant attended the final consultation meeting by conference call with Mr Baillie and Kathleen McGhee as notetaker on 11 May 2016. She was accompanied by her husband, Mr Gregor Runcie. She read from a prepared statement (J296) in which she emphasized that her role was not in 'transformations' at all but 'operations'. The claimant stated in particular: *"From an organisational responsibility perspective I would like to highlight that STS contains the Transformation and Operations Org, which is further split in two; the Transformation Org (under the leadership of Theresa Dirker) and Operations under Rene Ure). As you may know my role lies within the Operations Org reporting to Rene Ure. Transformation of the Global BP processes is Dwayne Schuster's responsibility who reports to Theresa. In November 2014 Susan asked me to "look at the execution of the LA CHW SOR process", which I have been doing since this time."* The claimant went on to say that she had been offering some guidance to a new member of Dwayne Schuster's team in addition to her other operational responsibilities. She stated: *"It would appear that in doing so I find myself considered a transformation team member who is now being made redundant, as my transformation role is now being picked up by the US team."* The claimant suggested an analogy with a team of racing drivers: *"Imagine there is a racing team, with engineers. .. in one dept reporting to Theresa and drivers in another dept reporting to Rene. Rene has an experienced driver with extensive knowledge of the car and how it works. The driver provides guidance to an inexperienced, newly appointed engineer... .The racing team then need to make HC reduction to save cost and select the experienced driver for redundancy with the justification that his engineer/development role can be picked up by the*

development team. Sounds unjustified doesn't it?" Mr Baillie failed to pass on to the redundancy decision maker Susan Bruce the claimant's statement and input to the consultation beyond making available by email the official note of the meeting (J231). He also failed to give any meaningful answers to the questions the claimant asked him, including the above challenges. For example, the claimant asked when and why she had been given the organisational code 'Org XI' when no one else in the team apart from Kirsten Shaw-Aspin had. Mr Baillie did not substantively respond to this question, nor to any others the claimant asked. This, taken with his failure to feed-back properly to Susan Bruce, the decision-maker, meant that the consultation with the claimant about how her redundancy might be avoided was largely pointless.

64. On 16 May 2016 the claimant attended a meeting with Mr Baillie at which she was dismissed by him. Mr Baillie read from a script (J310). The claimant's employment terminated on 5 August 2016. The final decision to make the claimant redundant had been taken by Susan Bruce in or before early March 2016.

65. The claimant appealed against her dismissal on 20 May 2016. She stated that the process had not been followed properly and that the reason for her dismissal was her health (J314 - 5). She disputed that she was redundant and said there was an on-going requirement for her role. She raised the issue of whether she should have been put into a 'pool of one' and said that Mr Baillie had not answered the questions she had asked. The appeal was referred to Mr Peter Follett and rejected. A report was sent to the claimant confirming the outcome. Throughout the redundancy process the claimant felt very low.

66. As set out above, Kirsten Shaw-Aspin was working in a subject matter expert operational role. This involved her in team leading. She was also supporting transformation and organisational improvements. In these respects, she was performing a similar role to that of the claimant. However, she was not placed with the claimant in a pool for redundancy selection, nor was she subjected to consideration of and dismissal for redundancy. Ms Shaw-Aspin had converted

from a contractor to an employee in or about June 2015 prior to the respondent beginning the redundancy process.

67. None of the respondent's staff involved in making decisions about the claimant has had any training in dealing with disability issues under the Equality Act 2010 or in handling disability in the workplace.

68. The effective date of termination of the claimant's employment was 5 August 2016. The claimant notified ACAS under the Early Conciliation rules on 1 November 2016. ACAS issued an EC Certificate on 1 December 2016. The ET1 was presented on 30 December 2016 and was accordingly in time in respect of claims relating to the dismissal.

69. The claimant's gross weekly salary at the time of her dismissal was £873.92. Her net weekly salary was £634.45. She was aged 49 and had completed 21 years' service. The claimant found alternative employment at a weekly net salary of £612.11 and started on 19 September 2016. She was unemployed for six weeks. Her loss for the period of unemployment was 6 x £634.45 = £3,806.70. Between 6 April 2018 and 31 August 2018 (21 weeks) the claimant's net salary in her new job dropped to £610.98. From 31 August 2018 it rose to £629.37. Her wage loss from 20 September 2016 to the date of this judgment (20 December 2018) is as follows: (a) from 20 September 2016 to 5 April 2018 (80 weeks) £634.45 - £612.11 = £22.34 x 80 = £1,787.20; (b) from 6 April 2018 to 31 August 2018 (21 weeks) £634.45 - £610.98 = £23.47 x 21 = £492.87; (c) from 31 August 2018 to 20 December 2018 (16 weeks) £634.45 - £629.37 = £5.08 x 16 = £81.28. The claimant's loss of salary to the date of the Tribunal judgment is £6,168.05. The claimant has lost statutory rights as a result of her dismissal.

70. The respondent decided to refuse to make the adjustment of not requiring the claimant to lead conference calls on or about 8 September 2015. The limitation period in respect of any claim (taking account of early conciliation would have expired around the end of 2015. The claim was lodged on 30 December 2016. The length of the delay was twelve months. By the end of 2015, the claimant was

so stressed and exhausted by the treatment meted out to her by the respondent that when she passed the second PIP in October 2015 and received a PBC2 rating for the year, she lacked the mental stamina that would have been required for further confrontation about the respondent refusing to remove the requirement for her to lead conference calls. Although she had taken some legal advice around 20 August 2015, this was regarding the respondent's attempt to fail her on the first PIP and what to do about it. The respondent's failure to make adjustments timeously contributed to the claimant's exhaustion and consequent lack of resolve. The respondent also lulled the claimant into a false sense of job security between October 2015 and March 2016 when it stopped performance managing her. The effect of the redundancy process on her health was significant. Initially she was hospitalised. Thereafter she was under significant stress. Once the claimant knew of her overall course of action and took advice, following her dismissal she acted sufficiently promptly so as to raise the other parts of her action timeously.

71. With regard to the adjustment that the claimant's hours be reduced temporarily, the respondent might reasonably have been expected to have made this adjustment within a month of the claimant's request, and therefore by 11 April 2016. Allowing for early conciliation, that claim ought to have been lodged around August 2016. The length of the delay is four months. The effect of the redundancy process on the claimant on top of everything else had initially been devastating. Her energy levels were affected, and she required to search for alternative employment, which she managed to do successfully.

72. The claimant had always wanted to work for the respondent, ever since she was a student. When she gained a job with them, she flung herself into it and worked long hours. The claimant was a regular top performer, got 1s in her PBCs and was on the managerial fast track until the beginning of her health problems. Even when her health began to be problematic in or around 2014 the claimant continued to work very hard. Mr Runcie was the main person around the home and carer for the children. He would take the children to school, help them with their homework, cook, wash and do all the housework. From late 2014/ early

2015 onwards, the claimant's whole time was taken up with work and there was no quality time with her family. She feared being isolated at work and so did not want to be seen to be taking time off, especially once the PIPs started.

73. When she felt able to do so the claimant consulted a solicitor and took some advice in connection with her selection for redundancy. The claimant felt very low throughout the redundancy process and was having real difficulty with stroke-like symptoms at this time, including difficulty communicating and remembering. The claimant had been loyal and committed to the respondent throughout her employment, describing herself as an 'IBMer'. It had been the claimant's intention to remain in the respondent's employment until retirement. She treated her colleagues with integrity, professionalism and trust and expected the same in return. Prior to the events described above she did not fee! the need to document conversations with colleagues. Since these events the claimant is less trusting of people generally.

74. The claimant did not claim benefits following her dismissal.

Observations on the Evidence

75. Where there was a conflict between the claimant's evidence and that of the respondent's witnesses, on balance we preferred the claimant's evidence. The claimant made appropriate concessions in cross examination. Where she had difficulty remembering a particular detail, she was honest about this.

76. We had concerns about parts of Mr Baillie's evidence. In paragraph 12 of his statement Mr Baillie categorically testified of the claimant: *"She was focused and skilled in working with HVEC only and had no connection or experience in CHW."* However, in cross examination he was forced to concede that the claimant had responsibility for CHW for Latin America (the 'SOR LA' project). Thus, his witness statement was misleading on this point and was also inconsistent with concessions made by other witnesses. The point was relevant to the issue of whether the claimant's dismissal was genuinely by reason of redndancy.

77. Mr Baillie was asked in cross examination whether the claimant had ever raised with him directly that she was experiencing difficulties with conference calls. He replied “No". He was then forced to concede that she had done so when taken by Mr Byrom to an email she had sent to Carter Dodd and himself on 29 July 2015 (J1 16) in which she had stated: *“Carter, David, I’ve been trying to cover calls etc as normal but having difficulty, especially today, I really need to rest my jaw.* In cross examination Mr Baillie described himself as the claimant’s ‘direct manager* and said he was her 'local manager for HR issues’. The claimant had sent him the draft RAAD on 25 June 2015. However, when it was put to him that the OH report had been received in May and that the respondent’s delay until September to put reasonable adjustments in place was a surprising amount of time, he said it had ‘never crossed his mind’. He confirmed that he knew that the consequence for the claimant of failing the PIP was that it could lead to her dismissal and agreed that he had known that the PIP was on hold. Despite having management responsibility for the claimant’s HR issues, he failed to progress the RAAD and said it had *"slipped* [his] *mind”* that the PIP was on hold. We could not understand how a manager could forget such a critical fact in relation to an employee for whose welfare he was directly responsible. The impression we had was that Mr Baillie was only nominally managing the claimant’s HR issues. In fact, it was Ms Bruce and Mr Dodd who were driving them. This became clear from Mr Baillie’s evidence in cross examination concerning the redundancy consultation. He was asked where the evidence was that he had considered and responded to the points the claimant had raised in her second redundancy consultation meeting and he replied: 7 *wasn’t sure I had to.”* He testified initially that he had not communicated the claimant’s consultation input to Ms Bruce. Asked in cross examination why he had not raised the claimant’s points with anyone else he said he was ‘taking guidance from his leadership team’. In re-examination Mr Hardman referred Mr Baillie to the note of the second consultation meeting (J231) and asked Mr Baillie (who had said that he would have shared the note with his line manager): *‘‘So Susan Bruce would see this note” to* which Mr Baillie replied *“Yes”* We gave his answer little weight because it was given in response to a leading question.

78. None of the respondent's relevant managers had received training in handling disability issues in the workplace. Their actions in managing the claimant in the summer of 2015 showed a lack of understanding of the respondent's obligations towards her. Both Carter Dodd and Susan Bruce had received and digested the OH report on the claimant's condition which clearly said it was *"very likely the reason for her poor performance this year was due to ill health and to avoid this moving forward she will require flexibility and adjustments".* It was clear at this stage that adjustments were required, and it was presumably for that reason that Mr Dodd had been advised by HR to put the PIP on hold on or about 19 June 2015. However, although the claimant filled in the RAAD document and sent it to Mr Baillie, nothing was done about implementing it and Mr Dodd compounded the situation by then failing the claimant on the PIP.

79. The decision by Susan Bruce and Carter Dodd to fail the claimant's first PIP completely lacked transparency. To conduct a process that could end the career of a long-serving and loyal employee in this way was not what we would have expected from a well-resourced multi-national employer. Having (in clear breach of the respondent's own procedure) failed to keep any proper written records of the 13-week extended PIP, Mr Dodd sent an email to Ms Bruce (J107) on 2 June 2015 saying he thought the claimant's performance was at a 2 or better when she was available to work. This is consistent with the claimant's evidence that her verbal feedback from Mr Dodd during the PIP process was that she was doing well (in spite of her health problems and the fact that adjustments had not been made prior to applying the PIP). Yet somehow, in a way that was not satisfactorily explained by the respondent, and without any proper supporting documentation, Susan Bruce changed the mind of Mr Dodd, the person actually monitoring the claimant and caused him to move from a 2 or better pass to a 4 fail. We did not accept Ms Bruce's explanation that this was due to benchmarking. (Even if this had been true, it would not have been reasonable to compare a disabled employee's performance with her peers without first making any necessary adjustments for her disability).

80. There were also a number of inconsistencies between the evidence of Susan Bruce, Carter Dodd and Susan Zante concerning Jennifer Caitens' view of the claimant's health and performance at and before the handover in November 2014. Mr Dodd claimed that Jennifer Caitens had written the 2014 PBC and that he had added a few touches. As Mr Byrom submitted, when referred to the amendment noted in paragraph 6 of his statement, Mr Dodd was unable to locate it in the PBC document Mr Dodd accepted that Ms Caitens had discussed the claimant's health issues with him during her handover, but was vague about their relationship with her alleged under-performance. Susan Bruce stated in evidence that Jennifer Caitens had provided feedback on the claimant's performance to herself and Mr Dodd at the handover. However, whilst Susan Zante in her evidence recalled Ms Caitens telling her that the claimant had health problems, she did not remember Jennifer Caitens discussing the claimant having any performance issues or giving any indication that there were any such issues at her own handover meeting with Ms Caitens. (She accepted in cross that had there been such issues the claimant's Blue Pages manager would have been made aware of them.) Ms Zante stated in cross examination that she had not been told by Ms Caitens of any deterioration in the claimant's performance. We concluded that had there been genuine issues with the claimant's performance in 2014, these would have been raised with the claimant and latterly Ms Zante and documented at the time. This was supported by Carol Bruce's evidence, (which she refused to retract in re-examination), that had there been performance issues, Jennifer Caitens would have been required under the PBC procedure to have documented them and fed them back to the claimant as there should be no surprises. When asked by Mr Hardman in re-examination whether the impending divestiture to Lenovo would have explained why Jennifer Caitens had not had any documented conversations with the claimant about her performance Ms C Bruce testified that the Lenovo divestiture would not explain why this had not happened and that if an employee has a performance issue this process must always be followed. There should be no surprises. For all the foregoing reasons, we concluded that, despite her health problems there were no genuine issues with the claimant's performance in 2014 and we accepted the claimant's evidence that Jennifer Caitens had agreed to let her know if this changed. We concluded that in

an employer with the administrative resources of the respondent, had there been such issues they would have been properly documented and fed back to the claimant as Carol Bruce said. We rejected the contrary evidence from Susan Bruce and Carter Dodd for these reasons. We did not accept in the absence of the requisite documentary records, that Jennifer Caitens had raised the claimant having performance issues in her handover to them in November 2014. Their stance on this matter - unsupported as it was by any documentary foundation - undermined our view of their evidence generally.

81. There were some comments made by the claimant about her performance possibly being affected by her health in the documents before us. We inferred from these that her health and self-confidence were increasingly eroded by the way she was managed during 2015, the stress to which she was subjected and the inconsistent messages she was receiving from the respondent about her performance.

82. We inferred from the foregoing facts, which were supported by the claimant's comments on the final review, that it was Mr Dodd who had added the negative comments and PBC 3 rating on the claimant's 2014 PBC. It was, after all, Mr Dodd who gave evidence about the rationale for these, which also suggested he was the author.

Applicable Law

Direct disability discrimination

83. Section 13 Equality Act 2010 provides as follows:

"13 Direct Discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. "

Discrimination arising from disability claim

84. Section 15 EqA provides:

"15 Discrimination arising from disability

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

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

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

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

Disability Discrimination claim - failure to make reasonable adjustments

85. Section 20 Equality Act 2010 provides:-

"(2) the duty comprises the following three requirements.

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

(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) ..... ”

86. Section 21 Equality Act 2010 provides:-

“(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person ....."

87. Schedule 8 to the Equality Act 2010 concerns the duty to make reasonable adjustments at work. Part 3 concerns limitations on that duty. Paragraph 20 of Schedule 8 deals with lack of knowledge of disability. It states:

"20 Lack of knowledge of disability, etc

(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 -

(a) .....

(b) ...that an interested disabled person has a disability and is tik&ty to be pieced ar *The disadvantage referred to in the first, second or third requirement.*

Burden of Proof

88. Section 136 EqA provides:-

> ***"136 Burden of proof***
>
> *(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, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision. "*

Discussion and Decision

Jurisdiction - Time Bar

89. In this case, the claimant complains that her dismissal on 5 August 2016 amounted to less favourable treatment contrary to section 13 of the EqA and a breach of section 39(2)(c). The effective date of termination of the claimant's employment, and thus, the date of the act to which the complaint relates was 5 August 2016. As Mr Byrom submitted, when the act to which the complaint relates is a dismissal, it is established by case law that the date from which the limitation period runs is the date on which notice expires and the dismissal takes effect and not the date when notice of termination is given. Lupetti v Wrens Old House Ltd 1984 ICR 348 EAT. The claimant notified ACAS under the Early Conciliation rules on 1 November 2016. ACAS issued an EC Certificate on 1 December 2016. The ET1 was presented on 30 December 2016 and was accordingly in time. All claims relating to the claimant's dismissal are in time as Mr Hardman accepts.

90. The claimant also makes a complaint of failure to make reasonable adjustments. With regard to time bar, Mr Byrom submitted that the respondent's failure to make reasonable adjustments continued until the day of the claimant's dismissal. He suggested that requiring the claimant to lead conference calls was a continuing act and that the duty to make adjustments continued throughout the remaining period of the claimant's employment. The difficulty with this submission is that section 123(3)(b) of the EqA provides that *"failure to do something occurs when the person in question decided upon it".* In this case, it was clear from the deletion of the adjustment in the draft RAAD (J163 and 166) that a definite decision had been taken to refuse the adjustment at some point between 23 July and 8 September 2015. On the evidence, the decision about whether to make the adjustments the claimant had requested was taken by the respondent on or about 8 September 2015. The claimant's employment terminated on 5 August 2016 and the ET1 was lodged on 30 December 2016. It ought to have been lodged by December 2015 in respect of the claim of failure to make this adjustment and was accordingly twelve months out of time.

91. Mr Byrom submitted in the alternative that esto any complaints were not brought within the appropriate period it is just and equitable to extend time. We considered whether it would be just and equitable to extend time in the circumstances of this case. We are required to consider the prejudice each party would suffer as a result of granting or refusing an extension, and to have regard to the other circumstances. The approach is multi-factorial and no single factor is determinative as Mr Hardman submits with reference to Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278. We firstly considered the length of and reasons for the delay. The claimant took some legal advice in relation to the failing of her PIP around August 2015, which led to her lodging her grievance. However, that predated the decision to refuse the adjustment to the requirement that the claimant lead conference calls on 8 September 2015. It is clear from her testimony and that of Mr Runcie, backed by the medical records that the claimant was so stressed and exhausted by the treatment meted out to her by the respondent during 2015 that when she passed the second PIP in October 2015 and received a PBC2 rating for the year, we infer that she would not have had the

mental stamina for further confrontation. In a sense, the failure to make the adjustments contributed to her exhaustion and consequent loss of resolve. We did not find the cogency of the evidence to have been affected by the delay since both the claimant and Mr Dodd recalled that leading conference calls was part of the claimant's role and the refusal of the adjustment is clear from the oral and documentary evidence. Once the claimant knew of her overall course of action and took advice following her dismissal she acted sufficiently promptly so as to raise the other parts of her action timeously. In a sense, we considered that the respondent lulled the claimant into a false sense of job security, by passing her PIP and rating her performance 2 for 2015, before dismissing her for 'redundancy' a few months later. During this period, time elapsed. The claimant would clearly be prejudiced if not allowed to advance this aspect of her claim. We did not consider the prejudice to the respondent to be great. They are already facing a timeous claim in which the same facts are pled in relation to the burden of proof. This head of claim only negligibly extends the hearing. It is not as though the whole case would have been time barred were the extension not granted. We considered and weighed up all the factors outlined above, balancing the prejudice to both parties and bearing in mind that extending time is the exception and not the rule and that the burden is on the claimant. We concluded that it would be just and equitable to extend time in relation to the failure to make the adjustment to the requirement that the claimant lead conference calls, particularly given the claimant's health problems around the time when the claim ought to have been made in the winter of 2015, and the fact that (in the opinion of OH) these had been exacerbated by the treatment she received from the respondent. It follows that the Tribunal has jurisdiction to consider this claim.

92. We considered limitation in relation to the adjustment that the claimant not be required to work full time from 11 March 2016 until her dismissal on 5 August 2016. Mr Byrom submitted that this was a continuing omission and that the case was accordingly in time. Applying section 123(4) we consider that the respondent might reasonably have been expected to have made this adjustment within a month of the claimant's request, and therefore by 11 April 2016. This would mean that, allowing for early conciliation, the claim ought to have been lodged around

August 2016. It was, in fact lodged on 30 December 2016. The length of the delay is four and a half months. At the time this claim ought to have been submitted the claimant had just had her employment of more than 20 years terminated unfairly. The effect of the redundancy process on top of everything else had initially been devastating. Her energy levels were affected, and she required to search for alternative employment, which she managed to do successfully. The further considerations set out above in relation to the first adjustment apply here to some extent. Weighing the prejudice to the claimant against that to the respondent and taking into account the considerations set out in the preceding paragraphs, we consider that it is just and equitable to extend time, taking account as before of the fact that the decision to extend time is the exception and not the rule, and that the onus is on the claimant. It follows that the Tribunal has jurisdiction to consider the claim.

93. No issue of time bar arises in relation to the third adjustment sought.

Claim of discrimination by failure to make reasonable adjustments

94. In Environment Agency v Rowan [2008] IRLR 20 the EAT gave general guidance on the approach Tribunals should adopt in reasonable adjustment claims. The EAT held that "An *employment tribunal considering a claim that an employer has discriminated against an employee .... by failing to comply with the ... duty must identify:*

> *(a) the provision, criterion or practice applied by or on behalf of an employer, or;*
>
> *(b) the physical feature of premises occupied by the employer;*
>
> *(c) the identity of non-disabled comparators (where appropriate); and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the claimant*

They observed that *"An employment tribunal cannot properly make findings of a failure to make reasonable adjustments under ss.3A(2) and 4A(1) without going*

through that process. Unless the employment tribunal has identified the four matters at (a)-(d) it cannot go on to Judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage. "

95. With that in mind we considered the adjustments contended for.

Not requiring the claimant to lead conference calls

96. The first PCP relied upon was the practice of requiring the claimant to lead conference calls. Looking at the facts found, the adjustment had been requested by the claimant in her first draft of the RAAD (J163) on 25 June 201 5 and refused. The section of the draft RAAD entitled *"MANAGER TO COMPLETE"* (J164) contained the words: *"Lynn is expected to deliver work results commensurate with her current band level and job responsibilities, including leading calls with management when required."* In Section D of the draft under the heading '7 *have agreed to the following adjustments..."* the words: *"Reduced LA SOR status calls from weekly to monthly"* appear crossed out under the heading 'Adjustment'. The words: *"Lynn will not have to lead calls as often as she had to in the past, which should relieve some of her stress"* appear crossed out under the heading: *"How this assists with the impact of the disability"* and *"July 23, 201 5"* appears crossed out under the heading *"Date implemented'.*

97. The fact that the claimant was required to lead calls also appeared to be supported by her email to Mr Baillie (J114) on 25 May 2015 in which she told him that she was having a jaw spasm: *"I'm ok to work (analyse & work via email) but I've not to talk at all. To ensure I do this I need to work from home and you'll need to find someone else to lead the LA calls this week in Dugald's absence"* Thus, we concluded from the documentary and oral evidence that the claimant had been required to lead calls and that an adjustment to halt or reduce this had been requested by her and refused. On the facts found, the PCP had been applied to the claimant from the date Ms Caitens left on 24 November 2014 until her

dismissal on 5 August 2016. Mr Hardman submitted on behalf of the respondent that there was no evidence that the claimant had been required to lead conference calls after 2 September 2015. He stated that the PCP had not, in fact been applied after that date. We did not agree with this submission. The claimant's evidence, which we accepted, was that she was required to lead calls weekly until the beginning of the second PIP in September 2015 and at times daily thereafter for the duration of the second PIP.

98. Mr Byrom submitted that the practice of requiring the claimant to lead conference calls put her at a substantial disadvantage in comparison with other employees who do not suffer from fibromyalgia because it exacerbated her symptoms and was a particular trigger for difficulty with words or recall as a result of her disability. This caused her humiliation and caused others on the call to doubt her competence all thereby placing her at higher risk of adverse comparative PBC ratings than employees not suffering from her disability. We noted in this regard that the PBC system had competition built in (as many such systems do) so that the performance of each employee was specifically assessed with reference to peers. We accepted the claimant's oral and statement evidence that from around 2014 when she was feeling under pressure, she would sometimes experience difficulty with words or recall and that being on conference calls was a particular trigger for this happening. We accepted that the PCP was applied to the claimant and did put her at a substantial disadvantage in comparison with persons who do not suffer from her disability. Thus, we find that the duty to make a reasonable adjustment was triggered in respect of this PCP. The next question is whether the adjustment would have been reasonable.

99. The duty, once triggered, is *"to take such steps as it /s reasonable to have to take to avoid the disadvantage. "* As the EAT emphasized in Royal Bank of Scotland v Ashton 2011 ICR 632, since [section 20 Equality Act 2010] is concerned with practical outcomes, rather than fair procedures, a Tribunal must look at whether the adjustment proposed by the claimant is itself reasonable. The sorts of factors which a Tribunal might consider in making that assessment are listed in paragraph 6.28 of the EHRC Code.

- whether taking any particular step would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment, eg advice from Access to Work;
- the type and size of the employer.

100. We concluded that there was a real or even good prospect of the adjustment removing the disadvantage on the evidence before us. If the claimant was not required to perform a task which had the effect of triggering her symptoms, she would not be marked down on that performance or experience her confidence and/or reputation being undermined. The evidence suggested that Jennifer Caitens and 'Dugald' had assisted in the past (or in the latter case could assist). David Baillie sat opposite the claimant in the office. Thus, on the evidence before us the step appeared practicable. Clearly, the respondent has substantial financial and other resources. It is unclear whether the step would have a cost. A colleague might happily take on this duty without necessarily requiring additional remuneration. We therefore concluded on balance that the adjustment was reasonable; that that the respondent failed in its duty to make a reasonable adjustment and that the claim under sections 20 and 21 EqA succeeds.

101. (We observe in passing that the EHRC Employment Code suggests in paragraph 6:33 that: *'allocating some of the worker's duties to another person'* as an example of a possible adjustment.)

102. No issue of knowledge of disability and disadvantage arises in relation to this adjustment. The respondent had the OH report in May 2015. They knew the claimant was suffering from fibromyalgia from 16 April 2015 and had information of her symptoms earlier than that. The adjustment had been requested by the claimant on the RAAD and the disadvantage has been referred to and deleted therein (J166). We refer to our general section on knowledge of disability below.

Allowing the claimant to reduce her hours

103. The second PCP was said to be the requirement for the claimant to continue to work full time. The same substantial disadvantage was cited as applicable to the previous adjustment. The adjustment was to allow the claimant to reduce her working hours.

104. The claimant requested reduction of her hours and/or changing her job role in the short and/ or potentially longer term by email to Mr Baillie (copied to Mr Dodd and Carol Bruce) on 11 March 2016 (J225). The comparative substantial disadvantage to which the claimant was put by this PCP with effect from March 2016 was the flaring up of her symptoms of fibromyalgia. We find that the duty was triggered. There did not appear to be any evidence that the claimant's request was ever considered by the respondent. Obviously by this time Susan Bruce had already taken the final decision to make the claimant redundant. From the evidence before us there was a real or even good prospect that making the adjustment for a temporary period would reduce the disadvantage, allowing the claimant's symptoms to settle and assisting her to remain in the workplace. There was no evidence that the step would have been impractical or disruptive. We concluded that the respondent did fail in a duty to make this adjustment and that its failure continued until the claimant's departure on 5 August 2016.

105. The third PCP relied upon was the conduct of a redundancy consultation period while the claimant was off sick. The substantial disadvantage was said to be that the claimant was unwell and therefore unable to properly prepare for and

participate in meaningful consultation meetings. The adjustment sought was the delay of the process until the claimant was able to fully participate. In the circumstances of this case we considered that the issue of reasonable adjustments did not arise. Since we have found that the redundancy consultation was effectively a sham, an adjustment to it would not have removed the disadvantage or otherwise made any difference.

Claims of direct discrimination and/or discrimination arising from disability

106. We referred to the list of issues set out at the beginning of this Judgment. We turned to consider whether the respondent directly discriminated against the claimant contrary to section 13 Equality Act 2010. This depended upon whether, because of her protected characteristic of disability, (here, fibromyalgia) the claimant was treated less favourably than other employees of the respondent were or would have been treated. The less favourable treatment identified by the claimant in this case was her dismissal on 5 August 2016. On behalf of the claimant, Mr Byrom submitted that the appropriate comparator was a hypothetical employee of the respondent having materially identical circumstances to herself but not suffering from fibromyalgia. It was said that while there was no direct comparator, the claimant would rely on the treatment of her former colleague Kirsten Shaw-Aspin, a SOR SME who was not selected for redundancy and dismissed.

107. In the alternative, Mr Byrom submitted that if the Tribunal concluded that the claimant's disability was not itself the reason for her dismissal then it should find that she was dismissed for something arising in consequence of her disability, namely its effect on her attendance and/or performance. Section 15 Equality Act provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability; and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. In this case, as we understand it, the claimant submits in the alternative that the unfavourable treatment she received was the termination of

her employment and/or placing her in a pool of one for redundancy selection purposes. It is convenient to address these alternative submissions together.

Application of the burden of proof

108. As Mr Hardman pointed out, the mere fact of the claimant establishing a protected characteristic and a difference in treatment would not shift the burden of proof to the respondent. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude, on the balance of probabilities that the protected characteristic was the reason for the treatment and any explanation by the respondent must be considered.

109. Borrowing from the seminal case of Igen Ltd v Wong (20051 IRLR 258 CA; It is for a claimant who complains of discrimination to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has discriminated against her because of her disability. It is important to bear in mind in considering whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases, the discrimination will not be an intention but merely based on the assumption that the person no longer fits in. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis will therefore usually depend on what inferences it is proper to draw from the primary facts found. At this stage the Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

110. Mr Hardman referred us to Teva (UK) Ltd v Goubatchev (UKEAT/0490/08 paras 24 - 26) for a succinct summary of the case law on inference. Quoting Mummery J (as he then was) in Qureshi v The University of Manchester [2001] ICR 847 at paragraph 26 the EAT in Teva said that an Employment Tribunal must embark on a careful analysis starting with making findings on the relevant facts and then proceeding to consider what inferences (if any) can be drawn from them but it

must always bear in mind that: *"The function of the tribunal is to find the primary facts from which they will be asked to draw inferences and then for the tribunal to look at the totality of the facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating application were on 'racial' grounds... The process of inference is itself a matter of applying common sense and judgment to the facts, and assessing the probabilities on the issue whether racial grounds were an effective cause of the acts complained of or were not"*

111. Mr Hardman submitted that there was no evidence at all on which to base a primary fact which might infer that Mr Dodd acted in any way other than in error when he closed out the first PIP procedure with a PIP4 and that even were there to be so, then such a presumption is rebutted by Mr Dodd's explanation of his error and the surrounding circumstances. We respectfully disagreed. Below, we apply the principles set out in the two foregoing paragraphs to the totality of the facts (including the respondent's explanations) to see whether or not, on the balance of probabilities, it is legitimate to infer that the claimant's disability or matters arising from it were an effective cause of her dismissal. It is important to note that the claimant's direct discrimination claim relates to her dismissal on 5 August 201 6. However, in assessing the reason for the act complained of regard may be had not just to that act, but also to other acts alleged to show evidence of there being a discriminatory explanation for the conduct of which complaint is made. Thus, whilst we agree with Mr Hardman that a claim in respect of some of the events below would be out of time if made, the facts are nevertheless relevant as part of the factual background to her dismissal.

112. For the reasons given, we considered the following facts significant, when taken together:

Assignment of a task on which others had failed to deliver and exclusion from meetings in relation to it

113. By the end of 2014 the claimant had worked for the respondent successfully for nearly two decades. Her PBC reviews up to and including 2013 had always been good, despite health difficulties she had been experiencing since 2011.

114. From 13 to 24 November 2014 the claimant suffered a serious jaw spasm which led to her working from home and being for those days unable to speak, lead conference calls or attend the office. During that period her task management was handed over from Jennifer Caitens to Susan Bruce owing to the Lenovo divestiture. As part of the handover Ms Caitens informed Ms Bruce, Mr Dodd and Ms Zante about the claimant's health problems. Ms Bruce then set the claimant the principal objective of fixing an operational issue in making payments to the respondent's business partners in the Latin American region ("SOR LA"). This was an important CHW task upon which others had failed to deliver. There were weekly meetings for the team working on SOR LA to discuss progress in the project, workload, strategies etc from which the claimant found herself excluded.

Award to the claimant of an unsatisfactory PBC3 rating for 2014 without any warning or documentary foundation in clear contravention of the respondent's appraisal procedure

115. A few weeks later, on 22 January 2015, following a decision taken by Susan Bruce and Carter Dodd, the claimant was awarded an unsatisfactory PBC 3 rating for the year 2014 completely out of the blue and in contravention of the respondent's appraisal procedure. Carol Bruce was very clear in both cross and re-examination about what the appraisal procedure requires. The respondent's managers are well trained on the PBC process and if someone has performance issues, these are discussed at the interim PBC review mid-year so that there are no surprises in the end-of-year PBC. Susan Bruce also conceded this point. Carol Bruce stated in re-examination that Ms Caitens being busy with the divestiture to Lenovo would not explain the respondent's failure to abide by this principle. Had there been any performance issues at or after the interim PBC they would have

been documented and fed back to the claimant. On the evidence before us we concluded that if the claimant had been at risk of receiving a PBC3 final rating, she would been told at the interim PBC meeting which was held with her. This would have been recorded and any issues thereafter would have been documented and fed back to her in order to give her an opportunity to improve. In this case the claimant was given the rating completely out of the blue without any warning or documentary foundation. Furthermore, Susan Zante was not informed by Jennifer Caitens that the claimant had any performance issues. The preponderance of the evidence we accepted on the point, including that of Carol Bruce and Susan Zante indicated that on 25 November 2014, the claimant was placed in a new team under the management of Susan Bruce, who was informed of her health issues. A few weeks later Ms Bruce and Mr Dodd awarded the claimant a PBC3 when there were no documented performance issues to support it. The PBC3 would trigger a process which could result in dismissal.

116. Mr Dodd had been managing the claimant for only a few weeks at the time of the 2014 PBC. The justification he gave for the rating was (a) that the claimant had asked for guidance about what she should focus on and (b) that her contribution in 'leading meetings and driving issues' was lower than that of others. The first criticism appeared to us curious in circumstances where the claimant was the only remaining member of an otherwise divested department and had only been managed by Mr Dodd and Ms Bruce for a few weeks. In cross examination Mr Dodd stated that Ms Caitens had written the PBC document and that he had added "a *few touches of the things I saw when I was her manager in 2014". We* concluded from the lack of supporting written justification from Ms Caitens that Mr Dodd had either written the PBC himself or had added the purported justification for his 3 rating. He accepted that he had made the final decision on the claimant's performance and conceded that despite knowing that the claimant's previous PBCs had all been good, he did not take into account her health.

Lack of management training in treatment of disabled employees

117. Prior to this case, none of the respondent's relevant managers had received training in handling disability in the workplace. The EHRC Code of Practice on Employment also provides that employers should be aware of the duty to make reasonable adjustments when considering past performance (Paragraph 17.80); as alluded to by the respondent's own OH provider, who told the claimant she ought to have lodged a grievance in relation to the award of a PBC3 for 2014.

The respondent's approach to adjustments

118. In his submissions for the respondent Mr Hardman submitted that *"informal adjustments had been in place since January 2015 - by way of permitting the claimant to work from home, and permitting a flexible working day - to alleviate the effect of the claimant's symptoms (of a condition then unknown) on her ability to work."* He referred to the RAAD Agreement finally drawn up between the parties on 8 September 2015 (J181). That Agreement suggested (retrospectively) that both home working and flexible working were introduced as adjustments on 1 January 2015. Although listed separately in the RAAD, they are effectively one adjustment since the flexibility is dependent on the home working. The failure to make this adjustment timeously is not one of the grounds of action for which a remedy is sought in this case. However, the respondent's approach to reasonable adjustments and the related issue of their knowledge is part of the background factual matrix and it is therefore relevant to the burden of proof. Mr Hardman submitted that the respondent had made this adjustment in January 2015. The RAAD finalised on 8 September 2015 states that the adjustment was made on 1 January 2015. We concluded that the respondent would indeed have been under a duty to make this adjustment from late 2014, that being the point at which we concluded that they had knowledge of both the claimant's disability as defined in section 6 EqA (albeit not the precise diagnosis) and the substantial disadvantage in question (see 'Knowledge of disability' below). We did not agree with Mr Hardman that the adjustment had in fact been made in January, but the submission implied acceptance that it ought to have been made then. We agreed.

Applying the Rowan test; the PCP of the respondent's applied to the claimant would have been the PCP that she attend the office premises in respect of all her working time or risk being criticised, disciplined or marked down on her contribution. We found as fact that whilst the claimant was sometimes informally permitted to work flexibly from home (for example, by Ms Caitens during her severe jaw spasm in November 2014), on other occasions, she was criticised, marked down or otherwise discouraged from doing so. For example, Mr Baillie told her in January 2015: 'By *the way, there's a new site director and you can't work from home'.* The claimant testified that she had relied on the ability to work from home in order to keep going. Because the adjustment was informal and not made using the respondent's RAAD procedure, the claimant's ability to rely on it did not survive Ms Caitens' departure. Indeed, on the facts before us, the claimant was not able to rely upon the adjustment until it was incorporated into the RAAD on 8 September 2015. Thus, the substantial disadvantage at which the claimant was put in comparison with persons who are not disabled would have been that she was unable because of her disability to attend the office full time but risked penalty, criticism or disciplinary action if she worked from home and this increased her stress levels and made absence and symptoms such as jaw spasms making her unable to speak more likely. Indeed, the claimant was given a PBC4 rating by Mr Dodd on 18 August 2015 in part allegedly for working from home. This demonstrates that her concern about the risk to her job of home working was fully justified. Thus, we concluded that these aspects of the respondent's approach to making adjustments for the claimant were facts from which the Tribunal could decide in the absence of other explanation, that the respondent discriminated by reason of her disability.

119. It is an employer's duty to make reasonable adjustments where the law requires it. A prudent employer, knowing that an employee is suffering from health impairments will refer them to OH and seek advice on whether their impairments may amount to a disability and whether adjustments are required. Susan Zante was the claimant's Blue Pages manager at the relevant time. However, she appeared unsure when or how to make an OH referral She allowed the claimant to be assessed under the PBC and PIP processes without considering the effect

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of her impairments and without adjustments in place. When the respondent did finally obtain a report from OH in May 2015 they were told that "/t /s *very likely the reason for her poor performance this year was due to ill health and to avoid this moving forward she will require flexibility and adjustments."* Instead of addressing the steps that would solve the substantial disadvantage to the claimant and taking them quickly, the respondent appeared to forget about adjustments altogether until reminded by the claimant and Carol Bruce. We infer from these primary facts that the respondent was not committed to supporting disabled employees and that the claimant's managers lacked a basic understanding of how to handle disability in the workplace.

The first performance improvement plan - the failure to set objectives within the claimant's remit or keep proper documentary records of review meetings

120. Having assessed the claimant at PBC3 for 2014 without taking any account of her health problems or considering whether adjustments were required, Mr Dodd then proceeded to place the claimant on a PIP. Being on a PIP is extremely stressful for an employee and the claimant's symptoms were exacerbated by stress as she had told her managers (for example, her email to Susan Zante dated 12 March 2015). PIPs normally last 4 weeks but Ms Bruce and Mr Dodd decided the claimant's PIP would last 9 weeks. The PIP was supposed to run from 1 March to 30 April 2015. Mr Dodd set the claimant objectives, some of which were not within her role to deliver; such as process improvements in China and certain transformation projects. He removed them once challenged, but claimed this was a reasonable adjustment. The PIP process required that the claimant be reviewed against the PIP objectives at least fortnightly. Mr Dodd gave the claimant positive verbal reviews but did not keep records of them. The lay members of this Tribunal were astonished at this. In a process that can lead to dismissal they regarded it as inconceivable that a manager would not keep records of discussions and progress or lack of progress against the objectives. One would expect in a company the size of the respondent that the process would be transparent. An employee needs to have written records so that she can clearly see what she needs to do to succeed. The only written record created by

Mr Dodd during the nine-week PIP period appears to have been an email dated 16 April 2015. It was OH's view in May that *"The stress of moving house and being placed on a PIP will have most likely aggravated her symptoms. The business should be supportive and give Lynn any help she needs to pass the PIP as further stress and anxiety may aggravate her symptoms which could lead to further absence."* We noted the failure to refer the claimant to OH prior to the PIP; the failure to use the RAAD process; the failure to make adjustments before placing the claimant on the PIP; and the complete lack of transparency in the PIP process itself. We inferred from these facts, taken together with the others set out below that the respondent was 'managing the claimant out'. On the balance of probabilities, we inferred that for the reasons in the paragraphs above and below, they were doing so because of her disability.

Extension of the PIP

121. Not content with the original 9 week PIP, on 23 April 2015 Mr Dodd and Ms Zante extended the PIP end date from 30 April to 1 June 2015. The following day the claimant went off sick citing the side effects of her new medication. She remained off until 1 May 2015. The extension of the PIP beyond its original (already double the usual) timescale was obviously likely to increase the stress on the claimant (as OH subsequently indicated in their report of 23 May). We noted that, beyond an instruction to the claimant to engage OH on 17 April 2015 and get a management referral done, there was no evidence of any discussions by Mr Dodd with the claimant about the impact of her health problems on the performance being measured in the PIP. Given the content of his email set out in the next paragraph, we could not understand why the PIP had been extended.

Failure of the PIP

122. On 2 June 2015 Mr Dodd told Susan Bruce in an email (J107) attaching the claimant's OH report and saying that he needed to close out the claimant's PIP: *"I think her performance is at a 2 or better level when she is available to work."*

However, after a discussion with Ms Bruce and advice from HR, Mr Dodd placed the PIP on hold to complete a RAAD.

123. The respondent's handling of the PIP then went from bad to worse. Forgetting that he had put the PIP on hold, so he could put in place reasonable adjustments, and without responding to the claimant's draft RAAD or putting those adjustments in place, Mr Dodd arranged a meeting with the claimant for 18 August to 'close off her PIP. Without the benefit of any documentary PIP review records (a matter remarked upon by Carol Bruce) and having not had a PIP review meeting since mid-April, he somehow discussed the claimant's performance under the PIP with Susan Bruce who told him the claimant should be given a PBC4 rating (which would lead to her dismissal). At this stage, the RAAD had still not been agreed by the respondent, and adjustments the respondent was duty bound to make were not in place. Mr Baillie, Mr Dodd, and Ms Bruce had all apparently forgotten they had put the PIP on hold and had also forgotten about the RAAD. We inferred that their focus at this point was the claimant's dismissal.

124. When the claimant attended the meeting on 18 August 2015 Mr Dodd told her she had failed the PIP and he was issuing her with an unsuccessful PBC4 rating. Like the PBC3 for 2014 which had begun the PIP process in January 2015, this PBC4 came completely out of the blue with no documentary foundation, in contravention of the respondent's own procedure. Mr Dodd explained to the claimant that this would 'kick off a further procedure which could ultimately lead to her dismissal. Mr Dodd's stated reasons for the 4 rating were firstly, 'asking for direction', as described in the 2014 PBC; and secondly, that the claimant was working from home without Mr Baillie knowing where she was. Working from home was one of the adjustments the claimant had requested in the draft RAAD document she had submitted to the respondent which they had not yet responded to. As discussed above, it was an adjustment the respondent now submits it had made informally from 1 January 2015. It appeared to us that these purported justifications for the PIP 4 rating were weak and disingenuous.

125. After the call Mr Baillie admitted to the claimant that he had said to Mr Dodd that he should *'be careful of Lynn because she's clever.* Later, on 18 August 2015 the claimant emailed Mr Dodd attaching his statement to her that the PIP was on hold, confirming there had been no further discussions about it between them since then and stating that she had forwarded the reasonable adjustments form many weeks ago and had had no feedback. The claimant felt that she was being 'stitched up'. The Tribunal inferred that she was indeed being 'stitched up'. This whole episode, as set out more fully in the findings in fact left us with the very strong impression that the respondent was trying to find a way to terminate the claimant's employment either because of her disability or because of something arising in consequence of it. On balance, we concluded it was the former because we inferred from the facts that the purported concerns about the claimant's performance were not genuine. This inference was supported by: Mr Dodd's positive verbal feedback to the claimant during the PIP; the lack of documentary foundation and written records to justify a PBC4 rating in breach of the respondent's own procedure; the weak reasons given by Mr Dodd for the PBC4; and Mr Dodd's high opinion of the claimant's performance after nine weeks of observation as stated in his email of 2 June 2015. There was little evidence of concern about the claimant's levels of absence. There was no evidence of any other genuine explanation or reason for the attempt to 'manage the claimant out' by means of the PIP at this stage. Mr Hardman submitted that Mr Dodd's explanation that he had made a mistake and had genuinely forgotten having put the PIP on hold was not sufficient to give rise to an inference of discrimination on its own. We accepted this, but it was not on its own. It was not a temporary aberration in an otherwise explicable process, it was one of a number of acts which taken together, on the balance of probabilities give rise to the inference that Susan Bruce wanted the claimant performance managed out. As stated, there was no documentary evidence to suggest that there was a genuine performance reason. Indeed, Mr Dodd's email of 2 June 2015 to Ms Bruce (J107) suggests precisely the opposite.

Outcome of the grievance

126. The claimant raised a grievance which was effectively upheld by Carol Bruce in her email of 27 August to Susan Bruce. On 31 August 2015 Carol Bruce emailed the claimant advising that she had now met with her global task leaders and UK HR and that they were in agreement to rescind the PBC 4 rating; finalise and document the RAAD and then to continue with a new PIP once the adjustments were in place for a 4 week period. She said that Mr Dodd, supported by Mr Baillie and herself would run weekly PIP progress/update calls. The second PIP contained objectives the claimant had already fulfilled, and she felt the objectives generally were less challenging than those in the original PIP. With Carol Bruce involved in the performance management process as an observer, that process became transparent and the claimant passed the PIP.

127. At the end of year PBC review on 12 January 2016 the claimant received a 2 rating for her performance for 2015 from Susan Bruce and Carter Dodd. From that point, Mr Dodd did not actively engage with the claimant and did not invite her to staff meetings. The claimant had to proactively set up time to have calls with him. The claimant also found that David Baillie was physically distancing himself from her. Mr Baillie did not intervene in the example in paragraph 56, nor did he go and see the claimant afterwards or ask if she was ok. The claimant became isolated, especially from Mr Baillie in a way that was picked up by colleagues. On 10 March 2016 she was missed out of a staff social walk invitation. (A small adminicle of evidence on its own, but one among many others). We inferred that the respondent, having failed to justify the claimant's dismissal by reason of performance had decided to go at it from another angle. The lack of management training on disability issues, the delay and general failure to make adjustments before comparing the claimant's performance with colleagues; the manoeuvres by Ms S Bruce and Mr Dodd over the first PIP; Mr Baillie's remark to Mr Dodd and the claimant's ongoing isolation by Mr Baillie and Mr Dodd all supported the inference on balance that the intention to manage her out remained.

Final decision on redundancy taken prior to consultation

128. As noted above, the final decision to make the claimant redundant was said to have been taken in early March 2016 prior to the consultation. Once again, the decision maker was Susan Bruce. The claimant was the only person in Susan Bruce's UK Operations to be made redundant.

Redundancy consultation shortcomings

129. During additional oral questioning in chief of Mr Baillie by Mr Hardman, Mr Baillie was taken to page J296 of the bundle. This was a statement the claimant had read out to him at the second redundancy consultation exercise. It contained a number of important points about the claimant's role not being in 'transformation' at all but 'operations'. On the evidence to which we were taken Mr Baillie failed to pass this statement on to the redundancy decision maker Susan Bruce. On his own evidence, he also failed to give any meaningful answers to the questions the claimant asked him or even to consider whether anything she said in her statement should affect whether her role should be made redundant. The conversation set out in paragraph 62 showed Mr Baillie unable to respond to the claimant's challenge that she was not in a transformation role. Her racing team analogy in J296 was never answered. In cross examination Mr Baillie was asked where the evidence was that he had considered and responded to the points the claimant had raised in her second redundancy consultation meeting and he replied: 7 *wasn't sure I had* to." He testified initially that he had not communicated the claimant's consultation input to Ms Bruce. Asked in cross why he had not raised the claimant's consultation input points with anyone else he said he was 'taking guidance from his leadership team'. In re-examination Mr Hardman referred Mr Baillie to the respondent's note of the second consultation meeting (J231) and asked, (Mr Baillie having said he would have shared it with his line manager): *"So Susan Bruce would see this note"* to which Mr Baillie replied *"Yes".* We did not feel able to give this much weight, and in any event, it did not answer the point about the redundancy consultation shortcomings. We were concerned about Mr Baillie's prevarication, both at the time (see paragraph 62) and before

us, on the issue of whether the claimant was in 'transformation' or 'operations' and what had led to her role being made redundant.

130. With regard to the claimant's comparator, from around March 2016 the claimant carried out sales out reporting functions alongside her colleague Kirsten Shaw-Aspin. The claimant was responsible for Latin America and Ms Shaw-Aspin was responsible for Europe. The claimant and Ms Shaw-Aspin were part of 'Operations' but were required to support the Transformation team's sales reporting initiatives at regular meetings and workshops. We do not find that Ms Shaw-Aspin was a direct comparator because she was less experienced than the claimant and junior to her. Their material circumstances were not completely similar. However, the facts found regarding this are part of the factual matrix from which we have drawn the inference that a hypothetical non-disabled comparator with otherwise materially identical circumstances would not have been dismissed.

131. We considered that the primary facts set out above and the inferences we have drawn from them constituted something 'more' in the sense referred to in Madarassy v Nomura International pic (2007] IRLR 246 CA. We concluded for the reasons set out in the foregoing paragraphs that there were facts in this case from which the Tribunal could conclude in the absence of any other explanation, that the respondent dismissed the claimant because of her disability. We did not accept the respondent's explanation that the reason for the claimant's dismissal was genuinely redundancy. In summary, we concluded that the claimant's PBC3 rating for 2014 and the first PIP were not supported by genuine performance problems. Jennifer Caitens had not raised any in the 2014 interim review or documented any thereafter. The justification given for the 2014 PBC rating by Mr Dodd was weak. We did not accept either Ms S Bruce's or Mr Dodd's evidence that Jennifer Caitens had raised performance issues with the claimant at her handover for the reasons given above. The absence of genuine performance problems is also inferred from the fact that Mr Dodd gave the claimant good verbal feedback for the first PIP but did not document the PIP reviews. The inference is strongly supported by Mr Dodd's email to Susan Bruce at J107 saying, after at least nine weeks' observation that the claimant's performance was

at a 2 or better level; and Mr Dodd's unconvincing justification for the PIP4 rating. It is clear from the evidence we accepted (and it is admitted) that Ms S Bruce caused Mr Dodd to change the claimant's PIP rating from a 2 or better where he thought it should be to a 4 fail. We also inferred the lack of a genuine performance problem from the fact that, once Carol Bruce was impartially observing the second PIP, the claimant passed without difficulty, although there was evidence that it had been decided at that point that the claimant should pass as the objectives were less challenging. We did consider that the continued pressure on the claimant gradually undermined her self-confidence and exacerbated her symptoms so that the respondent's treatment of her did eventually take its toll and begin to affect her performance, especially in relation to the jaw spasms which meant that she was sometimes unable to speak and could not lead conference calls when affected.

132. When it came to the redundancy/SOSR dismissal, Mr Byrom submitted that the respondent's consultation was a sham, as was the reason they put forward for her dismissal. He referred to R v British Coal Corporation ex parte Price [19941 IRLR 72. At paragraph 25 the Court of Appeal (Glidewell LJ) consider what constitutes 'consultation' for the purposes set out in paragraph 2 of the same judgment.: *"fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its view on those subjects, with the consultor thereafter considering those views properly and genuinely. "* He suggested that genuine consultation had not taken place with the claimant in this case and we agreed for the reasons set out above. The Tribunal concluded from the ongoing isolation of the claimant by her managers; the responses given by Mr Baillie in cross examination, along with the primary facts and inferences set out above that the consultation was a sham. Susan Bruce made the decision and Mr Baillie did not feed back to her important questions and information arising from his 'consultation' with the claimant. Given the course of events, including the detrimental treatment of the claimant during much of 2015, which only stopped when she brought a successful grievance, we did not accept the respondent's explanation that the decision to dismiss the claimant as the only redundant employee in Ms Bruce's UK operation a few

months later was genuine. We concluded that the burden of proof in these circumstances had shifted to the respondent and that they had failed to discharge it. We concluded that the claimant's case that her dismissal by the respondent on 5 August 2016 was because of her disability succeeds on the facts pursuant to sections 13(1) and 39(2)(c) Equality Act 2010; that the claimant's dismissal amounts to a detriment for that purpose; and that in dismissing the claimant the respondent thereby treated her less favourably than it would have treated a hypothetical comparator in the same material circumstances but not suffering from fibromyalgia.

133. As the section 13 claim succeeds, it is not necessary to consider the alternative section 15 claim, and this is dismissed.

Knowledge of disability

134. No issue of knowledge arises in relation to the section 13 claim. The act of direct discrimination complained of took effect on 5 August 2016. The issue of the point at which the respondent knew of the claimant's disability is, nevertheless, relevant in relation to the burden of proof in this case. A protected characteristic cannot be said to form part of the reason why a person acts in a certain way if that person has no knowledge of it. It would not be appropriate to criticise the respondent's approach to reasonable adjustments for the purpose of assessing the application of the burden of proof if the respondent did not know at the time and could not reasonably have been expected to know that the claimant had a disability (as defined in section 6) and was likely to be placed at the disadvantage referred to by the application to her of the relevant PCPs. We concluded that the respondent knew and could reasonably have been expected to know from at least November 2014 that the claimant had a disability for the following reasons: a) We accepted the claimant's evidence that she discussed her health impairments and the effect of these on her normal day to day activities with Jennifer Caitens and that in particular, this was discussed at the interim PBC review in mid-2014. This is referred to in the claimant's comments on her PBC3 rating toward the end of January 2015. Susan Zante also accepted that Jennifer Caitens had discussed

the claimant's health problems with her during their handover in November 2014 (at which point the claimant was working from home with Ms Caitens' permission due to a serious jaw spasm).

135. In an email to OH dated 22 January 2015 (J81) the claimant stated: *"I'm looking for guidance please. I've recently had health issues which have affected my work and now my performance and rd like to understand what support, if any, is available to help* me."(J81). The claimant received a reply from OH the following day advising that her first action should be to raise her issues/concerns with her manager *"as they may be able to address them with you taking account of any of the guidance provided within the 'Health and Performance section' of the OH Portal." The* claimant forwarded her email exchange with OH to Susan Zante under cover of the following message: *"Susan, Jennifer and I discussed this many times and I asked her to let me know if there were any performance/employment issues and I would formalise the situation with HR. It is extremely upsetting for me to be in a situation where I cannot contribute as I would like, and my performance to be reviewed in such a manner without recognition of the ongoing issues I face."*

136. We concluded from this and from the evidence given by the claimant in cross examination that the claimant had, indeed made Jennifer Caitens aware of her impairments and the substantial and long-term adverse effect they were having on her ability to carry out normal day to day activities. Had the respondent trained its Blue Pages managers in handling disability in the workplace, these discussions would have prompted either Ms Caitens or - later in 2014 - Ms Zante to make an OH referral during 2014 to see what support the claimant required. Instead, the matter was handled informally by the claimant being sometimes permitted to work flexibly from home and sometimes criticised for doing so. Thus, we concluded from the evidence before us, (particularly the evidence given by the claimant in cross examination), that the respondent could reasonably have been expected to know by November 2014 that the claimant had a disability (defined in section 6 as a physical or mental impairment having a substantial and long-term adverse effect on her ability to carry out normal day to day activities) and should have known by the time of her jaw spasm and period of home-working in

November 2014 that she was likely to be placed at the substantial disadvantage by the application to her of the provision that she attend the office premises and work office hours every day or face criticism.

137. The respondent certainly knew of the disadvantage by at least 1 January 2015, when it claimed retrospectively that it had made the adjustment. Mr Hardman suggested to the claimant in cross examination that there was no point in the respondent making a referral to OH until she had had a diagnosis. The claimant's response was persuasive: *"You don't have to put a label on something. If you have a medical condition with symptoms that are affecting your performance it's not the name that's important. I had a chronic long-term condition I was struggling very hard with. It had symptoms.'' She* said that OH should have been brought in before she was put on a performance improvement process. That is surely the correct approach. The precise diagnosis may not have been arrived at, but the symptoms were known. *"Disability'* is defined in Section 6 as a physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out day-to-day activities. We concluded that it was known to the claimant's managers by the end of 2014 and certainly by 1 January 2015 that she was suffering from an impairment that was having that effect, whether or not a formal diagnosis had been made, or a name had been given to it.

Unfair Dismissal

138. Section 98 of the Employment Rights Act 1996 ("ERA") indicates how a tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason. If the employer is successful in establishing the reason for dismissal, the tribunal must then move on to the second stage and apply Section 98(4) which requires the Tribunal to consider whether in the circumstances [including the size and administrative resources of the employer's undertaking) the employer acted reasonably. Here, the respondent's case is that the reason for their dismissal of the claimant was redundancy, failing which, reorganisation of the business being 'some other substantial reason' for dismissal

under section 98(1)(b) ERA. A reason relating to the redundancy of an employee is a potentially fair reason under Section 98(2)(c). Although the onus of proof is neutral under the second stage of the test, it is for the employer to show the reason for dismissal at stage one.

139. We are not satisfied that the respondent has fulfilled the requirements of section 98(1) by showing a potentially fair reason for dismissal in this case. For the reasons set out in our observations on the evidence above we rejected the evidence of Ms Bruce regarding the reason for the claimant's dismissal. We concluded from the facts of this case as laid out in detail above, that the reason put forward by the respondent for the claimant's dismissal was a sham as Mr Byrom submitted and that the real reason for the claimant's dismissal was her fibromyalgia.

Remedy

Recommendation

140. Mr Byrom invited us to make a recommendation under section 124(2)(c) EqA *"that the respondent is to ensure:*

- *that all its managers receive training in equal opportunities, disability in the work place and reasonable adjustments; and*
- *that managers conducting a redundancy exercise are appropriately trained and supported. "*

141. Section 124 EqA initially provided (s 124(3)) that an appropriate recommendation was: *"a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings ~~relate - (a)~~ on* -the comp/ainanT; *(b) on any other person"* However, this extended power was repealed in respect of all cases commenced after 1 October 2015), and the amended s 124(3) now provides that

a recommendation should be 'for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate'. Since the claimant is no longer in the respondent's employment, it is not competent for us to make the recommendation sought.

Compensation

Financial Loss to date of Tribunal Judgment

142. Section 124 Equality Act 2010 deals with remedies and provides that the Tribunal may *inter alia* award compensation. If compensation is awarded it must be calculated in the same way as damages for delict, in other words, it should, as far as money can do it, put the claimant in the position she would have been in but for the unlawful conduct. We therefore require to consider the position the claimant would have been in but for her dismissal and the failure to take the reasonable steps set out above. The claimant's gross weekly salary at the time of her dismissal was £873.92. Her net weekly salary was £634.45. She was aged 49 and had completed 21 years' service. The claimant found alternative employment at a weekly net salary of £612.11 and started on 19 September 2016. She was unemployed for six weeks. Her loss for the period of unemployment was 6 x £634.45 = £3,806.70. Between 6 April 2018 and 31 April 2018 (21 weeks) the claimant's net salary in her new job dropped to £610.98. From 31 August 2018 it rose to £629.37. Her wage loss from 20 September 2016 to the date of this judgment (20 December 2018) is as follows: (a) from 20 September 2016 to 5 April 2018 (80 weeks) £634.45 - £612.11 = £22.34 x 80 = £1,787.20; (b) from 6 April 2018 to 31 August 2018 (21 weeks) £634.45 - £610.98 = £23.47 x 21 = £492.87; (c) from 31 August 2018 to 20 December 2018 (16 weeks) £634.45 - £629.37 = £5.08 x 16 = £81.28. The claimant's loss of salary to the date of the Tribunal judgment is £6,168.05.

Private Medical Insurance Premia

143. Although there was reference in the claimant's Schedule of Loss to this benefit in kind and to the cost of funding alternative private medical insurance, this was not

vouched or covered in evidence and in these circumstances, we are unable to make an award for it.

Future Loss

144. We thought it likely on the basis of the OH report that the PIP process and failure to make reasonable adjustments in a timely fashion had caused the claimant to make the request to reduce her hours on 11 March 2016. Had she not been subjected to this treatment we thought it likely she would have remained full time with the ability to work from home when necessary. The claimant's on-going weekly loss is £5.08 from the date of the Tribunal Hearing. We concluded that it was appropriate to allow for a further two years' difference on the basis that at around that time it was likely the figures would equalise, so that the claimant's new remuneration would catch up with what she might have been earning had she stayed with the respondent, acknowledging that there was a reasonable chance that even had she stayed she might have moved to a role that did not involve leading conference calls. We have therefore allowed future loss of 104 weeks from the date of the Tribunal judgment. 104 x £5.08 = £528.32

Reimbursement of cost of medical report

145. The claimant has incurred the cost of obtaining the medical report from Dr Simon Dolin at J335 - 373 in the sum of £950. It is appropriate to include that in her overall loss.

Injury to Feelings

146. In Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871, [2003] IRLR 102, [20031 ICR 318 the Court of Appeal in England & Wales identified three broad bands of compensation for injury to feelings awards: a top band applicable only to the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment; a middle band used for serious cases that do not merit an award in the highest band; and a lower band

appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. Tribunals have considerable flexibility within each band allowing them to fix what they consider to be fair, reasonable and just compensation. The bands were updated for inflation by the EAT in 2009 in the case of Da'Bell v NSPCC (2009) UKEAT/0227/09, [2010] IRLR 19. The lower band was raised to between £600 and £6,000; the middle band was raised to between £6,000 and £18,000; and the upper band was raised to between £18,000 and £30,000. These figures have recently been updated again by the Presidents of the English and Scottish Tribunals. However, the new figures only apply to claims presented on or after 11 September 2017. The claim in this case was presented on 30 December 2016 and injury to feelings is therefore calculated according to the bands set out in Da'Bell. The award is meant to compensate for the hurt and humiliation suffered by a claimant and it is for the claimant to lead the necessary evidence. The award depends not on the seriousness of the discrimination but the nature of the claimant's reaction to it. The task of the Tribunal is to decide what effect the discrimination has had on the life of the claimant. Key factors are whether the discrimination has led to any medical condition, such as depression, panic attacks or stress related illness; how it has affected the claimant's personal relationships; and whether the claimant continues to suffer as a result of it. The Tribunal has to do the best it can to make a sensible assessment on the material available.

147. On the basis of our findings in fact, the claimant became more and more exhausted. She was only able to work, and unable to sleep or spend time with her family. She became allergic to her medication. She felt under immense pressure. She found that she was struggling more and more articulating during conference calls, which happened when she was stressed. Meanwhile, the claimant's feelings of isolation and exclusion were impacting on her self-worth. She began to struggle further and suffered a recurrence of her neurological problems. She developed numbness in her face. She became bad-tempered with her children and unable to spend quality time with her family. She was either working, hospitalised, ill or sleeping. On the basis of the material before us and taking account of the key

factors set out in the previous paragraph, we assess injury to feelings at the mid to higher end of the middle band of Vento and award £14,000.

Interest on awards

148. Under Regulation 2 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 the Tribunal is required to consider whether to award interest even if the claimant does not specifically apply for it. In the absence of any agreement by the parties regarding how much interest to award, interest is calculated under the Rules set out in Regulation 3. For injury to feelings awards, the interest runs from the date of the act of discrimination complained of and ends on the day the Tribunal calculates interest ('the day of calculation'). For the financial loss award, interest is awarded from the period beginning on the mid-point date and ending on the day of calculation. The mid-point date is the date halfway through the period beginning on the date of the act of discrimination and ending on the day of calculation. In Scotland, regulation 3(2) provides that interest accrues at the rate prescribed from time to time by the Act of Sederunt (Interest on Sheriff Court Decrees or Extracts) 1975. The current figure is still 8%, set by the Act of Sederunt (Interest on Sheriff Court Decrees or Extracts) 1993.

149. With regard to interest on the financial award (past loss only), 8% of £6,168.05 gives an annual figure of £493.44 and a weekly figure of £9.49. The act complained of occurred on 5 August 2016. The day of calculation is 20 December 2018 (124 weeks). The mid-point is 62 weeks. Therefore, interest on the financial award is 62 x £9.49 = £588.38.

150. With regard to interest on the injury to feelings award, 8% of £14,000 gives an annual figure of £1,120 and a weekly figure of £21.538. The Tribunal found that the first act/omission complained of occurred on or about 8 September 2015. The calculation day is 20 December 2018 (171 weeks). 171 x £21.538 = £3,683. Total interest on the awards is £588.38 + £3,683 = £4,271 .38.

Losses for unfair dismissal

151. The claimant has lost statutory rights as a result of her unfair dismissal. We assess these at £500. Other than this, there is no compensatory award because the claimant is compensated for her losses under section 124 EqA. With regard to the claimant's unfair dismissal, there is no basic award because we have assumed that the claimant received a redundancy payment.

152. The total award of damages, rounded to the nearest whole pound is calculated as follows:

Disability Discrimination Award	
Financial Loss	
Loss of earnings from 5 August 201 6 to 7 December 201 8	£6,168.05
Future loss	£528.32
Injury to feelings	£14,000.00
Interest	£4,271.38
Cost of medical report by Dr Simon Dolin	£950.00
Total Discrimination Award	**£25,917.75**
Unfair Dismissal Award	
Loss of statutory rights	£500.00
Total Unfair Dismissal Award	**£500.00**

153. The claimant did not claim for Jobseekers Allowance or other benefits. The Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996 accordingly do not apply to this award.

5

Employment Judge: M Kearns
Date of Judgment: 20 December 2018
Entered in register: 27 December 2018
io **and copied to parties**

15