EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Ms Paige Elizabeth Hyde	**AND**	**Northern Care Alliance NHS Foundation Trust**

JUDGMENT OF THE TRIBUNAL

Heard at: Manchester (by cvp) **On: 17-20 January 2022**
Deliberations at: Manchester (by cvp) **On: 16 February 2022**

Before: Employment Judge A M Buchanan
Non-Legal Members: Mr J Ostrowski and Ms E Cadbury

Appearances

For the Claimant: In person
For the Respondent: Mr J Upton - Solicitor

JUDGMENT

It is the unanimous Judgment of the Tribunal that:

1. The name of the respondent is amended to read Northern Care Alliance NHS Foundation Trust.
2. The claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 ("the 2010 Act") at all material times.
3. The claim of discrimination by failure to make reasonable adjustments advanced pursuant to sections 20/21 of the 2010 Act is not well-founded and is dismissed.
4. The claim of discrimination arising from disability advanced pursuant to section 15 of the 2010 Act is well-founded and the claimant is entitled to a remedy.
5. Any other claim of disability discrimination (howsoever advanced) is dismissed on withdrawal by the claimant.
6. A remedy hearing is required and will be listed as soon as possible.

REASONS

Preliminary matters

1.1 The claimant instituted these proceedings on 11 May 2020 relying on an early conciliation certificate on which Day A was shown as 7 May 2020 and Day B was shown as 11 May 2020. Complaints were advanced of unfair dismissal, disability discrimination, arrears of pay and notice pay.

1.2 The respondent filed a response dated 6 April 2021 in which all liability to the claimant was denied.

1.3 The claimant filed a detailed response (pages 37-44) to the respondent's response running to some 28 paragraphs. The contents of paragraph 18 (page 41) detailed reasonable adjustments contended for. The contents of paragraph 19 (page 41) summarised the claimant's case as ultimately advanced under section 15 of the 2010 Act and was then further clarified in the list of issues.

1.4 A private preliminary hearing ("PH") by telephone took place on 25 November 2020 (pages 45-58). Orders were made at that hearing for the claimant to clarify the complaints being pursued and to give further information in respect of her claimed disability.

1.5 The claimant duly provided further information (pages 59-73) and the matters about which complaint was made were set out at section 4g/h/k (pages 61-63). Further details of the claimed disability were set out at pages 65-69.

1.6 A further private PH took place on 8 March 2021 (pages 74-85). At that hearing it was confirmed that the complaints of disability discrimination being advanced were a complaint of failure to make reasonable adjustments and a complaint of discrimination arising from disability. A public preliminary hearing was listed for 10 June 2021 to consider two preliminary matters detailed below.

1.7 The public PH was listed to determine whether any complaint being advanced by the claimant had been presented out of time and whether the complaint of unfair dismissal should be dismissed because the claimant did not have two years continuous service as required by section 108(1) of the Employment Rights Act 1996 ("the 1996 Act"). It was noted that the respondent accepted that the claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 ("the 2010 Act") from 4 November 2019 but not before. The issue of whether the claimant was a disabled person at any time before that point in time was left to be determined at the final hearing. Provision was made for a list of issues to be agreed, if possible, for use at the final hearing.

1.8 The public PH duly took place which resulted in the complaint of unfair dismissal being struck out but the complaints of disability discrimination, whilst out of time, being allowed to proceed on the basis that they had been filed within such further period as was just and equitable pursuant to section 123 of the 2010 Act.

1.9 Orders (pages 650-656) made after the public PH required the claimant to provide full details of the disability discrimination complaints of failure to make reasonable adjustments and discrimination arising from disability and these were duly provided (pages 89-102) on 26 August 2021. The Tribunal noted that this document continued to refer to claims advanced under section 13 of the 2010 Act (direct discrimination). It was confirmed by the claimant at the outset of the final hearing that no such claims were pursued. It was noted also that in her pleadings the claimant had on several occasions referred to "*provision criterion and practice"* whereas she clearly meant to refer to "*reasonable adjustment".* The respondent confirmed that it knew the case it had to meet. The List of Issues referred to above did not refer to this most recent document but rather to paragraph 18 of an earlier document at page 41.

1.10 The respondent filed an updated response dated 21 September 2021 (pages 30-36) and the claimant filed a further response to that document on 24 September 2021 (pages 103-107). The Tribunal took account of all pleadings filed by the parties.

1.11 The list of issues was duly agreed (pages 86-88) and was reviewed at the outset of the final hearing. Paragraph 5 of the list of issues had been erroneously struck out instead of paragraph 6 which should have been deleted given the result of the public PH. As clarified at the outset of the hearing (and including the adjustments contended for as set out at paragraph 18 of the claimant's response to the respondent's grounds of resistance (page 41)), the issues appear in section 3 of this Judgment.

1.12 The claimant represented herself at the final hearing and adjustments were discussed before the hearing began to take account of the claimant's disability. Regular breaks were taken throughout the hearing and the Tribunal provided detailed explanations in respect of the procedure to be followed as and when requested by the claimant. The claimant was allowed to have her mother present with her throughout the hearing. During her oral submissions, the claimant indicated that she had been able to present her case as she wished and indicated that she felt her case had been carefully listened to by the Tribunal.

1.13 At the conclusion of the submissions, the Tribunal spent some time deliberating on the issues raised but was not able to complete those deliberations and accordingly arranged to meet on a further occasion to complete its decision-making process. This Judgment is issued with full reasons in order to comply with the requirements of Rule 62(2) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

The claims

2 The claimant advances the following complaints to the Tribunal:-

2.1 A complaint of disability discrimination by a failure to make reasonable adjustments relying on the provisions of sections 6, 20, 21, 39 and Schedule 8 of the 2010 Act.

2.2 A complaint of discrimination arising from disability relying on the provisions of sections 6, 15 and 39(2)(c) of 2010 Act.

3 The Issues

The issues in the various claims advanced to the Tribunal are:

Disability

1. Was the claimant a disabled person for the purposes of section 6 of the 2010 Act at any point before 4 November 2019?
2. If so, did the respondent have knowledge of the disability prior to 16 September 2019 (being the date on which the respondent received a report which detailed the claimant's relevant history).

Complaint of failure to make reasonable adjustments

3. The claimant relies on a provision, criterion or practice ("PCP") that she was required to undertake and/or cope with the usual rigours of her role. Did that PCP place the claimant at a disadvantage when compared to others such that the duty to make reasonable adjustments was engaged?
4. Did the respondent fail to make reasonable adjustments:
4.1 To provide reasonable support to the claimant and in particular to recognise that the claimant was struggling with the demands of her role?
4.2 To appoint a band 5 team member to manage the TWW Booking team?
4.3 To provide support to enable the claimant to clear the backlog of work?
4.4 To have JS relieved from her MDT Co-Ordinator role in order to provide additional support to the claimant.
4.5 To appoint a band 7 Assistant Cancer Manager – the claimant's line manager?
4.6 To ensure the MDT Room worked effectively.
4.7 To ensure the claimant did not need to work at home after working hours?
4.8 To ensure the claimant could take appropriate annual leave when requested?

Complaint of discrimination arising from disability

5. Did the respondent treat the claimant unfavourably by bringing her fixed term contract to an end before it expired?
6. Did the respondent treat the claimant unfavourably by encouraging SB to return early from her maternity leave?
7. Was any unfavourable treatment because of something arising from the claimant's disability namely her inability to attend work?
8. The respondent does not seek to rely on any proportionate means to achieve a legitimate aim.

4. **Witnesses**

In the course of the hearing, the Tribunal heard from the following witnesses:

Claimant

4.1 The claimant gave evidence and called no other witnesses.

Respondent

4.2 For the respondent evidence was heard from:

4.2.1 Nicola Remmington ("NR") who at the material time was employed by the respondent as a band 8 lead cancer manager and who was the claimant's line manager.

4.2.2 Jenna Slough ("JS") who at the material time was a band 5 cancer data quality coordinator and who was line managed by the claimant.

5. **Documents**

We had an agreed bundle comprising two lever arch files before us running to some 661 numbered pages. Any reference to a page number in these reasons is a reference to the corresponding page in the agreed bundle.

Findings of Fact

6. Having considered all the evidence both oral and documentary placed before us and in particular the way the oral evidence was given, we make the following findings of fact on the balance of probabilities:

6.1 The claimant was born on 21 June 1991. She began work as a multi-disciplinary team ("MDT") assistant coordinator within the cancer services department at Salford Royal Hospital NHS Foundation Trust ("Salford") on 5 September 2016 and subsequently moved up to the role of MDT coordinator. She was employed at band 4 of the Agenda for Change bands.

6.2 The claimant moved to work for the respondent (then known as the Pennine Acute Hospitals NHS Trust ("Pennine")) as a Cancer Support Manager with effect from 25 February 2019 within the Cancer Services Department ("the Department"). She described the move as "*taking a leap of faith"* because she accepted a fixed term contract from 25 February 2019 until 24 February 2020 to cover the maternity leave of the existing post holder Sara Bates ("SB"). The contract was set out at pages 163 to 172 and was for the fixed term of 12 months *"unless terminated earlier in accordance with the notice provisions included herein*". The notice provisions were set out at section 10 and required that the claimant receive 8 weeks' notice of termination given that she was employed by the respondent at band 6. There was a close working relationship between Salford and Pennine from April 2016 under the name Northern Care Alliance NHS Group and after the claimant was dismissed, but during the course of this litigation, Salford and Pennine formally merged and are known now by the name of the respondent in these proceedings. The result was that when the claimant moved to Pennine in February 2019, she lost her statutory protection in respect of certain employment rights (including unfair dismissal) but retained her length of service for certain rights including notice pay and redundancy.

6.3 The claimant was interviewed in January 2019 by NR and others. The Department comprised MDT coordinators and support staff. There was also a nursing arm with Macmillan nurses and an oncology nursing team. The claimant had no responsibility for the nursing side of the Department. At interview the claimant was told she would be managing 25 staff with the support of a Band 4 supervisor and a Band 5 data quality co-ordinator. The claimant was told that the team were due to

move in April 2019 from Rochdale to a new office at Oldham and that the TWW Booking Clerk team would be joining the Department.

6.4 In her role at Salford the claimant was well respected by her colleagues and by the medical professionals with whom she worked as was evidenced by the glowing testimonials set out pages 657 - 661 which we have considered. The claimant's role at Salford was at band 4 and, when she moved to work for the respondent, she became a line manager for the first time.

6.5 The duties of the claimant were detailed in the job description set out at pages 108-121. The claimant reported to the Assistant Cancer Manager (Band 7) and was accountable to the Lead Cancer Manager (Band 8). In the event, for the short time the claimant was in the workplace, the Assistant Cancer Manager was herself away because of illness and the claimant was line managed by NR as Lead Cancer Manager. The claimant's principal duties were to ensure all MDT meetings were of a high quality standard, to assist with the collection of cancer information, to oversee the tracking of patients through their cancer pathway, to encourage a team of MDT coordinators to avert breaches of national cancer waiting time targets, to contribute to the detailed validation of Trust cancer waiting time targets, to be responsible for submitting performance data on time to appropriate databases as required, to provide direct line management to the MDT co-ordination team and various additional duties including supporting the Assistant Cancer Manager and Lead Cancer Manager during absences or at times of high demand. The post represented a significant "step-up" for the claimant.

6.6 When she began her employment with the respondent, the claimant completed a *"Non-Medical New Starter Information*" form (pages 573A-573J). This form included at 573E a monitoring form on which the claimant was asked to and did reveal details of her ethnic origin, sexual orientation, and religious belief. The form also asked questions headed "*Disability Discrimination Act"* and the claimant declared that she had a "*mental health condition"* which amounted to a disability as defined and she also ticked a box marked "*other".* The claimant printed her name and signed the form and dated it 1 February 2019. Most of the form was sent through to NR as line manager of the claimant and indeed NR signed and completed page 573F. We accept the evidence of NR that she did not at any stage see page 573E.

6.7 The claimant began work in the Department on Monday 25 February 2019. NR was on annual leave. We accept that NR herself was under pressure from her own line manager to take outstanding annual leave before the end of the leave year in question. The Department was a very busy department and those who worked in it worked under considerable pressure. In her evidence, NR spoke of her own workload which required her to work evenings and weekends and to have to log on to chase matters up and be available to answer queries even at times of annual leave. We accept that the picture painted by NR was an accurate one but one which was not desirable from any perspective. The pressure under which those who worked in the Department operated is exemplified by the fact that the claimant's own line manager was absent throughout the time the claimant was in work due to workplace stress and, in fact, resigned in May 2019. Her replacement was recruited and appointed effective from September 2019. The working environment of the Department was much busier than the claimant had been used to at Salford.

6.8 The claimant spent her first week effectively shadowing SB whose role she was to cover. SB produced a detailed handover document setting out the duties the claimant was to take over. That document extends to 25 pages of closely typed information and is contained at pages 131-156. The document headed "*Cancer Support Manager -Handover"* is an exemplary document which provides a great deal of useful information. It also clearly illustrates the breadth of the role the claimant was taking up. In respect of NR, SB wrote (page 137):

"As much as Nicola is your line manager, you also need to manage her. Nicola has a unique skill… of being able to persuade you to do anything and you can't say no to her, however you need to be honest with Nicola. If you can't do something, tell her or if you are struggling with a deadline, make sure you let her know, I promise she will be fine with it and will help if she can….". SB described NR as "*a very good manager".*

6.9 Whilst the claimant spent the first week shadowing SB, at no stage did the claimant receive a formal induction into her role as the outcome of her later grievance later confirmed. The shadowing exercise was interrupted at various times during the week when SB had to attend personal appointments and when the claimant was asked to visit other sites. NR held two lengthy meetings with the claimant which were in the nature of an induction, but which were not documented.

6.10 NR was conscious that the claimant would require support in the role she was taking on as it represented a significant promotion. She put in place various measures to assist the claimant. We accept that NR and the claimant had two lengthy meetings on 5 and 6 (and some additional time on 12) March 2019 (page 197). We accept that there were no notes made of either meeting. The claimant was introduced by NR to those aspects of her role which were new to her principally the data collection and reporting duties. A factual dispute arose as to whether or not the claimant told NR during these meetings of the mental health condition from which she suffered namely depression and anxiety. We conclude that the claimant did not tell NR of those matters in either meeting and we prefer the evidence on this point of NR over that of the claimant. We do not conclude that the claimant was seeking to mislead us but rather that her recollection was at fault. We reach that conclusion because NR was an experienced manager. She was already dealing with a band 7 direct report who was away from work with long term anxiety problems and was alert to the issues raised by such matters for herself as a line manager. Furthermore, the claimant was very keen to make progress and embrace the challenge of her new role. Her mental health at the time was well managed by medication and there would be no reason to refer to those matters in that context. We conclude that NR had no personal knowledge of the claimant's mental health condition until she received an occupational health report some months later. However, as appears below we conclude that the respondent did have such knowledge and that it was imputed to NR.

6.11 In addition to the usual pressures of the role which the claimant was taking up, various other factors exceptionally increased those pressures at the time the claimant began her work.

6.11.1 The team in which the claimant worked was moving to new premises at the Oldham Hospital and this move was due to take place in April 2019. The new premises (known as D2) were being fitted out for use and we accept that an employee

named Gemma Emmerson was taking the lead in organising that move and in liaising with the Estates Department of the respondent. This matter was referred to on pages 145-147 of the SR handover document. Whilst the arrangements for the move were broadly in place when the claimant began work, we accept that this matter was an additional duty for the claimant at a time when she was new to the core duties of her role. The move took place in April 2019. The claimant was required on several occasions before the move completed to go into the office around 6am in the morning to allow contractors access to the office.

6.11.2 As part of the office move, the room in which MDT meetings took place each week also moved from Room G18 in the Education Centre to the new office suite and in fact was positioned next to the room in which the claimant and others worked from in D2. MDT meetings took place each week and were meetings at which medical professionals met together to discuss individual patients and agreed their care plans. It was important that IT systems worked well for such meetings in order to enable full discussion of medical records, images and the like. These were high level and highly pressurised meetings which the claimant and her team effectively organised and clerked. When the move to the new office took place, the IT software was not reliable and often broke down. This meant that MDT meetings (of which there could be as many as 8 each week across various specialisms) were interrupted and the MDT clerk was required to solve the problem. The clerks would often seek the assistance of the claimant, but she had no more knowledge or idea of how to solve the problems that they did. The claimant would send for IT specialists who luckily worked close by. The problem was eventually solved after some four weeks by diagnosing that the machinery had been wired incorrectly and having it rectified. We accept that for a period of several weeks the claimant's work was frequently interrupted by this problem and she became stressed because of it.

6.11.3 A decision had been taken to move another team of employees into the Department. This team was known as the "Two Week Wait Team" and comprised some 8 employees. It was decided that the claimant should become their line manager. Their work was not familiar to the claimant, and she found managing that team a source of stress. This matter was not mentioned by SB in her handover document. That addition meant the claimant's staff management responsibilities rose at that time from 25 employees to 33 employees.

6.11.4 The claimant's access to certain software packages was delayed which meant she was not able to carry out certain reporting duties or to become familiar with them as quickly as she would have liked to do. The duties of the claimant entailed her using computer packages such as Excel with which she was not familiar when she took up her duties.

6.11.5 The Assistant Cancer Services Manager who should have been the claimant's line manager at band 7 was away from work throughout the time the claimant was in the workplace. As a result, NR assumed responsibility for the line management of the claimant. NR was already under very considerable pressure in her role given the absence of her assistant and had relied heavily on SB whom the claimant was replacing.

6.12 To assist the claimant with line management responsibilities, which were new to her, NR agreed that she would sit in with the claimant when she carried out 1:1

meetings with her direct report JS and those meetings effectively became 2:1 meetings. By the time the claimant went away from work at the end of June 2019 she had responsibility for the data quality team, the MDT coordinators, the MDT facilitators , the MDT administration support and the TWW team. If all posts were filled, that would have been 40 employees (page 318/319). In addition to that support, we are satisfied that during the 16 or so weeks that the claimant worked in the Department, she did not take up all the duties of the role for which she was employed. The claimant was not required to deputise for NR at so called cancer performance meetings and the duty of her role to prepare patient tracking list updates remained with NR as did the duties appertaining to the reporting of systemic anti-cancer therapy. We are satisfied that JS and Heather Kilpatrick ("HK") provided very considerable support to the claimant and in particular HK assumed responsibility for much of the day-to-day management of the TWW clerks. JS provided considerable support to the claimant in relation to her duties of validating and uploading cancer waiting time performance details. We are satisfied that JS had been appointed to a new role of cancer data quality co-ordinator but that she delayed taking up the duties of that post in order to provide intense support to the claimant with her duties in the period of time she worked in the Department. We accept the evidence of NR as set out at paragraph 50 of her witness statement which details those aspects of the claimant's role which she had yet to take up by the time she went away from work at the end of June 2019.

6.13 The claimant had a small medical procedure on 14 March 2019 which meant she was away from work on that day and worked from home on the next day.

6.14 The claimant requested annual leave on 15 April and 23 April 2019. NR approved 15 April but not 23 April 2019 (page 229). The claimant took annual leave on 24 May 2019 (page 290). The claimant requested annual leave on 21-28 June 2019. NR granted leave on 21 June 2019 but not 24-28 June 2019 as she herself had leave already booked at that time.

6.15 The claimant and NR had regular 1:1 meetings which, for the most part, were minuted and the notes of the meetings made by NR were shared with the claimant. There was an evidential dispute on this matter. We note that the claimant accepts that NR made notes during the meeting, and we have reviewed those notes. We can see no reason why NR would not share the notes she made, and we accept that she did. Nothing much turns on the point. At the meeting on 9 April 2019 (page 243), it was noted that it was a priority for the claimant to become familiar with the working patterns of the TWW team in light of the recent transfer of that team to the Department. It was noted that the claimant was aware that it was her duty to deputise at cancer performance meetings if NR was not available. The claimant placed her stress level at 4/10 on 9 and 16 April 2019 meetings but at 6/10 at later meetings. We prefer the evidence of NR that the claimant was asked about her stress levels at those meetings and made the assessments which are recorded in the minutes. At the meeting on 16 April 2019 (page 248), it was reported that the task of inputting SACT data was still being dealt with by NR but that it would be transferred to the claimant once she had become comfortable with the process. An issue in respect of time off in lieu was noted and the claimant was asked to bring evidence of TOIL to each 1:1 going forward. At a 1:1 meeting on 28/30 May 2019 the claimant recorded her stress level at 6 and it was noted that she had still not been able to complete her

familiarisation with the work of the TWW team. A 1:1 meeting took place on 4 June 2019 (page 293) when the familiarisation with the work of the TWW team had still not been completed. The claimant was clearly struggling with various aspects of her role, and we infer that NR was entertaining doubts by this time about the claimant's ability to fulfil the role to which she had been appointed.

6.16 The claimant was absent from work with headache/migraine for 5 days from 13-17 May 2019 which was a week when NR was taking annual leave. The claimant returned briefly on 16 May 2019 but had to return home as she was unwell. As a result, Alison McCarthy, who met the claimant on 16 May 2019, decided to refer the claimant to occupational health ("OH") and in the referral wrote: *"Paige has been promoted into this new role and I am concerned this may be contributing to her current ill health. She reported in sick on Monday 13 May 2019 and states this is a migraine which she hasn't had for a couple of years… she returned to work today (16.5.19) but was clearly visibly not well and although she felt not well, she felt she had to return due to the workload and her manager being on leave. She did not feel able to talk to colleagues or move her head very much as this increased her symptoms…. I have discussed with Paige about my concerns and asked her to complete a stress questionnaire to discuss with her line manager when Paige returns to work".*

6.17 The claimant was due to be seen by OH on 17 June 2019. The claimant was absent from work again on Friday 14 and Monday 17 June 2019 with headache/migraine. She developed a headache at work and fainted on 13 June 2019. She was taken to accident and emergency and detained overnight because of low blood pressure and migraine and discharged the next day. As a result, the OH appointment was re-arranged to 2 July 2019. The claimant had annual leave on 21 June 2019. The claimant worked 24-28 June 2019 but then became unwell and did not in fact return to work again for the respondent. The fit note from 1 July 2019 recorded the reason for absence as "stress" but from 15 July 2019 the reason given was "depression".

6.18 The OH report dated 3 July 2019 (page 307) detailed that the claimant was suffering from migraines, and it was recommended that NR should conduct a stress risk assessment on her return to work because stress could be a trigger for migraine. It was suggested that regular 1:1 meetings take place to enable full discussion of problems. It was noted that the claimant would be seen again by OH on 19 August 2019.

6.19 In early July 2019 NR required Gemma Emerson to review annual leave and sickness leave dates which the claimant had inputted from the 1 March 2019 until the end of June 2019 in relation to her team as there were concerns that the information had not been inputted correctly.

6.20 On 18 July 2019 SB wrote by email to NR (page 317) in relation to her return to work. She indicated she wished to bring forward her return-to-work date after maternity leave and accrued holiday from 1 April 2020 to 13 January 2020. In the event SB did return to work on 13 January 2020 but shortly after that gave notice to leave the respondent as she had obtained another post elsewhere. The claimant asserted that NR had contacted SB to ask her to bring forward her return-to-work date. NR denied having done so. We accept the evidence of NR. NR was a senior

and experienced manager and was alert to the dangers inherent in asking an employee to return early from maternity leave and we are satisfied that she did not do so.

6.21 A long term health review meeting took place on 15 August 2019 attended by the claimant, NR and an HR advisor. The claimant reported that she was seeing her GP every fortnight and also seeing a counsellor and had been referred to the crisis team at the Fairfield General Hospital. She had been prescribed sleeping pills and was taking fluoxetine. The claimant reported she did not know when she would be able to return to work and that her work was contributing towards her anxiety particularly in the absence of the band 7 Assistant Cancer Manager. The claimant stated she would like more support for her workload. It was confirmed that the band 7 post had been recruited and the person appointed would begin work on 2 September 2019 and the band 5 Cancer Support Coordinator was already in post. It was noted that the claimant was to attend a further appointment at OH and a further review meeting was scheduled for 25 September 2019.

6.22 The claimant was seen again by OH on 16 September 2019 (page 333) when it was noted that the claimant's reason for absence from work had changed from migraine to depression. The report continued: "*She has a long history of mental health issues dating back to 2014. Her condition has been well managed in the past with appropriate medication and support but this recent exacerbation of her symptoms, Paige feels, has been triggered by a combination of work and personal issues. She is being supported by her GP who has changed her medication and offered regular support..".* It was difficult to say when the claimant would be able to return to work, but it would not be before the middle of October 2019.

6.23 On 23 September 2019 NR wrote to the claimant to cancel the sickness review meeting arranged for 25 September 2019 because the OH report of 16 September 2019 had confirmed the claimant was unfit to attend sickness absence review meetings.

6.24 On 27 September 2019 NR wrote (page 335) to the claimant in the following terms:

"I am writing to you regarding your current employment as Cancer Support Manager. As you are aware you were employed on a fixed term contract on the condition that your employment would terminate when Sarah Bates returns to work after her period of maternity leave. We have now received confirmation from Sarah Bates that her return date will be 2 December 2019. Unfortunately, the department does not have any further work for you beyond that date. We therefore issue you with notice of termination of the contract of employment and your employment with the Trust will terminate on 22 November 2019…..".

There was no contact with the claimant before that letter was written. The letter came as a great shock to the claimant.

6.25 On 23 October 2019 the claimant raised a grievance in relation to the termination of her employment and other matters which she detailed at pages 346-348. She asserted that she had tried her best in her new role and at first, she had had good feedback and then 8 additional staff were added to her 25-person team

and she had to facilitate the office move from Rochdale to Oldham D2 wing. She asserted she felt she had received little support in her new role. She detailed problems with the MDT room and noted that a band 6 manager with whom she worked closely had gone away from work with stress and had stepped down from her role and she had had to support her replacement. The claimant grieved certain matters in relation to unpaid hours of work and noted that she had become suicidal. She complained that the letter terminating her employment had been sent from the email account of a band 5 employee in her department rather than from the account of NR who had written the letter.

6.26 The claimant was interviewed in relation to her grievance on 21 November 2019 and a report by the investigating officer was produced in December 2019 (pages 376-384). The conclusion of the report detailed that the claimant was appointed from a band 4 to a band 6 post and went on:

"*It is a big jump from a band 4 to band 6 and this would have required a comprehensive induction programme and measurable objectives to support PH develop into this role. There is no evidence of an induction programme however NR states one was held in the first week and carried out by SB…… With all of the above taken into account I feel that PH should have been given a comprehensive induction programme and also specific measurable objectives to support her develop (sic) into the band 6 role. Though this has been communicated and been undertaken by NR, evidence in the form of meeting notes would have provided confirmation of what had been undertaken and communicated. However, there is evidence to support a very detailed handover and also regular contact and support from NR throughout PH contract. Based on the evidence gathered as part of the investigation, I do not recommend formal action is taken but would suggest a file note be made on NR personal file and a conversation is had with NR around the need to document staff induction programmes, audits of 1:1s and objective setting".*

6.27 A letter was sent to the claimant dated 31 Jan 2020 (page 397) which partly upheld the grievance. The letter continued:

"I therefore partly uphold your complaint that you received a lack of support and resources in the way of a comprehensive documented induction programme. I would like to apologise to you on behalf of the trust as the lack of a comprehensive documented induction programme falls short of the standards expected of managers in inducting staff and is not in accordance with Trust values. Although the Trust has policies and procedures in place to ensure staff receive training to support a full understanding of individual roles and responsibilities, it seems that on this occasion, the safeguards in place under the Policy were not fully followed by all parties. As a consequence, I would like to reassure you that appropriate management action has specifically been taken to address this following the investigation details of which are confidential".

6.28 The claimant was told of her right of appeal and did appeal (pages 401-403). However, the appeal was not taken forward when the claimant indicated that she intended to pursue proceedings before the Tribunal.

6.29 The claimant has suffered from anxiety for many years. Her GP records (pages 480-501) indicate she was first referred for anxiety problems on 28 July 2004. On 10 February 2015 the claimant was advised that she was clinically depressed and there was a review to consider if she needed medication. On 20 February 2015 the claimant was prescribed a low dose of the anti-depressant citalopram and has taken that medication or a prescribed alternative since that time in varying dosages. By 5 June 2017 she was taking 20mgs daily of citalopram and that dosage was later increased to 30mgs daily. On 18 December 2018 the claimant reported increased anxiety and panic attacks and that citalopram did not seem to be working. Her medication was changed to sertraline 50mgs daily. She attended her GP with "low mood" on 12 February 2019. That prescription was maintained when the claimant next saw her GP on 1 July 2019. On 15 July 2019 the medication was changed to fluoxetine which was increased to 40mgs daily in August 2019. In October 2019 the claimant's prescription was changed gradually from fluoxetine to mirtazapine. There was a short period in early 2019 when the claimant considered coming off her medication but did not do so.

6.30 We are satisfied that the claimant did not tell NR during her employment that she was struggling with her role or that she was disabled. The claimant was anxious to succeed in her new role and effectively hid her depression/anxiety. The claimant never took up all the duties of her role and, when she went away from work on 28 June 2019, there were several important aspects of the role which she had not taken up. The claimant received very considerable assistance with her duties from JS and from Heather Kilpatrick in respect of the TWW team. JS had been appointed to a new role from February 2019 but barely took up those duties given the assistance she provided to the claimant.

Submissions

7. We received detailed written submissions from the claimant and from the representative of the respondent. These were supplemented by oral submissions, and all are briefly summarised.

Claimant

7.1 The claimant summarised the case which she had advanced. She submitted that she satisfied the definition of a disabled person and had declared her disability on the new starter form completed on the 1 February 2019. The claimant asserted she had told NR of her disability at the meetings in early March 2019 for which there are no notes produced. The claimant asserted that the stress level indications completed on the 1:1 forms were made up without any input from her. The claimant submitted that she had made NR aware of her disability. She had had great difficulty managing up to 37 staff with frequent absences of her acting line manager and with the absences of key members of her team. She had been unable to take annual leave when she needed and wanted it because of having to cover for her line manager and take on the new team of TWW employees. The claimant submitted that she was not offered any conversation to discuss reasonable adjustments either during her time in the workplace or once she had become ill.

Respondent

7.2 Mr Upton filed written submissions extending to 68 paragraphs and made oral submissions. It was accepted the claimant was diagnosed with depression in 2015 and has been in receipt of medication for the vast majority of the time since that diagnosis. Substantial adverse effect on normal day to day activities was only accepted from 1 July 2019 and further, that effect was only accepted as likely to be long-term with effect from 4 November 2019.

7.3 It was submitted that the new starter form was not used as a method of enabling an employee to declare a disability and the claimant could have disclosed that disability separately to her line manager. It was submitted that the document at page 573E did not fix the respondent with knowledge of the claimant's disability. It was submitted that, if the claimant had disclosed the condition to NR, it was very unlikely that NR would have done nothing about it given her knowledge of how to deal with such matters and given that she was managing the absence of a band 7 manager for a similar condition. The respondent did not become aware of the impairment until the occupational health report of 16 September 2019.

7.4 It was submitted that the PCP relied on namely the requirement to undertake the usual rigours of the role was not applied given that the respondent only ever required the claimant to undertake a fraction of the full-time role. Given that that is so, the claimant should not have been placed at a substantial disadvantage. It was submitted that adjustments were made to effectively remove the claimant's duties in relation to the TWW team. It was submitted that the adjustment sought in respect of reducing the number of meetings with NR would not have removed any disadvantage and was not a reasonable adjustment. It was submitted that there had been an adjustment made to allow JS to work with and to support the claimant. It was submitted that the claimant was not covering the role of the band 7 post holder but that in any event the respondent acted reasonably in appointing to that post as soon as reasonably possible. It was submitted that the MDT room did work properly and that such problems as did exist were resolved within a reasonable time. It was submitted the claimant was never required to log on at home until the early hours of the morning and the respondent had no knowledge the claimant was doing so. It was submitted that the claimant was allowed to take appropriate annual leave and any leave which was refused was reasonably refused. It was submitted that the respondent had made all reasonable adjustments notwithstanding its lack of knowledge of the disability.

7.5 It was submitted that the reason the claimant's contract was terminated was because SB was returning to duty. and it had no connection to the claimant's disability or her absence from work which arose from that disability (if there was a disability).

8. The Law

The meaning of Disability within section 6 of the 2010 Act

8.1 The Tribunal reminded itself of the meaning of disability and in particular Section 6 of the 2010 Act which provides:

(1) A person (P) has a disability if--
(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability--
(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)--
(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

8.2 We have also referred to Schedule I to the 2010 Act and in particular the following paragraph 2:

2. Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

8.3 The Tribunal has reminded itself of the decision in **Goodwin –v- The Patent Office 1999 ICR 302 EAT** and the guidance in that decision to the effect that in answering the question whether a person is disabled for the purposes of what is now section 6 of the 2010 Act, a Tribunal should consider the evidence by reference to four questions namely:
1. did the claimant have a mental and/or physical impairment?
2. did the impairment adversely affect the claimant's ability to carry out normal day to day activities?
3. was the adverse effect substantial?
4. was the adverse effect long term?
We note that the four questions should be posed sequentially and not cumulatively. We note it is for us to assess such medical and other evidence as we have before us and then to conclude for ourselves whether the claimant was a disabled person at the relevant time.

8.4 The Tribunal reminded itself that the meaning of the word "*likely"* referred to at paragraph 8.2 above is "*could well happen*" as determined by Lady Hale in **SCA Packaging Limited –v- Boyle 2009 ICR 1056**.

8.5 We have reminded ourselves of the decision in **College of Ripon and York St John -v- Hobbs 2002 185** and note there is no statutory definition of "impairment" and that the 2010 Act contemplates that an impairment can be something that results from an illness as opposed to itself being the illness. It can thus be cause or effect. We have noted also the decision in **Urso -v- DWP UKEAT/0045/2016** and the necessity for an employer to consider the symptoms and effect of an employee's disability and that there may be cases where the specific cause of the disability is not known or has not been identified at the material time. What is important is that the employer considers the symptoms and effect of the impairment. We note that stress and anxiety can occur in bouts separated by periods of stress free good mental health but that is no barrier to establishing that anxiety or stress is a disability provided a claimant can show that the impairment has a substantial adverse long-term effect on ability to carry out normal day-to-day activities.

Failure to make Reasonable Adjustment Claim: sections 20/21 of the 2010 Act

8.6 The Tribunal has reminded itself of the relevant provisions of section 20 and 21 and Schedule 8 of the 2010 Act which read:

Section 20:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A 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 take to avoid the disadvantage.

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

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

Section 21

(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
(3) A provision of an applicable Schedule w)hich imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue

of subsection(2): a failure to comply is , accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8

8.7 The Tribunal has had regard to the relevant provisions of Schedule 8 of the 2010 Act and in particular paragraph 20 which reads:
" (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know...
(b)….that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

8.8 The Tribunal reminded itself of the authority of **The Environment Agency v Rowan [2008] IRLR20** and the words of Judge Serota QC, namely:

"*An Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the 1995 Act by failure to comply with section 4A duty must identify –*

(a) the provision, criterion or practice applied by or on behalf of an employer;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate);

(d) the nature and extent of the substantial disadvantage suffered by the claimant.
It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by and on behalf of an employer" and the 'physical feature of the premises', so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above 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".

The Tribunal notes this guidance was delivered in the context of the 1995 Act but considers it equally applicable to the provisions of the 2010 Act.

8.9 The Tribunal has reminded itself of the guidance in respect of the burden of proof in claims relating to an alleged breach of the duty to make reasonable adjustments in the decision in **Project Management Institute -v- Latif 2007 IRLR 579** where Elias P states:

"It seems to us that by the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative……that is why the burden is reversed once a potentially reasonable adjustment has been identified…..the key point…is that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a

substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made……we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

8.10 The Tribunal has had regard to the **EHRC Code of Practice on Employment 2011** ("the Code") and in particular paragraph 6.28 and the factors which might be taken into account when deciding what was a reasonable step for an employer to have to take namely:-

"(1) Whether taking any particular step would be effective in preventing the substantial disadvantage.

(2) The practicability of the step.

(3) The financial and other costs of making the adjustment and the extent of any disruption caused.

(4) The extent of the employer's financial or other resources.

(5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice from Access to Work).

(6) The type and size of the employer. "

We have also reminded ourselves of paragraphs 6.19 and 6.21 of the Code in respect of knowledge of disability:

"6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know or could reasonably be expected to know that a worker has a disability and is or is likely to be placed at a substantial disadvantage. The employer must however do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment…".

6.21 If an employer's agent or employee (such as an occupational health advisor, HR officer or a recruitment agent) knows in that capacity of a worker's disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. Employers therefore need to ensure where information about a disabled person may come through different channels, there is means - suitably confidential and subject to the disabled persons consent - for bringing that information together to make it easier for the employer to fulfil their duties under the Act".

8.11 In relation to the question of the knowledge of the respondent, the Tribunal has reminded itself of the decision in **Secretary of State for Work and Pensions –v- Alam 2010 ICR 665** and in particular the following guidance:

"Separately however, it seems to us clear, as a matter of statutory interpretation and giving the language of those provisions their ordinary meaning, that to ascertain whether the exemption from the obligation to make reasonable adjustments provided for by section 4A(3) and 4A(3)(b) applies, two questions arise. They are:

1. Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: "no" then there is a second question, namely,

2. Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)?

If the answer to that second question is: "no", then the section does not impose any duty to make reasonable adjustments. Thus, the employer will qualify for the exemption from any duty to make reasonable adjustments if both those questions are answered in the negative. That interpretation takes proper account not only of the use, twice, of the word "and" but also of the comma after "know" in the second line of section 4A(3)".

8.12 We note that where a position is reached when there is nothing an employer can reasonably do to alleviate a disadvantage then the duty to make adjustments falls away: this will be the case where the position is irretrievable. This may be the case where the employer has caused the employee's predicament where, even in that situation, there is no unlimited obligation to accommodate the employee's needs. If an adjustment proposed will not in fact procure a return to work, then it will not be a reasonable adjustment. We note also that the EAT in **Lincolnshire Police –v- Weaver 2008 AER 291** made it clear that a Tribunal must take account of the wider implications of any proposed adjustment, and this may include operational objectives such as the impact on other workers, safety and operational efficiency. The purpose of an adjustment in the employment context is to return the employee to work.

Discrimination arising from disability – section 15 of the 2010 Act.

8.13 The Tribunal has reminded itself of the provisions of **section 15 of the 2010 Act** which read:

"(1) A person (A) discriminates against a disabled person (B) if –

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

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

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

8.14 We remind ourselves that in considering a claim pursuant to section 15 of the 2010 Act, we need to consider what breach of section 39 of the 2010 Act is established, whether there was unfavourable treatment of the claimant, whether there is something arising in consequence of the disability and finally whether the unfavourable treatment was because of the something arising from the disability. In respect of the meaning of unfavourable in section 15 we noted **Trustees of Swansea University Pension & Assurance Scheme –v- Williams 2015 UKEAT/0415/14** and we have noted in particular the guidance:

"I accept Mr O'Dair's submission that it is for a Tribunal to recognise when an individual has been treated unfavourably. It is impossible to be prescriptive of every circumstance in which that might occur. But it is, I think, not only possible but necessary to identify sufficiently those features which will be relevant in the assessment which this recognition necessarily involves. In my judgment, treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be

taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be".

8.15 A useful explanation of the difference between claims under section 15 and those under sections 20/21 of the 2010 Act was provided by Judge Richardson in **General Dynamics –v- Carranza UKEAT/0107/**14 in the following terms.

"The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability – S.15 of the Act. The second is the duty to make adjustments, S.20-21 of the Act. The focus of these provisions is different. Section 15 is focused upon making allowances for disability. Unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20-21 focus upon affirmative action – if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage. In many cases the two forms of prohibited conduct are closely related – an employer who is in breach of the duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct. But not every case involves a breach of the duty to make reasonable adjustments, and dismissal for poor attendance can be quite difficult to analyse in that way. Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play, or whether the case is best considered and analysed under the new robust S.15".

8.16 We have reminded ourselves of the guidance of Simler J in **Pnaiser –v- NHS England 2016 IRLR 170** in respect of the proper approach to adopt in cases involving section 15 of the 2010 Act.
From these authorities, the proper approach can be summarised as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or

effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

Burden of Proof and other relevant provisions of the 2010 Act.

8.17 The Tribunal has reminded itself of the relevant provisions of **section 136 of the 2010** Act which read:

"(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 sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An employment tribunal……."

8.18 The Tribunal has reminded itself of the relevant provisions of **section 39 of the 2010 Act** and in particular:

(2) An employer (A) must not discriminate against an employee of A's (B)-
…
(c) by dismissing B
(d) by subjecting B to any other detriment……
(5) A duty to make reasonable adjustments applies to an employer…
(7) In subsections (2)(c)… the reference to dismissing B includes a reference to the termination of B's employment-…
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

Conclusions and Discussion

9. We approach our conclusions by dealing with the various complaints advanced and issues arising in the following order:

9.1 The question of the disabled status of the claimant in respect of the asserted disability of depression/anxiety.

9.2 The question of whether and, if so, when the respondent had knowledge of that disability and any substantial disadvantage to which the claimant was placed by any PCP applied.

9.3 The complaint in respect of alleged failures to make reasonable adjustments.

9.4 The complaint in respect of discrimination arising from disability.

10. We remind ourselves what this case is not about. We observe that some of the evidence of the claimant related to alleged failures by the respondent to observe its duty of care towards her. We have no jurisdiction over such matters and were told that no such proceedings are ongoing in the civil courts. Our jurisdiction is limited to questions of disability discrimination alone.

Discussion and conclusions

11. The question of disability

11.1 We approach the question of disability as set out in **Goodwin** (above). The claimant has suffered from the impairment of depression/anxiety since at least 2015. She has taken medication to ameliorate the effects of that impairment since 2015. The claimant had been asked to set out the effects of that impairment on her day-to-day activities if she had not been taking medication. The claimant provided that

information by reference to the time she wrote the document rather than the time of the alleged discriminatory acts. However, in her oral evidence to the Tribunal, the claimant told us that her medication played a massive part in her being able to function and without it that she would not be able to function even to the extent of being able to get out of bed in the morning and being able to carry out every day living activities. Whilst we noted a tendency for the claimant to exaggerate her evidence at times, we accepted her evidence in respect of the beneficial effect of the medication which she has taken since 2015. We are satisfied that without it there would be a substantial (in the sense of more than minor or trivial) adverse effect on her normal day to day activities and that that had been the position at all times since 2015.

11.2 If that last conclusion should be wrong, then we are satisfied that if, in the period from 2015 until November 2019, there were times when there was no substantial adverse effect on the claimant's ability to carry out day to day activities, then such substantial adverse effect was likely to recur. Accordingly, the claimant would be considered a disabled person pursuant to paragraph 2(2) of schedule I of the 2010 Act in any event.

11.3 We conclude that the claimant was a disabled person for the purposes of section 6 of the 2010 Act throughout the material period for the purposes of these proceedings namely from February 2019 until November 2019.

12. The knowledge of the respondent

12.1 As set out above, we accept that the claimant did not tell NR of her disabled status at any time. The question therefore arises as to whether the respondent generally had knowledge of the claimant's disability or should reasonably have had that knowledge. We have considered page 573E in detail as this is the central document in relation to the question of the respondent's knowledge of the claimant's disability. Whilst this is clearly a monitoring form, the claimant was asked to complete all the questions posed on it. The final section is headed "Disability Discrimination Act" and goes onto explain and ask questions about the various elements of the definition of disability. The claimant completed the questions raised and revealed that she had a mental health condition and another unspecified impairment which amounted to a disability, and she signed and dated the form – printing her name in full. This form was returned to the HR department of the respondent. We have considered whether that form is sufficient to fasten the respondent with knowledge of the claimant's disability.

12.2 We have considered the provisions of the Code and in particular paragraph 6.21 to which we refer at paragraph 8.10 above. We conclude that the claimant's declaration set out on page 573E is sufficient to fix the respondent generally with knowledge of the claimant's disability. The claimant was entitled to think that, by completing that form, she had advised the respondent of her disability. Given that the information was not given anonymously, we would have expected systems to have been in place, coupled with the claimant's consent, to ensure the claimant's line manager was advised of the declared disability.

12.3 If page 573E had been completed anonymously and had it been made clear to the claimant that the information was being provided purely for monitoring purposes

and would not be shared, then our conclusion may well have been different. However, in the circumstances of this particular case, we conclude that the respondent was aware of the claimant's disability from 1 February 2019 and further we conclude that that knowledge was imputed to the claimant's line manager. The respondent may well consider that that form needs to be updated given that it refers to a repealed statute and also that it should revisit its procedures so as to ensure that it is not fastened in the future with knowledge of an employee's disability without its line managers also being made aware of that fact and of the duties which arise in consequence of that knowledge.

12.4 Whilst dealing with the question of knowledge, we have considered whether or not, for the purposes of the reasonable adjustment claim, the respondent had knowledge or ought to have had knowledge of any substantial disadvantage to which the claimant was placed by reason of the PCP contended for in this case. In that regard, we conclude that if NR had had actual knowledge of the claimant's disability, then she would reasonably have made enquiries about the effect of that disability on the claimant in the context of the contractual duties she was expected to perform. Our conclusion at paragraph 12.3 above means that knowledge of the claimant's disability is imputed to NR, and we therefore conclude that NR. on behalf of the respondent, ought reasonably to have been expected to know of any substantial disadvantage to which the claimant was put by the PCP applied by the respondent.

13. The complaint of failure to make reasonable adjustments

13.1 In this complaint, the claimant contended that she was required by the respondent to undertake and cope with the usual rigours of her band 6 role. The respondent argued that that PCP was not in fact applied to the claimant because she was never required to complete all the duties of her role during the brief period she worked for the respondent and was at work.

13.2 We reject the respondent's assertion. Whilst the respondent made temporary adjustments to the role the claimant was employed to carry out, it is clear that the claimant was expected to fulfil all the duties of her role and was expected to cope with the usual rigours of that role. The adjustments made were to assist the claimant, as a new employee, to learn the duties of her role. There is no suggestion that the requirements of the claimant's role, which she took over from SB, were formally reduced in any way. The expectation was that the claimant would carry out all the duties of the role and that is clearly what the claimant and NR were working towards in the various 1:1 meetings held between them. The fact that some adjustments to the role were made in the early stages of the claimant's employment does not mean, in our judgment, that the PCP was not applied. We conclude that the PCP contended for by the claimant in this case was applied to the claimant and that element of this complaint is satisfied.

13.3 We have considered whether the PCP placed the claimant at a substantial (in the sense of being more than minor or trivial) disadvantage when compared to persons who were not disabled as the claimant was. We have considered this matter at length. The respondent contends that the claimant should not have been placed at a disadvantage given the reduced scope of the role the claimant was carrying out in her short time in the office. Having concluded that the PCP contended for in this case was applied, we conclude that that PCP did place the claimant at a substantial

disadvantage when compared to other employees who were not disabled. The claimant suffered from depression and anxiety and the rigours of the role were something which impacted adversely on the claimant to a greater extent than would have been the case with a non-disabled employee. We conclude that the substantial disadvantage element of this complaint is made out and that this complaint essentially revolves around whether the respondent made all reasonable adjustments to remove the disadvantage.

13.4 The duty to make reasonable adjustments fell to NR as the line manager of the claimant. We have already concluded that NR did not have actual knowledge of the claimant's disability. Thus, if NR did make all reasonable adjustments, then this will be an example of a case where the respondent (through NR) complied with its duty to make reasonable adjustments without knowing that it was in fact subject to that duty. If all reasonable adjustments were made, then that is sufficient. The respondent is not in breach of its duty even if its compliance is entirely fortuitous and unconsidered. Thus, we turn to the question of the adjustments contended for by the claimant as being reasonable but not made by the respondent.

13.5 We have considered whether it would have been a reasonable adjustment to have appointed a band 5 employee to manage the TWW booking team and so to have removed most, if not all, involvement of the claimant with that team. We accept what the respondent says about this matter. We concur that it would not have been a reasonable adjustment to employ a band 5 employee to manage that small team of 8 people. Whilst the claimant was working in the office, the respondent placed HK in place to temporarily supervise the TWW team and we are satisfied that HK was effective in that role. We accept also that after some "teething problems" in the first few weeks after the TWW team joined the Department, the claimant's involvement with that team greatly reduced. We conclude that the management structure in place to manage the TWW team was appropriate and did remove from the claimant any necessity for her to be involved in the management of the TWW team to any great extent. What was done was a reasonable adjustment to the PCP. To have gone further would have involved employing extra higher-grade staff to carry out duties not appropriate to that higher grade and would not have been reasonable.

13.6 We are satisfied that JS effectively delayed taking up the duties of her new role in order to provide intensive support to the claimant with her duties. We are satisfied that JS retained some small area of responsibility for clerking and organising one MDT meeting each week, but we do not accept it would have been a reasonable adjustment to have removed that duty from her in order to enable her to provide yet more support to the claimant. The support with which the claimant was provided was in our judgment reasonable. This is particularly the case given that that support was coupled with an adjustment to the duties of the claimant's role which she was required to perform. The MDT role of JS was an important role in respect of an important committee. There was no failure to make a reasonable adjustment in failing to remove from JS her MDT co-ordinator role.

13.7 In respect of the recruitment of a band 7 employee to replace CS, we conclude that the respondent acted reasonably and made reasonable adjustments to the claimant's role. We accept that the duties of the band 7 role were effectively absorbed by NR during the absence of CS and were not passed down to the claimant further than was reasonable. CS left her role in May 2019 and a replacement was appointed

effective from September 2019. We conclude that that was a reasonable time scale for the appointment process of a relatively senior employee and the respondent acted reasonably. In so far as the absence of CS from the workplace is concerned, the respondent acted reasonably and did not fail to make any reasonable adjustments to the role of the claimant in that regard.

13.8 With regard to the MDT room, we conclude that, after some initial teething troubles, the room worked effectively. We reject the claimant's evidence that the problems with the room were constant. Some meetings in the early days after the office move were disrupted, but not all of them, and once the problem with the IT equipment was diagnosed, the problem was swiftly rectified. We do not accept that any further adjustment to the role of the claimant was reasonably required in relation to the MDT room. The respondent addressed the problems as quickly as it reasonably could. Of course, further adjustment to the PCP could have been made such as removing from the claimant any responsibility for anything which went on in the MDT room. However, the MDT meetings were an essential part of the role which the claimant was employed to carry out and we conclude that any further adjustment would have been beyond that which was reasonable.

13.9 We do not accept that the claimant worked from home as often or as late as she claimed. We find this element of her evidence exaggerated. We accept that the claimant was at no time required to work from home until the early hours and the respondent through NR had no knowledge that the claimant was doing so. It was not part of the claimant's role that she should do so, and we do not accept that she did so to the extent she claimed. This was not a requirement of the claimant's role. There was no adjustment required to the PCP to remove a requirement which did not exist.

13.10 We do not accept that the claimant was unreasonably refused annual leave. Our findings indicate that in the four months the claimant was in the workplace, she was allowed to take some days of annual leave. There were some days which were requested and refused but we accept that that is part and parcel of any workplace where an employee works in a team. In the 16 weeks worked by the claimant, she took 3 days annual leave in addition to the bank holidays which fell within that period. The adjustment contended for in this matter was neither required not reasonable.

13.11 We have considered the adjustments contended for by the claimant under the general description of reasonable support as set out at points 4.1 and 4.3 of the list of issues above. In particular, we deal with the adjustments contended for by the claimant that the number of meetings she was required to attend with NR should have been reduced, that she needed and should have been provided with further support to enable her to clear the backlog of work which had built up and that she needed an appreciation by the respondent that she was struggling with her role. We also bring into this part of our deliberations the fact that the claimant did not receive a formal induction into her new role as the grievance outcome made plain.

13.12 In relation to the number of meetings between the claimant and NR, we do not accept that it would have been a reasonable adjustment to have reduced those meetings. We find that those meetings were a source of support to the claimant and that NR did all she could in those meetings to advise and guide the claimant in her new role. It is not a reasonable adjustment to require a line manager not to meet with her direct report in meetings designed to assist the employee and which we find did

assist the claimant. We conclude that NR, as an experienced manager, did put in place, in spite of her lack of knowledge of the claimant's disability, all reasonable adjustments in terms of support to the claimant. The claimant was afforded the advantage of detailed meetings with NR when she was introduced to her role, she was afforded the adjustment of not being required to carry out certain aspects of her role (particularly, but not exclusively, in terms of data collation) until such time as she could become competent to do so. Additional support was provided to the claimant from members of staff junior to her (including but not limited to JS) who to the dereliction of their own duties assisted the claimant in her duties and the claimant was encouraged to take up specific training on aspects of her role – such as training in the use of the IT package Excel.

13.13 We conclude that the respondent through NR did make all reasonable adjustments to the PCP in spite of a lack of appreciation on the part of NR that the claimant was disabled. This resulted from NR's appreciation that the claimant had moved to work for a new employer in a busier and more pressurised environment than she was used to, that she was moving up two significant grades in pay scale and that she was taking on much increased responsibility. We conclude that the claimant was fully inducted to her role by NR albeit informally. We conclude that a formal induction, which the grievance outcome noted was missing, would not have removed any disadvantage to which the claimant was subjected by the operation of the PCP.

13.14 We conclude that this is a case where the respondent made all reasonable adjustments to the PCP in an entirely fortuitous way and that none of the adjustments contended for by the claimant in this matter would have been reasonable or would have removed any disadvantage to which the claimant was put or both.

13.15 In those circumstances, the complaint of disability discrimination by alleged failure to make reasonable adjustments fails and is dismissed.

14.The claim of discrimination arising from disability: section 15 of the 2010 Act.

14.1 The bringing to an end of the claimant's contract in September 2019 effective from 22 November 2019 was unfavourable treatment of the claimant by the respondent.

14.2 We do not accept that NR encouraged SB to return early from her maternity leave. Any such conduct on the part of NR would have been to invite trouble for the respondent from SB herself and we conclude that NR was far too experienced a manager to have gone down that road. The claimant's evidence of this conduct on the part of NR was based on conjecture and supposition. We do not accept that the letter written by SB on 18 July 2019 was anything other than a happy coincidence for NR and one which gave her an opening to remove the claimant from the workplace from which she had been absent for some time.

14.3 We are satisfied that the absence of the claimant from the workplace which began at the end of June 2019 arose from her disability. The impairment of depression and anxiety had recurred severely, and the claimant was away from work because of that impairment which was a disability. It may well be that the rigours of

the claimant's role had caused the depression and anxiety to worsen but the resulting absence was because of the disability.

14.4 Thus we move to consider whether the claimant was treated unfavourably by NR because of her absence from work or simply because, as she claimed, SB had indicated that she wished to return to work early from her period of maternity leave.

14.5 This question requires us to consider the motivation of NR for her actions. We must carry out an examination of the conscious or unconscious thought processes of NR. We note that there may be more than one reason or cause for the unfavourable treatment. The "something" that causes the unfavourable treatment need not be the main or sole cause for the unfavourable treatment, but it must have at least a significant, or more than trivial, influence on the unfavourable treatment and thus become an effective reason or cause of it.

14.6 The relevant chronology in relation to the claimant's dismissal is troubling. On 18 July 2019 SB wrote to NR asking to bring forward her return date from maternity leave from April 2020 to 13 January 2020. The date of 13 January 2020 took account of some accrued annual leave for SB and her effective date of return to the payroll was 2 December 2019 although she did not propose to be in the workplace until 13 January 2020. We attach no significance to the fact that when she did return, SB gave notice to leave the employment of the respondent: we accept that this was not known to NR when she wrote to the claimant on 22 September 2019. The claimant was due to be in post until 24 February 2020. A long-term health review meeting with the claimant and NR took place on 15 August 2019 at which NR became aware for the first time of the seriousness of the claimant's condition and that no return-to-work date was proposed. Shortly after that, on 16 September 2019, NR received an OH report on the claimant which revealed a long history of mental health issues and indicated that any return-to-work date would not be before the middle of October 2019. On 23 September 2019, NR cancelled the next sickness review meeting due to be held on 25 September 2019 and then by letter dated 27 September 2019 wrote to terminate the claimant's contract with effect from 22 November 2019. There was no contact with the claimant before the letter was written. When asked why she had chosen the date of 22 November 2019 to terminate the contract, NR was unable to offer any explanation but referred back to advice she had received from HR to give the required 8 weeks' notice.

14.7 The date of 22 November 2019 in not a logical one. SB was not due to return to payroll until 2 December 2019 and indeed not due to return to the workplace until 10 January 2020. We ask ourselves why did NR choose to terminate the contract on a date which bears no direct relevance to the return of SB to the workplace? The office in which the claimant worked was a busy one and short staffed. Why add to that shortage and pressure even for the two weeks between 22 November 2019 and 2 December 2019? We ask ourselves whether NR would have acted as she did if the claimant had been in the workplace and not away from work because of her disability?

14.8 The evidence of NR on this matter was unconvincing. She was uncomfortable when asked questions on this point. Her lengthy witness statement, which ran to over 31 pages, did not adequately explain why she had decided to act as she did in September 2019 and terminate the claimant's contract at that point. We infer that by

September 2019 NR had noted the health problems of the claimant and had concluded that the claimant was not going to return to work soon or at all. Whilst the information received from SB was a reason for the decision to terminate the claimant's contract, it was not the only reason. We conclude that the claimant's absence from the workplace, consciously or subconsciously, was a material and effective reason why NR decided to act in September 2019 to bring the contract to an end. That absence arose from the claimant's disability and therefore the decision of NR was an act of discrimination arising from disability. The claimant's absence was inconvenient for NR and the rest of her team, and she moved to remove the claimant in part because of her absence.

14.9 The respondent did not seek to advance any defence of proportionality to a legitimate aim in relation to the dismissal. Furthermore, our conclusions in respect of the knowledge of disability set out above apply equally to this complaint. Thus, the complaint of discrimination arising from disability in this regard is well founded and the claimant is entitled to a remedy.

Final Comments

15. A remedy hearing will be required. The Tribunal will issue orders to prepare for that hearing separately.

EMPLOYMENT JUDGE A M BUCHANAN
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 12 March 2022
JUDGMENT SENT TO THE PARTIES ON

17 March 2022

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL