EMPLOYMENT TRIBUNALS

Claimant: Mr B Dangarembizi

Respondent: Commissioners for HM Revenue and Customs

Heard at: Manchester **On:** 16-27 May and (in chambers) 8-9 June 2022

Before: Employment Judge Phil Allen
Mr A Murphy
Ms H Fletcher

REPRESENTATION:

Claimant: In person
Respondent: Mr N Flanagan, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent discriminated against the claimant in breach of section 15 of the Equality Act 2010 by treating him unfavourably because of something arising in consequence of the claimant's disability by refusing to allow him to defer his interview for role 1638997 by moving into the holding pool and, thereafter, by not allowing him to be interviewed as part of the subsequent tranches as part of that recruitment exercise;

2. The respondent breached its duty to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 by: not moving the claimant into the holding pool for role 1638997 and, thereafter, not giving him the opportunity to be interviewed as part of the subsequent tranches as part of that recruitment exercise; and not moving the claimant into the holding pool for role 162332;

3. The respondent did not treat the claimant less favourably because of his disability in breach of section 13 of the Equality Act 2010. The claimant's claim for direct disability discrimination does not succeed and is dismissed;

4. Save for the claim found above, the claimant's other claims for discrimination arising from disability in breach of section 15 of the Equality Act 2010 do not succeed and are dismissed;

5. Save for the claims found above, the claimant's other claims that the respondent breached its duty to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 do not succeed and are dismissed;

6. The claimant was not unlawfully harassed by the respondent related to race in breach of section 26 of the Equality Act 2010. His claims for harassment related to race do not succeed and are dismissed;

7. The claimant was not unlawfully harassed by the respondent related to disability in breach of section 26 of the Equality Act 2010. His claims for harassment related to disability do not succeed and are dismissed;

8. The claim that the respondent indirectly discriminated against the claimant in relation to disability in breach of section 19 of the Equality Act 2010 when applying the provision criterion or practice of not contacting candidates who requested to be contacted to discuss reasonable adjustments was not brought within the primary time limit required by section 123 of the Equality Act, but the Tribunal did have jurisdiction to determine the complaint as it was brought within such other period as the Tribunal thought just and equitable;

9. The respondent did not indirectly discriminate against the claimant in relation to disability in breach of section 19 of the Equality Act 2010. His claim for indirect disability discrimination does not succeed and is dismissed; and

10. The respondent did not indirectly discriminate against the claimant in relation to race in breach of section 19 of the Equality Act 2010 as the provision, criterion or practice applied by the respondent was a proportionate means of achieving a legitimate aim. His claim for indirect race discrimination does not succeed and is dismissed.

REASONS

Introduction

1. The claimant is employed by the respondent and has been since 25 February 2019. The claimant is a customer service consultant at Administrative Officer grade. During his employment (as relevant to his claims) he made applications for five other roles with the respondent, as detailed in the attached appendix, the approach to which formed the basis of many of his claims. The claimant brought claims for disability and race discrimination and/or harassment on grounds of race and/or disability. He brought four separate Tribunal claims against the respondent (on 29 December 2019,

31 August 2020, 11 December 2020 and 29 January 2021) all of which were joined and considered together.

Claims and Issues

2. The claimant brought claims for: direct disability discrimination (section 13 of the Equality Act 2010); discrimination arising from disability (section 15 of the Equality Act 2010); breach of the duty to make reasonable adjustments (sections 20 and 21 of the Equality Act 2010); indirect disability discrimination (section 19 of the Equality Act 2010); harassment related to disability (section 26 of the Equality Act 2010); indirect race discrimination (section 19 of the Equality Act 2010); and harassment related to race (section 26 of the Equality Act 2010).

3. It was not in dispute that the claimant had anxiety and depression and, at the relevant time, that condition (or those conditions) constituted a disability (or disabilities) within the meaning of section 6 of the Equality Act 2010. The claimant is black and described his race as being of African orgin. He particularly explained his claim for harassment related to race within his witness statement by explaining that he has a long name (with twenty letters in total) and it is a Zimbabwean name. He contended that it is related to race.

4. Preliminary hearings were previously conducted in the claims on 10 September 2020 (180), 11 January 2021 (226), 29 March 2021 (305), 8 March 2022 (53) and 29 April 2022. Each of the hearings involved steps to endeavour to identify the claims brought and the issues to be determined. The case management order following the preliminary hearing on 29 April 2022 recorded that the list of issues had been agreed, and the respondent was subsequently required to prepare and provide a final version of the list. A document containing the list of issues was provided to the Tribunal at the start of this hearing. One amendment was made to that list (as recorded below). The list of issues (as amended) was agreed at the start of the hearing by both parties as being the list of issues which the Tribunal needed to determine. The list of issues appended to this Judgment records those issues, including the amendment made by the claimant.

Procedure

5. The claimant represented himself at the hearing. Mr Flanagan, counsel, represented the respondent.

6. The hearing was conducted in person, with both parties and all witnesses in attendance at Manchester Employment Tribunal.

7. An agreed bundle of documents was prepared in advance of the hearing. The substantial bundle ran to 2921 pages in the main bundle and 146 pages in the supplementary bundle. Where a number is referred to in brackets in this Judgment that refers to the page number in the main bundle, and an S in brackets followed by a number refers to the supplemental bundle. One additional photograph was provided to the Tribunal by the claimant during the hearing which was added to the back of the

supplementary bundle, being a photograph which the claimant had referred to in his reading list, but which he had not previously provided (S142). Some payslips were provided by the respondent during the hearing at the Tribunal's suggestion (S143).

8. On the first morning it was identified to the parties for the purposes of absolute transparency, that one of the members of the Tribunal panel initially appointed to hear the case has a partner who had previously worked for the respondent for forty years, albeit not for the last two and a half years. The claimant objected to that member hearing his case. Both parties were given the opportunity to inform the Tribunal of their view. The respondent's position was that the member did not need to recuse herself. The Tribunal adjourned and considered carefully the submissions of the parties.

9. Following the adjournment, the Tribunal returned to the hearing and explained to the parties that the panel had decided that the relevant member would recuse herself. It was emphasised that there was no question whatsoever of the member showing actual bias in conducting the hearing and the Tribunal panel was entirely satisfied that, as constituted, it could have appropriately and fairly heard the case. However, taking account of apparent bias and what had been outlined in the case of **Porter v Magill [2002] 1 All ER 465** (which had been cited by the respondent's representative), the Tribunal had considered whether in the relevant circumstances a fair-minded and informed observer would or could conclude that there was a real possibility that the Tribunal could be biased or swayed by personal considerations, and had concluded that a reasonable objective observer might identify that possibility.

10. As a result, a new panel member, Mr Murphy, was identified and commenced hearing the case on the morning of 17 May 2022. It was agreed with the parties on 16 May that they would not be required to return on the morning of 17 May as the whole of the 17 May would be taken as a reading day. In the discussions about reading time, the claimant had expressed concern about whether the rest of the first day would provide sufficient time for the Tribunal to read the statements and documents as required to hear his claim. The change in the composition of the Tribunal panel provided a full clear day for the entire panel to read the papers, and afforded two members of the panel one and a half days to read the statements and documents.

11. The Tribunal read all of the witness statements provided and the documents in the bundle which were referred to in those statements. The Tribunal read the claim and response forms and the claimant's further and better particulars of his claim (283) (as he requested). During the time taken for reading, the claimant also provided a reading list by email which identified the pages which he asked the Tribunal to read, and those pages were also read. During cross-examination a number of other pages were referred to, albeit often those pages contained duplicates of emails (and other documents) which were included elsewhere in the bundle. The Tribunal read only the documents to which it was referred during the hearing.

12. On 18 May 2022 the Tribunal restarted the hearing with the parties in attendance. The matters which had been addressed on the morning of 16 May were re-confirmed. The claimant confirmed that the list of issues was agreed, save for the addition of one point as 21.6 (included in the attached), to which the respondent did

not object as it was a point included in the claimant's grounds of claim. It was, however, highlighted that the respondent's witness statements had not been drafted to address that issue and therefore it was agreed that the respondent's representative would have the opportunity to ask (limited) supplementary questions of the relevant witness(es) to address the additional point identified.

13. A chronology and key list of people had been prepared by the respondent. The claimant's position was that the chronology omitted a number of key dates. The claimant was asked to identify any dates included with which he disagreed, and to outline them when the hearing reconvened. The claimant provided an amended written chronology, which the Tribunal panel received at lunchtime on 18 May, in which he had made substantial additions to the entries included by the respondent. The claimant also explained that he had stopped amending the chronology when he reached some dates which did not follow chronologically. It was confirmed with the parties that, in the light of the dispute over the content of the chronologies, the Tribunal would not rely upon them when identifying the dates upon which any events had occurred.

14. It had been identified in the case management order made following the preliminary hearing on 29 April 2022 that reasonable adjustments were required for the claimant. It was confirmed to the parties that if any breaks were required (in addition to the Tribunal's usual breaks) they should ask, and a break would be taken as soon as appropriate. On occasion during the hearing additional breaks were taken at the claimant's request or the Tribunal's suggestion. A chair was provided on 17 May which met the specifications requested by the claimant. It was confirmed that no one was to shout at anyone else during the hearing. It was confirmed that the claimant could refer to notes during the hearing. It was also confirmed, at his request, that the claimant could use an electronic bundle while giving evidence as he wished to, albeit it was emphasised to the claimant that it was the only document which he should have open on his laptop when giving evidence and he was asked to confirm this under oath when giving evidence. The claimant also confirmed that the electronic bundle used was an unmarked version. During the second week of the hearing the Tribunal adhered to a timetable prepared by the respondent and to which both parties wished to adhere, which meant that no more than two witnesses were heard on any single day. That meant that on many of the days the Tribunal hearing finished earlier than otherwise would have been the case, which ensured that the claimant was able to prepare for a limited number of witnesses each day and ensured that the days were not too long.

15. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal. The claimant's evidence was heard during days three and four of the hearing (18 and 19 May).

16. During the claimant's evidence and in the light of the way in which questions were asked in cross-examination, the claimant asked that he be given additional time to prepare for his cross-examination of the respondent's witnesses. This was considered at the end of his evidence. The claimant proposed that the Tribunal did not sit on Friday and he would then cross-examine the respondent's witnesses the

following week, estimating that the time required for all the witnesses would be four days. The respondent objected to a whole day being vacated and expressed concern about the case finishing in the time required. The Tribunal emphasised the importance of completing (at least) the evidence and submissions, in the ten days allocated. As a result, it was concerned about vacating a whole day. It proposed starting at midday on Friday and the claimant (after his evidence on Thursday 19 May) agreed to that approach. In fact, the claimant contacted the Tribunal on Friday 20 May to say that he was unwell and not able to attend the Tribunal hearing that day, due to a bad headache which had not been resolved by painkillers. As a result, the hearing was not conducted on Friday 20 May. It resumed on Monday 23 May.

17. The Tribunal heard evidence from the following witnesses for the respondent, who were cross examined by the claimant and asked questions by the Tribunal: Ms Zoe Brown, Operations Manager and previously Team Leader and the claimant's line manager from February to October 2019; Ms Kate Baggaley, Operations Manager and previously Ms Brown's line manager, who had also managed the claimant herself from the end of October 2019 until 10 February 2020; Ms Jane Townend, who at the time was Senior Officer within Personnel Tax Operations and who was the person who heard the claimant's grievance; Mr Matthew Styles, Deputy Head of Resources and recruitment lead; Ms Sharon Sheldon, Compliance Caseworker; Ms Jennifer Parker, Investigator (HO grade) and a member of the interview panel for the claimant on 21 August 2019; and Ms Ofunne Joy Uyanwune, Compliance Officer and also a member of the interview panel for the claimant on 21 August 2019.

18. After the evidence was heard, each of the parties was given the opportunity to make submissions. The parties were given time to prepare for submissions after the evidence concluded, with both parties making their submissions on the tenth day of the hearing (Friday 27 May). Both parties provided written submissions. They also each made oral submissions, the respondent's submissions being lengthier than the claimant's.

19. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons detailed in this document. The panel reached its decision (in chambers) on the afternoon of 27 May and, when reconvened, on 8-9 June 2022.

20. The Tribunal was grateful to the claimant and the respondent's representative for the way in which the hearing was conducted, which was entirely appropriate. At the end of his written submissions the claimant stated that, whatever the outcome of the claim, he felt proud and happy that he had been able to do this on his own and follow through with it. He stated that he believed that he had acquitted himself well throughout the process. In his oral submissions, the respondent's representative expressly agreed with this statement of the claimant, and the Tribunal would add its confirmation that it found that the claimant did so.

Facts

Disability

21. In his statement the claimant placed reliance upon certain medical evidence. In particular, he emphasised a report prepared by a Chartered Clinical Psychologist, Dr Julie Hardie, dated 18 February 2020 (2758). It is not necessary to summarise the claimant's full medical history in this Judgment. The report identified certain life events which had, unsurprisingly, had an impact upon the claimant's health. The report clearly recorded that the claimant "*had a history of anxiety and depression*" (2758), "*Anxiety with depression*" in November 2015 (2759) with "*Longstanding depression*" also being recorded at that time, and "*Low mood and depressive symptoms*" recorded as having come back in 2018 (2761). The report also made reference to "*neurological events and psychotic episodes*" which appeared to date from the mid-1990s (2764) but which it said the claimant had been reticent to disclose to medical professionals more recently. In summary the report concluded "*it appears that the* [claimant] *had a mental health condition that predisposes him to anxiety and depression in the face of stressors*", and that he "*had a significant history of mental health problems dating back to adolescence*" (2765).

22. In a report prepared on 26 August 2020, Ms Wallis Emanuel, a nurse, recorded of the claimant (in a section headed the history of conditions) that (2197) "*Mood is low, severe depression, things he plans to do and then cannot manage due to low mood and staying in bed, he procrastinates, postpones things, lack of motivation and energy…Can get stressed about a meeting or a remote thing can trigger panic attacks such as meetings or appointments. He will fail to attend these things*".

23. When asked about his conditions by the Tribunal, the claimant explained that his anxiety caused him to have palpitations and to develop, on occasion, a full panic disorder. His depression means that he can lose his get up and go. He can become manic to the point where he does things that he will later regret, followed by periods when he will struggle to get out of bed and can feel hopeless and melancholic. In his disability impact statement (133) the claimant described how his condition, untreated, caused him to lose motivation, have low mood, sadness, and insomnia. It said that when elevated or triggered by a stressor, the anxiety leads to panic attacks.

Interviews prior to joining the respondent

24. The claimant was made redundant from a previous job in November 2017 and spent most of 2018 trying to find a new job. In his statement he described how he had submitted multiple job applications and was invited to multiple interviews, but he had difficulties with the interview stage of the recruitment processes. A number of documents shown to the Tribunal demonstrated that the claimant had been unable to attend interviews due to his health during that period (705). The claimant successfully obtained a role with the Department of Work and Pensions which started on 5 November 2018 and continued until 12 February 2019.

Recruitment by the respondent

25. The claimant successfully obtained the role of Customer Service Consultant with the respondent, as an Administrative Officer, which he commenced on 25 February 2019. His role was to work on inbound calls

26. The claimant's evidence was that he disclosed his disability to the respondent on the application form for the role in which he was employed. The application form was not before the Tribunal. In his original details of claim (59) the claimant stated that he had submitted his application on 24 July 2018 and said yes to each of the following questions: do you consider yourself to be disabled; do you have any health issues or disabilities that have affected your ability to work in the past; and do you have any health issues or disabilities which you would like to discuss with our occupational health provider? There was no evidence which contradicted what the claimant said in the details of claim.

27. In the bundle of documents was a pre-placement questionnaire completed by the claimant for the health screening process, which was considered on 17 December 2018, in which the claimant stated that he had depression and anxiety (720). He also stated that was in the past, that he did not have a disability at the time, and he did not require reasonable adjustments.

Policies and procedures

28. The respondent operates policies and guidance which included: a probation policy (436); how to recognise and deal with vexatious or malicious concerns (562); raising a concern policy (639); and resolving a concern policy (646).

29. The respondent operates the Guaranteed Interview Scheme (GIS), under which the respondent committed to offer interviews to candidates who: had a disability; had indicated on the application form that they were eligible for and applying under that scheme; and met the minimum criteria for the job. In a document issued by the respondent, filling vacancies: diversity and the selection process, it said in guidance for those undertaking recruitment (664): "*GRS will email you about which applicants require any adjustments. If GRS are not involved in your recruitment process and the candidate has stated that they are covered by GIS you need to contact them to see what adjustments they require*". GRS is an external organisation who undertook the initial parts of the respondent's recruitment process for all of the relevant vacancies. The document also gave the following example of a reasonable adjustment in a recruitment process: "*allowing candidates to refer to pre-prepared notes*".

30. The same document also contained a link to a document prepared by Remploy called "a disability guide", which included advice on anxiety disorders and stress which said that support considerations in recruitment included "*Consider a 'working interview' where the individual can demonstrate their practical skills on the job rather than select solely on the basis of an interview*". When he was asked about this, Mr Styles' evidence was that whilst this may apply to some employers, in practice it could not apply to the respondent for the roles for which they recruited.

31. In a document for managers supporting job applicants issued by the respondent's HR team it advised "*If your team member gets through the sift consider what support they will need for interview? A mock interview is always recommended, who could help with that?*" (S63). Ms Brown's evidence was that this document was only launched on 23 June 2020.

Misspelling of the claimant's name

32. In his amendments to his grounds of claim (147) the claimant described his race for the purposes of his claim, as being of African origin with a distinctly Zimbabwean name which is long and difficult to spell. He contended that people of his racial and national background and origin are more likely than most to have names which are long and difficult to spell.

33. The claimant was issued with a contract of employment by the respondent. The claimant's first name was spelt incorrectly on that contract (407) (the final letter which should have been an "i" was an "l"). The Tribunal did not hear from the specific person who created the contract; Ms Baggaley's evidence being that the contract was passed to her from the HR department and the error would have been that of an unknown person in the HR department. The same incorrectly spelt contract was also sent to the claimant by Ms Baggaley in December 2019 when he requested a copy (1534); Ms Baggaley's evidence being that she simply pulled the electronic version of the contract from the system and did not think to check the spelling of the claimant's name on the contract. She denied that this had anything to do with the claimant's race. Her evidence was also that she was never made aware that the claimant was caused any distress by the issue.

34. The claimant provided the Tribunal with a photograph of a sign which displayed the claimant's name which was attached to his workstation (S142). The typed name card had the claimant's name incorrectly spelt and the claimant had corrected it in handwriting. The last letter of his surname had been incorrectly spelt with an "a" rather than an "l". The name card did not appear to be a sign which was of any permanence, it had the appearance of a laminated name badge. In his witness statement the claimant made no reference to: the workstation sign; what he did in response; or the impact which it had upon him.

35. The claimant's email address with the respondent was initially set up spelt incorrectly. His first name was recorded as ending with an "l" rather than an "i". The claimant raised this in an email at 13.50 on 26 February 2019 (764). The Tribunal was shown an email of 11 am on 28 February (771) by which time the spelling of the claimant's name appeared to have been corrected. Ms Brown's evidence was that it had certainly been resolved by 8 March 2019, although she did not know exactly when it had been resolved. In his evidence the claimant could not recall when it had been corrected.

36. The claimant placed some emphasis on a later occasion when his first name was similarly mis-spelt in an email from Ms Jukes sent on 16 January 2020 (135). That spelling was in the content of the email and not the address itself. In explaining why this affected him, the claimant explained in his email response of the same day (16 January 2020) "*I am a Zimbabwean national, of the Shona tribe and my name is a Shona name. We do not use the letter 'l' in the Shona language. It's the Ndebele people who use the letter 'l' and my name is an essential part of my identity".*

37. The claimant's access to Civil Service Learning was initially set up with an incorrect spelling, using an "l" as the last letter of the claimant's first name rather than an "i" (771). The claimant accepted that his manager had attempted to correct the issue.

38. The claimant's name on his For Skills log in was also spelt incorrectly using an "a" as the last letter of his surname rather than an "i". The claimant raised that on 8 March 2019 (777). He was particularly concerned about that error, which related to the apprenticeship training platform, in case it resulted in the qualifications obtained being recorded in the wrong name. The respondent provided a document from 8 March (776) which appeared to show the claimant's manager providing the correct spelling of the claimant's name to the For Skills provider.

39. In her evidence Ms Brown explained that an organisation called Knowledgepool had been used as the apprenticeship provider. That was an external training provider not part of the respondent. For Skills was a system used only to complete a maths and English diagnostic test if the person did not have GCSE qualifications. The claimant had his apprenticeship induction on 1 March 2019. The claimant pointed out a spelling error with his name to Ms Brown on 8 March (777). By 12 March the claimant had completed the required tests and received the results.

40. The Tessello platform was used by Knowledgepool to upload apprenticeship work and track progress. Ms Brown's evidence was that there were significant issues with access to this platform and a number of the claimant's peers also spent several months without access to it. Her evidence was that this had nothing to do with names and was a wider administrative issue.

The early part of the claimant's employment

41. The welcome letter sent to the claimant on 25 February 2019 said that if the claimant's probation period was for 12 months there would be a review meeting every three months (745). The claimant's probation period was initially considered to be twelve months; but was later reduced to take into account the time he had spent with DWP. Probation reports were completed for the claimant for the first and second review, both of which confirmed that he was on course to complete his probation and that his performance was good (741). The claimant confirmed in evidence that he had a probation review meeting in May 2019. He stated that he had not had sight of the second review document.

42. On 5 July 2019 the claimant emailed Ms Brown and told her that there were a couple of vacancies on the Civil Service website for which he wished to apply (803). In evidence the claimant accepted that he never told Ms Brown in an email that he was applying for the specific roles. The claimant emphasised that all the roles for which he applied were external roles, that is they were applied for in the same way and at the same time as candidates external to the respondent, with a box to complete in the process about the manager being informed. When asked by the Tribunal about the emphasis which he placed on external vacancies, the claimant referred to his wish for his manager and colleagues not to know that he had applied for vacancies because:

he did not want them to see his CV; and he did not want them to know about it if he did not succeed in obtaining the jobs. Mr Styles' evidence was that most jobs within the respondent are now recruited through the external process, under which an internal candidate seeking promotion had no advantage whatsoever when compared to a candidate applying from outside the organisation (save for not needing to go through the same pre-employment checks after the role had been offered).

The applications for jobs 1639021 and 1638997

43. On 10 July 2019 the claimant applied for two roles with the respondent: Compliance Caseworker – tax professional and operational delivery, graded EO (that is one grade above the claimant's role – 1639021); and Compliance Caseworker – tax professional or operational delivery, graded HEO (that is two grades above the claimant's role – 1638997).

44. For all of the roles for which the claimant applied, the claimant passed the on-line tests which candidates needed to pass in order to be able to progress. As that element of the process was not in dispute, it will not be repeated in this Judgment when explaining each subsequent application.

45. The Tribunal was provided with the job advertisements (580 and 592) and candidate packs for each of these applications (605 and 611). These largely mirrored each other. The packs outlined the process in some detail, including detailing (587) that questions at interview would include questions about three identified behaviours: making effective decisions; working together; and communicating and influencing. It was also confirmed that the interview would include strength-based questions. A link to information about the success profiles was provided. A section on the merit list (588) explained "*Candidates who are successful at interview are placed on a Merit List in strict merit order, in adherence with the Civil Service Recruitment Principles, starting with those who score highest at interview and in the online tests*". It also explained that if a candidate had been successful at interview, but the respondent was unable to offer a post immediately, they would be moved to the Reserve List for up to twelve months. Being on the Reserved List did not guarantee a post, but candidates might be offered a post similar to the one originally applied for if one became available within the duration of the Reserved List (stated to be usually up to twelve months).

46. The information also addressed the Holding Pool. It explained (587) that anyone who had met the minimum score on the tests, but not a raised score identified when a review had been undertaken of all the candidates who had passed them all, they would be placed in a Holding Pool but not (at that stage) progressed to interview. It was further explained (588) that candidates placed in the Holding Pool could be called to interview if further vacancies became available whilst the pool was live. The document stated "*This will be done in strict merit order in line with test results*".

47. Mr Styles' evidence about the relevant recruitment exercises explained that (due to the numbers of vacancies involved) the recruitments had been done in tranches, with the first tranche being considered initially and tranches two and three only subsequently being interviewed for vacancies which had not been filled by those

in previous tranches who had succeeded in interview and met the minimum standard. His evidence was that it might be harder to succeed in interview in later tranches, as there might be fewer vacancies available to be filled after the initial tranche had been interviewed and those who were successful appointed.

48. In an FAQ section, the information provided stated clearly that if a candidate failed to book an interview when invited to do so, or failed to attend an interview to which they had been invited (which had not been re-arranged) and had not contacted the respondent, then the application would be withdrawn (589).

49. In the candidate pack which was sent when the candidate was invited to interview, it said that the candidate needed to book an interview slot as soon as possible, and that those who did not do so would have their application removed after five working days (605).

50. The information provided about the interview gave more information about the questions which would be asked, and explained that the candidate should aim to give an example that took around eight minutes per question for each of the behaviours questions, and around two minutes per answer for the strengths questions (607).

51. In answer to a specific FAQ asking whether the candidate could bring notes to the interview (609), the following reply was provided "*Yes. However, please do not simply read from these notes during your interview and instead use them to prompt you if required. Reading verbatim from notes is likely to affect the scoring you receive*". Mr Styles' evidence was that the aim of the policy was to encourage candidates to give the best interview performance they could give, aiming to reassure candidates of the ability to rely on notes, whilst encouraging them to engage in the interview process and genuinely demonstrate their potential and capabilities.

52. In the same FAQ document, in answer to a question about preparing answers in advance of the interview, it was explained that the questions to be asked would be unique to the interview and, as such, a scripted response could not be prepared, and it was important that the candidate listened to the specific question asked and provided the best answer they could. In answers to questions, Mr Styles emphasised that the candidates were being scored against the specific question they had been asked in interview. The claimant's evidence was that the questions likely to be asked were such that you could prepare to answer them in advance. Ms Sheldon's evidence was that a candidate was able to find the likely questions to be asked from an internet search and therefore they could effectively prepare their answers to the questions they were likely to be asked.

53. The claimant, in his evidence, made reference to a document prepared by Civil Service Learning which was titled success profiles myth busting. That document listed what were described as myths and the response. One such myth (943) was "*Candidates should not refer to notes in the interview*". The detailed response given was "*Myth- this is particularly important for candidates who may find it difficult to remember their examples because of cognitive differences and/or anxiety. It would be good practice to reassure candidates at the outset that they can refer to their notes if*

they need to". Later in the document (945), it addressed the issue of candidates being able to practice their responses to strength questions in the interview. This was described as a myth because the questions weren't shared ahead of the interviews because the interviewers were "*looking for natural reactions*" and it also said "*You will need to be alert to looking for inauthentic responses*". Candidates were recommended not to over prepare.

54. The Tribunal was provided with the claimant's application form for role 1639021 (the EO role) (1650) but not the application form for 1638997 (the HEO role) as that could not be found. In the application form provided, the claimant answered that "yes" he did meet the criteria which applied to the GIS. Mr Styles' evidence was that this answer was accepted on trust for all candidates. In answer to the question whether he would require any reasonable adjustment during the selection process, the claimant replied "no".

Shift change

55. On 22 July 2019 the claimant changed his shift, to move to work on the 12 to 8 pm shift (until 29 September 2019). This had been requested by the claimant in an email on 20 June (798) because "*it would really suit my domestic and private life schedule*". A form was completed (799). In his statement the claimant referred to this as providing the respondent with constructive knowledge of the claimant's disability. None of the documents referred to explicitly linked the change to the claimant's anxiety and depression. The claimant's evidence was that he had discussed the change with Ms Brown, but he could not recall the conversation but could recall it was in a private room. Ms Brown's unchallenged evidence was that the claimant had explained to her that the change was around a special diet and going to exercise in the mornings. Ms Baggaley's evidence was that she believed the change was put in place to support the claimant with his health as he wanted to attend a weight management programme and wanted to access the class and the gym in the mornings. There was no evidence which explicitly linked the need to attend the gym, or attend such a programme, with the claimant's anxiety and depression (albeit it is accepted as self-evident that improved health generally is likely to benefit mental health).

July/August 2019

56. The claimant contended (albeit this was not addressed in his evidence) that on 25 July 2019 Ms Brown held a personal development conversation with him and that he requested a mock interview in that conversation.

57. On 1 August 2019 the claimant was absent due to a migraine (813). A detailed note was provided of the conversations between Ms Brown and the claimant. The claimant did not tell Ms Brown about his anxiety and depression on that occasion.

58. On 6 August 2019 the claimant emailed Ms Baggaley providing the dates for his two forthcoming interviews and asking her about arranging mock interviews (829). On 8 August the claimant sent an email to Ms Brown and Ms Baggaley regarding the profiles used for the interviews and outlining an example answer which he proposed

to give, asking whether it was one he should use (831). The Tribunal was provided with an exchange of emails between Ms Brown and Ms Baggaley (but not the claimant) which followed the 8 August email, in which Ms Brown said she was unsure about the format being used for the interviews and Ms Baggaley volunteered to have a chat with the claimant (835). Ms Brown's evidence was that she was a little unsure about whether the interviewers still used the format he had raised as the respondent changed its interview criteria around this time, and she approached Ms Baggaley who talked her through it.

59. On 15 August the claimant took leave for four days to prepare for his interview on 21 August. While he was off, on 17 August, the (successful) six-month probation report prepared by Ms Brown was sent to the HR Service Centre (841). Ms Brown emailed the claimant to explain that she had not had a chance to discuss that with him and she was on leave until 27 August, but the plan was to catch up properly on 27 August (the evidence was that both the claimant and Ms Brown had periods of leave which overlapped). It was expressly confirmed in that email to the claimant that Ms Brown had no concerns about the claimant's progression towards completing his probation (846). When the claimant responded explaining why he was off, Ms Brown responded to say she had not realised that the interviews were so soon.

60. Mid-afternoon on 17 August the claimant emailed Ms Brown asking her to nudge Ms Baggaley and offering to come into work if Ms Baggaley had availability on Monday or Tuesday (even though he was off) to discuss the interview (845).

The interview of 21 August 2019 (1639021)

61. On 21 August 2019 the claimant was interviewed for the EO Compliance Caseworker role (1639021). He was interviewed by Ms Parker and Ms Uyanwune. Ms Parker was a relatively experienced interviewer; Ms Uyanwune had first interviewed on 16 August 2019 and this was part of her first stint of interviews. Neither of the interviewers were aware of the claimant's disability. Ms Parker chaired the interview. The interview methodology used by the respondent had recently changed at the time of the interview, and had moved to behaviours and strengths questions, from competency based questions. Documents about the success profiles prepared by the respondent and available to interviewers and candidates had explained this change (1080 and 1095). The questions asked of the claimant were exactly the same as the questions asked of every candidate for the vacancy (1510).

62. There was a dispute of evidence about whether any mention was made about reading notes at the start of the interview. The claimant denied that it was. The script provided for interviewers (1508) did not contain any statement about referring to notes. Mr Styles' evidence was that he would always tell interviewers not to read out the script verbatim at the start in any event (and the script itself recorded that it was a suggested script for the interview panel which did not need to be followed word for word). Ms

Sheldon's evidence was that she always told her interviewers to tell candidates that they could refer to notes (albeit it was not included in the outline script). Ms Parker's evidence was that she always made a point of telling candidates that they could refer to any notes they might have brought, but shouldn't read from them, at the start of any interview. When challenged on this, Ms Parker was clear that she did so.

63. What happened next in the interview was not in dispute. The claimant was asked the first behaviour question and answered it without notably referring to his notes. He was asked follow-up questions about his answer. A follow-up question asked, which addressed GDPR and data protection, was something about which the claimant was very unhappy at the time but which did not form part of his complaints to the Tribunal. When the claimant had answered the follow-up questions, he asked whether he had time remaining for that question and was told he did. The respondent's witnesses' evidence was that the claimant then read verbatim from his notes. The claimant's evidence was that he read his notes and identified that he had omitted to explain some of the things which he had wished to about his example (the lessons learned and what he would do differently) and therefore he read (verbatim) from his notes those things which he had omitted.

64. The claimant provided an account of what occurred in the interview to Ms Sheldon in his conversation with her on 2 July 2020 (S53). She commented that in her call with him the claimant came across well-spoken and as a confident person (as he did during the Tribunal hearing) and the claimant responded: "*Yeah that was a bit surprising because you know if you saw any of the comments made by one of the panellists in the witness statement she said I actually spoke without using notes for the 37 minutes and only started reading notes when I was told there was about a minute or so left. So it's not as if I wanted to read out the notes throughout the interview no I don't need that. But there was some things I had forgotten to include in my main answer, which I then went back to the notes for and started reading word for word. And that's what they did not like, but it was just for one minute of the eight minutes that were allocated to me*". That document was a transcript of a recording and it would appear likely to be the case that the reference to 37 minutes was in fact a reference to the first seven minutes (of the eight allocated to the question).

65. The claimant's witness statement contained no account within it about what he said had occurred at the interview. In answer to questions, the claimant contended that Ms Parker raised the issue of notes at the end of the first question. He did not recount precisely the words she said, but he emphasised that he was left with the understanding that he could not refer to his notes at all for the rest of the interview, and therefore did not do so.

66. The respondent's witnesses' evidence was that the issue of the claimant reading from his notes was not raised during the responses to the first question at all, but only when the claimant had repeated the same approach to the second question. Their evidence was that he had again begun to read verbatim from his notes at the end of the time allocated after he had answered the second question and the follow-up questions to it. Ms Parker's evidence was that when the claimant started to read verbatim from his notes at the end of his time for the second question, and after he

had initially answered the second question without referring to his notes, she said "*something along the lines of 'can I interrupt you there for a second, instead of just reading from the notes do you want to refer to them'*". In her witness statement Ms Parker expressed the view that her intervention had been something of a success because after it the claimant used his notes "*in an appropriate way*" and not as a script from which he read. She stated that she was "*absolutely sure*" that at no point did she tell the claimant that he could not use his notes, and in her answers to questions she disagreed that the claimant may have felt he could not do so after her intervention, because she felt he referred to his notes appropriately for the remainder of the interview.

67. Ms Uyanwune's evidence was entirely consistent with that of Ms Parker. She accepted that Ms Parker chaired the interview; she emphasised that she would have intervened had Ms Parker tried to prevent the use of notes entirely.

68. It was put to the claimant in cross-examination that his understanding of Ms Parker's comment may have been a communication error, and the claimant said that yes it may have been a tragic miscommunication. He went on to say that Ms Parker interrupting in that way at all was unfair because it stopped the interviewee's flow and impacted upon their confidence. The claimant stated that Ms Parker had no mandate to stop the claimant or to interfere with his presentation; and explained that for him what had been said not only stopped his flow for that interview, but also for subsequent interviews as well.

69. When he was asked about how his notes prepared in advance could be used to answer the specific questions asked in the interview, the claimant explained that because he knew the topics about which he would be asked, he had been able to prepare notes of the examples he would be able to give to answer the questions he would be asked.

70. Following the interview and after the claimant had left the room, the two interviewers discussed and provided the claimant with a combined score for each question (1016). The claimant scored: two out of seven for making effective decisions; two out of seven for working together; and two out of seven for communicating and influencing. For each of those behaviours, the claimant scored below four, which was the minimum required score for each question in order to be successful in interview. Ms Parker's evidence was that any single score below four in the behaviours section would result in a candidate being unsuccessful (irrespective of how well they had done in the rest of the process).

71. Neither Ms Parker nor Ms Uyanwune believed that the claimant's verbatim reading of his notes in the interview had adversely affected his scores (albeit Mr Styles in an email said that it had). Ms Parker was clear that she did not believe that a candidate reading verbatim from notes could effectively answer the question which had been asked in an interview, explaining her evidence with reference to an example of a pre-prepared answer about the weather, which would be an answer to the question but not a genuine answer to the question asked. As the claimant was scored only two for the first behaviours question, he was effectively already in a position where

he would not have been successful in the interview even before Ms Parker intervened regarding the reading of notes (albeit that the scoring did not take place until after the interview concluded and each interviewer would not have known what the other would have scored the claimant until the subsequent discussion).

72. In the assessment of the claimant's skills answers, the claimant scored: three out of four as a problem solver; three out of four for team player; and three out of four for explainer. This latter part of the interview was scored as being successful. The claimant emphasised that the questions and answers were briefer for that part of the interview.

73. As an overall outcome the claimant was stated to be unsuccessful. The general comments provided (1016) were "*The interview answers appeared to be more competency based than behaviour based. May benefit by reviewing the criteria as there are some strong points within the examples*". The scores given were agreed by the two interviewers.

74. Ms Parker's evidence was that she spoke to Mr Daughtry about the interview and scoring. Ms Uyanwune's evidence was that she was entirely unaware that this discussion had taken place. Mr Daughtry had not been part of the interview panel; he was the person in charge of the interview process that day and was described by Ms Parker as the first point of contact if the panel had any questions. Ms Parker's evidence was that she asked him if they could score the claimant's interview using the previous competency-based structure as he would have scored far higher using those criteria. Mr Daughtry advised her that she could not do so.

The complaint and post-interview events

75. At one minute after midnight on 22 August 2019 the claimant made a complaint about the interview which had been undertaken on 21 August (854). The complaint was specifically directed against Ms Parker. The first part of the complaint related to the subject matter of the first question and the follow up questions to it. The second complaint was that Ms Parker had "*prevented me from using my prepared notes..imposed a total ban on the use of my notes. This is inconsistent with the interview pack which clearly states that I can use notes if I need prompting, but if I read them verbatim, then it may affect my scoring*". The complaint was received by Mr Styles and forwarded to the complaints team, who arranged for the facts to be investigated.

76. The claimant was absent from work on ill health grounds on 22 August, which was his second occasion of absence. The reason was recorded as migraine (849). On 29 August the claimant had a third episode of absence, which was recorded as due to fever and nausea (876).

The six-month probation review meeting

77. The claimant's evidence was that he did not believe that a six-month probation meeting had ever taken place. Ms Brown was not certain in her evidence about the probation review meeting. In her witness statement she: highlighted in an email on 4 September she had said that she had been hoping to hold the probation meeting that day (S32); stated that she was not absolutely sure whether she held the six month probation meeting; and said that she may have discussed the claimant's probation at the same time as one of his regular Personal Development Conversations, saying she seemed to remember putting one lot of paperwork to one side and saying that they were now going to talk about probation. In answering questions, Ms Brown was somewhat more categoric in her assertion that such a meeting had taken place, but she could not recall when. When the claimant took her to an email from him in which he asked about his probation review meeting to which she had not responded, Ms Brown could not explain why she had not.

September 2019 and the response to the complaint

78. The claimant was informed that he had not been successful in his interview for the EO Compliance Caseworker role (1639021) on 3 September 2019. In an email to Ms Brown on that date (936) the claimant recorded that he had been told that the answers appeared to be more competency-based than behaviour-based. He stated to Ms Brown that he didn't really know what the difference was. Ms Brown responded on the same day saying that she had spoken to Ms Baggaley who would be happy to help the claimant during his investment time the following week (something to which the claimant responded as "*fantastic*").

79. Also on 3 September the claimant emailed Ms Brown following an exchange about the best contact number for occupational health to contact the claimant, by asking whether he would be required to work during a notice period and the options for pay in lieu of notice (937). Ms Brown confirmed that the notice period was four weeks. The claimant, when asked about this in the hearing, could no longer remember the precise reason why he had asked, but he remembered that he was not enjoying working at the respondent at that time.

80. On 4 and 5 September 2019 Ms Parker (961) and Ms Uyanwune (963) provided their emailed responses to the complaint about the conduct of the interview. The claimant in cross-examination accepted that the first substantive paragraph of Ms Uyanwune's account was accurate: "*The applicant appeared to have pages of text that he did not use immediately at the beginning of the session. After fully answering the first question (a Behavioural question) and we (the panel) had no further questions to ask, he asked if there was more time available. We indicated that he had some time left for the question (I cannot remember how much time was left, probably a minute +/- 20 seconds.) He then proceeded to read out word-for-word his notes until the end of time available.*"

81. Ms Uyanwune's account of the second question was not agreed by the claimant as he said that the issue of notes had been raised at the end of the first question. She went on to say in her email "*On the following question (also a behavioural one), he appeared to follow the same pattern i.e. answered without using his notes (this lasted*

for most of the 8 mins allowed for the question). Again for the leftover time, he started to read out his notes to the panel, when the panel chair advised that it was probably not the best to read out his notes. I remember very well that he was not asked 'not to use' his notes".

82. Ms Parker's account regarding notes said "*He was allowed to use his notes during the interview as prompts the same as every other candidate. This was explained to him at the begging of the interviews, the same way that every candidate received*". The claimant disputed that he was told this in the interview. Ms Parker went on to say in the email, regarding her intervention, which she said was after the second answers had been given, "*when he went to read directly from his notes didn't stop him from doing so but I did tell him not to read just from the notes. I explained he could refer to the notes but not sit there and read off the notes only. From memory he looked at his notes as a prompt and finished the example*". She also went on to add "*End of the day sitting there reading from a piece of paper isn't right. I can't gauge him, there's no eye contact and it appears non genuine at the end of it*".

83. On 10 September 2019 the claimant was provided with a formal response from Mr Styles to his complaint about the conduct of his interview on 21 August (1077). Mr Styles accepted what had been said in the two interviewers' accounts, which is that they had not asked the claimant not to use his notes, but that Ms Parker had asked the claimant not to read directly from his notes and had reminded him that he was able to refer to his notes, but not to read from them verbatim. The complaint was not upheld. In a response sent by the claimant on the same day (1130) he said "*I don't know how I can refer to notes without reading them. The act of referring to notes requires that I read them*". The claimant explained that he had not sought reasonable adjustments or made a formal request to refer to his notes, because the interview pack had stated that he could refer to his notes.

84. An occupational health report regarding the claimant was provided to Ms Brown on 17 September 2019 (2725). The report did not refer to or address anxiety and depression at all; it focussed on the reasons given by the claimant for his recent episodes of absence. The occupational health advisor gave his opinion that the Equality Act would not apply in this case (albeit he was not advising about the disability upon which the claimant relied in this case).

Deferment of the interview for job 1638997

85. The claimant was due to be interviewed for the 1638997 role (HEO) at 2.15 pm on 19 September 2019. At 7.23 am the claimant sent an email which was copied to Mr Styles (1258). At that time it was not copied to Ms Brown (but it was subsequently copied to her as it was included in a chain as part of a subsequent email from the claimant of 16 October 2019). The claimant asked for the interview to be deferred for at least a month, explaining that deferment of a week or two would be unlikely to unhelpful. He referred to the expectation that there would be several tranches of interviews for the campaign, to be drawn from the holding pool, and stated that he was willing to be placed in the second or third waves of interviews. He spelled out clearly in that email that he had a disability under the Equality Act 2010 and that he believed

what he was seeking was a reasonable adjustment. The email did not state that the claimant's disability was anxiety and depression; but it referred to bouts of severe anxiety. He said "*In the lead-up to the interview I had bouts of severe anxiety directly attributable to the pending interview for this vacancy. I have also had two quite frightening panic attacks … I can directly attribute these panic attacks to the pending interview for this vacancy. The restoration of my mental health is now a priority*". During cross-examination, Mr Styles accepted that he was aware that the claimant had a disability covered by the Equality Act 2010 on 19 September 2019.

86. The interview was postponed and re-arranged for 24 October 2019, being the deferment of at least a month which the claimant had sought. The interview was deferred to the last date upon which interviews would be carried out for the first tranche of candidates for the HO role, that is those candidates who had scored the highest in the online tests and from whom the appointments would be made following the interviews. By delaying the interview to that date, the respondent did not delay the process as a whole, as all the candidates in tranche one would in any event need to be interviewed before they could be ordered according to merit and appointments offered following that merit order.

Late September and October 2019

87. The amendments to the chronology prepared by the claimant recorded that on 22 September 2019 he became aware that a colleague who had applied for the HO role had received a mock interview from Ms Baggaley. There was no dispute that another candidate had. The other candidate was not absent on ill health grounds when the mock interview was sought or provided.

88. On 23 September 2019 the claimant emailed Ms Brown because he had missed what he described as two ECS training sessions (1169). ECS was the Employer Compliance System, a system used by the claimant as part of his role. He said he had missed the session because it was delivered outside his shift hours. Ms Brown responded in an email that she would look at the availability of the ECS sessions. Ms Brown's evidence to the Tribunal was that another team leader had provided a one hour session to the team on 12 August 2019 at 10 am which was not a training session but was there to support people. The claimant would not have been working at that time because of his changed shift pattern. Ms Brown had arranged to do the session on 13 September (1069) but the claimant had responded that he could not because his investment time (the time the respondent allowed employees for such activities) was set aside for his interview preparation with Ms Baggaley. The claimant did not attend an ECS session before he commenced sickness absence on 11 October.

89. The claimant sought to arrange a mock interview via his Union and separately the BAME society, but was unable to do so. On 24 September the claimant emailed Ms Brown to request a mock interview. Ms Brown requested that Ms Baggaley provide it because, as the claimant was applying for a role at Ms Brown's grade, she said she would not be the best person to mock interview him. Ms Brown chased Ms Baggaley on 2 October (1210) and informed the claimant (1212).

90. On 6 October 2019 the claimant applied for the role of Compliance Caseworker (tax professional or operation delivery) based in Nottingham (16232). The candidate pack mirrored that for the earlier applications (S80). In his application form for that role (S77) the claimant confirmed that he met the criteria under the GIS and he replied "*yes*" to the question as to whether he would require a reasonable adjustment during the interview. In answer to being asked to outline the adjustment that may help, the claimant stated "*I may need to use notes during an interview*". Mr Styles' evidence was that his team would not have contacted the claimant in relation to the use of notes, because this was something which was allowed as standard and therefore no adjustment was required. Ms Sheldon's evidence was that no health information whatsoever (included the application form and/or the questions about disabilities and adjustments) was provided to interview panels, save that: they might be told that the applicant had a disability (generically) and required a particular adjustment; or, unusually and if the candidate had agreed, they might be told about the disability if there was a need to do so when outlining the required adjustment.

91. On 11 October 2019 the claimant was due to have undertaken a mock interview with Ms Baggaley, accompanied by another colleague. The mock interview did not take place as the claimant was unwell on that day. He commenced a period of ill health absence from work with the respondent from which he did not return until 26 December 2019 (and in practice he first physically returned on 29 December).

92. Ms Brown undertook a number of keeping in touch calls with the claimant during his absence. Detailed notes were provided of a number of the calls, albeit that the claimant's evidence was that they were incomplete. The note recording the contact on 11 October 2019 recorded the claimant as having informed Ms Brown that he had anxiety and depression and that this was the reason for his absence (1354). Ms Brown's evidence was that this was the first time that she was aware that the claimant had the condition(s) of anxiety and depression; she had previously been unaware of this. Her clear evidence was that she had not been provided with the claimant's application form or any information about his answers to questions about disability; those documents were not retained on the personal file which she set up and maintained for the claimant.

93. The note of 15 October call recorded the claimant as having confirmed that the previous diagnosis from his GP was depression and anxiety (1355). During the same call the claimant was recorded as informing Ms Brown that the interview which he was seeking to re-arrange was no longer a priority; that he may attend the interview on 24 October if he could not re-arrange it "*but at the moment he was not preparing for it as he no longer had faith in the process so he no longer took it seriously*" (1356).

The request for further deferment of interview for job 1638997

94. The re-arranged interview for 1638997 (the HEO role) was due to take place on 24 October 2019. On 16 October 2019 the claimant sent an email which was copied to Mr Styles and Ms Brown, to say he was not well enough to be able to attend. The claimant referred to his condition being covered by the Equality Act 2010 without stating what it was. He emphasised that the interview had been re-scheduled as a

reasonable adjustment. He explained that: he remained unwell; his GP had on 16 October increased the dosage of his medication; and that he was certificated as not fit for work until 31 October. He requested that the interview be further deferred to a date beyond 31 October "*when I anticipate I will be well enough to attend*" (1258).

95. Mr Styles made the decision that the interview could not be deferred or postponed as the 24 October was the last date of interviews for that first tranche. His witness statement said that the respondent would not be able to put everyone in the tranche in merit order and make offers in strict merit order, until they had interviewed the claimant. His evidence was that if the respondent allowed the claimant to be interviewed later from the holding pool as part of tranche two or a later tranche, it would not be appointing in merit order. In his statement and his evidence before the Tribunal he emphasised the absolute requirement for the respondent to appoint strictly on merit order, as a failure to do so would breach the strict Civil Service Commission rules and (he felt) the respondent's legal obligations. His witness statement said "*In short, we are unable to progress the recruitment to the stage of making offers, until everyone in the tranche has been interviewed and we knew their scores and the correct merit order*". This explanation was also provided in Mr Styles' email to the claimant on 18 February 2020 (1805) albeit in relation to a later application (16232, Nottingham).

96. In his witness statement Mr Styles also addressed: the objective of getting the recruitment done as soon as possible; the large scale of the recruitment exercises; the need to complete tranches so that delay did not mean that good candidates accepted other jobs before they were informed of the outcome; the importance of candidates not having a bad recruitment experience so as not to discourage future applications; and the fact that some candidates awaiting an outcome might be unemployed and therefore delay would effect their ability to earn. His evidence was that for those roles (1638997) there were 681 applications, for 16232 there were 696 applications, and for 47927 there were 1030 applications.

97. In his evidence to the Tribunal Mr Styles provided further information about the application of the tranches. He emphasised that if the claimant had been allowed to be interviewed in a later tranche, he would have been in a position where an appointment would be made out of merit order. His evidence was that any appointment out of strict merit order would jeopardise the legitimacy of not only the candidate appointed later than their performance merited, but also the appointment of the other candidates appointed earlier than they would otherwise have been. He explained that a candidate in a later tranche may be less likely to be appointed following interview and the score required to succeed may be higher, because the first/earlier tranche would have filled many of the positions available. He also raised the possibility of a challenge from someone moved to a later tranche, either on the basis that the relevant candidate would later contend that they should have been appointed in the earlier tranche, or requesting a move back to an earlier tranche. He emphasised the scale of the recruitment exercises when explaining why candidates moving between tranches would not, in his view, be possible or in adherence with the required principles.

98. The Tribunal was provided with the Civil Service Commission Recruitment Principles (S12). It was Mr Styles' evidence that the respondent strictly adhered to

those principles and was required to do so. He emphasised in his evidence that the merit principles were considered to be very important. Paragraphs 31-33 (S17) say "*Taking all the evidence into account, the panel must establish which candidates are appointable and place them in an order of merit…Where the competition is for a single, or a small number of roles, each candidate who is judged appointable must be ranked in a merit order…In a competition for a large number of roles (bulk recruitment), or in a rolling recruitment, the method used must ensure that no candidate is selected who did less well than another candidate who has not been selected; by the end of the competition all the roles must have been given to the most meritorious candidates"*. The Principles contain provision for a reserve list, where a competition identifies more appointable candidates than there are available candidates.

99. At the time, Mr Styles decision was provided to the claimant in a relatively brief email of 16 October which said that the respondent was unable to accommodate a further re-arrangement (1261). The claimant responded on the same day by saying that he had decided to attend the interview (albeit in fact due to his health he was ultimately not able to do so).

Late October 2019 and the request for the mock interview by Skype

100. The notes of the keeping in touch call between the claimant and Ms Brown on 16 October recorded a discussion about the deferment of the HO interview and the claimant raising a question about whether he would be paid whilst he was off sick, to which Ms Brown responded that she was unsure but would get back to him (1357). On the same date, Ms Brown was copied into the claimant's emails referred to above (1264/1266) which included the claimant's email copied to Mr Styles on 19 September 2019 in which he directly attributed his severe bouts of anxiety to the pending interviews, referring to having panic attacks which were attributed to it.

101. On Thursday 17 October 2019 the claimant emailed Ms Brown and requested a mock interview over Skype (1274). He referred to an interview which he had with DWP and the interview for the Compliance Officer role (1639021). He also informed her that he was considering applying for the Civil Service Fast Stream programme (expressly stating that he had done so because the guidance for it said he should inform his line manager). Regarding the mock interview and the Compliance Officer role, the claimant said "*you will have seen, I'm sure, the response from Mr Styles, the lead recruitment officer for the vacancy, stating that no further adjustments can be accommodated regarding the interview date. As such, I was wondering if it may be possible to have that mock interview done via Skype? It was scheduled to happen on the same day that I fell sick. It remains important to me, despite the unfortunate turn of events, that I have the scheduled mock interview*".

102. The Tribunal was provided with notes of a conversation which Ms Brown had with Ms Gillespie, a Civil Service HR case worker, on 18 October 2019 (1278 and

1283). These notes were a central part of the claimant's direct disability discrimination claim and were an important source of his unhappiness with the respondent and Ms Brown in particular. The notes recorded that Ms Brown was seeking advice from the HR caseworker regarding the claimant. The note recorded Ms Brown highlighting what had been said by the claimant: that the absence was directly linked to the interviews; and they had increased his anxiety and caused panic attacks.

103. Regarding the mock interview, Ms Gillespie's note (1278) recorded "*Manager is not comfortable doing this due to the emails he has sent stating that the interviews are causing him stress. I advised that if she does not feel comfortable doing this then she should not and advise the* [claimant] *of her concerns. Advised that it is reasonable that she refuses this request. Advsied that it would be reasonable to have a conversation with* [the claimant] *explaining concerns in* [the claimant] *applying for promotion two grades above him if it's causing him so much stress. Advised that she cannot tell him not to apply or attend interviews but as a duty of care it was reasonable to discuss her concerns*".

104. Ms Brown's note (1283) included the statement regarding the mock interviews "*I was unsure how to proceed with this due to the nature of* [the claimant's] *illness and also my position because I am supposed to be supporting a return to work with the any adjustments necessary*". Her note referred to the advice being that it was "*reasonable*" "*to have a frank discussion*" with the claimant. It confirmed what was said in Ms Gillespie's note but also included: "*She said it would reasonable for me to explain that I was not confident by giving him a mock interview and encouraging him to go to interview, that this would not have a negative effect on his condition*"; (regarding applying for other jobs) "*it would be reasonable for me to suggest that he concentrates on getting himself well and back to work first*"; and "*She stated we could not stop him attending interviews whilst he had a fit note in place but we can and needed to raise concerns really*".

105. Ms Brown's evidence in her witness statement stated that she was concerned about simply agreeing to do a mock interview during the claimant's sickness absence. She emphasised that the claimant had stated in an email that his condition continued to deteriorate and he remained unwell, not fit for work, and that the dosage of his medicine had been increased. Her evidence was that as the claimant was saying that his condition was directly linked to the job interviews, and bearing in mind that her primary responsibility was to successfully manage the claimant and help him improve his wellbeing and get him back to work, her thought process was that she was not comfortable to support the claimant and encourage him to go for more job interviews by arranging a mock interview. She was concerned about making his situation worse.

106. During cross-examination Ms Brown was questioned about why she had not informed the claimant about her conversation with the HR advisor or about what had been said. Her evidence was that the HR advice was provided as part of a confidential support for managers and therefore she did not need to do so. In any event, however, what she emphasised in her evidence was that she never discussed the claimant's request for a mock interview with him any further because when she next spoke to the claimant, in a call on Tuesday 22 October, the claimant informed her that he was no

longer proceeding with the interview and had withdrawn from the process. Ms Brown's evidence was that because she had been told that the claimant had withdrawn from the process, she did not believe she needed to progress the request for a mock interview or to discuss it further. In her witness statement Ms Brown stated that at no point did she say to the claimant that he could not have a mock interview (something which was not contradicted by the claimant's witness statement). In her oral evidence she explained that the discussion about the mock interview did not take place (following the 17 October request) because the claimant confirmed he had withdrawn from the process.

107. The notes of the keeping in touch interview for 21 October 2019 recorded that the claimant had provided an alternative contact number as he was staying in a hotel in Manchester. The notes recorded that Ms Brown had spent forty-three minutes getting through to the reception at the hotel, who attempted to put the call through to his room three times but without reply (1357).

The voicemail message

108. The Tribunal heard evidence about a voicemail message which Ms Brown stated had been left on her phone by the claimant, which was not recorded in any of the notes taken by her at the time. Ms Brown believed the voicemail was left on 21 October 2019. Her statement recorded that the claimant had called her during the morning on her personal mobile phone and had left a voicemail which was around four and a half minutes in length. She recorded that the claimant repeatedly said "*hello hello*" and said things like "*I know you are watching, I know you are listening to me*". The recording went quiet for a time, and then the claimant said hello again and stated his name. Ms Brown's evidence was that she found the message quiet distressing. She acknowledged that the claimant did not accuse her of bugging his hotel room in the call (as she later alleged), but she said he made comments which she believed to be along the lines of that he knew she was listening.

109. Both Ms Brown and Ms Baggaley gave evidence that they had a conversation after the call, in which it was discussed. Ms Brown recorded that they discussed whether to call the Crisis team; Ms Baggaley accepted that the respondent did not have a Crisis team and suggested the reference was to the employee support line, which could also be contacted by managers. In any event, they agreed to see what happened and, as contact was subsequently made with the claimant, the issue was not progressed. No action of any kind was taken following this call and it was not recorded in any notes (until Ms Townend's interview with Ms Brown on 28 August 2020).

110. The claimant did not address this call/voicemail in his witness statement, but in answer to questions said that he could not recall this call being made. He said that he did not believe he had had a psychotic episode at that time, and explained that when he had such an episode it tended to last for a longer period. Ms Baggaley was cross-examined about whether the call in fact took place, but was unable to answer as she had not listened to the voicemail, she had only been told about it. The claimant did not put to Ms Brown that the voicemail had not been left, albeit he did question her about

the information she subsequently gave to others about it. Ms Brown's evidence was that she never mentioned the voicemail to the claimant and she deleted it as after she stopped managing the claimant as she blocked his number and deleted everything from him.

111. As part of his claim, the claimant contended that there was a rumour at work that the claimant was a paranoid schizophrenic. Ms Brown's evidence was that she was not aware of any such rumour. The claimant did not provide any positive evidence that she was aware of such a rumour.

Further contact with the claimant and his withdrawal from the interviews for job 1638997

112. A further keeping in touch conversation took place between the claimant and Ms Brown on 22 October (1357). The claimant informed Ms Brown that he was getting worse. There was a discussion about the claimant's health and why he was staying in a hotel. The claimant said that he was unable to attend the HO Compliance job interview "*as the sedation is heavy and his short term memory has been affected*" as well as due to the need to put his mental health first and as a priority. On the same day the claimant emailed Mr Styles to say that he was not in good enough health to attend the interview scheduled for 24 October and with deep regret he withdrew (1301). In this email the claimant did not propose any other approach to his candidacy being assessed.

113. In fact, as a result of what was described as recruitment reprioritisation, no immediate appointments were made as a result of the HO recruitment exercise, albeit Mr Styles' evidence was that at the time of his interaction with the claimant he did not know that would be the case.

114. Mr Styles evidence was that adjustments could have been made to the interview had they been requested, but that it would not have been fair on applicants to allow some to be recruited without interview as this would be inconsistent and not in accordance with one of the main recruitment principles: to recruit fairly; it being important to judge all candidates on the same basis.

115. Further keeping in touch meetings between the claimant and Ms Brown were noted on 22 and 23 October 2019 (1358). In the 23 October meeting the claimant raised ill health retirement, with the claimant referring to his mood being lower because he had needed to withdraw from the HO compliance job. The claimant also raised what his options were if he did not return to work, and his notice period was confirmed to him in response to his question, followed by a discussion about whether he would need to work his notice.

116. On 28 October 2019 the claimant attended an informal attendance management meeting with Ms Brown (1346). The evidence was that the claimant's working relationship with Ms Brown had not had any fundamental issues prior to this meeting. Ms Baggaley also attended the meeting and took notes, albeit that it was the claimant's evidence that he was not aware that she had attended (the meeting having

taken place by Teams). The meeting included a discussion about the claimant's absence, the interview he had attended and why he was unhappy about it, and the HEO interview which he had not been able to attend. The note recorded that Ms Brown raised her concerns with the claimant that he had a further interview due and she expressed concern that this could potentially have a negative impact on his mental health following the events from the first interview the claimant had attended. She also stated that it was her priority to help the claimant successfully return to work. Concerns were raised about the claimant sending e-mails during the early hours of the morning, and the claimant explained that due to him being unwell he did not sleep much at night and hence that was why emails were sent during the early hours. The claimant explained that he was happy to go through the interview process for the Nottingham role as it would not be the same interviewers as last time and it was a different recruitment campaign (he emphasised that his complaint was against Ms Parker).

117. One issue that the claimant was not happy about from this meeting was that there had been a discussion about the information which might be provided about the claimant if he was successful in any interview. The claimant asserted that Ms Brown had told him that if he was successful in interview then his personnel file would be forwarded to them. Ms Brown's explanation was that if the claimant was successful in applying for a role within the respondent, that is what would happen as that is what she would have to do. Her evidence was that she said this in response to a question which the claimant asked her.

118. Ms Brown acknowledged in her witness statement that she had made a mistake when recording the claimant's sickness absence on the respondent's system. She inputted the time period of the fit note. This was an error. She should have left the absence open ended. Her error resulted in the claimant being overpaid and not reducing to half pay as he should have done under the terms of his contract. It was common ground between the parties that: the claimant was entitled to one month of full pay and one month of half pay during his sickness absence; he was overpaid; and the overpayment was subsequently deducted from his pay. Ms Brown explained this as "*an inadvertent error*". Ms Brown did not realise this mistake until the claimant contacted her asking when he would go to half pay. On 2 December 2019 she contacted Human Resources and the error was identified on 5 December (1495).

119. On 28 October 2019 (1351) the claimant emailed Ms Brown to ask for copies of the keeping in touch notes and meeting notes. Ms Baggaley's evidence was that she did not see that email. On 29 October the claimant emailed Ms Brown about the informal attendance meeting, as he felt that the tone had not been supportive but rather confrontational and threatening (1363). Ms Brown responded that the claimant's well-being was her main concern.

The time managed by Ms Baggaley

120. On 31 October Ms Baggaley took over line management responsibility for the claimant from Ms Brown. The claimant accepted that he had no contact with Ms Brown (save for an email which he sent to her) after this date. Ms Baggaley line managed the claimant until 10 February 2020. Keeping in touch meetings were held with the

claimant by Ms Baggaley on 13 November, 15 November, 20 November, 27 November and 3 December. As recorded below, later those notes were typed up (1375) and provided to the claimant. Various text messages were also exchanged with the claimant.

121. Ms Baggaley's evidence was that the meetings were focussed on the claimant's health and she could not recall any particularly significant development at work which she felt it necessary to update the claimant about, nor did she recall him asking about any developments. Her evidence was that she would tell a job holder anything which directly impacted upon them when they were absent such as team moves or changes in process, but she would only provide this information at the time when the job holder was due to return to work. There was no evidence of the claimant specifically seeking any particular information, nor was there any clear evidence of anything specific which the claimant had not been told whilst absent which had adversely impacted upon him. There was no dispute that the claimant was sent the relevant regular bulletins whilst he was absent.

122. An occupational health report was provided for the claimant dated 2 November 2019 (2755). That report detailed the claimant's history of anxiety and depression, commented on his condition at that time, and recorded that the claimant was not fit to work. The report stated that it was likely that the claimant's condition met the requirements of the Equality Act 2010.

123. On 15 November 2019 the claimant's interview for 16232 was due to have taken place. It was not entirely clear when the claimant had requested a postponement of that interview, but the request was received by Mr Styles on 18 November only after the interview had been due to have taken place. The request (1486) was that the interview be deferred beyond 28 November 2018. In the request the claimant referred to his disability and detailed the condition (also referring to panic attacks).

124. Mr Styles checked the interview timeframe for the campaign and, after identifying that the 15 November was the last date when interviews were taking place (meaning that the claimant's request would have resulted in a delay of at least two weeks before concluding the process), he concluded that he did not consider it reasonable to defer the interview and refused the request. Ms Ainsworth emailed the claimant on 25 November (1483) explaining that "*we cannot approve any more reasonable adjustment requests for you*". The decision was later explained in more detail in Mr Styles email of 18 February 2020 (1805). It would appear that the claimant was recorded as withdrawn from the process on 19 November as this would have occurred automatically as a result of the claimant's non-attendance at the interview on the date it had been arranged.

125. On 2 December 2019 the claimant texted Ms Baggaley to advise her of his twenty-eight day notice of resignation. He confirmed that he was not fit for work for the twenty-eight days (1381). Later, on the same day, the claimant texted that he found the keeping in touch calls to be having a negative impact on his anxiety. He requested that they be conducted less frequently, to which Ms Baggaley agreed.

126. The claimant and Ms Baggaley had a telephone conversation on 3 December 2019. The call was noted but it was common ground that a conversation about the claimant's notice period also took place which was not recorded in the notes. Ms Baggaley's evidence was that she discussed with the claimant whether he wanted to terminate his employment earlier than the end of his notice period. She said she wanted to make clear that he could be released earlier. She explained that her reason for doing so was because the claimant was unwell, on nil pay, and had mentioned he was distressed by the keeping in touch calls. She was unaware at the time that the claimant was still entitled to statutory sick pay and she acknowledged in her statement that she would probably not have suggested it had she been aware. Her evidence to the Tribunal was that she was obligated to continue to hold the keeping in touch calls with the claimant, even thought he was working his notice and would not be returning due to ill health. It was agreed that the claimant's last day of employment would be 11 December. The claimant did not provide an account of this meeting in his witness statement, but his evidence/case was that he was pressured by Ms Baggaley to bring his termination date forward.

127. On 9 December the claimant texted Ms Baggaley and highlighted that having checked his bank account he had noticed that he had received full pay for October and November. He asked for his employment contract. Later on the same day the claimant texted Ms Baggaley asking for written confirmation of the position and reminding her that it had been her idea to bring forward the date of termination, as the claimant had expressed the desire to "*serve*" his twenty-eight day notice. He felt that everything was being "*rushed through*" and asked for time to reconsider his resignation as "*the decision was made during a particularly severe depression*". Subsequently the claimant reversed his decision to resign and Ms Baggaley's evidence was that it was her decision to allow him to do so. His employment did not end on 11 December (or at all, as he remains employed by the respondent).

128. On 18 December 2019 Ms Baggaley held a formal sickness review meeting with the claimant. Notes were taken (1545). Ms Baggaley explained that she had been unaware of any entitlement to statutory sick pay when there had previously been a discussion about resignation. There was a lengthy discussion about occupational health referrals and a fit for work plan. At the end of the meeting Ms Baggaley asked if there was anything else which the claimant wished to raise. The claimant mentioned his period with the DWP and asked if that time could be added to his probation with the respondent (that is to reduce the length of the probationary period required). Ms Baggaley said that she would check. This was confirmed in a letter following the meeting sent on 27 December (1552).

129. During the hearing the Tribunal was provided with the payslips for the claimant for late 2019 and early 2020. The claimant's take home pay in December 2019 dropped significantly, but from the payslip (S144) it would appear that was due to the payment covering a period of ill health absence and not due to any recovery of overpayment of salary. An overpayment recovery was recorded on each of the January and February 2020 payslips (S145/146), shown as £111.84 each month. As a result the claimant's take home pay in each of those months was lower than it had been in November 2019. The deductions of the overpayments were taken from months

when the claimant was otherwise being paid full salary or a figure approaching full salary; they were not made from a month when the claimant was paid a lower amount due to absence.

130. The claimant entered his first Employment Tribunal claim on 29 December 2019 (following ACAS Early Conciliation between 15 and 30 November 2019).

131. In a text message on 10 January 2020 the claimant requested the notes of the informal attendance management meeting of 28 October (1442). The message also requested the notes of the KIT calls. The text message was not fully visible but did not appear to refer to previous unanswered requests and no explicit evidence of any such request was identified to the Tribunal. The typed notes of the meeting were provided on 15 January 2020 (2112). The email which enclosed those notes said the keeping in touch notes would follow.

132. Ms Baggaley's evidence was that she had started a log with the KIT notes in but hadn't caught up with it and filled it in later (the claimant during the hearing highlighted the absence of notes for some of the conversations which had taken place). Ms Baggaley also gave evidence that once a subject access request had been made, she took advice and there was a process to follow. She ultimately printed off what was required. On 30 January 2020 the claimant informed Ms Baggaley that it was now too late to send the KIT call notes (1685). However, he made a formal complaint about the failure to provide them on 31 January (1691). He chased them on 15 February (1761), informing her that he had instructed a solicitor to help him obtain them. Some documentation was then handed over to the claimant, but not the KIT call notes as the claimant highlighted in an email of 25 February (1828). It was not in dispute that the notes were ultimately provided to the claimant as part of a data protection subject access request response, albeit the Tribunal was not shown any evidence which recorded when that occurred.

Grievance and early 2020

133. The claimant submitted his grievance in emails on 31 January 2020 (in which he raised four points) (1791) and on 2 February 2020 (in which he raised twenty two) (1773). On 17 February 2020 Ms Townend was sent the paperwork as she had been identified as the person to consider it. Ms Townend was sent the claimant's personnel file, but her evidence was that she decided not to read it because she knew it would contain information which was not relevant to the grievance and it would therefore be a breach of GDPR for her to read it. As she did not do so, she was not aware of the claimant's depression and anxiety or any adjustments sought or made in relation to it, until these were explained to her by the claimant.

134. On 25 February 2020 Ms Baggaley wrote to the claimant to confirm that he had passed his probation period (1827). The date upon which this had occurred was back-dated taking account of the period of time during which the claimant had been employed by DWP prior to his employment with the respondent (it was backdated to 17 November 2019). Ms Baggaley's evidence was that she looked into the claimant's DWP service after her return from holiday over the Christmas period and, once the

entitlement and time was confirmed and advice taken, she confirmed that it could be taken into account and had been. It was also her evidence that probation review meetings were not usually undertaken while someone was absent on ill health grounds, which was why there had been no nine-month review meeting. The letter sent to confirm completion of the probationary period was in fact sent on the date on which the claimant completed a year's service (even though the completion was back-dated).

135. A meeting to discuss the claimant's grievance was proposed for 4 March 2020, but the claimant was unable to attend due to his health (1846, the claimant referred to work-related stress), so it was re-arranged. The claimant sent further documents to Ms Townend regarding his grievance on 5 and 10 March. On 11 March 2020 the claimant met with Ms Townend regarding his grievance (1868). The meeting was also attended by a note taker. It was a face-to-face meeting. The meeting was relatively brief. The claimant's email with the twenty-two points was discussed and the claimant confirmed that he did not have twenty-two complaints. The claimant was asked to set out in short bullet points what his concerns were and how he would like them resolved. The claimant said he had not thought about the resolution he was seeking. The claimant agreed to do this and, at the time, did not object to the request (albeit he never did provide the document requested). The claimant's evidence to the Tribunal was that he had expected to be asked about his grievances in detail in that meeting.

Applications for jobs 47927 and 43863

136. On 27 March 2020 the claimant applied for the post of Band O Compliance Caseworker, campaigns and projects, based in Manchester (47927). The Tribunal was provided with the job advertisement (2562), candidate pack (S93) and the claimant's application form (2557). The pack reflected the other packs referred to. On his application form the claimant confirmed he met the criteria of the Disability Confident Scheme, stated that he did require reasonable adjustments, and in describing what they were said "*I may need to use notes during an interview or reschedule the interview. I would like to be contacted to discuss this further*". This recruitment process was delayed due to the Covid-19 pandemic and the claimant was placed in a holding pool.

137. On 11 April 2020 the claimant applied for the role of O Compliance Caseworker, Campaigns & Projects in Cardiff (43863). The Tribunal was provided with the job advertisement (2521), candidate pack (2547) and the claimant's application form (2554). The pack reflected the other packs referred to. On his application form the claimant confirmed he met the criteria of relevant disability scheme, stated that he did require reasonable adjustments, and in describing what they were said "*I may need to use notes during an interview or reschedule the interview. I would like to be contacted to discuss this further*".

138. The claimant had a period of ill health in April 2020 which followed the national Covid lockdown. After the lockdown the claimant commenced working from home and the claimant's evidence was that he continued to do so at the date when he gave

evidence in this Tribunal hearing. Ms Townend (at the time) put the fact that she had not received anything from the claimant down to the pandemic.

Grievance correspondence in May 2020

139. On 4 May 2020 the claimant raised further complaints with Ms Townend (1920). Ms Townend responded saying she was looking forward to the claimant's email as requested on 11 March. On 7 May the claimant emailed Ms Townend. In summary he suggested that she was delaying the process (1921). He then sent other emails on the same day (1923) referring to his CBT and, later saying that if Ms Townend wished to deal with his complaints she could "*still do so. There is enough information and evidence in the emails I sent you for you to do so. But if you want to continue pretending that you don't really know what I was complaining about, or that the complaint is poorly written, or that we need to get to know each other first, then you can continue sitting on my complaint for as long as you like*".

140. On 11 May Ms Townend sent a short email asking if the claimant would like a further meeting to be arranged and highlighting the availability of Pam Assist (1938). On 13 May the claimant sent a further email to Ms Townend which included a proposal that she recuse herself. He said "*Given my concerns about you I raised in my most recent emails e.g. the complaints do not seem to make sense to you and you therefore wanted them re-written in more concise/succinct bullet points, I would like you to consider whether you are the right person to proceed with the investigation or whether you should recuse yourself from it. I cannot re-write the complaints in bullet points without stripping them of their essence. I believe detail is important ..that any reasonable innocent by-stander can easily make sense of my complaints as they are currently written*".

141. In his evidence the claimant accepted that the emails were not good. He emphasised that the reason why he wrote emails in such a way was because of his anxiety and depression.

142. Ms Townend sought advice from an HR Advisor before responding. That advisor proposed what should be said in the response (1936). The Tribunal did not hear evidence from that advisor. In her response of 27 May (1940) Ms Townend said "*I feel I must address the tone and language you are using in your communications to me. I feel your emails are rude and disrespectful and instead should be in line with Our Commitments* [which was a link to the respondent's commitments]. *May I remind you that you must treat everyone with dignity and respect. I would like to draw your attention to the Vexatious or malicious complaints policy* [which was also a link]... *I would ask also ask that the disrespectful way you have been communicating with me should stop and if it continues I may need to consider action under the Upholding our Standards of Conduct policy*". The email also reminded the claimant about what had been sought on 11 March and asked for the information to be provided by 5 June.

143. Within Ms Townend's email she made reference to the respondent's policy on how to recognise and deal with vexatious or malicious concerns. When asked about why she had referred to that policy, Ms Townend emphasised a line within it about

when a concern could be regarded as vexatious (562) which described such a concern as where the employee "*fails to clearly identify the substance of the concern, or the precise issues which may need to be investigated despite reasonable efforts by the manager to assist them*".

144. Ms Townend's evidence was that she did not see any valid reason put forward by the claimant for her to withdraw from the process. She explained that if she did another manager would need to start again and the process had been going on for over two months and she wanted to avoid delay. She said she was simply trying to understand the claimant's grievance and did not see any reason why this should mean that she ought to withdraw.

145. The claimant responded on 28 and 30 May. On 28 May (1948) he said "*My current Stress Management Plan states that the stress and anxiety may manifest itself in the tone of my e-mails. I am aware of this and that is regrettable, but it is a consequence of my disability – my poor mental and emotional health*". On 30 May (1947) he corrected himself, identifying that the information that his stress and anxiety may manifest itself in the tone of emails appeared in the Wellness Plan. He said "*I believe I would benefit more from a positive and sympathetic approach rather than threats of disciplinary action for behaviour arising because of my disability and for which I am yet to receive full support*". In cross examination, Ms Townend accepted that after receipt of the claimant's emails she understood more about why he had responded as he had. No action was taken as a result of the claimant's emails.

The Cardiff role (43863) and interview arrangements

146. The claimant was invited to interview for the Cardiff role (43863) and scheduled his interview for 1 June 2020. Prior to the interview no contact was made with the claimant as he had requested. Mr Styles' evidence was that as notes were something which could be used in the interview as standard, the recruitment team would not have contacted the claimant. No notice appears to have been taken of the claimant's statement that he might need to reschedule the interview, but the claimant did not contact anyone to do so. The claimant did not attend the interview. As a result, his application was unsuccessful. His evidence was that he did not attend because he had not been contacted in advance regarding his request for reasonable adjustments.

147. On 8 June 2020 the claimant emailed Mr Styles to ask, amongst other things, why he had not been contacted regarding reasonable adjustments for the Cardiff role (43863). A response was provided by Mr Styles on 11 June (1967) saying that as the use of notes was permitted as standard there was no need to put anything in place, and it was not possible to make individual phone contact with candidates to discuss interviews because of the number of applicants for roles. The claimant responded at length on the same day (1965). The email suggested that the request for contact had related to other matters in addition to reasonable adjustments for disability, as well as highlighting that the stated adjustment had also mentioned the possibility of postponement.

148. On 15 June 2020 Mr Styles responded (1973) and said "*I do think you raise a valid challenge in response to our current process around ringing candidates. I am arranging to hold a review of our process to see what the resource implications are and whether this is something we can offer going forward. I'm going to ask one of my team to be in touch to offer you a re-arranged interview for this campaign. They will contact you by email with the dates available and will be able to discuss adjustments with you*".

149. Mr Styles' evidence in his statement was that he felt the right thing to do was to step outside of the process on this occasion and offer the claimant a rescheduled interview even though that window fell outside the recruitment window for the post. His evidence to the Tribunal was that this was possible because he knew about the future recruitment being undertaken by the respondent and, with the numbers involved, felt able to offer this to the claimant. He also explained in evidence that the respondent has now changed its approach to contacting candidates who asked to be contacted about reasonable adjustments.

150. In his response of 15 June (1973) the claimant rejected the opportunity to be interviewed for role 43863, and stated that he had never asked for the campaign to be restored, and that he had now lost trust and confidence in the respondent's recruitment process. He also said, more generally, "*I will never apply for another HMRC vacancy again nor continue to engage with the recruitment process for the other vacancies which I have applied for but remain outstanding"*.

June and July 2020 – grievance, conversation with Ms Sheldon and FOIA response

151. On 24 June 2020 the first detailed grievance meeting (but the second actual meeting) was conducted by Ms Townend with the claimant. This meeting was conducted remotely (as were all subsequent grievance meetings). Ms Townend in her witness statement said that this meeting was postponed, but in fact during re-examination when she was taken to the meeting notes, she confirmed that a meeting had taken place on that date.

152. On 2 July 2020 the claimant and Ms Sheldon had a meeting conducted over Teams. At the time the claimant believed that they had a good rapport and was positive about the meeting with Ms Sheldon (albeit he later revised his view when he saw internal correspondence). Ms Sheldon had been the Business Expansion Manager in charge of overseeing and managing a team of staff dealing with the business expansion in the region, including the external recruitment undertaken on a large scale at the time. Ms Sheldon told the claimant that some people were struggling with the transition from behaviour to competency (the scoring methods for interview), even some of the interviewers (S41). Ms Sheldon's stated view to the claimant at the time (S46) was that "*You need some mock interviews, just to get you into the habit of having interviews so that you don't get too panicky about it when it's going to happen*". She also advised the claimant, for futures interviews, to tell the panel at the start of the interview that he had ticked the box to say he had a disability and to be upfront about it and the adjustments required. She explained to the claimant (as she did to the

Tribunal) that the panel would not be provided with any of the information on the application form, such as whether the candidate had a disability.

153. Mr Styles also provided the claimant with a response to his freedom of information request in an email on 2 July 2020 (2050). In that email Mr Styles provided information about some of the recruitment exercises which were the subject of the claims before the Tribunal. This information included:

a. For vacancy 1638997, there had been a pause on appointments and, at the time of the email, no appointments had been made although offers had been made. Fifteen candidates on the reserve list were about to receive an offer. Three hundred of the five hundred and three candidates in the holding pool were to be interviewed in July and August;

b. For vacancy 16232 (Nottingham), fourteen candidates had taken up duty and four had offers with July dates. Fourteen candidates remained on the reserve list. Forty-four were in the holding pool. A pause on recruitment had meant that they had not made immediate appointments following the interviews conducted between 4-15 November 2019;

c. For vacancy 43863 (Cardiff), Mr Styles re-confirmed that he "*accepted*" the claimant's "*challenge in terms of contacting candidates who request a phone call, and I offered to contact you and arrange a further interview, but you did not accept this. I have now added this into our process so any future requests will be accommodated*".

The process for job 47927 and interviews generally

154. On 9 July 2020 the claimant was invited to interview for role 47927, Band O Compliance Caseworker, campaigns and projects, based in Manchester. He was given five days in which to select a time for interview. He was remined of the need to do so, after 48 hours. As the claimant did not select a time, he was withdrawn from the process on 15 July. Mr Styles' evidence was that this was an automatic process undertaken by GRS, the third party providers.

155. Mr Styles' evidence was also that GRS made an error on this campaign and did not inform the respondent of the reasonable adjustments requested. However, his evidence was that such information would only ever have been sent to the respondent once a candidate booked an interview (which the claimant had not done). The claimant's comment regarding adjustments was the same as that for 43863 which had already been addressed and responded to by Mr Styles. The claimant gave no evidence whatsoever about his ability or inability to book an interview within five days as requested, having apparently been able to do so for each of the other recruitment campaigns in which an interview had been offered or undertaken.

156. The respondent adopts a practice of requiring applicants for all roles to be interviewed. Mr Styles' evidence was that they did so for the campaigns which involved the claimant partly because what was being undertaken was recruitment for generic

and not specific jobs. The interviews were designed to test ability, strength, behaviour, and overall potential (rather than experience). The interviews were stated to be a way of assessing suitability and giving a chance to ask questions. His view was that the type of role to be undertaken meant that if a candidate could not attend an interview at all he would question whether the roles were suitable for the candidate. Interviews were stated to be the preferred way of testing candidates.

Grievance meetings - July and August 2020

157. On 20 July 2020 the claimant attended a meeting with Ms Townend regarding his grievance (the third meeting, but the second with substantive discussion) (2072). In this meeting Ms Townend asked questions about the claimant's condition and the medication which he took for it. Her evidence was that she did so, because she wished to understand. Ms Townend's evidence was that the claimant did not raise any concerns about the questions in the meeting. On 21 July he sent Ms Townend a statement of disability he had prepared.

158. On 3 August 2020 the claimant attended a further meeting with Ms Townend regarding his grievance (the fourth meeting, but the third with substantive discussion) (2151). The claimant was accompanied at this meeting by his PCS representative.

159. On 4 August the claimant emailed Ms Townend some concerns about how the meeting had been conducted (2145) and again suggested that someone else should conduct the process, on this occasion because of what he perceived to be a "*potential bias towards management*". Ms Townend did not discontinue her involvement; her evidence was that this was because she felt it was her job to continue. On 27 August the claimant emailed a very lengthy set of questions which he felt should be asked of Ms Baggaley and Ms Brown, following a request for any specific questions which he wanted Ms Townend to ask (2167).

160. On 28 August 2020 as part of the investigation into the claimant's grievance, Ms Townend met with Ms Brown. The notes taken (2245) as part of this interview were subsequently provided to the claimant on 8 September 2020 (2238). There were three elements of the notes which were particularly in dispute in the Tribunal hearing.

161. The note recorded that Ms Townend asked Ms Brown to confirm whether the claimant had spoken to her about the applying for jobs as per the guidance, to which Ms Brown was recorded as replying "*No, Batsirai did not speak to me about applying for jobs*". What was recorded in the notes as written, was factually incorrect as the claimant had spoken to Ms Brown about applying for jobs. The evidence of both Ms Brown and Ms Townend was that what Ms Brown had said was limited to answering whether the claimant had formally notified her about his applications for other roles (when he had not provided any formal communication which sometimes appeared to be required as part of the process). In her witness statement Ms Brown emphasised that what was said was an answer to a question, not a criticism of the claimant. Ms Townend suggested that there was no detail in what was written; and she could not now recall why she had asked the question.

162. At two points in the notes Ms Brown made reference to bugging. The notes recorded: (2246) "*including an accusation I was bugging his hotel room*"; and (2249) "*I was accused of bugging his hotel room*". Ms Brown's evidence was that she herself had used the word "*bugging*". However, both her evidence and that of Ms Townend was that she had been speaking about her perception that the claimant believed that she had done so; she had not stated that he had explicitly alleged that she did so. Ms Townend's evidence was that she did not delve further into this issue as she did not feel it was part of the grievance investigation.

163. In the interview notes (2246) Ms Brown was recorded as saying "*I received up to 17 emails a day at all hours about lots of different things… He said to me that he was nocturnal, and it weas a reasonable that I should answer all his emails at 2am when obviously I am logged off*". Ms Brown remembered that the claimant had referred to being nocturnal. She stated that she had not asserted that the claimant had required responses at that time. In her witness statement she said that she accepted that the claimant had never said that he thought it was reasonable for Ms Brown to reply at 2 pm (despite what is said in the notes). Her evidence was that she had received a number of emails outside work hours. The Tribunal was shown one email sent by the claimant at 2 am. Ms Brown identified one email at 18.50, albeit that fell within the claimant's twilight shift hours (but not Ms Brown's working hours). The Tribunal was not shown any other emails sent outside normal working hours to Ms Brown. Ms Townend remembered the word nocturnal being used, and felt that what was said was more about what Ms Brown was feeling about the claimant's contact, rather than the claimant expecting a response at a particular time of day. Her evidence was that nothing was done with this information.

164. The notes of the meeting were sent to Ms Brown by email on 21 September 2020 (S59), that was some time after they were provided to the claimant. She confirmed they were accurate on the same morning. When challenged on the fact that she had done so, when her evidence before the Tribunal was that the notes were not accurate, Ms Brown referred to a grievance process being difficult and she stated that she had skimmed the notes, and confirmed they were accurate at the time, as she wished to get them off her desk.

165. On 31 August 2020 the claimant entered his second claim at the Employment Tribunal, referencing an ACAS Early Conciliation certificate which recorded conciliation as having occurred on 16 June 2020.

September 2020 and the end of the grievance process

166. On 3 September the claimant was invited to a further grievance meeting to take place on 15 September (2227). The invite stated that it was a final meeting. The claimant responded saying he would consider whether it was a good idea to participate in that meeting given the concerns which had arisen from the previous meeting, but, in any event, he could not attend the proposed meeting date (2229). It was re-arranged for 16 September in a letter of 7 September which repeated that it was a final meeting (2234).

167. On 16 September 2020 the claimant had his final meeting with Ms Townend regarding his grievance (the fifth meeting, but the fourth with substantive discussion) (2281). The PCS representative also attended this meeting. Within this meeting, amongst many other things, the claimant raised the things with which he was unhappy from the interview notes with Ms Brown, including emphasising that the only email which he had sent to her in the early hours was the one sent at 2.06 am and there had been no expectation of an early response (2284). Ms Townend's evidence was that she made it clear to the claimant that it was the final meeting.

168. At 6.59 am on 21 September 2020 the claimant requested a further grievance meeting. His email (2278) stated that on reflection he had realised that he had not acquitted himself well during the meeting on 16 September. He referred to having "*fluffed the emails I had wanted to rely on*", "*had a brain freeze*" and "*waffled a bit*". He said he had not addressed Ms Baggaley's meeting notes. His request was very specific, asking for another meeting to last two hours with three five-minute breaks, and to use audio only and not video. The claimant referred to his intention to take diazepam before the meeting to calm his nerves.

169. At 7.36 am Ms Townend responded refusing the request. She explained that she had stated the previous meeting was a final meeting. She explained that the claimant had said in the meeting that he did not need to respond to Ms Baggaley's responses. She said "*If there is anything else you wish to add, you will have the opportunity to do this with an Appeal Manager*". Ms Townend's evidence was that she did not recognise the claimant's description of himself at the meeting, he had not appeared anxious. He had dealt with the issue he raised. Ms Townend's witness statement recorded "*I had made it clear to him before the meeting on 16 September that it would be the final meeting, and I felt I had sufficient information to make a decision on the concerns which were within my remit*". She referred to the four meetings, a considerable amount of correspondence and the wish to avoid further "*snowballing*".

170. In her witness statement Ms Townend referred to the reference to appeal as being "*I did this to try to reassure the claimant by pointing out that although I was declining his request for another meeting, if he was unsatisfied with my conclusions, there was the opportunity to raise this at appeal stage, if necessary*". When answering questions during the hearing, Ms Townend's evidence was somewhat different. She said that she always referred to an appeal at this point in a process because that was what the policies required, and the inclusion of this in the email was no different to what she would have said to anyone else at the same stage of the process.

171. On 22 September 2020 at 7.36 am the claimant was sent the notes of the final grievance meeting (2318). At 9.24 am the claimant stated that he did not agree the notes as there was important information missing (the Tribunal heard no evidence about what that information was). At 9.47 am Ms Townend asked for amendments to be sent by 4 pm on Thursday (which would have been the 24th) (2317). Further emails were exchanged, including the claimant saying (2317) "*You must always bear in mind that you are dealing with a vulnerable adult with a disability and dodgy short-term memory, so some allowances need to be made*". At 11.57 am the claimant asked for

the deadline to be extended to Monday 28 September. Ms Townend stated at 16.16 on 22 September that the deadline stood as she was seeking to complete her deliberations that week (2315). The claimant's PCS representative suggested emailing any comments by the deadline (2314). In her witness statement Ms Townend explained that she did not extend time because: the claimant was not providing her with any reason why he could not meet the deadline; the task of amending the notes was not considered by her to be onerous; the claimant already appeared to have identified the faults as he had said there was important information missing; she was keen not to further delay or stretch out the process; and she did not see how the deadline was unfair or unreasonable. The claimant never provided his amendments to the notes.

172. At 16.54 on 22 September 2020 the claimant withdrew his grievance (2314). He said "*If it is the case that you have not made a final decision and that I will not be offered a further meeting, then I would like to withdraw this formal concern with immediate effect. You are advised that the main reason I have withdrawn the formal concern is that I have not been offered a further meeting*".

173. Ms Townend responded by asking the claimant to take a few days to consider his request; giving him until midday on 28 September. The claimant confirmed that he was not going to change his mind and, on 24 September, said "*I will consider any outcome which is prepared in the absence of the further meeting I requested as a flawed outcome, whichever way it goes*". It was not in dispute that had the claimant not withdrawn his grievance but disagreed with the outcome, he would have had the opportunity to appeal and the appeal would have been considered by someone more senior than Ms Townend.

174. As the claimant had withdrawn his grievance, the outcome was not provided to him. A report was written by Ms Townend in which the complaints were not upheld, which was provided in the documents before the Tribunal (2321). In that report, Ms Townend recorded (2327) that she had received sixty-four emails from the claimant, some very long and some with attachments, including one email which had another thirty-six emails attached to it.

175. On 11 December 2020 the claimant entered his third Employment Tribunal claim, following ACAS Early Conciliation conducted between 12 October and 11 November 2020. On 29 January 2021 the claimant entered his fourth Employment Tribunal claim, following ACAS Early Conciliation conducted between 30 November and 30 December 2020.

Disparity audits

176. In 2019 the respondent published a race disparity audit (364). The claimant placed reliance upon that document in his indirect race discrimination claim. The report was a lengthy and complex document.

177. The respondent placed emphasis on a summary of the findings (379) in which it was said that "*When compared to representation rates within HMRC, there appears to be little disparity in the promotion rates of White and BAME employees*".

178. The claimant emphasised two statistics recorded in the recruitment data graphs which were appended to the document:

a. that, for internal applicants applying from within the Civil Service, 13% of BAME candidates passed through interview compared to 30% of white internal (Civil Service) applicants (397); and

b. for candidates applying from within HMRC, 11% of BAME candidates passed through interview as compared to 29% of white internal (HMRC) candidates (398).

179. In 2021 the respondent published a disability disparity audit (525). Whilst the claimant referred to it in general terms, he did not highlight any particular element of it upon which he relied.

The Law

Knowledge of disability

180. The issue of knowledge needs to be considered specifically in relation to each of the claims brought. Direct discrimination is about the knowledge of the alleged discriminator. The Judgment in **Seccombe v Reed in Partnership Ltd EA-2019-000478** (upon which the claimant's representative relied) does clearly and by reference to the provisions of the Equality Act, set out what knowledge is required for each of the relevant provisions. It says:

> **"The issue of knowledge of disability has to be considered in a slightly different way for the various types of conduct proscribed by the Equality Act 2010. There is no reference to knowledge in section 13 of the Equality Act 2010, however, as the less favourable treatment must be because of the protected characteristic, which generally requires consideration of the mental processes of the putative discriminator, there can generally only be direct disability discrimination if the putative discriminator knows of the disability."**

181. For discrimination arising from disability, section 15(2) of the Equality Act 2010 provides that unfavourable treatment does not amount to such discrimination if the respondent can show that it: did not know that the claimant had the disability in question; and could not reasonably have been expected to know.

182. For reasonable adjustments, paragraph 20 of schedule 8 of the Equality Act 2010 provides that the respondent only has a duty to make an adjustment if it: knew or could reasonably be expected to have known that the claimant had a disability; and that it knew or could reasonably have been expected to have known that the claimant was, or was likely to be, placed at the substantial disadvantage alleged.

183. In his submissions, the respondent's representative stated that Employment Tribunals have been provided with guidance as to the approach to be taken with claims of reasonable adjustments. He relied upon **Newham Sixth form College v Sanders [2014] EWCA Civ 734**, and what was said by the Court of Appeal:

> **"The nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot… make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed on the employee by the PCP."**

184. What the respondent knows or could reasonably be expected to know for the purposes of the discrimination arising from disability claims and the claims for breach of the duty to make reasonable adjustments, is about the respondent collectively and is not about the knowledge of any individual or specific employee.

185. As the Tribunal identified to the parties it would do, it took into account the Equality and Human Rights Commission's code of practice on employment (2011). The relevant sections on knowledge are, in particular, at paragraphs 5.17, 5.18 and 6.21. They say:

> **"If an employer's agent or employee (such as an occupational health adviser or a HR officer) knows, in that capacity, of a worker's or applicant's disability, the employer will not usually be able to claim that they do not know of that disability; and that they cannot have subjected a disabled person to discrimination arising from a disability. Therefore, where information about disabled people may come through different channels, employers need to ensure that there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act…**
>
> **If an employer's agent or employee (such as an occupational health adviser, a HR officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's or potential applicant'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 that where information about disabled people may come through different channels, there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act."**

186. The respondent's counsel submitted that the Tribunal was obliged to consider the approach cited by HHJ Eady QC in **A Ltd v Z [2020] 1999**, namely that there needs to be actual or constructive knowledge of the disability at the relevant times. He

submitted that an employee's representations of any absence or impediment issue can be of importance, but importantly, there was no obligation on an employer to make every inquiry where there is little or no basis for doing so, as endorsed by **Seccombe v Reed in Partnership Ltd UKEAT/0213/20/00**. He also submitted that a person cannot discriminate against someone because of their disability, if they do not know that they are disabled – it follows that consideration is needed of the discriminator's mental state: **Seccombe**. He also submitted that knowledge of disability is also required for a finding under sections 15 and section 20 of the Equality Act 2010.

Direct discrimination

187. Part of the claim relies on section 13 of the Equality Act 2010 which provides that:

> **"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."**

188. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same. Section 23(2) of the Equality Act 2010 provides that for a claim of direct discrimination the relevant circumstances relating to a case include a person's abilities. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different. It is not a requirement that the situations have to be precisely the same.

189. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include any other detriment. The characteristics protected by these provisions include disability.

190. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee without a disability would have been treated reasonably.

191. The protected characteristic does not have to be the only reason for the conduct provided that it is an "*effective cause*" or "*significant influence*" for the treatment.

192. The claimant placed reliance upon the Judgment in **Amnesty International v Ahmed [2009] IRLR 884** in which Underhill LJ (as he now is) said:

> **"… The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of. That is the language of the definitions of direct discrimination in the main**

> **discrimination statutes and the various more recent employment equality regulations. It is also the terminology used in the underlying Directives …In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself…But that is not the only kind of case. In other cases—of which *Nagarajan* is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in *James v Eastleigh*, a benign motive is irrelevant"**

Discrimination arising from disability

193. Section 15 of the Equality Act 2010 provides:

> **(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.**

194. For unfavourable treatment there is no need for a comparison, as there would be for direct discrimination. However, the treatment must be unfavourable.

195. In his submissions, the respondent's representative submitted that the test to be applied in relation to unfavourable treatment is: something said or done (or omitted to be said or done) which places the person at a disadvantage, requiring a measurement of the objective sense of that which is adverse as compared to that which is beneficial: **T-Systems Ltd v Lewis UKEAT/0042/15**.

196. As the respondent's representative submitted, **Pnaiser v NHS England [2016] IRLR 170** outlines the correct approach to be taken:

> **"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 s.15 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*. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises….

(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 s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.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* 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.**
>
> **(h) Moreover, the statutory language of s.15(2) makes clear … 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 s.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 s.13 and a discrimination arising from disability claim under s.15.**
>
> **(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed."**

197. Section 15(1)(b) of the Equality Act 2010 provides that unfavourable treatment can be justified where it is a proportionate means of achieving a legitimate aim. That requires: identification of the aim; determination of whether it is a legitimate aim; and a decision about whether the treatment was a proportionate means of achieving that aim.

198. The respondent submitted (citing **R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213**) that in considering the respondent's justification, the Tribunal is required to consider three elements; (i) is the objective sufficiently important (ii) is the measure rationally connected to the objective and (iii) are the means chosen no more than necessary to achieve the objective?. He also submitted that the Tribunal is obliged to make a fair and detailed analysis of the working practices and business considerations involved: **Hensman v MoD UKEAT/0067/14/DM.**

199. The Tribunal took into account the Guidance in relation to objective justification contained in paragraphs 5.11, 5.12 and 4.25-4.32 of the EHRC Code of Practice on Employment 2011. It is for the respondent to justify the practice and it is up to the respondent to produce evidence to support its assertion that it is justified. The Tribunal must ask itself whether the aim is legal, non-discriminatory, and one that represents a real, objective consideration? The Tribunal must then ask itself whether the means of achieving the aim is proportionate? Treatment will be proportionate if it is 'an appropriate and necessary' means of achieving a legitimate aim. Necessary does not mean that it is the only possible way of achieving the legitimate aim, it will be sufficient that the same aim could not be achieved by less discriminatory means.

200. The Guidance also says (in paras 5.8 and 5.9) that something that arises in consequence of the disability means that there must be a connection between whatever led to the unfavourable treatment and the disability. The consequences of a disability include anything which is the result, effect or outcome of a disability. Some consequences may not be obvious.

Indirect discrimination

201. S19 Equality Act 2010 provides:

> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> **(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

202. When considering a claim of indirect discrimination it is necessary to consider the statutory test in stages:

a. The first stage is to establish whether there is a PCP;

b. If the Tribunal is satisfied that the PCP contended for has been or would be applied, the next step is the analysis of whether there is a particular disadvantage for those with the relevant protected characteristic when compared to those that do not share the protected characteristic. The comparative exercise must be in accordance with section 23(1) of the Equality Act 2010. In relation to disability it is therefore necessary to consider those with the individual's particular disability.

c. If the group disadvantage is established, then it must be shown that it did or would put the individual at that disadvantage.

203. The burden of proving those elements is on the claimant.

204. The claimant in his submissions relied upon **Essop and others v Home Office (UK Border Agency) [2017] UKSC 27** in his indirect discrimination claims. He also relied upon **Ryan v South West Ambulance Services NHS Trust [2021] IRLR 4** as authority for the proposition that there is no need to know the reason for the disparity. That Judgment says that it is not necessary for the claimant to show the reason for the group disadvantage identified; all that is required is that there is a corresponding group

and individual disadvantage. **Essop**, as emphasised in **Ryan**, identified that the prohibition on indirect discrimination aims to achieve equality of results (in the absence of justification) when dealing with hidden barriers which are not easy to anticipate or to spot.

205. In **MacCulloch v ICI [2008] IRLR 846** the Employment Appeal Tribunal set out the following legal principles with regard to justification:

> **"(1) The burden of proof is on the respondent to establish justification: see *Starmer v British Airways [2005]IRLR 862* at [31].**
>
> **(2) The classic test was set out in *Bilka-Kaufhaus GmbH v Weber Von Hartz* (case 170/84) *[1984] IRLR 317* in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see *Rainey v Greater Glasgow Health Board* (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.**
>
> **(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].**
>
> **(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: *Hardys & Hansons plc v Lax [2005] IRLR 726, CA*."**

The duty to make reasonable adjustments

206. Section 20 of the Equality Act 2010 provides:

> **(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'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.**

207. Section 21 of the Equality Act 2010 provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

208. The matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

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

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the claimant.

209. The requirement can involve treating disabled people more favourably than those who are not disabled. That is indeed the very nature of the duty; it is to make adjustments to the practices which an employer usually follows. The claimant relied upon **Waddingham v NHS Business Services Authority ET/1804896/13 and 1805624/13** and submitted that the employer has a pro-active duty to make reasonable adjustments. The authority he cited was not one with which the Tribunal was familiar, or which was shown to the Tribunal, but nonetheless the Tribunal accepted the broad proposition that the obligation to make reasonable adjustments applies to the respondent irrespective of whether or not the claimant identified at the particular time the precise adjustments required or sought. An employer has a duty to make the adjustments which are reasonable to offset the substantial disadvantage suffered by the application of the provision, criterion, or practice.

210. Whether something is a provision, criterion or practice should not be approached too restrictively or technically, it is intended that phrase should be construed widely. A one-off act can be a PCP but it is not necessarily the case that it is.

211. **Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664** (a case which the Tribunal highlighted to the parties during submissions) is authority for the fact that a duty to consult is not of itself imposed by the duty to make reasonable adjustments, the only question is, objectively, whether the respondent has complied with its obligations to make reasonable adjustments or not. The duty involves the taking of substantive steps, rather than consulting about what steps might be taken. **Salford NHS Primary Care Trust v Smith [2010] EAT 0507/10** said:

> **"Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage ..are not reasonable adjustments within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify"**

212. The respondent's representative in his submissions relied upon **Lincolnshire Police v Weaver [2008] All ER 291** and stated that the reasonableness test required an objective standard to be deployed. The question cannot be answered only from the perspective of the employer, but must take into account the wider implications and operational objectives of the employer.

213. When considering reasonable adjustments, the Tribunal took into account the EHRC Code of Practice on Employment.

Harassment

214. Section 26 of the Equality Act 2010 says:

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

215. As the respondent's representative detailed in his submissions, section 26(4) of the Equality Act 2010 obliges the Tribunal to consider (a) the Claimant's perception (b) the other circumstances of the case and (c) whether it was reasonable for the conduct to have that effect. The Claimant's perception alone is insufficient to turn conduct into harassment: **Ali v Heathrow Express and Redline Assured Security Ltd [2022] EAT 54**.

216. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

217. The alternative bases in element (b) of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its

purpose (and vice versa). It is important that the Tribunal states whether it is considering purpose or effect.

218. Even if the conduct has had the prescribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. The Tribunal must consider whether it was reasonable for the conduct to have that effect on that particular individual. It must also ask, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element. When considering the effect and whether it is reasonable, the Tribunal should consider the context in which the alleged word or phrase was used. Harassment can be found to have the requisite effect irrespective of intent and regardless of whether the alleged harasser knew at the time that the claimant had the protected characteristic.

219. In terms of allegations of harassment which rely upon a series of incidents, the Tribunal is required to keep in mind that each successive episode of alleged harassment has its predecessors, the impact of the separate incidents may accumulate, and that the impact upon the working environment created may exceed the sum of the individual episodes.

220. When considering whether the alleged harassment had the effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him, not every adverse comment or conduct will constitute the violation of a person's dignity and/or create the prescribed effect. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended (**Dhaliwal**). For consideration of whether something created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, the question is whether an environment was created; and there may be a distinction between an incident and whether an environment was created in certain contexts. However, a serious one-off incident can amount to harassment.

221. The Tribunal must also be satisfied that the harassment claims are related to the protected characteristic. An enquiry should therefore be made of the context and the mental processes of the alleged harasser, which will all be relevant. The respondent's representative relied upon **Bakkali v GMB (South) Ltd UKEAT/0176/17**.

222. When considering whether facts have been proved from which a Tribunal could conclude that harassment was on a prohibited ground, it is always relevant to take into account the context of the conduct which is alleged to have been perpetrated on that ground.

The burden of proof

223. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination or harassment case and provides as follows:

> **"(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".**

224. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that he has been treated less favourably than his comparator or hypothetical comparator and there was a difference of a protected characteristic between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

225. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

226. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

227. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his or her motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of? The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare and that Tribunals frequently have to infer discrimination from all the material facts. Few employers would be prepared to admit such discrimination even to themselves.

228. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

229. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race (or with any other difference of a protected characteristic) would have been treated reasonably

230. The way in which the burden of proof should be considered has been explained in many authorities, including: **Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332**; **Shamoon v Chief Constable of the RUC [2003] IRLR 285; Hewage v Grampian Health Board [2012] ICR 1054; Igen Limited v Wong [2005] ICR 931; Madarassy v Nomura International PLC [2007] ICR 867; Royal Mail v Efobi [2021] UKSC 33**.

Time limits/jurisdiction

231. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it. The key date is when the act of discrimination occurred. The Tribunal may also need to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased.

232. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble [1997] IRLR 336**. Those factors are: the length of, and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the relevant respondent has cooperated with any request for information; the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action. However subsequent case law has said that those are factors which illuminate the task of reaching a decision but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent.

233. **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** confirms that the exercise of a discretion should be the exception rather than the rule

and that time limits should be exercised strictly in employment cases. The onus to establish that the time limit should be extended lies with the claimant.

Conclusions – applying the Law to the Facts

234. The matters contained at paragraphs numbered 1-6 of the list of issues (as recorded in the attached appendix) are not issues which the Tribunal needed to determine. For ease of reference the Judgment will refer to issues using the numbering in the attached list even though there were not in facts any issues to determine at numbers 1-6.

Knowledge of disability – issue 7

235. The first of the matters contained in the list of issues which required determination by the Tribunal was the issue recorded at number 7: knowledge of disability. It was accepted by the respondent that the claimant had a disability within the meaning of section 6 of the Equality Act 2010 at the relevant time by reason of anxiety and depression. It was the claimant's evidence, which the Tribunal accepted (even though there was no document available to corroborate it), that he disclosed having a disability on his application form for the role which he obtained of Customer Service Consultant. On that basis, the respondent was aware of his disability from 24 July 2018. In any event, the pre-placement questionnaire (720) which was considered on 17 December 2018, provided the respondent with the information that the claimant had had depression and anxiety.

236. The respondent was not made aware of the details of the claimant's condition or how it impacted upon him, at the time that he applied for his role or when he commenced it. The pre-placement questionnaire stated that the claimant did not require reasonable adjustments. There was no evidence of the claimant informing the respondent's recruitment team or his line management of the details of his condition prior to 19 September 2019. When he completed the application for roles 1639021 and 1638997 entered on 10 July 2019, the claimant confirmed that he was covered by the disability scheme operated by the respondent, but also stated that he did not require reasonable adjustments to the process and no detail was provided.

237. On 19 September 2019 the claimant first made an employee of the respondent aware of both his condition and details about how that condition impacted upon him, when he sent his email about the interview for role 1638997 (the HO role for which he ultimately was not interviewed). Amongst the recipients of that email was Mr Styles. Mr Styles accepted in evidence that he was aware that the claimant had a disability from that date, and the Tribunal further finds that he was also aware of details of the impact that the claimant's condition had upon him and, in particular, upon his ability to attend and undertake interviews, from that date.

238. Ms Brown was personally first made aware of the claimant's disability on 11 October 2019. The claimant made her aware of the impact which his disability had upon him in the KIT calls on that date and shortly thereafter, and in the emails which he sent to her, including the email of 19 September 2019 which she was provided with

as part of an email chain on 16 October 2019. That email described the impact that the claimant's condition had upon him and his ability to attend and undertake interviews.

239. The first detailed report provided to the respondent about the claimant's condition and the impact it had upon him, was the occupational health report provided on 2 November 2019 (2755). The previous occupational health report of 17 September 2019 (2725) had not reported on the claimant's depression and anxiety at all, it not having been the reason for the claimant's absences prior to that date. The claimant's absence on 11 October 2019 was the first date when he was absent from work due to his anxiety and depression.

240. As recorded in the legal part of this Judgment, the issue of knowledge and how it applies differs for each of the claims brought. For the reasonable adjustment claims, knowledge (or imputed knowledge) is specific to the substantial disadvantage suffered. Accordingly, the Tribunal applied its findings in relation to knowledge to, and will address the issue of knowledge where relevant when considering, each of the specific allegations (addressed in more detail below). However, for the purposes of the claims for discrimination arising from disability, the Tribunal found that the respondent was aware that the claimant had depression and anxiety (or at least that he had previously had it) and was aware of that disability, prior to the claimant commencing employment with the respondent.

241. The evidence from the witnesses called by the respondent was that information about a candidate's or employee's disabilities, or reasonable adjustments requested or required, was not passed between those responsible for recruitment and those responsible for line management. There was no evidence of any process in place for that information to be passed, or for an employee to be able to consent to information being passed, between those responsible for recruitment and those responsible for line management. There was also no dispute that those conducting interviews were not made aware of a candidate's disability and were only informed about any requests for reasonable adjustments in the circumstances evidenced by Ms Sheldon (see paragraph 90). The Tribunal noted Ms Sheldon's advice to the claimant in their conversation of 2 July 2020, that for futures interviews he should tell the panel at the start of the interview that he had ticked the box to say he had a disability and to be upfront about it and the adjustments required. It was apparent to the Tribunal that the respondent did not have in place the channels for information referred to in the extracts from the Equality and Human Rights Commission's code of practice on employment paragraphs 5.17, 5.18 and 6.21 as quoted at paragraph 185 above, including in particular for internal candidates with disabilities attending interviews. Ms Sheldon's suggestion to an existing employee that he should bring his disabilities and adjustments required to the attention of an interview panel at the start of the interview, placed a requirement on a candidate which would not have been present had the respondent put in place the channels identified in the EHRC guidance which are recommended to make it easier for the respondent to fulfil its duties under the Equality Act 2010.

Direct disability discrimination – issues 8-10

242. The alleged less favourable treatment relied upon by the claimant in his claim for direct disability discrimination was clarified during the hearing and expressly confirmed by the claimant during his oral submissions. The alleged less favourable treatment relied upon was limited to the allegation that the respondent did not conduct a mock interview with the claimant over Skype. The allegation did not relate to the claimant's request for a mock interview in person (which had ultimately been arranged for 11 October 2019 but did not take place on that date because he was absent on ill health grounds).

243. The request for a mock interview over Skype was made to Ms Brown on Thursday 17 October 2019. As already addressed in relation to knowledge above, Ms Brown was aware of the claimant's disability and the impact which it had upon him and his ability to undertake interviews from 11 October 2019.

244. The claimant informed Ms Brown that he was no longer proceeding with the interview and had withdrawn from it on Tuesday 22 October. As recorded at paragraph 106, Ms Brown's evidence was that because she had been told that the claimant had withdrawn from the relevant interview process, she did not believe that she needed to progress the request for a mock interview or to discuss it further. The Tribunal accepted that evidence as true. It was clearly part of the claimant's case to the Tribunal that it would have been helpful for him to have had a mock interview by Skype even though he had withdrawn from that particular application process, due to the number of other applications that he made, but that contention did not have any impact upon the reason why Ms Brown evidenced that she did not take the Skype mock interview forward in October 2019. The period during which Ms Brown did not conduct a mock interview by Skype whilst she believed the request remained outstanding, was only between Thursday 17th and the following Tuesday (22nd).

245. The claimant relied upon a hypothetical comparator. Evidence was heard about someone who had undertaken a mock interview with Ms Baggaley, but that evidence provided no genuine assistance to the Tribunal in considering how a hypothetical comparator would have been treated, as that mock interviewee was neither absent from work at the time, nor did he request or undertake a mock interview by Skype.

246. On Friday 18 October 2019 Ms Brown discussed her reticence to arrange a mock interview by Skype with Ms Gillespie as detailed at paragraphs 102-105 above. The evidence was that Ms Brown was not intending to arrange a mock interview by Skype as requested by the claimant following that call and for the reasons she explained, but ultimately the reason why she did not do so was the claimant withdrawing from the interview not the matters she discussed. In summary, those reasons were: the fact that the claimant was absent on ill health grounds at the time; and the claimant's own statement that he had suffered bouts of severe anxiety and panic attacks which he directly attributed to the impending interviews as stated in his email of 19 September (1258) sent to Ms Brown on 16 October (albeit that statement was about the actual interviews and not a mock one).

247. Accordingly, the Tribunal found that a hypothetical comparator in materially the same circumstances as the claimant would have been someone who made a request

for a mock interview by Skype on Thursday 17 October and was believed to no longer wish to have that request taken forward on Tuesday 22 October because they had withdrawn from the relevant interview process. The Tribunal found that such a comparator would have been treated in the same way: a mock interview would not have been conducted in that time.

248. Even had the Tribunal focussed on the reasons Ms Brown had for not wishing to arrange a mock interview by Skype at that time, rather than the reason she in fact ultimately did not proceed with such an interview, the Tribunal would still have found that the claimant was not treated less favourably than a hypothetical comparator in materially the same circumstances would have been. Such a comparator would also have been someone who was absent from work on ill health grounds at the time the requested mock interview by Skype would take place and who had expressed the view that the reason for their absence was directly attributable to impending interviews (although not the requested mock interview). The Tribunal found that the claimant was not treated less favourably than such a hypothetical comparator without the claimant's disability would have been, as Ms Brown would also not have conducted a mock interview with them by Skype while they were absent on ill health grounds.

249. The treatment which the claimant contended was less favourable, that is not conducting the mock interview by Skype, was not because of the claimant's anxiety and depression. It was because he had withdrawn from the substantive interview, and (had he not) would have been because he was absent on ill health grounds at the time and had stated that the interview which had been arranged had directly contributed to his absence.

250. The claimant was entirely correct in his submission that direct discrimination can never be justified by the motive for the discrimination, as exemplified by the **Amnesty International** case upon which he relied. Had the Tribunal found that the claimant had been treated less favourably because of his anxiety and depression than a hypothetical comparator without anxiety and depression would have been, it would not have found that Ms Brown's motivations or reasons would have otherwise provided any response to or defence to the claim. A paternalistic and/or well-intentioned concern by a manager could not explain away what would otherwise be direct discrimination. However, for the reasons explained, the Tribunal did not find that direct discrimination had occurred.

Discrimination arising from disability – 11.1 (interview notes)

251. The Tribunal considered issues 12-15 as they applied to each of the allegations of unfavourable treatment relied upon as set out in the table as issues 11.1-11.11.

252. The unfavourable treatment which the claimant alleged as issue 11.1 was that on 21 August 2019, the Respondent stopped the Claimant from using his notes during the Claimant's job interview for job reference number 1639021.

253. There was no dispute that the claimant was spoken to by Ms Parker whilst reading verbatim from his notes in answer to a question (either the first or second main question asked). It was also not in dispute that the claimant had already, at the point of the interruption, initially answered the question for some minutes without reading from his notes and had answered the follow up question(s). The reading verbatim only occurred at the very end of the time allocated for the question.

254. What was in dispute was whether the claimant was: stopped from referring to his notes, or told that it was probably not the best to read out his notes. This was a dispute of evidence between: the claimant; and the (consistent) evidence of Ms Parker and Ms Uyanwune. The Tribunal found Ms Uyanwune in particular to be an entirely credible witness. She was very clear in her evidence that had Ms Parker tried to prevent the use of notes entirely, she would have intervened. The Tribunal accepts the evidence of Ms Uyanwune and Ms Parker of what occurred in the interview and, in particular, found the record given by Ms Uyanwune of what occurred in her email of 5 September 2019 (963) as being accurate and correct (the claimant having accepted the first paragraph as being accurate but not the second) and where there was any dispute about what occurred in the interview preferred her evidence to that of the claimant.

255. As put to the claimant in cross-examination and accepted by him, the issue may have been a miscommunication error. In an email of 10 September 2019 (1130) the claimant stated that he did not know how he could refer to notes without reading them, showing that he had not understood the important distinction between reading verbatim from his notes and referring to his notes to assist him in answering, which Ms Parker had endeavoured to explain. The claimant was someone in a stressful interview environment and, as is recorded in his evidence, is someone with a condition which affects short-term memory. The Tribunal did not find that the claimant was stopped from using his notes during the interview as he alleged. Ms Parker did intervene and effectively stop him from reading verbatim from his notes while adding to the answers he had already given, but the Tribunal found that she did not stop him referring to his notes.

256. In considering the other issues listed at 13-15 in relation to allegation 11.1, the Tribunal would have found that the need to refer to notes because of the claimant's poor short term (working) memory and lapses in concentration was something arising in consequence of the claimant's disability in the light of the evidence heard. However, the need to read verbatim from his notes was not something which arose in consequence of the claimant's disability. The evidence did not support a contention that he needed to read verbatim because of his disability (had that been what had been alleged) and, indeed, the claimant had spoken without reading his notes for the first seven minutes of the first question and a similar amount of time for the second question, before he decided to read verbatim from what he had prepared. In the light

of the Tribunal's findings, it did not need to and could not determine issues 14 and 15 as they applied to allegation 11.1.

Discrimination arising from disability – 11.2 (deferment refusal)

257. What was asked in deciding whether the respondent had treated the claimant unfavourably as alleged for allegation 11.2 was: in respect of the claimant's application for job reference 1638997 (Compliance Caseworker – Tax Professional or Operational Delivery), did the respondent refuse to make further deferments/postponements of the claimant's interview, causing the claimant's withdrawal from the recruitment process?

258. The respondent did postpone and re-arrange the job interview for job 1638997 from 19 September 2019 until 24 October 2019. That complied with what the claimant requested on 19 September. However, the respondent refused to defer the interview further when the claimant requested a further postponement on 16 October 2019. That refusal to defer the interview further was unfavourable treatment. It placed the claimant, who was unable to attend the interview on that date due to his health, at a disadvantage. That was adverse for him in an objective sense.

259. The something arising in consequence of the disability relied upon by the claimant was that the claimant's disability and the medication he had started taking for his disability, prevented him from attending and participating in an interview during the required period. The Tribunal found that was something arising in consequence of his disability.

260. The unfavourable treatment was found by the Tribunal to be because of the something arising. The need for the interview date of 24 October to be deferred in order to attend and the inability to progress with the application unless the interview was deferred, did arise in consequence of the claimant's disability which meant he was not at that time well enough to attend and participate in the interview. At the time that the decision to refuse the deferment was made, the respondent was aware of the claimant's anxiety and depression and that was the reason both for his absence from work and wish to have the interview deferred.

261. The Tribunal was then required to decide whether the respondent's refusal to defer the interview was a proportionate means of achieving a legitimate aim. The aim relied upon by the respondent with regard to the non-deferment of interviews was not stated in the list of issues at issue 15 but was recorded at issue 37 as being: conducting a fair, consistent, effective and proportionate recruitment process and the efficient use of the respondent's resources. The Tribunal found that the aim (or aims) relied upon was a legitimate one.

262. The Tribunal then considered whether the refusal to defer the claimant's interview was a proportionate means of achieving that legitimate aim. The Tribunal accepted Mr Styles evidence about why the respondent needed to conclude the recruitment exercise for the first tranche of candidates for those posts. It accepted the importance of following the merit process for the tranche of candidates and accepted the reasons given for needing to complete the substantial recruitment exercise as soon

as possible for that tranche (see paragraph 96). Had the respondent completed its recruitment under the exercise for job 1638997 with the conclusion of that tranche, the Tribunal would have accepted that the refusal to defer the interview was a proportionate means of meeting the legitimate aim relied upon.

263. However, it was not the case that the recruitment for job 1638997 was completed with the candidates in the first tranche. The respondent was operating a holding pool, where other candidates who had qualified for interview (but who had not scored as highly as those in the first tranche) had been placed and could be interviewed at a date later than 24 October 2019 if the vacancies were not filled by the first tranche. It was recorded in Mr Styles' response to the claimant's freedom of information request of 2 July 2020 (2050) that three hundred of the five hundred and three candidates in the holding pool for those roles, were to be interviewed in July and August 2020. That meant that over three hundred candidates who had scored less than the claimant in the tests undertaken, were interviewed for the roles (or offered interviews) on dates when the claimant would (or at least could) have been well enough to attend the interview had he been allowed to defer his interview and to be moved into a subsequent tranche as he had requested.

264. In considering whether the respondent's refusal to defer the claimant's interview so that he was placed in the holding pool and interviewed in a later tranche, the Tribunal carefully considered Mr Styles' evidence about why he said that could not have occurred and did not comply with the merit principle to which the respondent strictly adheres (and is required to under the Civil Service Recruitment Principles). The Tribunal did not find that evidence to be persuasive. The claimant was in a position where he was unable to attend the first tranche of interviews. If he was interviewed in the second tranche, the only person who would not be in the order of merit precisely where they would have been had he been able to be interviewed as part of the first tranche, was the claimant (who would not be in that position anyway as he was unable to attend the interview within the required timescale). No one but the claimant was adversely affected in terms of the rigid merit principles. The claimant would have been unable to raise a subsequent issue about being part of the second tranche (if he was placed there because he was not well enough to attend an interview during the first tranche's period), even if the second tranche were required to score more highly in interview than the first tranche had been as a result of fewer vacancies being available. The Tribunal could not see how the second tranche was adversely affected in terms of merit if the claimant was able to be interviewed alongside them. The Tribunal did find that the scale of the recruitment exercise made it dis-proportionate to delay the conclusion of recruitment from the first tranche; but did not find that the size of the exercise meant that a candidate in the claimant's position, unable to attend the interview in the time required because of something arising in consequence of his disability, could not be deferred (by being placed in the holding pool) and offered the opportunity to attend an interview in a later tranche.

265. The Tribunal found that refusing to defer the claimant's interview until the second tranche was interviewed (that is placing him the holding pool) in an exercise where interviewing a later tranche was envisaged (and indeed was in fact required), was not an appropriate and necessary way of achieving the legitimate aim. There was

an alternative and less discriminatory means of achieving a fair, consistent, effective and proportionate recruitment process, which was placing the claimant in the holding pool and interviewing him as part of the later tranche. The Tribunal reached that finding taking a fair and detailed analysis of the working practices and organisational considerations involved and considering the scale of the recruitment exercise which the respondent was undertaking.

266. As a result, the Tribunal found that by refusing to defer the claimant's interview in respect of his application for job reference 1638997 (Compliance Caseworker – Tax Professional or Operational Delivery) and not place him in the holding pool to be interviewed as part of the next tranche of interviews undertaken, the respondent did discriminate against the claimant in breach of section 15 of the Equality Act 2010 by treating him unfavourably because of something arising in consequence of the claimant's disability, and that treatment was not a proportionate means of achieving a legitimate aim.

Discrimination arising from disability – issue 11.3 (job 16232)

267. The alleged unfavourable treatment 11.3 was: on 19 November 2019, in respect of the claimant's application for job reference 16232, did the respondent withdraw the claimant's application, before consideration had been given to his request for reasonable adjustments? This was treatment which occurred (the application was withdrawn before the claimant was contacted about reasonable adjustments) and being withdrawn from an application process was unfavourable.

268. The something arising in consequence of the disability relied upon by the claimant was that the claimant's disability and the medication he had started taking for his disability, prevented him from attending and participating in an interview during the required period. The Tribunal found that was something arising in consequence of his disability.

269. Issue 14 (applied to issue 11.3) was whether the unfavourable treatment found was because of something arising in consequence of the claimant's disability. The Tribunal found that the reason why the claimant was withdrawn from the interview without being contacted was not because of the something arising relied upon. The claimant was not contacted because the respondent (at that time) did not routinely contact applicants who asked to be contacted about reasonable adjustments. The reason why the less favourable treatment relied upon occurred was not the something arising from the claimant's disability as alleged. The claim as recorded in the list of issues did not succeed.

Discrimination arising from disability – issue 11.4 (mock interview by Skype)

270. The issue at 11.4 reflected the direct disability discrimination allegation already addressed. It relied upon the respondent not conducting a mock interview by Skype in October 2019 after the claimant requested it (and the claimant confirmed that the allegation was about the non-provision of the Skype mock interview specifically). The

respondent did not arrange a Skype mock interview for the claimant and that was unfavourable treatment.

271. The something arising in consequence of disability relied upon by the claimant was that the claimant was on sickness absence due to disability. Between 17-22 October 2019 that was correct. The Tribunal found that was something arising in consequence of his disability.

272. Issue 14 (applied to issue 11.4) was whether the unfavourable treatment was because of something arising in consequence of the claimant's disability. The Tribunal did not find it had been. The non-provision of the mock interview was because the claimant withdrew from the substantive interview and told Ms Brown that he had done so. That was not the something arising from disability upon which the claimant relied for this allegation.

Discrimination arising from disability – issue 11.5 (not kept up to date with developments)

273. Issue 11.5 was the claimant's contention that the respondent failed to keep him up to date with developments at work during his sickness absence during the period 11 October 2019 to 26 December 2019.

274. There were regular conversations between the claimant and his line manager during his absence from work, initially with Ms Brown and latterly with Ms Baggaley. The claimant was able to raise any matters during those meetings. He was provided with bulletins. Ms Baggaley's evidence was that she could not recall any particularly significant development at work which she felt it necessary to update the claimant about. There was no evidence of anything particular which the respondent omitted to tell the claimant. Ms Baggaley's evidence was that she would only normally provide information to a job holder at the time when the job holder was due to return to work. The Tribunal's view was that it was the right approach for an employer not to send or provide lots of information about developments at work while an employee was absent from work on ill health grounds (albeit that there would, of course, be potential exceptions).

275. The Tribunal did not find that the treatment alleged by the claimant actually occurred; the respondent did not fail to keep him up to date with the developments at work which it should have provided during his period of absence. In any event, for the reasons explained, any non-provision of information about developments was not unfavourable. It did not place the claimant at a disadvantage and, measured in an objective sense, it was not adverse.

276. Had the Tribunal not reached this finding, it would not have found that the reason why the claimant was unfavourably treated as alleged was because of the something arising relied upon (his sickness absence). Not keeping the claimant up to date whilst absent was not because he was absent, albeit that it was something which only arose during a period of absence.

Discrimination arising from disability – issue 11.6 (notifying HR of sickness absence)

277. In issue 11.6 the claimant alleged that the respondent failed to notify HR of the claimant's disability-related sickness absence. In practice there was no evidence that anyone failed to notify the respondent's HR of the claimant's absence. However, there was evidence that Ms Brown had recorded the wrong dates for absence when inputting it on the respondent's system in error (see paragraph 118).

278. The respondent submitted that this could not be unfavourable treatment because the effect of the error was that the claimant was paid (at least initially) more than he was entitled. The claimant argued that having over-payments subsequently deducted was unfavourable. The Tribunal did not find that this was unfavourable treatment in the circumstances found in this case and with the overpayments being deducted in the way that they were. The claimant was paid more than he was entitled to at the time he was absent; that was beneficial for him. The over-payments were only deducted from payments in January and February 2020 when the claimant was back at work and otherwise in receipt of a full month's salary or an amount approaching a full month's salary. The overpayment was deducted in two instalments.

279. Even had the Tribunal found the mis-reporting to have been unfavourable treatment, the Tribunal would not have found that the reason for it was because of something arising from the claimant's disability. The dates were reported in error based upon the dates on the fit note. That was not because of the fact that the claimant was on sickness absence (the something arising relied upon), it was because Ms Brown made a mistake.

Discrimination arising from disability – issue 11.7 (the resignation date)

280. The alleged unfavourable treatment relied upon for issue 11.7 was that Ms Baggaley pressured the claimant to bring forward his resignation date. There was no dispute that the claimant resigned in December 2019 and, following him giving notice, Ms Baggaley raised with him the termination date being moved forward. The evidence is detailed at paragraph 126 above, it being a conversation which was not documented at the time. The Tribunal found Ms Baggaley's evidence about what was discussed to be truthful. It was notable that she subsequently allowed the claimant to retract his resignation when he wished to do so. On the evidence heard by the Tribunal, it found that Ms Baggaley did not pressure the claimant to bring forward his resignation date. Ms Baggaley did raise the possibility of moving it forward for the reasons she evidenced (being absent, unwell, believed to be on nil pay, having mentioned he was distressed by the KIT calls), which the Tribunal accepted were her reasons for doing so. Raising the possibility with an employee who has resigned in such a conversation was not, of itself, unfavourable treatment. There was nothing adverse for the claimant in the possibility being raised and him being given the opportunity to move forward his termination date if he wished to do so.

281. Of the matters relied upon as being the something arising in consequence of the claimant's disability, the Tribunal found: the sickness absence was something which arose from the claimant's disability; the resignation was not something which

arose from the claimant's disability (or at least it was not evidenced to the Tribunal that it was). However, as the Tribunal found the treatment alleged not to be unfavourable it was not necessary to determine whether it was because of the something found to be arising in consequence of the disability. It was also not necessary to determine issue 15 in relation to issue 11.7.

Discrimination arising from disability – issue 11.8 (KIT notes)

282. The unfavourable treatment alleged as issue 11.8 was that Ms Baggaley failed to give the claimant his Keeping in Touch call notes. The first question to be determined was whether the respondent treated the claimant unfavourably as alleged. The evidence which related to this issue is addressed at paragraphs 131-132 above. There was no evidence given about this by the claimant in his witness statement. Based upon the evidence identified to the Tribunal, the KIT notes were requested by text message on 10 January 2020 and were provided to the claimant on an unknown date when the respondent provided its response to a data protection subject access request (which appeared to be in, or around, February 2020 although that was not shown in evidence). Ms Baggaley personally did fail to give the claimant his KIT call notes, but the notes were provided by the respondent.

283. The respondent's representative submitted that what occurred was not unfavourable treatment, highlighting that people would not normally be provided with the copy KIT notes, it caused no identified disadvantage to the claimant, and they were provided to him and fed into the grievance process. The Tribunal considered carefully whether this non-provision by Ms Baggaley and the delay in the respondent providing the notes, was unfavourable treatment. The Tribunal accepted that potentially, and in some circumstances, delayed provision of notes requested could be unfavourable. However, in the circumstances which existed in this case, for the period in question (particularly in the light of the fact that by 30 January the claimant himself had informed Ms Baggaley that it was too late for the notes to be provided), and for the reasons given by the respondent's representative, the Tribunal found it was not unfavourable treatment for the notes not to be provided for the period concerned.

284. The something arising in consequence of the claimant's disability relied upon was that the KIT notes were a result of the claimant's disability-related absence. It was the case that the claimant's absence and therefore the need for KIT conversations was something which arose in consequence of the claimant's disability. However, the Tribunal found that the reason why the claimant was not provided with the notes for the period of non-provision by Ms Baggaley was not because of the claimant's absence or something arising in consequence of his disability (albeit it was something which occurred in the context of the claimant's absence due to disability). The reason for the notes non-provision was because of Ms Baggaley's need to catch up with completing her KIT notes and, once the subject access request had been made, the taking of advice and the following of the formal process. Those reasons were not something arising in consequence of the claimant's disability.

285. Had the claimant intended this complaint to be about the lack of detail in the KIT notes and the absence of some notes of some conversations (as those were things

he raised in the course of the hearing) it would also have been found that the gaps and lack of detail did not occur because of something arising in consequence of the claimant's disability on the same basis. Any inability of Ms Baggaley to record all conversations, or to record KIT calls in the same detail as Ms Brown, was not because of the claimant's disability-related absence (albeit it was in the context of his absence).

Discrimination arising from disability – issue 11.9 (meeting notes)

286. The issue raised at 11.9 was the alleged unfavourable treatment that: Ms Baggaley refused to give the claimant informal meeting notes he had requested and thereby prevented him from accessing and using the grievance procedure. In the evidence which the Tribunal heard, the claimant requested the meeting notes in a text message on 10 January 2020 (1442) and they were provided on 15 January 2020 (2112). The text message of the 10 January did not suggest that this was an outstanding request. The Tribunal did not hear any other evidence that the request had been made earlier and it was not detailed in the claimant's witness statement. The Tribunal finds that Ms Baggaley did not refuse to provide the claimant with the informal meeting notes; she did provide them when requested.

287. In any event, even had the Tribunal not reached that finding about the provision of the notes, any delay (which the Tribunal did not find there was) was not because of something arising in consequence of the claimant's disability. In the list of issues that something arising is stated to be that the behaviour the claimant wished to complain about occurred during an informal attendance management meeting to discuss the claimant's disability. What is relied upon was not, technically, something arising in consequence of the claimant's disability. Anything arising in consequence of the claimant's disability was not the reason for any delay or non-provision of notes.

Discrimination arising from disability – issue 11.10 (probation reviews)

288. The issue raised at 11.10 was the alleged unfavourable treatment that: the respondent failed to conduct the claimant's six month and twelve-month probation reviews.

289. The respondent did undertake a six-month probation review for the claimant in a document completed by Ms Brown which was not provided to the claimant but was sent to the HR service centre on 17 August 2019 (841). It recorded that the completion was successful. It was expressly confirmed to the claimant in an email of 17 August that Ms Brown had no concerns about the claimant's progression towards completing his probation.

290. There was a disagreement in the evidence between the claimant and Ms Brown about whether a six-month probation review meeting ever took place. The claimant's evidence was that it did not. Ms Brown was not absolutely sure, but she thought it had (her evidence is detailed at paragraph 77 above). The Tribunal accepted the claimant's evidence that a six-month review meeting did not take place as Ms Brown's evidence was uncertain and, to an extent, contradictory. The Tribunal did not accept her

assertion during the hearing that a meeting had taken place, when what had been said in her witness statement was that she was not sure.

291. The Tribunal did not find that the fact that a review meeting had not taken place was unfavourable treatment, where the claimant had been recorded as successfully having completed the review. The Tribunal did not find that the failure to meet was the source of major anxiety to the claimant as he pleaded (107) in the light of Ms Brown's email to him which had clearly spelt out that she had no concerns about his progression. Any concerns that the claimant had about the impact which his subsequent absence may have had on the completion of his probation (as he suggested during cross-examination) post-dated the absence of a formal meeting at the six-month stage.

292. In any event, the Tribunal did not find that the failure to conduct a six-month probation review meeting was because of something arising in consequence of the claimant's disability. The alleged something arising relied upon was that the claimant was on disability-related sickness absence, which would have been something arising in consequence of his disability. However, that was not the reason why the six-month probation review meeting did not take place as, at the time it should have taken place, the claimant was not absent from work on ill health grounds. The reason it did not take place was because of the holiday periods (which overlapped) of the claimant and Ms Brown.

293. The claimant's probation was successfully completed after twelve months. The completion of the probation period was back-dated by Ms Baggaley in the light of the claimant's service with the DWP, something which he raised in a meeting on 18 December 2019 and she confirmed after clarification in a letter of 25 February 2020. Whilst there was no record of a formal meeting, where the claimant was confirmed as having successfully completed his probation the absence of a meeting was not unfavourable treatment. In any event, as the claimant's probation period did not last for twelve months when the DWP service was taken into account, the need for a meeting at twelve months did not arise (as the probation had already been completed). There was no evidence whatsoever that the failure to meet at the twelve month point was because of the claimant's disability-related absence or of something arising in consequence of his disability; at the twelve month point the claimant had returned to work and was not absent at all.

Discrimination arising from disability – issue 11.11 (ECS training)

294. The issue raised at 11.11 was the alleged unfavourable treatment that: the respondent failed to deliver ECS training to the claimant. Whilst the respondent emphasised that the training provided to others was not formal training; the informal training provided to others was not provided to the claimant.

295. The reason why the training was not provided to the claimant at the time that it was provided to others was because the claimant worked on the twilight shift. The respondent did not deliver the training because the claimant worked an alternative working pattern to others. However, the Tribunal did not find that the reason why the

claimant worked the alternative shift pattern was because of his disability. The claimant worked the twilight shift for other lifestyle reasons including diet and exercise. There was no evidence before the Tribunal that those reasons, given at the time by the claimant and as understood and evidenced by Ms Brown and Ms Baggaley, were the claimant's disability.

The duty to make reasonable adjustments – issue 16.1 (notes in interviews)

296. The Tribunal considered issue 16.1 as it applied to issues 17-20 in the list of issues. The Provision criterion or practice (PCP) relied upon was the respondent's policy on the use of notes during job interviews. The substantial disadvantage which the claimant contended he suffered was that he was unable to rely on his notes during the job interview for job 1639021. He contended that the reasonable adjustment which should have been made to the PCP was to have allowed the claimant to read from his notes, even if verbatim, for at least part of the interview.

297. As was recorded in relation to the issue of knowledge, whilst the respondent collectively had been informed that the claimant had the disability relied upon prior to the interview on 21 August 2019 for role 1639021 (to which the allegation primarily relates), the respondent had not been informed about how the claimant's condition impacted upon him personally and the claimant had not (prior to that interview) raised the need to refer to notes prior to the interview taking place. Accordingly, the Tribunal found that the respondent did not have actual knowledge that the claimant was placed at the substantial disadvantage relied upon.

298. However, the Tribunal noted what was set out in one of the documents provided by or on behalf of the respondent by Civil Service Learning (943). In that document it was explicitly spelt out that the need to refer to notes in an interview was particularly important for candidates who may find it difficult to remember their examples because of anxiety. As the respondent was aware that the claimant suffered from anxiety and as its own materials explicitly recognised the fact that those with anxiety may be placed at a substantial disadvantage if unable to rely upon notes in an interview, the Tribunal found that the respondent could have been reasonably expected to know (as at the date of the interview) that he was likely to be placed at the substantial disadvantage alleged. The fact that the people conducting the interview were not in fact aware of the claimant's disability was considered to be irrelevant for determining the respondent's collective knowledge (and the absence of channels for providing that information has been addressed at paragraph 241 above).

299. The respondent's policy on the use of notes at interviews was a PCP. That policy is the one described in the FAQ document (609). That policy was that a candidate could bring his notes to interview and could use them as a prompt, however they should not read verbatim from them. Whilst the claimant contended that what was required of him in the interview differed from that policy, nonetheless the PCP applied by the respondent was that recorded in its documents. That would have been the case even had the Tribunal found that the specific interview panel had deviated from the policy in a particular case. The Tribunal found that the panel in the claimant's own interview followed the policy for the reasons already explained in the determination of

issue 11.1, it not being a breach of the policy for Ms Parker to have explained that the claimant should not do what the policy said he shouldn't.

300. The Tribunal did not find that the claimant suffered the disadvantage alleged. The claimant was able to refer to his notes and use them as a prompt as that was what the respondent's policy provided. Had the claimant relied upon a substantial disadvantage that he was unable to read from his notes verbatim, the Tribunal would have found that was something which was applied but it would not have found that the claimant suffered a substantial disadvantage as a result. As the claimant had been able to answer the question asked and answer the subsidiary questions without reading from his notes for seven of the eight minutes, him not being able to read verbatim to supplement the answers given for the remainder of the time allocated was not a substantial disadvantage for the claimant. If he had been unable to refer to his notes that clearly would have been something which placed the claimant at a substantial disadvantage, but that was not what the Tribunal found either occurred or resulted from the application of the policy which the respondent had in place.

301. It was not necessary for the Tribunal to go on and determine whether it was a reasonable adjustment for the respondent to have allowed the claimant to read from his notes, even if verbatim, for at least part of the interview, as a result of the findings in issues 17-19 as they applied to 16.1. However, had it needed to have done so, the Tribunal would not have found that allowing the claimant to read verbatim from his notes for part of the interview was a reasonable adjustment which the respondent was under a duty to make in the context of an interview for roles which required successful candidates to provide public facing responses to questions asked. A candidate answering specific questions asked with preprepared answers read verbatim, would not have enabled the interviewers to have genuinely tested and assessed a candidate's strengths and therefore would not have been an adjustment which it would have been reasonable for the respondent to have been required to make.

The duty to make reasonable adjustments – issue 16.2 (attending interviews)

302. For issue 16.2 the PCP relied upon was the respondent's requirement that a candidate had to physically attend and participate in a job interview. That was a PCP which the respondent applied (at least for the vacancies about which the Tribunal heard evidence).

303. The substantial disadvantage relied upon by the claimant was that he could not attend interviews for either of jobs 1638997 or 16232 due to his disability and the medication he started to take for his disability. Those with anxiety and depression are placed at a substantial disadvantage in relation to this matter in comparison with those who do not have that disability, as they are less likely to be able to attend an interview at the time that it is arranged. The claimant was absent from work on ill health grounds and certified as not fit to work at the time he was required to attend interviews for those roles in the tranche in which he had been placed after undertaking the tests. The claimant was placed at a substantial disadvantage in comparison to someone without a disability who would not have been unable to attend the interview on ill health grounds at the time it was arranged (or in the case of 1638997 initially rearranged).

304. The respondent had actual knowledge of both the claimant's disability and the substantial disadvantage at which he was placed at the time when the claimant suffered the substantial disadvantage relied upon, Mr Styles having received the claimant's email on 19 September 2019 which provided a detailed explanation to him.

305. The final question to be determined on this issue by the Tribunal was whether the respondent took such steps as it was reasonable for it to take to avoid the substantial disadvantage. The claimant contended that there were three reasonable adjustments which it should have made: offered further deferment/postponement of the interview; explored other means of assessing the claimant's suitability for the job; and/or contacted the claimant to discuss reasonable adjustments.

306. The Tribunal did not find that the use of other means to assess the claimant's suitability for the job was a reasonable adjustment which the respondent was required to make. Using interviews as a way of assessing and fairly and consistently selecting between applicants is widely used and commonly accepted to be an appropriate approach to identifying who should be offered a role with an employer. In these recruitment exercises as Mr Styles evidenced (see paragraph 156 above), the campaigns were for generic and not specific jobs and the interviews were designed to test ability, strength, behaviour, and over-all potential. The interviews were a way of assessing a candidate's suitability for the roles being recruited, being public-facing roles which required the successful candidate to respond to questions asked. The Tribunal found interviews to be an appropriate way to genuinely assess an applicant's ability to fulfil the role and it was not felt to be a reasonable adjustment for the respondent to undertake some completely different method of assessing suitability for the role and comparing candidates. This decision took account of both the need for fair recruitment generally (and the respondent's commitment to doing so) and the need to undertake fair recruitment in the substantial exercises which the respondent was undertaking.

307. The Tribunal did not find that contacting the claimant to discuss reasonable adjustments was a reasonable adjustment. It would have been a method of exploring whether reasonable adjustments could have been made but was not, of itself, an adjustment (see the cases of **Tarbuck** and **Salford NHS PCT** as addressed in the section on the law). In any event, contacting the claimant to discuss adjustments would not have addressed the disadvantage which he suffered as a result of the application of this PCP as he was, and would have remained, unable to attend the interview due to his health (on the dates when the interviews were due to take place).

308. The question of the deferment has already been addressed in the Tribunal's findings on issue 11.2 above, albeit for that issue the Tribunal's decision was being made to determine whether deferral was a proportionate means of achieving a legitimate aim rather than determining the reasonableness of the adjustment sought. However, for similar reasons to those explained for issue 11.2 above the Tribunal found that:

a. It would not have been a reasonable adjustment to have delayed the conclusion of the first tranche of the recruitment exercise for either role

for the reasons Mr Styles evidenced and, as a result, had that been the only tranche from which candidates were recruited and had there been no holding pool the respondent would not have been in breach of the duty to make reasonable adjustments;

b. For both roles 1638997 and 16232 the respondent did operate a holding pool. For the former role, three hundred and five candidates who had qualified for interview (but who had not scored as highly as those in the first tranche) were recorded in Mr Styles' response to the claimant's freedom of information request of 2 July 2020 (2050) as due to be interviewed in July and August 2020. That meant that over three hundred candidates who had scored less than the claimant in the tests undertaken, were interviewed (or offered interviews) as part of the former recruitment exercise on dates when the claimant would (or at least could) have been well enough to attend the interview had he been allowed to defer his interview and to be moved into a later tranche as he had requested. There was no evidence to which the Tribunal was directed which provided the same detail about interviews in later tranches for 16232, but a holding pool was put in place;

c. the Tribunal carefully considered Mr Styles' evidence about why he said that could not place the claimant in a later tranche and why he felt that did not comply with the merit principle to which the respondent strictly adheres and is required to under the Civil Service Recruitment Principles. The Tribunal found that placing the claimant in a later tranche was a reasonable adjustment which the respondent was required to make to offset the substantial disadvantage which he suffered as a result of the application of the PCP. The duty to make reasonable adjustments is a requirement to treat those with disabilities more favourably and Mr Styles' evidence about the importance of not delaying the respondent's practice did not mean that deferment into the holding pool was not a reasonable adjustment. As addressed above, if the claimant was interviewed in the second tranche, the only person who would not be in the order of merit precisely where they would have been had he been able to be interviewed as part of the first tranche was the claimant (who would not be in that position anyway as he was unable to attend the interview within the required timescale). No one but the claimant was adversely affected in terms of the rigid merit principles. The Tribunal did find that the scale of the recruitment exercise meant that delaying the conclusion of recruitment for the first tranches was not reasonable; but did not find that the scale meant that it was not reasonable for a candidate in the claimant's position unable to attend the interviews in the time required to have the adjustment made of being offered the opportunity to attend an interview in a later tranche (having been placed in the holding pool).

309. As a result, the Tribunal found that it would have been a reasonable adjustment to have placed the claimant in the holding pool for both roles 1638997 and 16232

(which was in effect deferring his interview) and then to have offered him an interview for the relevant role at the time when those in the subsequent tranche were offered an interview.

Harassment related to race – issues 21-24

310. The Tribunal considered together the claimant's allegations of harassment related to race as listed at issues 21.1-21.6 as the claimant's contention was that it was the effect of the matters alleged collectively which constituted harassment.

311. The respondent did misspell the claimant's name on: his e-mail address initially provided to him; his employment contract; and the name plaque provided for his workstation. The respondent's external training provider misspelt the claimant's name on his log-in for For Skills. The Tribunal accepted Ms Brown's evidence that the issues with access to the Tessello training platform were wider and not related to the claimant's name. The Tribunal also did not find that the claimant proved that the respondent failed to correct the spelling of the claimant's name after he repeatedly complained about it being misspelt. The (limited) evidence before the Tribunal evidenced attempts being made to resolve the issues and correct the spelling when the claimant raised it including, in the case of the email address, the issue being evidenced as having been resolved within a short period of time. The fact that a copy of the same contract containing the previous misspelling was provided later, was not a failure to correct something about which the claimant evidenced that he had complained. Whilst the claimant placed some emphasis on the further misspelling of his name by Ms Jukes in an email in January 2020 (135), the Tribunal did not see that as evidence of a failure to correct a previous misspelling, but rather a further example of someone misspelling the claimant's name, on that occasion in the text used within the email sent.

312. The conduct found was unwanted conduct.

313. The claimant did not genuinely allege that the conduct's purpose was to violate his dignity or to create the requisite environment. In his further particulars of claim (148) he stated that may not have been the purpose (but he said it certainly had that effect). In any event the Tribunal would not have found that the purpose of the misspellings was that required in a case where the claimant's name was misspelt by a number of different people (in most cases being a person unknown). The claimant did assert that the effect for him was that the misspellings violated his dignity and created an intimidating, hostile, degrading, humiliating and offensive environment. In his email to Ms Jukes of the 16 January 2020 he explained why that was the case (135).

314. The Tribunal needed to determine whether it was reasonable for the conduct found to have had the requisite effect. That assessment had to be made from the claimant's point of view, but the Tribunal was also required to consider whether it was reasonable for the conduct to have that effect on the claimant. The Tribunal found that the matters relied upon were all relatively short term and, whilst there were a number of occasions when there had been misspelling, they were limited in number. The

Tribunal could understand that the misspelling could reasonably be (and clearly to the claimant was) frustrating. However, the test the Tribunal needed to apply required that it had the effect of violating the claimant's dignity or created an environment which was intimidating, hostile, degrading, humiliating or offensive. The Tribunal found the occurrences and misspellings to be relatively transitory, offence was clearly unintended, and when applying the type of effect required and the words used in section 26 of the Equality Act 2010 it was not reasonable for those occurrences of misspelling found to have had the effect required (even when looked at from the claimant's point of view).

315. As part of the test for unlawful harassment the Tribunal also needed to decide whether the conduct was related to race. The Tribunal accepted that misusing a person's name could be related to race in certain circumstances (such as where a colleague did so repeatedly and deliberately because they did not wish to learn the claimant's name because it was not perceived to be a British name). However, in the circumstances being considered in this case the misspellings were administrative in nature. The Tribunal found that the misspellings of the claimant's name were not related to race. Members of the Tribunal panel were themselves familiar with their names being misspelt on occasion by others. The fact that the claimant's name was also misspelt was not found to be related to race, albeit that the claimant placed emphasis upon his name being associated with his race. The Tribunal did not have the benefit of having evidence about the mental processes of those who had misspelt the name. However, the misspellings appeared to have been administrative in nature rather than having been made by those to whom the claimant was known. Looking at the context in which the misspellings occurred, the Tribunal did not find them to be related to race.

Discrimination arising from disability – issue 25 (claim two)

316. Issues 25-28 in the list of issues arose from the claimant's second claim to the Tribunal.

317. The list of issues recorded at 25.1 that it was accepted that the respondent did not contact the claimant to discuss reasonable adjustments ahead of the interview scheduled for 1 June 2020 for vacancy 43863. The question asked was whether that amounted to unfavourable treatment? In circumstances where the claimant wished to be contacted and had asked to be, not contacting him was unfavourable in the circumstances, as it was adverse for the claimant. Issue 25.2 recorded that it was accepted that the respondent informed the claimant that his application for that role was unsuccessful and it was accepted that amounted to unfavourable treatment.

318. The Tribunal found that (issue 26) the reason why the claimant did not attend the interview for job 43863 was not because of something arising in consequence of his disability. The claimant elected not to attend the interview because he had not been contacted by the respondent. The reason they had not contacted him was not because of something arising in consequence of his disability; it was because the respondent's

practice at the time was not to contact applicants who asked to be contacted. The absence of contact was also not because of something arising. The fact that the claimant was informed that his application was unsuccessful was because he did not attend the interview; which was because he chose not to do so after having not been contacted.

319. As a result of the findings the Tribunal reached, the Tribunal did not need to determine whether the respondent not contacting the claimant after he had asked to be contacted, was a proportionate means of achieving a legitimate aim. The aims relied upon of conducting a fair, consistent, effective and proportionate recruitment process and the efficient use of the respondent's resources were legitimate aims. However, had it needed to reach a decision, the Tribunal would not have found that the practice of not contacting applicants with disabilities who ask to be contacted regarding reasonable adjustments was a proportionate means of achieving that aim, not least because once he considered it more carefully Mr Styles did decide that the claimant and others who made the request in such circumstances could and should be contacted in the future. The Tribunal considered that the respondent was right to have changed that practice and would not have found the previous practice of not making contact, to have been a proportionate means of achieving the aims relied upon.

The duty to make reasonable adjustments – issues 29-32 (claim two)

320. What was recorded as issue 29 was that the respondent accepted that it had the PCP of having an interview stage to its recruitment process.

321. Issue 30 asked whether that PCP placed the claimant at a substantial disadvantage in comparison with persons who are not disabled? The Tribunal found that it did. Those with anxiety and depression will find it more difficult to attend interviews than those without. The Tribunal heard evidence about the difficulties which the claimant had in attending interviews, both prior to joining the respondent and then after he did so.

322. In the list of issues at issue 30 what was included also referenced the respondent not contacting the claimant when he had requested that he be contacted to discuss reasonable adjustments. Prior to Mr Styles proposing a change, that was the respondent's practice. However, that was not a substantial disadvantage at which the claimant was placed because of the PCP relied upon. The absence of contact was not as a result of the PCP of having an interview.

323. This allegation was part of the second claim. It related to recruitment exercises undertaken or progressed after 19 September 2019 when Mr Styles had been made aware of the claimant's disability and the substantial disadvantage at which he was placed in attending interviews as a result.

324. In terms of the reasonable adjustments sought (issue 32), that was effectively already determined in the Tribunal's findings on issues 16.2 above. The Tribunal did not find it to be a reasonable adjustment for the respondent to have to make when

recruiting for any of the roles raise in the claim, for it to have undertaken other means of assessment other than an interview. The adjustment actually contended at issue 32 was that the respondent should have contacted the claimant to discuss adjustments: that was not an adjustment which offset the disadvantage suffered as a result of the PCP; and, in any event, that would have been a method of exploring whether reasonable adjustments could have been made but was not, of itself, an adjustment (see the cases of **Tarbuck** and **Salford NHS PCT** as addressed in the section on the law).

Time limits – issue 33-34 (claim two)

325. Whilst the list of issues at 33 and 34 raised jurisdiction and time issues for the second claim, there did not appear to be any genuine issue which arose. The date when the interview for role 43863 was scheduled was 1 June 2020 and the absence of contact with the claimant prior to the interview continued up until the date of the interview. The claim was entered within three months of the act complained of.

Discrimination arising from disability – issue 35-37 (claim three)

326. The allegations to be determined at issues 35-41 arose from the claimant's application for job 47927. The application was made on 27 March 2020. He was invited for interview on 9 July 2020. He was given five days in which to select a time for interview. He was remined of the need to do so, after 48 hours. As the claimant did not select a time, he was withdrawn from the process on 15 July.

327. The unfavourable treatment alleged at issue 35.1 was that the respondent failed to contact the claimant as he requested on the application form. The respondent did not do so, and the Tribunal found that to be unfavourable treatment.

328. Issue 36 was whether the unfavourable treatment was because of something arising in consequence of the claimant's disability. There were two reasons why the claimant was not contacted about this interview as evidenced by Mr Styles (in evidence which the Tribunal accepted): GRS (the third party provider) made a mistake and did not inform the respondent about any of the candidates who requested adjustments as they should have done; and, in any event, they would only have done so once the claimant had booked an interview. In the list of issues the claimant alleged that the respondent consciously chose not to contact the claimant; the Tribunal did not find that to have been true. The unfavourable treatment was not because of something arising in consequence of the claimant's disability as it was because of error and the claimant not selecting a time for interview.

329. In issue 35.2 the unfavourable treatment alleged was the respondent's withdrawal of the claimant's application. That occurred and was unfavourable treatment.

330. However, as recorded for issue 35.1, the unfavourable treatment was not because of something arising in consequence of the claimant's disability. Mr Styles' evidence was that where a candidate did not book an interview the process of the

candidate being withdrawn from the recruitment exercise was an automatic one undertaken by GRS. The claimant's application was withdrawn because he did not book an interview.

331. As part of issue 35.3 the claimant alleged that the respondent did not offer to restore the claimant's application for role 47927 even though there was a live holding pool. The Tribunal found that neither to be unfavourable treatment nor to be because of something arising in consequence of the claimant's disability. The claimant had chosen not to book a date for the interview for the role. Prior to not doing so he had stated in an email of 15 June 2020 (1973) that he would never apply for another vacancy with the respondent again nor continue to engage with the recruitment process for the other vacancies for which he had applied which remained outstanding. Where the claimant's stated wish was not to engage in any recruitment process, not offering to restore an application was not unfavourable treatment. The reason why the respondent did not do so was not because of something arising in consequence of the claimant's disability; it was because the claimant had said that he did not wish to engage with it (and had not done so).

332. As a result of the decision reached on issues 35 and 36, the Tribunal did not need to determine issue 37 in the list of issues.

The duty to make reasonable adjustments – issues 38-41 (claim three)

333. Issues 38 to 41 also related to the application for job 47927, but were claims for breach of the duty to make reasonable adjustments arising from that recruitment process.

334. The PCP relied upon in issue 38.1 was requiring candidates to select an interview time slot within a five-day time limit. That was a PCP applied by the respondent. There was however no evidence which showed that it was a PCP which placed the claimant at a substantial disadvantage, albeit that it could potentially place some people with anxiety and depression at a substantial disadvantage compared with those who did not. The requirement had nothing to do with the claimant's disability and his ability to comply with it was not adversely affected by his disability as evidenced by the fact that the claimant had booked an interview within the time required for all the other roles for which he had applied. As recorded in issue 39 of the list of issues, the claimant was unsuccessful in the recruitment campaign for that job, but that was because he did not book an interview slot, it did not show a substantial disadvantage suffered by the claimant when compared to others who did not share his disability.

335. Issue 38.2 was the PCP of requiring candidates to attend an interview. That claim is the same as those brought regarding the other applications processes (issues 16.2 and 29-32). The requirement to attend an interview did place those with anxiety and depression at a substantial disadvantage compared with those who do not share that disability for the reasons explained previously, and did in general terms place the claimant at that disadvantage (albeit for this role there was no evidence that the

claimant had in fact been unable to attend the interview arranged because of his disability).

336. Issue 38.3 was the PCP of recommending that interviewees do not read sections of their notes verbatim. That issue has already been determined for the earlier exercise in issue 16.1. The Tribunal did not find that it being recommended that the claimant not read verbatim from his notes was something which placed the claimant at a substantial disadvantage for the reasons explained, even if it was possible that those with anxiety and depression were placed at a substantial disadvantage compared with those who did not.

337. Issue 38.4 was the PCP of not contacting candidates who request to be contacted to further discuss reasonable adjustments during the interview. Until Mr Styles changed the practice for the claimant on 15 June 2020 (1973), and thereafter the respondent changed it more generally, it was a PCP applied by the respondent (albeit it ceased to apply it thereafter). The Tribunal found that it placed those with anxiety and depression at a substantial disadvantage when compared with those who did not, as those with anxiety and depression are more likely to need contact, discussion and clarification regarding what is required when compared to those who do not have the disability. The issue of whether it placed the claimant at a disadvantage was more complicated in the Tribunal's view. The Tribunal's view was that the respondent should have contacted the claimant to discuss reasonable adjustments when he asked them to, something which it is understood the respondent would do now if the same request occurred. As the respondent did not contact the claimant, it did not establish what it was the claimant was requesting and/or could not identify whether any adjustment sought could be made. However, the claim being considered is the claimant's third Tribunal claim and job 2419677. What the claimant was seeking was contact, but the reason he wished to be contacted was to discuss: use of notes; and/or the prospect that he might need to postpone the interview. There was no evidence before the Tribunal that any contact would have led to discussion about anything else (at least in relation to disability discrimination). A conversation about the use of notes would have resulted only in confirmation of the policy about which the claimant was fully aware. A conversation about postponement would have made no difference to the claimant as he was aware of how he could seek a postponement when he needed to (having obtained one for the first vacancy for which he applied) and also he had been told when a postponement would not be granted. In those circumstances the absence of contact and a conversation was not in fact something which placed the claimant himself at a disadvantage.

338. For all of the PCPs relied upon as issue 38, the reasonable adjustment which the claimant contended should have been made (to all of the PCPs) at issue 41.1 was to be contacted to discuss the adjustments. That was found to be an adjustment which only potentially avoided the disadvantage alleged which arose from the non-contact with candidates (issue 38.4), as for the other PCPs the adjustment sought would not have avoided the substantial disadvantage identified. In addition and as already found in relation to previous allegations, the Tribunal found that contacting the claimant to discuss matters would have been a method of exploring whether reasonable adjustments could have been made but was not, of itself, an adjustment. Accordingly,

the claimant's claim that the respondent breached its duty to make reasonable adjustments for all of the PCPs relied upon did not succeed because the reasonable adjustment sought was not found by the Tribunal to be a reasonable adjustment.

Indirect disability discrimination – issues 42-45 (claim three)

339. The indirect disability discrimination claims brought and recorded at issues 42-45 relied upon the same PCPs as the duty to make reasonable adjustment claims addressed above.

340. For the PCP of requiring candidates to select an interview time slot within a five-day time limit, that was a PCP applied by the respondent. There was however no evidence which showed that it was a PCP which placed the claimant at a substantial disadvantage, albeit that it could potentially place some people with anxiety and depression at a substantial disadvantage compared with those who did not (see paragraph 334 above). As recorded for issue 25, the Tribunal found that the aims relied upon of conducting a fair, consistent, effective and proportionate recruitment process and the efficient use of the respondent's resources, were legitimate aims. For this PCP the Tribunal also found that the practice of requiring a candidate to book an interview time within a five-day time limit was a proportionate means of achieving those aims, where a reminder was sent and taking into account the large number of candidates involved in the recruitment exercise.

341. For the PCP of requiring candidates to attend an interview, that was a requirement applied by the respondent, it did place those with anxiety and depression at a substantial disadvantage compared with those who do not share that disability for the reasons explained previously, and it did in general terms place the claimant at that disadvantage. However, the Tribunal found that the requirement was a proportionate means of achieving the legitimate aims relied upon (being those aims recorded in the previous paragraph). The reasons for this have been explained in paragraph 306 above when determining the issue of reasonable adjustments as it applied to issue 16.2; and the reasons why the Tribunal found that conducting interviews and requiring a candidate to attend were a proportionate means of achieving a legitimate aim were the same (when considering recruitment for a role required to undertake public-facing work and duties of the type required).

342. For the PCP of recommending that interviewees do not read sections of their notes verbatim, the Tribunal did not find that it being recommended that the claimant not read verbatim from his notes was something which placed the claimant at a substantial disadvantage, even if those with anxiety and depression were placed at a substantial disadvantage compared with those who did not. In this allegation the Tribunal drew a distinction between what was alleged (not reading verbatim) and what was not (such as not being allowed to refer to his notes, where the outcome would have been different). Whilst the Tribunal did not need to go on and decide the issue, had it needed to do so, the Tribunal would nonetheless have found that recommending not reading verbatim from notes was a proportionate means of achieving the legitimate aims relied upon in the context of interviews for the roles in question.

343. The practice of not contacting candidates who asked to be contacted about reasonable adjustments was, until Mr Styles changed the practice for the claimant on 15 June 2020 (1973) and thereafter the respondent changed it more generally, a PCP applied by the respondent (albeit it ceased to apply it thereafter). The issues of substantial disadvantage have been addressed at paragraph 337. As a result of the decision explained in that paragraph, the Tribunal did not find that the claimant was placed at a disadvantage by the absence of contact. Had the Tribunal found that he was, it would not have found that the practice, of not contacting applicants who asked to be contacted to discuss reasonable adjustments, was a proportionate means of achieving a legitimate aim. Whilst efficient use of the respondent's resources was a legitimate aim, taking account of the limited number of people who could or would ask to be contacted to discuss reasonable adjustments, the refusal to contact those people was not found by the Tribunal to be a proportionate approach. That decision was supported by the conclusion reached by Mr Styles that the claimant and others could and should be contacted; Mr Styles own decision effectively demonstrated (or at least supported) that the previous practice was not a proportionate means of achieving the stated aims.

Indirect race discrimination – issues 46-49 (claim three)

344. There was no dispute that the respondent applied the PCP of requiring candidates to attend an interview as part of its recruitment process to persons who shared the claimant's race and those who did not.

345. In asserting that persons who shared the claimant's race were put at a particular disadvantage when compared with those who did not, the claimant relied upon the respondent's own published findings recorded in its race disparity audit. As he emphasised, one table showed that for internal applicants applying from within the Civil Service, 13% of those candidates who were identified as black and minority ethnic passed through interview when compared to 30% of white internal Civil Service applicants (397). A second table, which in practice recorded a sub-set of the first, recorded that the contrast was 11% of BAME candidates from within the HMRC against 29% who were white.

346. Those statistics did not break down sufficiently to identify whether the claimant's own identified racial group was placed at a disadvantage as opposed to the slightly imprecise and broad category of black and minority ethnic candidates more generally, nonetheless the Tribunal accepted that the claimant had proved particular disadvantage in relying upon the statistics obtained and provided by the respondent itself. In the list of issues was an additional question at the end of issue 47 which asked "In what way?". The Tribunal did not find that was a question it needed to answer (at least in determining the disparate impact). As recorded in the legal section above (paragraph 204) the whole point of indirect discrimination is to achieve equality of opportunity when dealing with hidden (but evidenced) barriers, which is what the statistics relied upon appeared to show in this case.

347. The claimant himself was put at that disadvantage as he had been unsuccessful in passing through interview.

348. The respondent relied upon the aim of a fair and effective recruitment process to support the respondent's business. The Tribunal found that to be a legitimate aim. It was one which was legal, non-discriminatory, and represented a real and objective consideration.

349. Issue 49 was whether requiring candidates to attend an interview as part of a recruitment process was a proportionate means of achieving that aim. The Tribunal has already addressed the requirement for interviews in determining other issues, see paragraph 306 above regarding the duty to make reasonable adjustments and 341 regarding indirect disability discrimination. The same matters and evidence were taken into account. For similar reasons the Tribunal did find that requiring candidates to attend an interview as part of a recruitment process was a proportionate means of achieving a fair and effective recruitment process to support the respondent's business. Interviews are widely recognised to be a method of fairly and effectively recruiting for roles. Taking account of the roles for which the respondent was recruiting, and the skills required of those who would undertake those roles, the Tribunal found that the very skills required were those being tested in the interviews undertaken. The reasons why the interviews had the discriminatory impact were not immediately obvious (and whilst that did not mean that disparate impact was not established it was relevant when considering the proportionality of requiring interviews). There was an absence of any genuine and credible alternative way of achieving the respondent's stated aim across the number of candidates involved, albeit in any event an approach does not have to be the only possible way of achieving the aim for it to be proportionate. The Tribunal found that requiring candidates to be interviewed was an appropriate and necessary means of achieving a fair and effective recruitment process to support the effective operation of the respondent. The Tribunal found it to be a proportionate means of achieving the stated aim relied upon.

350. Whilst not relevant to, or taken into account in, the decision reached on this issue, the Tribunal also noted that the respondent has taken steps to address the disparate outcomes identified, since the publication of the race disparity audit.

Time issues – issues 50-51 (claim three)

351. As a result of the decisions reached on the third claim, it was not necessary for the Tribunal to consider in any detail the issues of jurisdiction and/or time, save in one respect. The Tribunal did consider whether the issues which related to the non-contact with the claimant after he had made the request in his application, were claims brought within the time required. Putting aside any question of continuing act, which could not be determined no discrimination having been found, the Tribunal found that those claims were entered outside the primary time limit. Mr Styles confirmed that the PCP of not contacting the claimant would cease to be applied on 15 June 2020 (1973); the third Tribunal claim was entered on 11 December 2020 (after early conciliation between 12 October and 11 November 2020). Accordingly, neither a claim was entered nor ACAS early conciliation commenced within the period of three months following the PCP ceasing to apply to the claimant. The claim was entered a little under three months outside the primary time period.

352. The Tribunal determined that it was just and equitable to extend time and therefore it had jurisdiction to determine that complaint. The factors which were taken into account generally have been outlined in the section of this Judgment which addressed the law. Time limits are important and there for a good reason. The claim was entered outside the time required and, at that point, the claimant had already issued two other claims within the time required, as well as having had access to advice on time limits from his trade union in addition to the many resources available publicly to all. The exercise of the discretion importantly involves a balance considering the balance of prejudice between the parties. The prejudice to the claimant is that he would have been unable to have had a decision in a discrimination claim. There appeared to be no specific prejudice to the respondent save for actually having to defend the claim; no particular prejudice having been identified; the relevant witness having been heard; and the evidence in the claims having been presented to the Tribunal. In those circumstances it was found to be just and equitable to extend time when the balance of prejudice, in particular, was considered.

Harassment related to disability – issue 52.1 (Ms Townend's email of 27 May 2020)

353. Issue 52.1 related to exchanges of emails between the claimant and the senior manager conducting his grievance, Ms Townend. Ms Townend had made reasonable requests of the claimant regarding his grievance in the first initial meeting and subsequently. As the claimant accepted, what the claimant had said to Ms Townend in his emails was not good. She responded on 27 May reminding the claimant of the respondent's policies and asking that he stop communicating with her in what she believed had been a disrespectful way. No formal action was taken as a result.

354. The content of Ms Townend's email was, from the claimant's point of view, unwanted. The Tribunal accepted the claimant's evidence and what he said in his subsequent emails of 28 and 30 May that the claimant's stress and anxiety could manifest itself in the tone of his emails, and therefore the claimant's conduct and the response was related to his disability. The purpose of the email was not to undermine the claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for him; the purpose was to try to ensure that the claimant's communication was not disrespectful and addressed in the right tone (and following HR advice). However, even if the email had the requisite effect upon the claimant, the Tribunal did not find that it was reasonable for it to do so. The email was written in a fairly even-handed way. It addressed in an appropriate way the emails which the claimant accepted were not good. It highlighted the relevant policies and procedures. The reference to the vexatious or malicious complaints policy was explained by Ms Townend (see paragraph 143) and what the policy said fitted with the claimant's refusal or inability to clarify the precise issues being raised in his grievance. Looked at objectively, whilst taking into account the claimant's position and viewpoint, the Tribunal did not find that it was reasonable for the specific email sent with the wording used, to have had the particular effects required for the claim for harassment to be made out.

Harassment related to disability – issue 52.2 (Ms Townend's questions in 20 July 2020 meeting)

355. On 20 July 2020 as part of her investigation of the claimant's grievance, Ms Townend did ask questions about the claimant's condition and the medication which he took. There was no evidence that the claimant raised any objection at the time and on the following day he sent a statement of disability he had prepared.

356. The Tribunal accepted from the claim brought that the conduct was unwanted conduct, or was at least unwanted conduct when looked at with hindsight. It found the conduct was related to the claimant's disability as they were questions about his disability and the medication which he took for it.

357. The Tribunal did not find that the purpose of the questions asked was to undermine the claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for him; the Tribunal accepted Ms Townend's evidence that she asked the questions because she wished to understand his condition in the context of the grievances which she was investigating. The Tribunal did not find that in fact the questions asked had the required effect at the time. The claimant did not object at the time and he sent further information about his health and disability the following day. In any event, even had it had the requisite effect, the Tribunal would not have found that it was reasonable for such questions to have had that effect when the questions asked were considered in the context of the grievances which the claimant himself had raised and asked to be investigated (and a meeting conducted with him as part of that grievance process).

Harassment related to disability – issue 52.3 (Ms Townend refusing to recuse herself)

358. The harassment alleged in issue 52.3 was Ms Townend's refusal to recuse herself from conducting the grievance process. The respondent's representative submitted that such a refusal could not be unlawful harassment. The Tribunal agreed with that submission. In any event, Ms Townend's decision not to recuse herself from the handling of the grievance was not related to disability at all. The request made on 13 May arose from the requests Ms Townend had made to set out in short bullet points what the claimant's concerns were and how he would like them resolved and the decision made was because Ms Townend (understandably) could not see any valid reason to recuse herself and any other manager would need to start again with the process. The request and the decision made was not related to disability.

Harassment related to disability – issue 52.4 (Ms Townend referring to the appeal)

359. In an email on 22 September 2020 to the claimant Ms Townend did say that if there was anything else which the claimant wished to add, he would have the opportunity to do this with the appeal manager. The email was sent prior to the grievance decision being provided. The grievance process was close to concluding because Ms Townend had conducted all the meetings which she intended to. The email followed the claimant's request for a further grievance meeting and what was said needed to be considered in the context of Ms Townend declining the claimant the further meeting which he believed he should have had.

360. The reference was one which was unwanted from the claimant's point of view. However, the Tribunal did not find that the decision, or what was said, was related to the claimant's disability. It was about the conduct of the grievance process and the availability of an appeal; even if it was premature it did not relate to disability. The purpose of the statement was not to have the requisite effect. Even if the statement had the effect required to constitute harassment; the Tribunal did not find that it was reasonable for it to have the effect of undermining the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Whilst it may not have perhaps been the most positive thing for the person handling the grievance to refer to raising things on appeal prior to her decision being made/provided, nonetheless the Tribunal found the reference to what the claimant could do on appeal at a late stage in the process was something trivial or transitory which did not meet the requirements of the statutory harassment test.

Harassment related to disability – issue 52.5 (Ms Brown's comments)

361. Issues 52.5.1-52.5.3 arose from things said by Ms Brown to Ms Townend on 28 August 2020 in a meeting in which she was being interviewed as part of the investigation into the claimant's grievance. The comments about which the claimant complained were all made in answers to questions which were put to Ms Brown by Ms Townend and were those recorded in the notes of the meeting (as opposed to necessarily being what was actually said by Ms Brown or recording what was asked and answered in full).

362. The first allegation (55.5.1) was that Ms Brown falsely asserted that the claimant had not informed Ms Brown of his intention to apply for vacancies. As detailed in paragraph 161 above, what was recorded in the notes was not factually correct as the claimant had spoken to Ms Brown about applying for jobs. What both Ms Brown and Ms Townend evidenced was that what Ms Brown had in fact said had been limited to answering whether the claimant had formally notified her about his applications for other roles. Ms Townend could not recall why she had asked the question. The answer did not result in any action. The Tribunal did not find that what was said was related to disability; it was about the claimant's contact with his manager regarding job applications.

363. Issue 52.5.2 relied upon Ms Brown falsely asserting that the claimant had accused her of bugging his hotel room. Ms Brown's evidence about the voicemail message left and the other evidence heard by the Tribunal is addressed in paragraphs 108-110. In the light of the evidence heard, the Tribunal accepted Ms Brown's evidence about the message that she received as being true, her evidence being entirely genuine and credible and the claimant's recollection of matters at the time being uncertain (with the claimant being in a position at the time where he was in the hotel because of the seriousness of the episode and his evidenced inability to appreciate risk). The Tribunal also accepted that, when she was speaking in the meeting, Ms Brown was describing her experience of the message, she was not describing the words actually used by the claimant. The use of the word "*bugging*" by Ms Brown was not accurate nor did it accurately describe what the claimant had said in the message.

364. The Tribunal found that the alleged conduct and the note made was not wanted and it related to the claimant's disability. Neither the purpose of what was actually said nor the purpose of it being recorded in a note and being sent to the claimant, was the requisite purpose. The purpose was to answer a question asked in the course of a grievance investigation and to provide the claimant with notes which recorded (or at least summarised) what had been said.

365. The Tribunal accepted that the effect of what was recorded was subjectively for the claimant such that it undermined his dignity and caused a humiliating or offensive environment for him. However, the Tribunal did not find that it was reasonable for it to have that effect in the context in which it was said. It was said during the investigation of a grievance which the claimant had raised and in answer to questions which were asked about the grievance which related to it. The provision of the notes recording what was said was an appropriate part of the grievance process. The respondent's representative emphasised the importance of the Tribunal considering the context of what was said and it being a meeting undertaken to investigate the grievance; and the Tribunal agreed that the specific context was very important in determining whether it was reasonable for what was said/recorded to have the requisite effect. The Tribunal did not accept that what was said in a grievance meeting could never reasonably be found to have the requisite effect to be unlawful harassment, but it did understand that open and honest responses to questions asked in such a process are a necessary part of a grievance being appropriately investigated. As part of the grievance process the claimant had the opportunity to respond to what was said/recorded, as indeed the claimant did in the grievance meeting on 16 September 2020. Accordingly, the Tribunal found that it was not reasonable for what was said and recorded in the notes to have the requisite effect, in that context.

366. Issue 52.5.3 also arose from what Ms Brown said to Ms Townend in the meeting of 28 August 2020 and what was recorded in the notes of the meeting sent to the claimant. That issue was the false assertion by Ms Brown that the claimant had demanded that she replied to his emails in the middle of the night. The evidence is addressed at paragraph 163. What was recorded in the note about the claimant thinking it was reasonable to expect a response to his emails at 2 am was inaccurate and only one email was evidenced as having been sent to Ms Brown at 2 am. Ms Townend's evidence that what was said was more about Ms Brown's feelings about the claimant's contact was accepted as being correct.

367. As with issue 52.5.2, the alleged conduct was unwanted and it related to the claimant's disability. The purpose of what was said and what was recorded was not that required for unlawful harassment; the purpose was to explain what Ms Brown had been feeling at the time (and to provide a record of what had been said). What was said in the notes did have the effect of undermining the claimant's dignity and caused a humiliating or offensive environment for him. However, the Tribunal found that it was not reasonable for it to have that effect in the context of a grievance investigation process and in notes which recorded questions asked and answered in that process (the context being as explained in more detail in relation to issue 52.5.2).

Discrimination arising from disability – issue 56.1 (refusing a further grievance meeting) (claim four)

368. Issue 56.1 relied upon the alleged unfavourable treatment that on 21 September 2020 Ms Townend had refused to schedule an additional grievance hearing date. The claimant attended five meetings with Ms Townend to discuss his grievance (four substantial meetings and the initial shorter introductory meeting). Ms Townend had made it clear prior to the fifth meeting on 16 September 2020 that it would be the final meeting. On 21 September the claimant requested a further grievance meeting and Ms Townend refused. Her evidence was that she had made it clear prior to the 16 September meeting that it was the final meeting and she believed she had sufficient information to make a decision on the matters within her remit.

369. The refusal was treatment which, considered from the claimant's point of view and with his wish to have a further opportunity to say what he wanted, was unfavourable treatment.

370. The something arising in consequence of the claimant's disability upon which the claimant relied (issue 57.1), as recorded in the list of issues, was that the claimant's disability had affected his ability to engage with the grievance process. The claimant had engaged with the grievance process and had provided significant material to Ms Townend and had undertaken a number of meetings with her. The Tribunal did not find that the claimant's ability to engage with the grievance process was something arising in consequence of his disability. Even had it been, the reasons why Ms Townend refused a further meeting (the unfavourable treatment relied upon) were not because of something arising from the claimant's disability; they were because of the wish to conclude the process after a fifth meeting which had been stated to be the final meeting and a belief that she had the information required to make a decision.

371. Had it been necessary for the Tribunal to decide, the Tribunal would also have found that the decision not to have a further grievance meeting was a proportionate means of achieving the legitimate aims relied upon. The aims relied upon were: dealing with the claimant's grievance in a proportionate and timely manner; and responding to the claimant's grievance. Those aims were legitimate. Not holding a further meeting (even where the claimant had requested it) was proportionate where there had been four/five meetings already. Ms Townend was not applying a blanket rule and there had not been only one or two meetings (as there would often be in many grievance processes). In the context of the grievance process which had been followed, refusing a further meeting was a proportionate means of achieving the aims identified.

Discrimination arising from disability – issue 56.2 (refusing to extend the deadline for notes) (claim four)

372. The unfavourable treatment alleged for issue 56.2 was that Ms Townend refused to extend the deadline date for the claimant to read and agree his meeting notes. At 7.36 am on 22 September 2020 the claimant was sent the notes of the final grievance meeting. At 9.24 am he said he did not agree the notes as there was

important information missing. At 9.47 am Ms Townend asked for amendments by 4 pm on 24 September. The claimant asked to be given the weekend in addition to be able to check, but that was refused. The claimant's PCS representative suggested emailing any comments by the deadline set. Ms Townend evidenced why she did not extend the deadline and the Tribunal accepted her evidence (see paragraph 171). The reasons included that the claimant had not provided any reason why he could not meet the deadline and he had already identified that information was missing from the notes.

373. The Tribunal did not find that this treatment was because of something arising in consequence of the claimant's disability. The Tribunal did not find that the claimant's disability had affected his ability to engage with checking notes (he was in work at the time). The request was because the claimant wanted more time to check the notes and its refusal was for the reasons given by Ms Townend. That treatment and the reasons for it were not because of the something arising relied upon by the claimant (57.1).

374. Had it been necessary for the Tribunal to have decided the issue, the Tribunal would not have found the deadline imposed to be a proportionate means of achieving the legitimate aims relied upon. The grievance had been submitted on 31 January and 2 February 2020, seven months previously. Not allowing the claimant to also have the weekend to respond to the notes provided and imposing a two-day deadline to review the notes was not proportionate in the context of a grievance which had taken that long to resolve. Nonetheless, as the Tribunal did not find that the unfavourable treatment was because of something arising in consequence of the claimant's disability, the decision on the issue of justification did not result in the claim succeeding.

Discrimination arising from disability – issue 56.3 (Ms Brown's accusation) (claim four)

375. Issue 56.3 related to the same matters as have been addressed for issue 52.5.2, but as an allegation that Ms Brown's false assertions amounted to discrimination arising from disability.

376. The something arising in consequence of the claimant's disability for this allegation was different to that relied upon for issues 56.1 and 56.2 (see issue 57.2). What the list of issues recorded was that it was a rumour that the claimant may be a paranoid schizophrenic. The Tribunal heard no positive evidence to prove that the rumour existed. In any event (and more importantly), Ms Brown's evidence was that she was not aware of such a rumour. The Tribunal found her evidence about this to be truthful. As a result the alleged something arising in consequence of the claimant's disability was not proved, and it was not the reason for Ms Brown making the comments which were relied upon as being the unfavourable treatment (as she did not know about it, even if it existed). Issue 56.3 did not succeed as a result.

The duty to make reasonable adjustments – issues 59-62 (claim four)

377. Issue 59 required the Tribunal to decide whether the respondent had the PCP of a rigid and inflexible grievance process. The Tribunal did not find that the respondent

had a rigid and inflexible grievance process. It had a grievance process detailed in the raising a concern policy and the resolving a concern policy. That process adhered to the requirements of the ACAS code. As the facts of this case demonstrated, the policy or practice was not inflexible; new things were accepted and investigated while the claimant's grievance was progressed, and a number of meetings were held (not just one or two). The policy as applied by Ms Townend was flexible.

378. In any event, the Tribunal would not have found that the PCP alleged is a PCP which could be relied upon. Whilst the raising a concern policy or responding to a concern policy themselves were PCPs, the description of them as being rigid and inflexible was not. Whilst what is a PCP must not be approached too technically or restrictively and should be construed widely, the way in which this PCP was described did not detail a policy, practice, rule, arrangement, criteria, condition, prerequisite, qualification or provision it detailed the manner in which one of those things was applied. The policies themselves did not place the claimant at a substantial disadvantage when compared to those who are not disabled.

379. Even had it been necessary for the Tribunal to decide, it would not have found that scheduling a further grievance meeting (issue 62.1) would have been a reasonable adjustment in any event, for the reasons explained when considering issue 56.1 (discrimination arising from disability) but in applying the test of whether the adjustment sought was one it was reasonable for the respondent to have had to take. In terms of allowing extra time to read and agree the meeting notes (issue 62.2), the Tribunal would have found that to have been a reasonable adjustment for the reasons explained when considering issue 56.2 (discrimination arising from disability) but in applying the test of whether the adjustment sought was one it was reasonable for the respondent to have had to take.

Time limits - Issue 62-63

380. The Tribunal did not need to determine the issues of jurisdiction regarding claim four, there being no argument advanced that the claims were not brought within time and in the light of the findings which the Tribunal has made.

Summary

381. For the reasons explained above, the Tribunal found that the respondent did breach its duty to make reasonable adjustments and (for 1638997) did unlawfully discriminate for reasons arising from disability by not moving the claimant into the holding pool for role 1638997 and thereafter not giving him the opportunity to be interviewed as part of the subsequent tranche as part of that recruitment exercise; and not moving the claimant into the holding pool for role 162332. The Tribunal did not find for the claimant on any of his other claims.

382. The remedy to which the claimant is entitled will now need to be determined. Further case management orders and the notice listing a further remedy hearing will be provided separately.

Employment Judge Phil Allen
22 June 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
23 June 2022

FOR THE TRIBUNAL OFFICE

Appendix to the Judgment - Agreed list of issues

The Claimant brings 4 claims against the Respondent, which have been formally consolidated.

The 4 claims are as follows:

	Case number	**Date presented**
Claim 1	2417087/2019	29 December 2019
Claim 2	2413539/2020	31 August 2020
Claim 3	2419677/2020	11 December 2020
Claim 4	2401455/2021	29 January 2021

LIST OF ISSUES

The Claimant's job applications

The Claimant made several job applications and refers to them in his claim. A summary of the applications is below for reference.

Job number	**Job reference**	**Job title**	**Date of Claimant's application / interview**	**Referred to in which claim**
1	1639021	Compliance Caseworker – Tax professional or operational delivery (EO)	10 July 2019 Interview 21 August 2019	Claim 1
2	1638997	Compliance Caseworker – Tax Professional or Operational Delivery (HEO)	10 July 2019 Interview scheduled 24 October 2019 (withdrawn)	Claim 1

3	16232	Compliance Caseworker (Nottingham)	Interview scheduled for 15 November 2019	Claim 1
4	43863	Compliance Caseworker	Interview scheduled for 1 June 2020	Claim 2
5	47927	Compliance Caseworker, Campaigns and Projects (Manchester)	Application 27 March 2020 9 July 2020 invitation to interview	Claim 3

Disability and knowledge thereof – relevant to all 4 claims

6 The Respondent has conceded (in its letter to the Tribunal and Claimant dated 6 January 2021) that at all material times, the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 by reason of anxiety and depression. Anxiety and depression are the only disabilities on which the Claimant is permitted to rely for the purposes of his claim.

Knowledge of disability

7 Did the Respondent have actual or constructive knowledge of the Claimant's disability?

Claim 1 - 2417087/2019

Section 13 Equality Act 2010 (EA) – direct disability discrimination

8 Did the Respondent treat the Claimant less favourably than it treated or would treat others as follows:

8.1 In or around October 2019, the Respondent did not conduct a mock interview with the Claimant.

9 The Claimant relies on a hypothetical comparator.

10 If so, did the Respondent treat the Claimant less favourably because of his disability?

Section 15 EA– Discrimination arising from disability

11

	Item number[1]	**Unfavourable treatment alleged**	**'Something arising in consequence of disability' relied on by the Claimant**
11.1	#1	On 21 August 2019, did the Respondent stop the Claimant from using his notes during the Claimant's job interview for job reference number 1639021?	The Claimant's disability required him to use notes during the interview because of his poor short term (working) memory and lapses in concentration.
11.2	#2	In respect of the Claimant's application for job reference 1638997 (Compliance Caseworker – Tax Professional or Operational Delivery), did the Respondent refuse to make further deferments / postponements of the Claimant's interview, causing the Claimant's withdrawal from the recruitment process?	The Claimant's disability and the medication he had started taking for his disability, prevented him from attending and participating in an interview during the required period.
11.3	#3	On 19 November 2019, in respect of the Claimant's	The Claimant's disability and the medication he had

[1] See Claimant's amended claim document dated 3 September 2020

		application for job reference 16232, did the Respondent withdraw the Claimant's application, before consideration had been given to his request for reasonable adjustments?	started taking for his disability, prevented him from attending and participating in an interview during the required period.
11.4	#4	In or around October 2019, the Respondent did not conduct a mock interview with the Claimant.	The Claimant was on sickness absence due to his disability.
11.5	#5	The Respondent failed to keep the Claimant up to date with developments at work during his sickness absence during the period 11 October 2019 – 26 December 2019.	The Claimant was on sickness absence due to his disability.
11.6	#6	The Respondent failed to notify HR of the Claimant's disability-related sickness absence.	The Claimant was on sickness absence because of his disability.
11.7	#7	Kate Baggaley pressured the Claimant to bring forward his resignation date.	The Claimant's disability-related sickness absence, the exhaustion of his contractual sick pay, and the Claimant's decision to resign.
11.8	#8	Kate Baggaley failed to give the Claimant his Keeping in Touch (KIT) calls notes.	The KIT call notes were a result of the Claimant's disability-related absence.

11.9	#9	Kate Baggaley refused to give the Claimant informal meeting notes he had requested and thereby prevented him from accessing and using the grievance procedure.	The behaviour the Claimant wished to complain of occurred during an informal attendance management meeting to discuss the Claimant's disability.
11.1	#10	The Respondent failed to conduct the Claimant's 6-month and 12-month probation reviews	The Claimant was on disability-related sickness absence.
11.1	#11	The Respondent failed to deliver ECS training to the Claimant.	The Claimant worked an alternative working pattern because of his disability.

For each allegation above:

12 Did the Respondent treat the Claimant unfavourably as alleged?

13 If so, is the matter relied on by the Claimant in the final column 'something arising in consequence' of the Claimant's disability?

14 If so, was the unfavourable treatment because of the something arising in consequence' of the Claimant's disability?

15 If so, can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

<u>Sections 20 & 21 EA – Reasonable adjustments</u>

16

	Item number[2]	**Provision Criterion or Practice (PCP)**	**Substantial disadvantage**	**Reasonable adjustment contended for**
16.1	#1	The Respondent's policy on the use of notes during job interviews	The Claimant was unable to rely on his notes during the job interview for job 1639021	The Respondent should have allowed the Claimant to read his notes, even if verbatim, for at least part of the interview
16.2	#2 and #3	The Respondent's requirement to physically attend and participate in a job interview	The Claimant could not attend the interview for jobs 1638997 or job 16232 due to his disability and the medication he had started to take for his disability. The Claimant was covered by a fit note during that period.	The Respondent should have (1) offered further deferment / postponement of the interview, (2) explored other means of assessing the Claimant's suitability for the job and / or (3) Contacted the Claimant to discuss reasonable adjustments.

For each allegation above:

17 Did the Respondent have the PCP alleged?

18 Did the Respondent's PCP put the Claimant at the substantial disadvantage in comparison with persons who are not disabled?

[2] See Claimant's amended claim document dated 3 September 2020

19 If so, did the Respondent have actual or constructive knowledge that the Claimant was put to that substantial disadvantage?

20 Did the Respondent take such steps that it was reasonable for it to have to take to avoid the substantial disadvantage? The Claimant alleges that the Respondent should have made the adjustments set out in the final column.

Section 26 EA - Harassment related to race

21 Did the Respondent engage in the following conduct, as alleged in the grounds of claim at paragraphs 13-55:

21.1 Misspelling his name in his e-mail address,

21.2 Misspelling his name on his log-in details of a platform called ForSkills,

21.3 Misspelling his name, resulting in him being unable initially to access the Tessello training platform,

21.4 Misspelling his name on his contract of employment

21.5 Failure to correct the spelling of the Claimant's name after repeatedly complaining of the misspelling

21.6 Misspelling on name plaque on workstation

22 If so, was it unwanted conduct within the meaning of s.26(1)(a) EA?

23 If so, was that unwanted conduct related to the Claimant's race?

24 If so, did the unwanted conduct have the purpose or effect (having regard to the matters to be taken into account in s.26(4) EA) of:

24.1 violating the Claimant's dignity, or

24.2 creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Claim 2 - 2413539/2020

Section 15 EA– Discrimination arising from disability

25 Did the Respondent treat the Claimant unfavourably?:

25.1 It is accepted that the Respondent did not contact the Claimant to discuss reasonable adjustments ahead of the interview scheduled for 1 June 2020 for vacancy 43863 O Compliance Caseworker. Did that amount to unfavourable treatment?

25.2 It is accepted that the Respondent informed the Claimant that his application was unsuccessful and that this amounted to unfavourable treatment.

26 Was the fact that the Claimant did not participate in the interview 'something arising in consequence' of the Claimant's disability?

27 If so, was the alleged unfavourable treatment because of that 'something'?

28 If so, was the alleged unfavourable treatment a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aims of conducting a fair, consistent, effective and proportionate recruitment process and the efficient use of the Respondent's resources.

Sections 20 & 21 EA – Reasonable adjustments

29 The Respondent accepts that it had the provision, criterion or practice (PCP) of having an interview stage to its recruitment process.

30 Did the Respondent's PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant alleges that he was put to the following substantial disadvantage: His application was not successful. It was not successful because he did not attend the interview. He did not attend the interview because the Respondent did not contact him to discuss reasonable adjustments as he had requested, and in line with the Respondent's policy of contacting all candidates who declare a disability and request reasonable adjustments on their application forms.

31 If so, did the Respondent have actual or constructive knowledge that the Claimant was put to that substantial disadvantage?

32 Did the Respondent take such steps that it was reasonable for it to have to take to avoid the substantial disadvantage? The Claimant alleges that the Respondent should have contacted the Claimant to discuss adjustments.

Limitation

33 Was the claim presented to the Tribunal within the 3 month time limit in s.123 EA?

34 If not, is it just and equitable to extend time?

Claim 3 - 2419677/2020

Section 15 EA – Discrimination arising from disability

35 Did the following amount to unfavourable treatment, in respect of the Claimant's application on 27 March 2020 for vacancy 47927?

35.1 The Respondent failed to contact the Claimant as requested by the Claimant on his application form.

35.2 The Respondent's withdrawal of the Claimant's application.

35.3 The Respondent did not offer to restore the Claimant's application even though there was a live holding pool.

36 If so, was the unfavourable treatment because of something arising in consequence of the Claimant's disability? The Claimant alleges that the following is the 'something arising in consequence' of his disability: The fact of his disability operated on the Respondent's mind either consciously or subconsciously. Or it did not operate on the Respondent's mind when it ought to have operated. The Respondent consciously chose not to contact the Claimant, when it knew or ought to have known that he was a disabled candidate, and was aware or ought to have been aware of its own policy of contacting disabled candidates who apply via the Guaranteed Interview Scheme. So, in its mind, the Respondent trivialised the Claimant's request to be contacted to discuss his disability and decided not to contact him.

37 If so, was the alleged unfavourable treatment a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aims of conducting a fair,

consistent, effective and proportionate recruitment process and the efficient use of the Respondent's resources.

Sections 20 & 21 EA – Reasonable adjustments

38 Did the Respondent have the following PCPs:

38.1 Requiring candidates to select an interview slot within a 5-day time limit,

38.2 Requiring candidates to attend an interview,

38.3 Recommending that interviewees do not read sections of their notes verbatim, and / or

38.4 Not contacting candidates who request to be contacted to further discuss reasonable adjustments during the interview?

39 If so, did the Respondent's PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant alleges that he was put to the following substantial disadvantage by all 4 PCPs: His application was unsuccessful in that recruitment campaign for that vacancy. This also led to his loss of trust and confidence in the interview phase of the Respondent's recruitment process, as a disabled candidate.

40 If so, did the Respondent have actual or constructive knowledge that the Claimant was put to that substantial disadvantage?

41 Did the Respondent take such steps that it was reasonable for it to have to take to avoid the substantial disadvantage? The Claimant alleges that the Respondent should have made the following adjustments:

41.1 Contacted the Claimant to discuss adjustments.

Section 19 EA - Indirect disability discrimination

42 Did the Respondent apply, or would it apply, the PCPs listed at paragraph 38 above to persons who were not disabled?

43 Did the PCP or PCPs put or would have put disabled persons at a particular disadvantage when compared with persons who are not disabled? In what way? The Claimant says that the particular disadvantage was as follows:

43.1 The strict time limit of 5 days puts disabled candidates at a particular disadvantage as they may need more advance notice and more prompting, particularly where the last activity in the recruitment process has occurred approximately 4 months prior. The 5-day window is too short to rely on e-mail communication only. This should be followed up by a telephone call, in circumstances where a candidate has not responded to the email prompt. Rather than follow up with a telephone call, the Respondent chooses, and chose, to withdraw the application altogether. A disabled candidate with poor mental health may not be as alert to such e-mail communication as a non-disabled candidate.

43.2 The requirements for all candidates to attend an interview without offering alternative methods of assessing their suitability (or mock interview) for a job particularly disadvantages disabled candidates with anxiety disorders, to whom a job interview could trigger a panic attack.

43.3 The Respondent's requirements for candidates not to read sections of their interview notes verbatim when they need to, and to penalise them by adjusting their scores if they do so, particularly disadvantages candidates who may need to rely on their interview notes a bit more, even verbatim, due to their disability.

43.4 The Respondent's practice of not contacting candidates who request to be contacted to further discuss reasonable adjustments would put disabled candidates at a particular disadvantage, as they are unable to attend interview in the absence of those reasonable adjustments.

44 Did the PCP or PCPs put, or would have put, the Claimant at that disadvantage?

45 If so, was the PCP or were the PCPs a proportionate means of achieving a legitimate aim? The Respondent relies of the legitimate aims set out at paragraph 37 above.

<u>Section 19 EA – Indirect race discrimination</u>

46 Did the Respondent apply, or would it apply, the PCP of requiring candidates to attend an interview as part of its recruitment process to persons of the Claimant's race and those who were not?

47 Did the PCP or PCPs put or would have put persons of the Claimant's race at a particular disadvantage when compared with persons of a different race? In what way?

48 Did the PCP or PCPs put, or would have put, the Claimant at that disadvantage?

49 If so, was the PCP a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aim of a fair and effective recruitment process to support the Respondent's business.

Limitation

50 In respect of any alleged acts of discrimination which occurred prior to 13 July 2020, was the claim presented to the Tribunal within the 3 month time limit in s.123 EA?

51 If not, is it just and equitable to extend time?

Claim 4 - 2401455/2021

The first part of the claim related to the Claimant's 're-presentation' as grounds for claim, some of the matters which were the subject of the Claimant's amendment application. The Judgment of Employment Judge Robinson sent to the parties on 20 April 2020 determined that those issues are not allowed to proceed.

The draft list of issues below relates to the remainder of Claim 4.

s.26 EA - Harassment related to disability

52 Did the Respondent engage in the following conduct:

52.1 On 27 May 2020 by e-mail, Jane Townend threatened to discipline the Claimant, and made a remark to the Claimant about making frivolous and malicious allegations;

52.2 On 20 July 2020, in a meeting to discuss the Claimant's grievance, Jane Townend asked intrusive questions of the Claimant about his disability;

52.3 Following the Claimant's e-mail to Jane Townend on 13 May 2020 inviting her to recuse herself from the grievance process, Jane Townend refused to do so;

52.4 On 22 September 2020, Jane Townend referred to the availability of an appeal, before the grievance had been decided.

52.5 On 28 August 2020, in a meeting to discuss the Claimant's grievance, Zoe Brown:

52.5.1 Falsely asserted that the Claimant had not informed her of his intention to apply for vacancies;

52.5.2 Falsely asserted that the Claimant had accused her of bugging his hotel room; and

52.5.3 Falsely asserted that the Claimant had demanded that she reply to his e-mail in the middle of the night.

53 If so, was it unwanted conduct within the meaning of s.26(1)(a) EA?

54 If so, was that unwanted conduct related to the Claimant's disability?

55 If so, did the unwanted conduct have the purpose or effect (having regard to the matters to be taken into account in s.26(4) EA) of:

55.1 violating the Claimant's dignity, or

55.2 creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

<u>Section 15 EA – Discrimination arising from disability</u>

56 Did the following amount to unfavourable treatment?

56.1 On 21 September 2020, Jane Townend refused to schedule an additional grievance hearing date;

56.2 On 22 September 2020, Jane Townend refused to extend the deadline date for the Claimant to read and agree the meeting notes.

56.3 On 28 August 2020, Zoe Brown falsely asserted that the Claimant had accused her of bugging his hotel room

57 If so, was the unfavourable treatment because of something arising in consequence of the Claimant's disability? The Claimant alleges that the following is the 'something arising in consequence' of his disability:

57.1 For 56.1 and 56.2, the Claimant's disability had affected his ability to engage with the grievance process, and

57.2 In respect of 56.3, a rumour that the Claimant may be a paranoid schizophrenic?

58 If so, was the alleged unfavourable treatment a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aims of dealing with the Claimant's grievance in a proportionate and timely manner, and responding to the Claimant's grievance.

<u>Sections 20 & 21 EA – Failure to make reasonable adjustments</u>

59 Did the Respondent have the following PCP:

59.1 A rigid and inflexible grievance process

60 If so, did the Respondent's PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant alleges that he was put to the following substantial disadvantage: The Claimant was not granted an additional grievance meeting when he requested one and he was not given an extension to the deadline for reading, amending and agreeing to the meeting notes. This forced him to withdraw from the Respondent's grievance process.

61 If so, did the Respondent have actual or constructive knowledge that the Claimant was put to that substantial disadvantage?

62 Did the Respondent take such steps that it was reasonable for it to have to take to avoid the substantial disadvantage? The Claimant alleges that the Respondent should have:

62.1 Scheduled a further (5th) grievance meeting;

62.2 Allowed the Claimant more time to read and agree the meeting notes – an extension of 4 days to utilise the weekend.

Limitation

63 In respect of any alleged acts of discrimination which occurred prior to 31 August 2020, was the claim presented to the Tribunal within the 3 month time limit in s.123 EA?

64 If not, is it just and equitable to extend time?