EMPLOYMENT TRIBUNALS

Claimant:	**Ms Katrina Stobbs**
Respondent:	**Commissioners For His Majesty's Revenue & Customs**
Heard at:	**Newcastle Employment Tribunal**
On:	**28th November to 1st December 2022**
Before:	**Employment Judge Sweeney**
	Pam Wright
	Clare Hunter
Appearances:	**For the Claimant: David Robinson Young, counsel**
	For the Respondent: Patrick Keith, counsel

JUDGMENT having been given to the parties on 1st December 2022 and a written record of the Judgment having been sent on 8th December 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

WRITTEN REASONS

1. By a Claim Form presented on **19 March 2022**, the Claimant brought a complaint of disability discrimination. At the time she was unrepresented. By the time of the telephone preliminary hearing on **07 June 2022**, she had obtained legal representation. Judge Jeram ordered some further information and clarification of the complaints to be provided by **08 July 2022**. The claims were clarified as:

1.1. a complaint that the Claimant had been treated unfavourably because of something arising in consequence of her disability and

1.2. a complaint that the Respondent had failed to make reasonable adjustments.

2. The Respondent resisted both complaints in an amended response served on **19 August 2022**.

The Hearing

3. The final hearing was heard over four days beginning on **28 November 2022**.The Claimant gave evidence on her own behalf and called no other witnesses. The Respondent called three witnesses as follows:

3.1. Julie Atkin, Operations Leader in Benefits and Credits ('B&C')
3.2. Katie Dickinson, Front Line Manager in B&C
3.3. Claire Taylor, Higher Officer in Child Benefits

4. The parties had prepared a bundle of documents consisting of 508 pages. **The issues**

5. An agreed list of issues had been prepared in advance of the hearing. They are set out in the Appendix at the end of these reasons. Mr Keith confirmed that there was no jurisdiction issue as it was no longer suggested that the complaints were out of time.

Disability

6. Disability was admitted by the Respondent. The Respondent also admitted that, at all material times, it knew that the Claimant was a disabled person within the meaning of section 6 Equality Act 2010.

Findings of fact

7. Having considered the evidence and submissions of the parties, we make the following findings of fact. The Claimant and Respondent are referred to a 'C' and 'R' respectively.

8. C is a disabled person within the meaning of section 6 EqA, with both mental and physical impairments. She has suffered from depression for at least twenty years. She has been employed full time by HMRC since **February 2013**, most latterly as an Assistant Officer ('AO') in the B&C department. Prior to the first national lockdown in **March 2020**, she worked in R's office at Waterview Park, Washington. Since then, she has been working from home, which is at the heart of these proceedings. She has been on sick leave for the past two weeks or so. However, other than that she has a good sickness absence record.

9. C has a brother, Paul, who is now about 65 years old. Paul has a complex mix of disabilities. He has an X chromosome linked genetic disorder which results in severe learning difficulties. In addition, he suffers from severe COPD, cerebral palsy, hip deformity, arthritis, glaucoma and macular degeneration. Up until **September 2018**,

Paul lived with another family member. However, from then he moved in with C and he continues to live with her to this day. Previously, arrangements were in place for Paul's carers to care for him during the day, when C was at work. However, this changed from March 2020, when due to the pandemic and the risk of people bringing covid in from outside, the Claimant became his main carer.

10. From **March 2020** up to **September 2021**, the tasks C had been working on were largely to do with the processing of applications for Tax Credits. During this period of 18 months, there were no concerns about her performance either as to the quality of her work or in terms of her overall productivity. C found that she was coping well working from home and that her mental health was much better. This was partly because she did not have the added pressure of worrying about Paul when she was working in the office. But it was also largely because she had found working in the office environment more stressful lately. She described the environment as 'toxic'. We do not accept that the environment was toxic, but we are satisfied that the Claimant found office life stressful and detrimental to her mental health and that this was the case before Covid. Whatever the reason the Claimant was finding office more stressful, the fact is that she was.

11. In August **2019**, she attended an Occupational Health ('OH') appointment [**page 317**]. The OH adviser said:

> *"Mrs Stobbs has a longstanding history of mental health issues being diagnosed and treated for anxiety and depression for many years. In recent months Mrs Stobbs has been experiencing increased stress due to triggers relating to family issues…. Coping with increased stressors has resulted in Mrs Stubbs underling depression and anxiety increasing. She has been reviewed by her GP. Her GP advised her to take time away from work, however she feels this would be detrimental to her recovery'. Mrs Stobbs finds the routine of work helps her cope with her symptoms on a daily basis… Mrs Stobbs is experiencing significant symptoms. She reports poor concentration, her focus and memory are affected, variable mood; she advised she is frequently feeling irritable, she is experiencing disturbed sleep resulting in fatigue and feeling emotional…. Although currently at work, Mrs Stobbs remains emotionally vulnerable and her mental health remains vulnerable to flare ups of symptoms…. Mrs Stobbs is likely to be considered disabled under the provisions of the EqA 2010.'*

12. Following this report, an adjustment was made for C by taking her off telephony duties, which had been a significant stressor for the claimant.

13. In the summer of 2020, it was apparent that C and others would be moving on to different tasks (within their job descriptions) and to a different manager. She was concerned that this might mean a return to telephony work, so she submitted an ACC1 form. Although we did not have that ACC1 form in the bundle, there is a reference to it in the email of **13 July 2020** [page **327]**. An ACC1 is a form which employees of

HMRC use for a variety of purposes, ranging from accidents at work to raising concerns about their health.

14. On **09 July 2020**, C met Sophie Storey a Higher Officer to discuss the ACC1 and the imminent team changes [**page 505**]. It was agreed that she would move to the Childcare Services team. In the meantime, she was to continue working on POCA work after which she would move on, with support, to the new task. Sophie Storey encouraged C to continue to meet her colleagues on Microsoft Teams for support, something which she had been doing since working from home. Her then manager, Roy Cofton, was to have a full handover with C's new manager who (although not known at that time) was to be Katie Dickinson, to make her aware of and discuss both 'passports' that Claimant holds. The Claimant asked Ms Storey to be considered for future plans to permanently work from home but was advised that there were no plans at that time for anyone in CSG to work from home permanently.

15. On **01 June 2021**, a collective agreement, PACR, came into effect which introduced new terms and condition, one of which was the right to work from home 2 days a week.

16. The 'guidance' to PACR, on **page 64 refers** says something about what we have now all come to refer as 'hybrid working'. It says '*we are also offering you the opportunity to work from home for two days per week, or more where your business area agreed, if your role is suitable*.' It then refers to the 'balancing home and office working policy'. According to the Respondent's response at paragraph 9 [**page 49**] this was a contractual provision.

17. On **06 August 2021**, C made a request to permanently change her contractual terms [pages **330 - 335**. She set out the reasons for her application to work permanently from home on a contractual basis [page **333]**. The first and primary reason for requesting the change was her health. C explained that she had struggled with anxiety and depression for several years; that she is on medication; that she struggled with bad anxiety going into the office physically being sick on many occasions and unable to concentrate due to noise levels due to call demand on the 'floorplates'. She described how over the years it had taken its toll on her body mentally and physically. She also referred to the arthritis in her knees and back and to the office being open plan, cold and draughty, making the pain worse. She also went on to describe her brother's situation. She said she could be available for training and occasional manager or team meetings if planned.

18. The context of the reference to Paul was that, since she had been working from home, she found that he had been better in his behaviours as he feels safe and better able to build on routines. This had the beneficial consequence that she found it less stressful to deal with him. However, her own mental health needs was at the heart of the application. That was something that Katie Dickinson said she has only come to realise as these proceedings have unfolded. C's mental health and Paul's well-being are not mutually exclusive. When he is doing well, so is she. When she was working

in the office, she would worry about what he would be like when she returned home. The other aspect of working in the office, from C's point of view, was that she found that she was more likely to be disturbed at work by being contacted and having to leave the office to seek permission to return home – for example when a carer had not turned up, or if Paul was upset because of changes to his routine. It is clear to us that Paul is a very important part of her life. But the application was not to work from home to care for Paul.

19. In early **September 2021**, the nature of C's work changed from tax credits to CSO work (which we understand to be 'Child Service Office'). There are two elements to this work: processing applications for 30 hours of child care; processing applications for tax free childcare (TFC), where an account is created to enable a person to receive up to 20% from the government, calculated on what they pay for child care. Collectively, this work is referred to as assessing CSO eligibility.

20. The AOs in Katie Dickinson's team are all involved in assessing CSO eligibility. Cases are categorised on a traffic light basis, red, amber and green – 'amber' meaning that there remains work to be done on the application and that it is incomplete, for example waiting for further information to be obtained before it can be 'cleared' or closed. When cleared it will go to green (eligible) or red (not eligible). Some cases go either straight to green or red right away and do not make their way to Ms Dickinson's team. The Claimant and the other employees in Katie Dickinson's team, therefore, worked on amber cases only, certainly at the material time.

21. This was new work for the claimant and for others in KD's team. There are two systems which employees use in undertaking CSO eligibility work, namely 'GRO' and 'CBS'. These systems (which largely do the same thing) allow the AOs to check information such as birth registrations and CRNs (child reference numbers). Cdid not have access to these systems when she started doing CSO work but she obtained access on **13 October 2021** or thereabouts. This impacted her ability to clear cases for the first month or so of her working on CSO eligibility.

22. One of the issues raised in this case was the Claimant's performance. She was not hitting target on the numbers of cases cleared. This was mentioned to her at a PDC in **September 2021** with Katie Dickinson albeit there was no clear indication given to her of what the targets were.

23. R produced a table at **page 457** showing productivity of C in the period **06 September 2021 to 05 November 2021**. What these figures reveal is that the number of cases being cleared was below that which R expected. Management had set a training target in this period of 15 cases. Later, C was given a target of 20, which was under what the R expected from its 'flight path'. This reduced target was a result of her not doing telephony work. An AO doing telephony work would potentially have quicker access to information needed to convert an amber to green or red by simply being able to

speak to someone, thus enabling him or her to clear more cases more quickly. C was not told that she was on a reduced target until **February 2022**. The table at **page 457** also shows her utilisation rate – which means the time working on task. The Respondent has a 'target' of 85% in this respect. During the time covered by the table on **page 457,** C's on task or utilisation rate was above target.

24. The way the cleared cases target worked was that C was expected to complete 20 clearances a day. Others would be expected to hit anything from 31 a day down to 25. The actual number varied according to individual needs and circumstances and depended also on where people were on the flight path. Employees are monitored on both numbers and quality. Ms Dickinson did not clearly communicate to C what her targets were, something which Kirsty Allen subsequently agreed with when considering C's grievance. Ms Dickinson has never had any concern with regards C's utilisation rate, nor did she have any concern about the quality of her work. The only issue was that C had not been hitting the numbers of cleared cases.

25. C herself was concerned about this and could not understand why she was not hitting the numbers. She is experienced in working on various tasks within HMRC, albeit not this one, and could not put her finger on the problem. We are satisfied that whatever the explanation for the reduced numbers at that time, the fact that she was not hitting numbers was not to do with the fact that she was working at home, for example by being distracted by caring for Paul, or other features of home-working. She was not caring for her brother while working. Certainly, Ms Dickinson accepted that she was not concerned by the prospect of the Claimant caring for Paul while she was meant to be working. Further, the utilisation rates show her as being on task. Had she not been working and tending to Paul's needs, R would have seen those utilisation rates drop.

26. Before **September 2022**, C had shown signs of improving, albeit it was patchy. She was still not hitting the desired numbers. This is reflected in Katie Dickinson's file notes on **page 440,** within the stress reduction plan. It is accepted by Ms Dickinson that from about **September 2022**, C's numbers have improved. We can see from page **502** and **503** that C's performance in terms of the numbers has improved such that she is generally hitting, and in fact, exceeding her targets. Up until **September 2022**, C had been logging on at 9am and getting on with whatever cases were on the system. The system operates like a taxi rank: it is on a first come first served basis. In **September 2022**, while remotely shadowing a colleague, she was alerted to what in our judgement can be called some 'tricks of the trade'. She was advised by her colleague that, if she logged on at 07.45am (1 hour 15 minutes earlier than she had been) she would have greater access to 'BF' cases. Those were amber cases that could potentially be cleared more quickly because they were partially completed already and had been marked to be brought forward ('BF') at a time when it was envisaged the required information to enable the AO to clear the case would have been obtained. Up until now, because C had been logging on at 9am, by the time she did so most of the 'BF' cases had been dealt with by other AOs. Thus, she would by and large be dealing with those amber cases that might take longer.

27. It is, we find, no coincidence that she started improving significantly from this period. She was hitting targets largely because she was now accessing cases which could be cleared more quickly. She still had to deal with non-BF cases of course, but the fact that she was logging on earlier helped her improve her numbers.

28. Returning to the chronology of events, at some point after she submitted her home working application, most probably in **September 2021**, Ms Dickinson asked C to attend an OH assessment. However, C did not agree to this. Although we consider that unwise of her, it was because of her previous experience of an OH assessment, when the OH Adviser told her (rightly or wrongly(that she did not want to say she should not work on phones because she may lose her job.

29. C's application for permanent home working was rejected on **02 November 2021** [**page 338**]. It came as a surprise to everyone in the tribunal room when Katie Dickinson said that she did not make the decision to reject the application for homeworking. The letter on page **339** is in her name and expresses a view in the first person, 'me'. Her witness statement at paragraph 21 suggests she 'considered' it. Anyone reading that letter and her statement would consider her to have been the decision maker. Indeed, the policy requires (as Ms Taylor accepted) that the line manager considers the application and makes the decision. Of course, it is perfectly understandable that the manager may seek advice from others. However, in this instance, Ms Dickinson was simply given the pre-typed letter at **page 338** and was told to give it to C. We welcome Ms Dickinson's honesty. She came across to the Tribunal as an empathetic and honest witness overall, doing her best to assist the Tribunal. However, we feel she was put in a difficult position by being put forward as the decision maker in an application for home working and a reasonable adjustment when in fact she was not.

30. Ms Dickinson did not even know for sure who had made the decision. She assumed that it was either or both of Paul Gibson and Jason Karpanos, who are both senior to her. It was Mr Gibson who asked her to give the letter to C. Ms Dickinson was not able to explain what the writer meant by '*detrimental effect on the organisation's ability to meet customer demands*'. That was not discussed with her. Nor was she able to explain any part of the letter, nor was she able to say who had expressed the view that the application '*reads to me as working from home suits my circumstances better*'.

31. The reasons given for the rejection are:

31.1. A detrimental effect on the organisation's ability to meet customer demands;

31.2. B&C operations are only able to offer home working for two days a week as per the pay and reform agreement;

31.3. There is nothing to indicate in your application that you couldn't do your role effectively for 3 days a week in the office and as such there aren't grounds for the request to be considered.

32. The letter also states that '*this is your application to work permanently from home due to caring concerns*'. Prior to the letter being issued, Ms Dickinson was instructed by Mr Gibson to speak to C and ask her specifically about her caring responsibilities [see file note **page 337**]. She was not asked to speak to C about her mental health or disabilities.

33. Ms Taylor accepted, and in any event, we so find that by someone (possibly Mr Gibson) making the decision as Mr Robinson Young put it, *in the shadows*, this is a significant departure from procedure (and a 'procedural error' in the words of the policy). We find that it also demonstrates an absence of transparency. C has always suspected that, as regards this decision, '*strings'* were being pulled from above. In light of the way this evidence unfolded in these proceedings that suspicion has been borne out. Ms Dickinson's strings were being pulled. Not even Claire Taylor, who heard the Claimant's appeal against this decision, was aware of who the decision maker was, and assumed it had been Ms Dickinson. It is apparent from her statement that Julie Atkins also assumed it was Ms Dickinson.

34. C appealed the decision. Her appeal is on **page 342**, dated **22 November 2021**. It was heard by Claire Taylor. Ms Taylor met with C on **08 December 2021** [**page 350 – 353**]. Ms Taylor rejected the appeal in an outcome letter dated **20 December 2021** [**page 359-360**].

35. We have to say that we were not impressed by the way Ms Taylor handled this appeal. She did not speak to the decision maker. Had she spoken to the person who she assumed to be the decision maker, Ms Dickinson, she would have learned what we (and she) learned in the course of this hearing – that she had not in fact made the decision, and that this, in itself, constituted a procedural error, something she was supposed to look out for on appeal. Ms Taylor also struggled to explain to us the words she had entered in the second box on **page 357** under 'appeal summary'. She concluded that '*all facts that were given at the time were taken into account'*. Ms Taylor endeavoured to explain that this was a reference to her taking all facts into account. However, we reject that explanation. It is clearly a reference to the original decision (as is clear from the template question on the left). Ms Taylor was, however, in no position to say that all facts were taken into account because she did not speak to anyone, and the letter at **page 338** gives no clue as to what is meant by 'detrimental impact on the business'. It is also right to say that there was 'something' on the application to indicate that C could not do her role effectively for 3 days in the office. Certainly, it could not be said that there was 'nothing'. Yet Ms Taylor did not question this.

36. Further, it is clear to the Tribunal that not all facts were taken into account on the original decision, because the letter (whoever wrote it) says that '*this is your application to work permanently from home due to caring concerns'*. It was not. It was an application to work from home because of her mental health. There is reference to Paul and to the fact that C is his carer but in the context of her application being because of her needs, not his. Although there is a reference to mental health on **page 338**, we infer that the decision maker regarded this application not as a request for a **reasonable adjustment**, but as an application for home working due to caring concerns.

37. Mr Keith accepted that it is open to us to draw inferences from the fact that the actual decision maker has not been here to give evidence. We do so. We draw the inference from the unexplained absence of the decision maker that there was a reluctance at higher management level to accede to requests for home working and that this was driven by a desire to see people return to the office after covid restrictions

38. C was very upset and distressed when she received the appeal decision. She completed a further ACC1 form. In **January 2022**, although she has been knocked back on the appeal, she again raised the issue of homeworking with Sally Piggott, who works in mediation and resolution support. C felt that Sally Piggott listened to her. She arranged a meeting with Ms Dickinson on **12 January 2022**. There is a file note at **page 372**. On **13 January 2022**, Ms Dickinson emailed Julie Atkin explaining that C was very upset. Ms Atkin responded to say that C '*does not meet the criteria for permanent home working as it needs to be exceptional circumstances and most of Katrina's reasons is to do with caring for her brother'*. Once again, this response from Ms Atkin suggests to us that no one in senior management (indeed no one at any level of management) considered that C was seeking a reasonable adjustment. This is consistent with the letter of **page 338**, which does not anywhere consider that C is in effect asking for a reasonable adjustment – despite her application referring to her being disabled under the EqA.

39. Around this time, C asked for a stress reduction plan to be put in place [pages **436 – 441]**. From then there were regular meetings. There became more of an emphasis from management on the numbers from this point, most probably following the email from Julie Atkin on **13 January 2022**. This is consistent with C's evidence that it was not until **February 2022** that the Respondent really started talking about targets and performance.

40. On **16 February 2022**, C attended OH [**page 381 – 383**]. The recommendation was

> *"Following today's telephone consultation with Katrina, she appears to be coping well working from home and have not reported any concerns with her work including her day-to-day functioning. She is having a good work life balance and compliant with the intake of her prescribed medications which indicates good progress.*

Returning to the office may exacerbate her anxiety and depression symptoms and which may trigger the self-harming thoughts. I have tried to make her understand that working from home on a permanent basis may not meet business needs. I would advise that you meet with her to discuss a way forward that would benefit both parties.'

41. On **page 382**, in answers to questions 3 and 4 from R, the OH adviser clearly states that she is fragile mentally and that returning to the office would exacerbate her mental health symptoms.

42. On **15 March 2022** [**page 392**] C met with Katie Dickinson to discuss the OH report. Ms Dickinson's focus was to see if C was willing to consider any further smaller compromises such as coming into the office for 1 day a month. Ms Dickinson explained that she had spoken to EAS and that they considered that the right way forward was not permanent home working. A file note recording a conversation between KD and EAS, makes it clear that C should be expected to compromise [**page 391]**. However, EAS were also of the view that, if there were no performance issues, they would be inclined to consider the request for permanent home working.

43. C would agree to one day a month but provided it was confirmed in writing that her home working arrangement was to be a permanent change. R would not agree to that. R's position was that the offer of 1 day a month was temporary, with a view to working towards C coming to the office on a '3 and 2' basis (that is, 3 days a week in the office and 2 days at home). Julie Atkin said in evidence that this offer of 1 day a month office work could have been open ended but this was never explained to the Claimant, and that was not the intention of R at the time. As far as C was concerned, the offer was temporary and that in the future she would be expected to build up her time in the office. This had been confirmed in the original rejection letter where she was told that B&C were only able to offer 2 days a week.

44. C presented her Claim Form to the Tribunal on **19 March 2022**. On **17 April 2022**, she submitted a grievance. It seems that this was replicated in **June 2022**. The grievance was considered by Kirsty Allen [**pages 445-456**] and the outcome was sent to C on **07 October 2022**. At a meeting between Katie Dickinson and C on **21 April 2022**, they agreed that matters were now out of both of their hands as there was employment tribunal proceedings and a 'formal concern' process under way.

45. Although not referred to in witness statements, during this hearing it emerged that there are two people within Julie Atkin's area of 220 people in respect of whom, R has implemented a contractual change to their contracts to permit permanent home working. One involved an employee with a physical impairment, Ms Atkin could not recall the other. She understands that two others were refused, one of which was a person with social anxiety and agoraphobia. She thought the other person who was refused was also someone with a mental impairment but she could not recall.

Relevant law

Sections 20-21 Equality Act 2010: reasonable adjustments

46. The first situation in which a duty to make reasonable adjustments arises is where a 'provision, criterion or practice' (PCP) of the employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. A PCP is one 'applied by or on behalf of' the employer (paragraph 2(2)(a) Sch 8 EqA).

What is a PCP?

47. Although not defined in the statute, some assistance as to the meaning of 'PCP' is afforded by the EHRC's Employment Code, which states that the term 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision' (para 4.5). The term 'PCP' is to be construed broadly, 'having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability': **Lamb v Business Academy Bexley** EAT 0226/15.

48. In **Ishola v Transport for London** [2020] I.C.R. 1204 Simler LJ accepted that the words 'provision, criterion or practice' were not to be narrowly construed or unjustifiably limited in their application. However, she it was significant that Parliament had chosen these words instead of 'act' or 'decision'. As a matter of ordinary language, it was difficult to see what the word 'practice' added if all one-off decisions and acts necessarily qualified as PCPs. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The act of discrimination that must be justified is not the disadvantage, but the PCP. To test whether the PCP is discriminatory or not it must be capable of being applied to others. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words 'provision, criterion or practice' all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again.

49. Tribunals should not adopt an overly technical approach to what constitutes a 'practice' for the purposes of showing that a PCP has been applied. In **United First Partners Research v Carreras** [2018] EWCA Civ 323 C had become disabled following a road accident. He claimed disability discrimination on the basis that, after an initial period when he had been allowed to work shorter hours as a result of his disability, the employer began expecting him to work late once or twice a week, and this amounted to a failure to make reasonable adjustments. C's pleaded case referred to a PCP of being 'required' to work late. An employment tribunal dismissed the claim, finding that

although there was an expectation or assumption that C would work late, this was not the same as a 'requirement' that he do so. The EAT allowed C's appeal, holding that he had not used the word 'requirement' in any statutory sense but merely as an example of a 'practice'. The protective nature of the legislation meant that when identifying the PCP a tribunal should adopt a liberal rather than an overly technical or narrow approach. While 'requirement' might be taken to imply some element of compulsion, the EAT did not read the term as limited to that: an expectation or assumption placed upon an employee could well be sufficient. The Court of Appeal agreed that the tribunal had adopted too narrow an approach to the interpretation of the term 'requirement'. It does not necessarily carry a connotation of 'coercion' in the sense understood by the tribunal. On the contrary, it may, depending on the context, represent no more than a strong form of 'request'. The allegation was not that C was explicitly ordered to work in the evenings or subjected to other explicit pressures which had the effect of depriving him of any real choice; but rather that it was made clear by a pattern of repeated requests that he was expected to do so and that created a pressure on him to agree.

The PCP must be applied

50. Tribunals must be careful not to allow overly technical arguments that a PCP has not actually been 'applied' to a disabled person to preclude an otherwise valid claim. For example, the simple act of informing an employee that she must return to a particular post in due course may be sufficient to amount to the application of a PCP, even if the return to work is never effected because of the employee's objections. In **Rider v Leeds City Council** EAT 0243/11 the claimant, who had asthma, was instructed to return to her previous post as a nursery officer following a period of secondment. She claimed that her condition would be exacerbated if she returned to work in a polluted area of Leeds, in a job that involved contact with young children likely to transmit upper respiratory tract infections. She never returned and was eventually dismissed. An employment tribunal found that there had been no actual application of a PCP whereby R must return to her former post because she had not actually been forced to return. On appeal, the EAT stated that the tribunal had taken a very narrow view as to whether the PCP had been 'applied'. It was satisfied that the instruction to return to the previous post, repeated on a number of occasions, without any consideration of alternative posts, amounted to the application of a PCP [see IDS Handbook, volume 4, Chapter 21 para 21.63].

The PCP must place the employee at a substantial disadvantage

51. Section 212(1) EqA provides that 'substantial' means 'more than minor or trivial'.

The PCP must place the employee at a substantial disadvantage in comparison with persons who are not disabled

52. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP: **Sheikholeslami v University of Edinburgh** [2018] IRLR

1090, EAT. If the disadvantage experienced by a disabled person arises from something other than a PCP, the employer will not be subject to a duty to make reasonable adjustments. Where, for example, the substantial disadvantage is caused not by the application by the employer of a PCP but as a real personal choice made by the employee, the section 20 duty will not be triggered. An employer will be not under a duty to make adjustments simply for the — albeit laudable — purpose of helping to improve a disabled person's medical condition. The duty arises only if there was a PCP relating to the claimant's substantive job that needed to be alleviated because of his disability.

Knowledge of substantial disadvantage

53. In **Secretary of State for the Department of Work and Pensions v Alam** [2010] I.C.R. 665, the EAT held that the correct statutory construction of what was then section 4A(3)(*b*) Disability Discrimination Act 1996 ('DDA') involved asking two questions:

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

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

54. If the answer to that question was also negative, then there was no duty to make reasonable adjustments. The DDA provisions then under consideration are replicated in Sch 8, Pr 3, para 20 of the Equality Act 2010.

55. It is for a Respondent to show that it did not know and could not reasonably have been expected to know of these things. If a tribunal were to find that an employer did not have actual knowledge, it must consider whether it had constructive knowledge. That involves a consideration of whether the employer could, applying a test of reasonableness, have been expected to know, not necessarily the employee's actual diagnosis, but of the facts that would demonstrate that she had a disability, namely that she was suffering from a mental impairment that had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. The same applies in relation to the likelihood of substantial disadvantage. Applying that test of reasonableness, the tribunal must ask what the Respondent could be expected to know. It is not enough to ask only what more might have been required of the employer in terms of process without asking what it might then reasonably have been expected to know: **A Ltd v Z** [2020] I.C.R. 199.

Identifying the step which it is reasonable to take

56. The tribunal must identify with some particularity what 'step' it is that the employer is said to have failed to take in relation to the disabled employee. The degree of specificity required in identifying that step depends on the facts of each case.

57. The adjustment concerned should be a practical step or action as opposed to a mental process, and it should, if taken, help to alleviate the substantial disadvantage to which the claimant is put by the application of the relevant PCP. There does not necessarily have to be a good or even a 'real' prospect of an adjustment removing a disadvantage for it be regarded as a reasonable one. It is enough that there is a prospect of the disadvantage being alleviated: **Leeds Teaching Hospital NHS Trust v Foster** EAT 0552/10. In Griffiths v Secretary of State for Work and Pensions [2017] I.C.R. 160, CA, Elias LJ commented: "*So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness*."

58. Therefore, the focus of the tribunal must be on whether, having regard to other factors affecting reasonableness, there is a chance that the adjustment proposed would be effective in removing or reducing the disadvantage as a result of the claimant's disability and not on whether it would advantage the claimant generally.

Burden of proof.

59. In Project Management Institute v Latif [2007] IRLR 579, EAT Mr Justice Elias (then President of the EAT) held that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. Elias J added: "*We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not*."

60. Therefore, what a claimant must do is raise the issue as to whether a specific adjustment should have been made. Thus, the onus is firmly on the claimant and not the respondent to identify, in broad terms at least, the nature of the adjustment (or 'step') that would ameliorate the substantial disadvantage. Having done so, the burden then shifts to the employer to seek to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

Section 15 Equality Act 2010: discrimination because of something arising in consequence of disability

61. Section 15 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.

62. The focus of section 15 is in making allowances for a person's disability: **General Dynamics Information Technology Ltd v Carranza** [2015] I.C.R. 169, EAT, para 32. An employer cannot discriminate against a disabled person contrary to section 15 if, at the time of the unfavourable treatment, it did not know that the Claimant had a disability and could not reasonably have been expected to know that.

63. For a claim under section 15 to succeed, there must be 'something' that led to the unfavourable treatment and this 'something' must have a connection to the claimant's disability. Paragraph 5.9 of the EHRC Employment Code states that the consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability'.

64. In **Pnaisner v NHS England and anor** [2016] IRLR 170, the EAT summarised the proper approach to section 15. First, the tribunal must identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person. The 'something' need not be the sole reason for the unfavourable treatment but it must be a significant or more than trivial reason for it. In considering whether the something arose 'in consequence of' the claimant's disability', this could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator. There is no requirement that the employer be aware of the link between the disability and the 'something' when subjecting the employee to the unfavourable treatment complained of: **City of York Council v Grossett** [2018] I.C.R. 1492.

65. An employer will avoid liability under section 15 if it shows that the unfavourable treatment was a proportionate means of achieving a legitimate aim. In the EHRC Employment Code, paragraph 4.30 states that the means of achieving a legitimate aim must be proportionate. In deciding whether the means used to achieve the aim are

proportionate the Tribunal is required to carry out a balancing exercise. To be proportionate a measure had to be both an appropriate means of achieving the legitimate aim and reasonably necessary: **Homer v Chief Constable of West Yorkshire** [2012] I.C.R. 704, SC, per Baroness Hale @ paras 24-25. Proportionality requires a balancing exercise between the impact on the employee and that of the employer: **Hardy & Hansons plc v Lax** [2005] ICR CA.

Discussion and conclusion The complaint of failure to make reasonable adjustments The PCP

66. Mr Keith submitted that R did not apply the PCP and that the Claimant conceded this. We do not accept this – she made no such concession. We remind ourselves of the authorities on what may amount to a PCP, that we are to take a broad and non technical approach and that a PCP is something that can be applied in the future. We conclude that there was a present application of a PCP in the Claimant's case which was that she was required to work at least 3 days in the office. That is what was said in the letter and that position had not changed. The reference to working 1 day a month was expressed to be on a temporary basis only. Therefore, the requirement, the expectation, the 'contractual provision' from the 'PACR' applied to C – as it did to others. The contractual provision was in effect 'you must work in the office or work 3 days in the office and 2 days at home'.

67. R applied the PCP, namely that the Claimant work in the office for 3 days a week, with the other 2 working at home. This is clearly the case from the evidence:

67.1. The letter rejecting the request for an adjustment (contractual homeworking application) which stated that B&C can only offer 3 and 2 [**page 338**]

67.2. The evidence of R's witnesses that HMRC is an office-based organisation requiring its employees, since **June 2021** to work at least 3 and 2 and that absent special circumstances, that is the expectation. Therefore, the normal expectation is work in the office or 3 and 2.

68. To the extent that it was suggested that the offer of 1 day a month was open-ended and as such meant that the PCP had not in fact been applied to C, we did not accept this. Firstly, it was never expressed to C as being open-ended. Indeed, she was seeking written confirmation of this but never got it. We found that the 1 day a month offer was intended to be temporary, and as such the current expectation was still '3 and 2'. Even if the anticipated future expectation was 3 and 2, that was sufficient to amount to the application of the PCP.

Did the PCP place C at the substantial disadvantage identified in the list of issues?

69. The identified disadvantage was that the PCP was likely to:

69.1. exacerbate the effects of C's disabilities,
69.2. mean that she would be unable to attend work and perform her duties,
69.3. increase the likelihood that she would be subjected to action for attendance and or performance reasons

70. We conclude that returning to work in the office on a '3 and 2' basis would have a detrimental effect on C and would likely exacerbate the effects of C's disabilities, causing anxiety and stress and a deterioration in her mental health. That is, after all, what the OH adviser advised and what the Claimant herself had more recently felt, through her experiences of working in the office environment [**page 381**]. There was no evidence to counter the opinion of the OH adviser or the evidence of C. If, at the time, R had disagreed with what was set out in the OH report, it could have a conversation with her about perhaps seeking a more in-depth report from her medical practitioners. It is relevant that C has a significant past history of mental issues and that fact that some very serious issues occurred 20 years ago does not mean those mental health issues go away. The medical evidence that we do have, sparse as it is, supports the evidence given by the claimant and is also consistent with the opinion expressed by the OH adviser in February 2022, that her mental health had deteriorated to such an extent that she was finding it more difficult to control her anxiety and that returning to office work was likely to exacerbate this. In our judgement, that must be taken to be a return to regular office work, such as 3 days a week.

71. We found the claimant to be a very credible witness when speaking about her mental health, and indeed other things. She struck us as being a person with real insight into self-management of her health. She knows what works best for her. Work is very important to her. We accepted her description of her mental health and how it had been adversely impacted by the worry of returning to an office environment. We are satisfied that the PCP had the effect of exacerbating her mental health symptoms. A requirement to work in the office is also likely to increase her sick leave and in turn, this would likely increase the risk of some form of action against her for nonattendance. These are the logical consequences and likely in the sense that they 'could well happen'.

72. Therefore, the PCP has been clearly and properly identified by the Claimant and we are also satisfied that it put her to the substantial disadvantage in the way set out in the list of issues. The next question was whether R knew or ought reasonably to have known this. R must establish this by evidence. We conclude that R knew that the PCP was likely to put C at the substantial disadvantage that attending office was likely to exacerbate her mental health symptoms and that they knew this as of **16 February 2022**. That is what the OH adviser told them. The Respondent has offered nothing to counter that other than an expression of opinion on the part of managers, Ms Dickinson, Ms Atkin and Ms Taylor that working the office is likely to be beneficial to her. That is simply their subjective opinion.

73. We would add that we can understand why managers say that working in a hybrid way with a mix of office and home working is a good thing. We have a mix of views about that on the tribunal. Some feel that it is a good thing, others that it depends on what works for individuals. A '3 and 2' arrangement may well work for most people but in this case, the evidence is that it was not something that would work for C's mental health. On the contrary, it would exacerbate it. The information available to the Respondent from **16 February 2022** was that returning to the office was likely to exacerbate C's health symptoms. R has satisfied that it could not reasonably have been expected to have known this before then, owing to C's refusal to attend an OH assessment, something Ms Dickinson had wanted her to do earlier.

What, if any steps could R have taken to avoid putting C to the substantial disadvantage?

74. The suggested step is a contractual change for permanent home working with C attending the office 1 day a month. R did not submit that this step would not have had a chance of alleviating the disadvantage to C (in the event that we were we to find that she has been placed at a substantial disadvantage). Rather, R submitted that it was not reasonable to adjust C's contract to permit her to work from home, with 1 day a month attendance at the office. R submitted that a change to permanent home working (with 1 day a week) is a serious change to change contracts of employment and that if the Respondent were to accede to every such request there would be 'silos' of people working from home, following potentially thousands of applications. This submission smacks of a 'floodgates' type argument, suggesting that R is concerned about large numbers of people applying to work from home, even though this concern is not borne out by evidence. The evidence before the tribunal was that only a handful of people have such permanent contractual arrangements since the policy was introduced. We were told of only two.

75. In any event, this is a case of a disabled employee seeking a reasonable adjustment. The only issue is whether the step that C has proposed has a chance of reducing the disadvantage and if so, whether it is reasonable to take the step. We conclude that the step would have a chance of alleviating the stress and anxiety caused to the Claimant. It was not just the thought of returning to office life that caused her stress, the experience of it prior to the first national lockdown had already started to adversely affect her mental health. By taking the step, that would have alleviated the pressures on her health with the added consequence of reducing the likelihood of her missing work through deteriorating ill health, thus reducing the likelihood of any future capability proceedings – however far off those might be.

76. R submitted that the proposed adjustment was not reasonable because of the concerns over C's performance and that the offer of 1 day a month was a reasonable adjustment in its own right such that it had complied with the section 20 duty. Mr Keith submitted that there was no need to agree to this permanently as a contractual change for it to have the desired effect. However, the question is whether that step avoids the disadvantage to her. In C's case, she was not told that the 1 day a week offer could

last indefinitely. Indeed, R was not prepared to commit this to writing which is what she had asked for and this was causing her anxiety. We found that the proposed arrangement of 1 day a month office work was temporary and that R would look to increase C's time in the office to 3 and 2. However, C's mental health was such that, in order to avoid a deterioration in her symptoms, she needed the assurance of a contractual change or written commitment that it was a permanent arrangement and that she would not come under pressure to build up to weekly office working. That worry was clearly having a detrimental impact on her and contributing to her anxieties. Therefore, the Respondent's step, absent a permanent contractual change, was insufficient to avoid the disadvantage.

77. The question then was whether it is reasonable to expect R to agree to such a permanent contractual change. If R can reasonably accommodate C working from home, attending the office 1 day a month on an open-ended basis (albeit with a view to seeing whether they could get her to go to 3 and 2 a week, or any other permutation of home/office working), then what is it, we asked, that would render it unreasonable for R to take that extra step of amending C's contract thus permitting her to work permanently on that basis? We could not see on the evidence what it was that would render this unreasonable and bear in mind that the burden is on R to show this, which it has not discharged.

78. We conclude that amending the contract as requested was a reasonable step. We bear in mind:

78.1. Firstly, the policy allows for permanent home-working;

78.2. Secondly, this is a reasonable adjustment request and the test is not whether the circumstances are exceptional (which is the test R applied to C's request). It is whether there is a PCP which puts her to a substantial disadvantage which R knew or ought to have known and that there is a step which would have a prospect of alleviating that disadvantage. Nowhere does the legislation speak in terms of 'exceptional circumstances'.

78.3. Thirdly, two people have had their contracts changed to permit permanent home working. Therefore, this is something that R can reasonably manage.

78.4. Fourthly, the performance concerns which Katie Dickinson had were not about the quality of C's work but about hitting numbers. Her performance on numbers and quality can be monitored just as well at home as in the office. We do not accept that working in the office would lead to an improvement in the figures. As demonstrated by the evidence, we found that C's numbers improved after she shadowed the colleague and found out about the BFs. That happened remotely. She did not attend the office and her numbers are above target while working from home. This evidence demonstrates to us that there is little correlation between the numbers and office working. We very much feel that the emphasis put

on Cs performance in this case was overplayed by R. Yes, there were some genuine and reasonable concerns about C hitting numbers, but not so as to warrant Ms Dickinson putting C on a PIP.

78.5. Fifthly, there is no mention of performance in the letter of **page 338** and Ms Dickinson was not able to tell us what the writer had in mind.

79. Given all these, there was a benefit to the Claimant in reducing the disadvantage to her and no detriment to the Respondent. It was reasonable for it to take the proposed step.

80. We conclude that R prefers people in the office or at best to work 3 and 2. They have emphasised that they are an office-based organisation. Whilst they have a good policy on flexible working which has a lot to be admired, we feel that they took their eye off the ball in C's case. The policy [**page 106]** encourages managers to balance the strategy of being an office-based organisation with colleagues' personal circumstances. Management did not consider that C was a disabled person making a request for reasonable adjustments. Had they done so, they ought to have taken the advice of the Expert Advice Service before giving a decision on the application [**see page 107**] about reasonable adjustments. The organisation appears to us to be very policy and procedure driven. The decision that is made depends on the policy under which the application is made and the policy in this case required there to be exceptional circumstances before permanent home working could be permitted. On the evidence of Ms Dickinson and Ms Taylor that means other avenues had to be explored before permanent home-working could be agreed. Thus, because C had not actually returned to the office, to 'give it a go' so to speak (and explored that option) it was considered there were no exceptional circumstances in her case which, we infer, resulted in the request being refused.

81. We accept that R did make adjustments for C with regards to telephony and that she is still working from home – but according to Ms Dickinson's file note, she continues to work from home because the matter is now in the hands of the tribunal. In any event, in a claim of failure to make reasonable adjustments, it is a question of considering whether R was under a duty to take such steps as would avoid the substantial disadvantage. In this case, we are satisfied that the duty existed as of **16 February 2022** and that R did not take such steps. The '3 and 2' minimum requirement has never gone away even though C is not working it. We are satisfied that it was reasonable for R to provide C with a formal agreement in writing permitting her to work from home and requiring her to attend the office once a month. In those circumstances, the complaint of failure to make reasonable adjustments is well-founded. We turn now to the second complaint.

Section 15 discrimination

82. As Mr Robinson-Young submitted, this was not the strongest part of his case. There were three allegations of unfavourable treatment:

82.1. Unreasonably querying the standard of C's performance (para 11a of the list of issues),
82.2. Unreasonably rejecting her home working request (para 11b of the list of issues),
82.3. Refusing to implement the recommendation of OH to meet with C and
82.4. discuss a way forward that would benefit both parties (para 11c of the list of issues).

83. We do not accept that R acted unreasonably in querying the standard of C's performance and C accepted as much herself in her evidence. Therefore, this aspect must fail for that reason alone. In any event, C has never suggested that she was not hitting the numbers because of her disability or anything in consequence of her disability. Ms Dickinson rightly queried the numbers and she did so because they were down not because of anything that arose in consequence of C's disability.

84. We do not accept that 11 (b) works as it is drafted read alongside para 12(a) and (b) in the list of issues. The arguments there are circular. The reason for rejecting C's application was primarily twofold:

84.1. Firstly, it was considered to be an application for home working to care for her brother. We accept that was an unreasonable reading of the application but that was clearly a factor in the mind of the person who wrote the letter at **page 338**).

84.2. Secondly, it was rejected because not all options had been explored (and that there were no exceptional circumstances). Had the 'something' been drafted differently, we may have held otherwise. Although Mr Robinson-Young had contemplated applying to amend this aspect of the claim, in the end he did not pursue that application. The case was put to the tribunal as it appears in the list of issues. We are satisfied that the application was not rejected because of C's need to apply for home working – that is a circular argument. Nor was it because of C's complaint or appeal.

85. As to para 11(c), this was put as a failure to meet to discuss a way forward. As we have found, Katie Dickinson did meet with C, frequently and immediately after receipt of the OH report. Ms Dickinson at no point refused to meet to discuss anything with C. Therefore, C has not made out that she was unfavourably treated in that respect either. In any event the complaint of unfavourable treatment in paragraph 11(c) of the list of issues adds nothing to the reasonable adjustments complaint.

86. Therefore, the complaint of failing to make reasonable adjustments in contravention of sections 20 and 21 Equality Act 2010 is complaint is upheld. The complaint under section 15 of unfavourable treatment because of something arising in consequence of disability complaint is dismissed.

REMEDY

Findings of fact

87. C has not suffered any financial loss arising out of the failure to make reasonable adjustments. She has continued in employment with R and continues to work from home. She has experienced emotional distress and unhappiness since being refused her request for home working and particularly so after OH had advised R that her mental health may exacerbate if she were to return to office work. It has affected her sleep, for which she takes sleeping pills. More recently she has developed a skin condition known as Dyshidrosis which she associates with stress. The stress comes with the uncertainty of her position and has endured from February 2022 for a period of about 9 months during which time she has felt like the process has dehumanised her.

88. In the two weeks leading up to the tribunal hearing she had been absent on sick leave.

Conclusion and discussion

89. There was no claim for financial losses as none had been sustained. Therefore, the question for the tribunal was whether to order the Respondent to pay any compensation to C in respect of injury to feelings. C also sought a recommendation. A tribunal has the power to make an appropriate recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate (section 124 Equality Act 2010).

90. In the Schedule of Loss dated 08 July 2022, the amount claimed in respect of injury to feelings was £12,000. In his oral submissions, Mr Robinson-Young suggested a more appropriate amount to be in the region of £18,000. Mr Keith submitted that £5,000 was an appropriate amount by way of compensation. He rightly reminded the tribunal that the amount had to be compensatory and not punitive. Mr Keith submitted that the hearing had been upsetting for C and that we must not confuse her upset and anxiety demonstrated during the course of the hearing with any hurt or other feelings flowing from the discriminatory act.

91. Awards in discrimination claims must not be too low, as that would diminish respect for the policy of the legislation which has condemned discrimination. On the other hand, awards of injury to feelings should be restrained, as excessive awards could be

seen as a way to untaxed riches. Tribunals must focus on the actual injury suffered by the claimant and not the gravity of the acts of the respondent.

92. C has clearly suffered upset, distress and unhappiness from the failure to make the adjustment she requested. We found her to be a measured witness who described the effects on her mental health without exaggeration. The period over which she has experienced these feelings is significant, being some 9 months from what we found to be the date of the discriminatory omission. However, there was little in the way of medical evidence that might support any award in the middle band of Vento and certainly nothing to support the figure suggested by Mr Robinson-Young. Such limited medical evidence that there was, combined with the Claimant's oral evidence justified an award in the lower Vento band.

93. In our judgement an award of **£8,000** is appropriate compensation. We were grateful to both counsel for agreeing the amount of interest as **£515.51**.

Recommendation

94. The tribunal makes the following recommendation in accordance with section 124(2)(c) of the Equality Act 2010:

That by 23 December 2022, the Respondent provides a formal agreement in writing to permit the Claimant to work from home, requiring her to attend the office once a month for as long as her current circumstances prevail but, in any event, to be reviewed no later than 5 years from then in line with paragraph 44b of Appendix 2 of the HMRC Collective Agreement – Pay and Contract Reform 20201 (PACR) [**page 193** of the hearing bundle]

Employment Judge Sweeney

23 December 2022

Sent to the parties on:

23 December 2022

For the Tribunal:

Julie Davies

APPENDIX

AGREED LIST OF ISSUES

Jurisdiction

1. Was the claim submitted within three months starting with the last date of the act to which the claim relates and as extended by the application of the ACAS early conciliation process?

2. If the claim in relation to any act of discrimination was not submitted within three months, did such act amount to conduct extending over a period, and was the claim brought within three months of the end of that period?

3. If not, would it be just and equitable to allow such claims to proceed?

Failure to make reasonable adjustments

4. Was the Respondent under a duty to make reasonable adjustments?

5. What was the relevant PCP that put the Claimant at a substantial disadvantage? The PCP was the requirement to work from the office at least 3 days per week

6. What was the substantial disadvantage? The Claimant asserts the following:

    (a) It is likely to exacerbate the effects of her disabilities;

    (b) She would be unable to attend work and perform her duties;

    (c) It would increase the likelihood she would be subjected to disciplinary action for attendance and/or performance reasons, which could include dismissal.

7. Did the Respondent know, or ought it reasonably to have known, of this substantial disadvantage?

8. What steps could the Respondent have taken to avoid this disadvantage and did they fail to do so?

9. Did the Respondent take the following reasonable steps to avoid the alleged disadvantage:

    (a) referring the Claimant to mental wellbeing sessions;

    (b) permitting the Claimant further time to work from home;

(c) permitting the Claimant to take breaks more frequently; and

(d) only requiring the Claimant to attend the office once per month.

10. Should the following reasonable adjustments have been implemented, as alleged by the Claimant:

(a) A formal agreement in writing to permit the Claimant to work from home and only requiring her to attend the office once per month.

Discrimination arising from disability

11. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her alleged disability as follows:

(a) Unreasonably querying the standard of her performance;

(b) Unreasonably rejecting her home working request;

(c) Refusing to implement the recommendation of Occupational Health which was as follows: "R*eturning to the office may exacerbate her anxiety and depression symptoms and which may trigger the self- harming thoughts…. I would advise that you meet with her to discuss a way forward that would benefit both parties."*

12. What was the "something arising" in consequence of the Claimant's alleged disability? The Claimant asserts:

(a) her need to formally apply for home working because the effects of her disabilities would be significantly exacerbated were she to return to work in the office; and

(b) her complaint/appeal following the Respondent's rejection of this request.

13. If so, was this treatment a proportionate means of achieving a legitimate aim? The Respondent asserts that it required attendance in the office to ensure that customer demands were met without there being a detrimental impact on output. Furthermore, some attendance in the office is required by employees to ensure that teams can work collaboratively and to enable knowledge and expertise to be shared.