EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
X	AND	Ministry of Defence

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT SOUTHAMPTON **ON** 5 to 9 September 2022

EMPLOYMENT JUDGE GRAY **AND MEMBERS** **MR J SHAH MBE**
MR R SPRY-SHUTE

Representation

For the Claimant: Mr C Murray (Counsel)
For the Respondent: Mr J Allsop (Counsel)

JUDGMENT

The unanimous judgment of the tribunal is that:

- **The complaints of discrimination arising from disability (Equality Act 2010 section 15) and for failure in the duty to make reasonable adjustments (Equality Act 2010 sections 20 & 21), all fail and are dismissed.**

JUDGMENT having been delivered orally on the 9 September 2022, with the written record of the decision then being sent to the parties on the 15 September 2022 and written reasons having been requested by email from the Claimant dated 14 September 2022 (which as it was received before the decision was sent to the parties was not understood to be a request for full written reasons until a follow up email was sent by the Claimant dated 21 April 2023), in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This claim was heard at a final hearing for five days (liability only), at the Southampton Employment Tribunal on 5, 6, 7, 8 and 9 September 2022.

2. At the start of the hearing the following preliminary matters were addressed:

2.1 The anonymisation and privacy and restrictions on disclosure order (pursuant to Rule 50 of the Employment Tribunal Rules of Procedure) which had been granted at the hearing on the 28 September 2021 by Employment Judge Livesey. The Employment Judge having considered the submissions made by the parties concluded that it was "evidence of a personal nature" being any evidence of a medical, or other intimate, nature which might reasonably be assumed to be likely to cause significant embarrassment to the complainant if reported. It was agreed that the Judgment referring to the Claimant would anonymise her as "X".

2.2 The parties evidence.

2.2.1 We were presented with an agreed bundle of 743 pages. In addition, there were pages added numbered from 744 to 759, which were copies of social media posts from both sides that were then addressed in examination in chief and cross examination.

2.2.2 It was agreed that we would watch the short 2 min 40 second video submitted by the Claimant into evidence before she then gave her oral evidence.

2.2.3 We were presented with a witness statement from the Claimant and four witness statements in support of the Respondent. It was submitted that the witness statement of Mrs Laing had changed from the version exchanged between the parties. We were therefore presented with a tracked changes version of that statement and our attention was drawn in particular to the amendments to paragraph 25 of that statement (which is also referenced in an opening note of the Respondent at paragraph 22 of that). It was agreed that this matter would be addressed in oral evidence.

2.3 The list of issues. A version of this (see below) was ultimately agreed just before the start of hearing the evidence following the inclusion of the specifics of the allegations as taken from the referenced parts of the claim form and the particularisation of the legitimate aim. As to the particularisation of the legitimate aim, Respondent's Counsel asserted that the justification defence was already pleaded generally in the grounds of resistance (see paragraph 29). Claimant's Counsel took a pragmatic view not objecting to an amendment to include it, if one were needed, as the Claimant was not taken by surprise by what was stated as the legitimate aim. Having

considered the parties representations the panel confirmed that the amendment to the previously agreed list of issues was permitted.

2.4 The chronology had not been agreed with each party producing their own versions. It was agreed that the parties' Counsel would try to agree the chronology while the Tribunal undertook its pre-reading. This was then subsequently agreed by the parties and we are grateful to them for doing so as it was of great assistance to the Tribunal. The parties were also able to agree a cast list.

2.5 The hearing timetable was agreed as follows, it being intended that evidence and submissions would conclude by midday on day four.

Day 1 – preliminary matters to 11am.
Tribunal reading to 2pm
Watch the Claimant's video (2 mins and 40 secs)
Claimant's evidence

Day 2 – Claimant's evidence AM
Respondent's evidence, Ms Forges then Ms Wearmouth

Day 3 – Respondent's evidence, Mrs Laing and then Mrs Redford

Day 4 – parties' submissions (and any evidence left) to finish by midday, then Tribunal deliberations – ***[in the end evidence and submissions concluded at 1pm]***

Day 5 – Tribunal deliberations then judgment (liability only) and then dealing with case management for compensation or other remedies to be determined, if appropriate. ***[Judgment was delivered orally from 2pm]***

The Issues to be determined on liability

3. These were agreed as follows based on a composite version of those agreed at the case management hearing on the 28 September 2021 and now including the relevant parts of the referenced claim form as well as the permitted amendment particularising the Respondent's legitimate aim.

1. Time limits.

(Claim presented on 2 June 2020 following Early Conciliation between 2 April 2020 and 2 May 2020) – ***[Acts on or after the 3 January 2020 will be in time]***.

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Disability

2.1 The Respondent has admitted disability from 29 August 2018 for reason of mental health condition which was caused by early-onset menopause.

3. Discrimination arising from disability (Equality Act 2010 section 15)

3.1 Did the Respondent treat the Claimant unfavourably? The alleged unfavourable treatment as set out in paragraph 22 of the amended particulars of claim is:

3.1.1 Initiating an informal performance plan;

3.1.2 Truncating it before it had run its anticipated course;

3.1.3 Giving the Claimant a First Warning;

3.1.4 Thereafter giving the Claimant a Final Written Warning;

3.1.5 At the meeting of 7 January 2020, reiterating that the Claimant was still not working to the required standard expected of someone of her grade and experience and criticising the quality of the work done by her.

3.2 Did things arise in consequence of the Claimant's disability? The alleged matters arising in consequence of the Claimant's disability are described within paragraph 21 of the amended particulars of claim and are the difficulties experienced by the Claimant:

3.2.1 In meeting deadlines;

3.2.2 Producing work of the accuracy and quality required;

3.2.3 Managing the expected volume of work and performing at the level which her experience and qualifications implied.

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim?

The Respondent relies upon the legitimate aim(s) of ensuring that customer deadlines were met, that work that was produced for customers was accurate and of a high quality and that employees performed work in accordance with their level of experience and qualifications so the team could be run efficiently for the benefit of all.

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 Could something less discriminatory have been done instead;

3.5.3 How should the needs of the Claimant and the Respondent be balanced?

3.6 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

4.1 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4.2 A "PCP" is a provision, criterion or practice. Did the Respondent have any of the four PCPs as identified within paragraph 12 of the amended particulars of claim which are:

4.2.1 the Respondent's performance standards and/or expectations for the completion of work within specified deadlines ("the Deadline PCP");

4.2.2 the Respondent's performance standards and/or expectations for the accuracy and quality of work ("the Quality PCP");

4.2.3 the Respondent's performance standards and/or expectations for the volume of work to be allocated to a Cost Accountant, grade C 2 ("the Volume PCP");

4.2.4 the Respondent's performance standards and/or expectations of the level of complexity of work to be allocated to a Cost Accountant, grade C 2 ("the Complexity PCP).

4.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? The alleged substantial disadvantage is set out within paragraph 13 of the amended particulars of claim, which is:

4.3.1 because her ability to concentrate, to achieve the same output or to achieve the same output within time constraints and to do so with the accuracy which was required were each significantly impaired by her disability.

4.4 Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

4.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests those set out between paragraphs 15 and 19 of the amended particulars of claim, which are:

4.5.1 The Respondent could have created greater flexibility in deadlines to allow for non-productive time caused by the symptoms of the menopause;

4.5.2 The Respondent could have allowed the Claimant to return to the desk she had occupied prior to August 2018 when she had her hysterectomy to avoid the distraction of noise and the frequent movement of personnel;

4.5.3 The Respondent could have allowed the Claimant to work from home when she was adversely affected by menopausal symptoms particularly those of poor concentration and anxiety;

4.5.4 The Respondent could have provided feedback in a positive and supportive fashion rather than in a critical and confrontational context;

4.5.5 The Respondent could have provided assistance by way of Joan or another team member sitting alongside the Claimant and working through tasks together with her;

4.5.6 Reinstating the notional attendance concession;

4.5.7 The Respondent could have allocated less demanding work on a temporary basis;

4.5.8 The Respondent could have transferred her temporarily to a different and less demanding role pending her recovery from her mental ill-health;

4.5.9 The Respondent could have paused or ceased the performance procedure pending the beneficial effects of properly titrated hormone therapy.

4.6 Was it reasonable for the Respondent to have to take those steps and when?

4.7 Did the Respondent fail to take those steps?

The Facts

4. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering the factual and legal submissions made by and on behalf of the respective parties. We were also assisted by a very full agreed chronology and cast list.

5. The Claimant makes complaints of disability discrimination against her current employer alleging something arising and failure to make reasonable adjustments.

6. The Respondent denies any discrimination, also asserting that it had justification to act the way it did and made adjustments that were reasonable.

7. This is not a case where the question of whether the Claimant is a disabled person or not within the meaning of the Equality Act 2010 is in dispute.

8. It is accepted, as noted in the agreed list of issues, that the Claimant is disabled from the 29 August 2018 for reason of mental health condition which was caused by early-onset menopause. There is a broader concession in the amended grounds resistance (see page 36 – paragraph 4) and the agreed chronology as to the Claimant's impairments, but for the purposes of this claim the focus is on a mental impairment.

9. We find the Claimant is a disabled person at times material to this claim for the agreed reason.

10. It is asserted the following difficulties arise from that disability for the Claimant:

    10.1 In meeting deadlines;

    10.2 Producing work of the accuracy and quality required;

    10.3 Managing the expected volume of work and performing at the level which her experience and qualifications implied.

11. Further, that there is a substantial disadvantage to her because her disability impacts on her ability to concentrate, to achieve the same output or to achieve the same output within time constraints and to do so with the accuracy which was required were each significantly impaired by her disability.

12. Although not positively conceded by the Respondent as to the linkage between the disability and the difficulties that arise for the Claimant and the existence of the substantial disadvantage it is clear from the evidence we have been presented, that this is so, and it was accepted by both Mrs Laing and Mrs Redford in cross examination.

13. It was also apparent from the evidence and the submissions made by both Counsel that as to the question of knowledge, the Respondent had the requisite knowledge of the disability and the substantial disadvantage prior to the first

allegation of discrimination, save it was recognised that there was an update to this knowledge position following a letter from the Claimant's GP in September 2019. As Respondent's Counsel acknowledged the Respondent asserts it made reasonable adjustments, it could not do so if it did not have knowledge.

14. By way of background to this case in build up to the first alleged act of discrimination it is not in dispute that the Claimant has an unfortunate run of health and personal circumstances and that her performance suffers.

15. In February 2000 the Claimant was diagnosed with endometriosis and had her first laparoscopy. This was followed in February 2003 by a second laparoscopy. Then a third in September 2017.

16. On the 8 September 2003 the Claimant's employment with the Respondent commenced.

17. On the 20 July 2010 the Claimant commenced her role at the MOD Cost Assurance and Analysis Service based in Portsmouth as a Cost Accountant C2.

18. As Mrs Laing ("DL") explains in her witness statement at paragraphs 3 and 4, reference the Industry Cost Analysis (ICA) team in Portsmouth Dock Yard … "This team has one Section Lead, six Senior Investigating Accountants, four Investigating Accountancy positions and an Administrator. The Claimant is an Investigating Accountant who would normally be line managed by a Senior Investigating Accountant …. 4. In ICA we examine the financial business of industry defence contractors and report financial advice to our internal Customers, usually MOD Commercial teams, who are procuring products and services for Defence. The work varies in complexity and we deliver different products.".

19. Then at paragraph 7 … "MOD review performance via a Performance Appraisal Review (PAR) and the reporting periods are from 1st April to the following 31st March.".

20. In 2015 the Claimant broke her ankle. In October 2017 the Claimant had ankle surgery.

21. In November 2017 the Claimant had the Mirena Coil fitted.

22. The Claimant says she suffered depression and was prescribed anti-depressants in January 2018.

23. In January 2018 DL assumes line management responsibility for the Claimant. At this time, the Claimant was working a 12-week period of reduced hours, mainly working from home until March 2018.

24. DL explains in her witness statement at paragraphs 10 to 17 her views of the Claimant's performance in the period 1 April 2017 to 31 March 2018. These were not challenged by the Claimant in cross examination, and we accept what DL says. In short at this time the Claimant was underperforming, despite reduced hours and being assigned simpler tasks, and there were issues over communication between DL and the Claimant.

25. As at the 2 May 2018 the Claimant continued to suffer with bleeding and internal pain (see page 113).

26. On the 29 August 2018 the Claimant underwent a total hysterectomy.

27. As already noted, the Respondent has admitted disability from 29 August 2018 for reason of mental health condition which was caused by early-onset menopause which is the relevant impairment for the claim made.

28. DL describes in her statement (at paragraphs 18 to 23) continuing performance issues with the Claimant, culminating in December 2018 with Mrs Redford ("JR") (Senior Investigating Accountant) offering to and then acting in a role of supporting and managing the Claimant (as described at paragraph 23).

29. In January 2019 the Claimant returned to work on a phased return and a return-to-work meeting was held on 7 January 2019 (see page 132). We note from page 132 and as acknowledged by the Claimant in cross examination that the Claimant is being given extra time to finish tasks.

30. On the 21 January 2019 the Claimant emailed DL, Tony Lock and Stephen Wheeler to confirm her mental health was still struggling and that she would be unable to return to full working hours that week (see page 135).

31. On the 24 January 2019 there is a Catch-up meeting with the Claimant (see page 136). It notes agreement to the extra reduced week and that the Claimant does not want DL to go to OH for anything.

32. In February 2019 the Claimant returned to normal working hours (see page 143).

33. From 6 to 21 February 2019 the Claimant is on annual leave (see pages 138 to 139).

34. It is on the 16 February 2019 that the Claimant's mother died (see pages 140 to 142)

35. The Claimant has a period of special paid leave from the 25 February 2019. This particular issue was focused on by the Claimant as it was identified that the exchanged version of the witness statement of DL included details of her agreeing for the Claimant to have extra leave. This was then removed from the statement that was presented to us under oath. It was suggested by Claimant's Counsel that as a result of this we should not accept what DL says. We do not agree with this. Although there is a change to the statement, DL explained under oath that it arose because she could not back up what she recalled with documentation so did not want to stand by it. It is not uncommon for such a realisation to happen during the preparation in evidence and is a key purpose of cross examination, for a parties' representative to be able to challenge the sustainability of a disputed factual point.

36. On the 4 March 2019 the Claimant has sick leave (see pages 668 to 669).

37. In April 2019 JR becomes the Claimant's line manager.

38. Between the 4 to 8 April 2019 there is email correspondence between the Claimant, DL and JR addressing the Claimant's expressed concerns about her mental health (see pages 148 to 158). We have noted from the cross examination of the Claimant about these emails that the Claimant does not appear to have an issue with this and agreed that the emails were appropriate.

39. As is noted on the agreed chronology and was not in dispute, on the 9 April 2019 there is a Performance Appraisal Review (PAR) meeting, and the Claimant was given easier tasks to build up her confidence. The Claimant expressed an interest in more challenging work (see page 160).

40. The Claimant says that in April 2019 she suffered bleeding and was sent for a cervical biopsy (see page 164).

41. It is then at this time chronologically we get to the first allegation of discrimination. The Claimant alleges that she was treated unfavourably by the Respondent initiating an informal performance plan.

42. The Agreed chronology notes that on the 24 April 2019 the Informal performance management of the Claimant starts (see page 162).

43. The Claimant refers to this allegation in paragraph 35 of her witness statement saying … "35. On 24 April [2019], I was called into a meeting with Debbie and Joan. I was informed that I was being placed on a three-month informal performance management process because my performance was "currently not meeting the expected standards". This was despite them knowing that I mentally was not coping, had ongoing health issues and had been placed into early menopause. [Please see pages 162 - 164, 172, 267 of the bundle]".

44. DL addresses it at paragraph 32 of her witness statement … "32. On 24th April 2019 we started the Managing Performance Process (MPP), having taken appropriate HR advice, as we were so concerned about the Claimant's performance. We started with the informal part of the process. With the Claimant's agreement Joan referred her to OH to ensure we were doing all that we could from a health perspective (p162)."

45. And in paragraph 18 of JR's witness statement … "18. 24/4/19 Performance and Attendance meeting, p.162. The Claimant was informed that the informal process of MPP was starting. She would: receive extra support from us for at least the next 3 months; be provided with 5 clear actions to undertake and be provided with a programme of weekly meetings. We advised obtaining OH support and again advised contacting the EWS. The Claimant agreed to an OH referral. DL ended with "ask for any support that you need".

46. There is a dispute between the parties about the initiation of this informal performance plan in that the Claimant asserts it as being unfavourable, the Respondent does not accept this. Further, that it was truncated before it had run its anticipated course, the second and connected allegation of something arising, is also in dispute, the Respondent asserting it was not truncated and the Claimant's assertion is based on a misunderstanding on her part (we address this second dispute later in our fact find).

47. Looking carefully at the contemporaneous correspondence to this matter at page 162 we note that it does say they will be giving the Claimant extra support for at least the next three months. We prefer the contemporaneous notes and JR's evidence about this matter. The Claimant's interpretation is wrong. This was an offer of support to the Claimant in knowledge of her undisputed performance difficulties. They also agreed a referral to OH to seek input about the Claimant's condition. The Claimant agrees it is a good idea to go to OH (see page 162).

48. It could also be argued that the Respondent not taking action in knowledge of the Claimant's circumstances and not offering support would be unfavourable treatment.

49. On the 29 April 2019 the Claimant attended occupational health, the report was provided to JR (see pages 174 to 176).

50. We accept what JR says in paragraph 19 of her witness statement. This is supported by the contemporaneous documents referred to. The Claimant is provided support in line with the recommendations of OH. This would not have happened if the Respondent had not initiated an informal performance plan.

51. As is also noted in the agreed chronology on the 30 April 2019 there is a Stress reduction meeting. The Claimant started working reduced hours without a reduction in pay; with one task removed; and the Claimant able to set her own deadlines (see pages 191 to 192 and 608). Although the Claimant disputed her ability to set her own deadlines in cross examination this was contrary to the contemporaneous documents we were taken to and the witness evidence of JR, which we accept.

52. On the 8 May 2019 there is a further meeting to discuss mitigation of the Claimant's work stress (see page 191). On the 13 May 2019 there is an email to record the discussions from those Stress reduction meetings (see pages 191 to 192).

53. In May 2019 the Claimant expressed to DL and JR that she felt suicidal (see page 190).

54. Then on the 16 May 2019 there is a Progress meeting. Reduced hours are in place (18 hours per week) extended to the week beginning 20 May 2019 (see page 203).

55. What became apparent to us in the oral evidence in this case is the focus on two potential reasonable adjustments at this time that the Claimant says she was asking for, but the Respondent was not making. These are allowing the Claimant to move back to her old desk and reinstating the notional attendance concession.

56. Firstly, that the Claimant be allowed to move back to her old desk. The Claimant asserts that the Respondent could have allowed her to return to the desk she had occupied prior to August 2018 when she had her hysterectomy to avoid the distraction of noise and the frequent movement of personnel. This is addressed by the Claimant in paragraph 51 of her witness statement … "51. At most of the Thursday meetings with Joan I complained about the noise at the new desk blocking my ability to concentrate. I requested a return to my old desk as it was empty. Joan said that Debbie wouldn't allow it and I could only work on the other

side of the office. The other side wasn't air-conditioned and as I suffered with terrible hot flushes I would not be able to work there. It also didn't have any desks, just meeting tables. Only one desk had an IT connection and that's the conference room which was regularly booked. I couldn't block out any noise and began wearing headphones; something I feel is rude. It helped a little but I was still struggling to concentrate. I was refused permission to work from home."

57. This factual assertion by the Claimant was completely disputed by JR and DL. JR said the Claimant never asked to move back to her old desk. The only reference to the office being noisy came up at a meeting on the 18 November 2019 (see page 530) and was addressed with discussion around headphones or use of the conference room. We accept the evidence of JR on this as supported by the contemporaneous documents. Further, JR gave oral evidence saying that the old desk was itself noisy due to its proximity to the other team and a gregarious member of that team. Plus, the old desk was used as a hot desk. We find that the Claimant did not request it and further it has not been proven on the balance of probability to us that making such a move would have alleviated any substantial disadvantage associated to the alleged PCPs.

58. We would also note that with reference to the Claimant's assertion that she was refused permission to work from home, this has not been proven on the balance of probability either. The Respondent has demonstrated through evidence and contemporaneous documents that it was asked for by the Claimant and granted. As was submitted by Respondent's Counsel in written submissions, it is supported by way of reference to pages 205, 560, 570 and 765 of the hearing bundle. All that was usually required was that the fact that the Claimant was working from home was placed in JR's diary (see page 768).

59. Considering then the other area of potential reasonable adjustment that is in dispute, whether the Respondent should have reinstated the notional attendance concession.

60. In short this was where a manager could exercise discretion to allow for a workday that is cut short by departure due to sickness to not be recorded on the HRMS system as sickness. This has the positive effect of meaning such sickness does not build up to trigger potential consequences of formal warnings and reduced pay due to sickness levels.

61. It appears to have been "turned off" around April 2019 and DL explained that she considered it helpful to do so for the purposes of visibility of sickness of the Claimant. DL says that she did this in consultation with HR advice (see page 183 for example). She says it was done to assist support for the Claimant by having a fuller understanding of actual absence. Further, DL says that at the time the Claimant was given reassurance that no formal action would happen. JR supported this in her evidence and confirmed she also gave the Claimant such assurances.

62. The Claimant disputed that she was given such assurances and that she felt under pressure to stay in work when she was not well enough to do so.

63. About the reinstating of the notional attendance concession this is noted as an issue for the Claimant on the 22 May 2019 when the Claimant attended occupational health, (see pages 206 to 208). See in particular page 206 which notes that its removal is concerning the Claimant. Then at page 207 it records that the concerns from the Claimant have been noted in the report. It notes that this … "is a decision of management however I would recommend this is considered together with the available medical information.".

64. It is not apparent from the documents presented to us in this case that the matter is raised at the stress reduction meetings taking place around this time. See for example the email that follows a Stress reduction meeting on the 4 June 2019 (see pages 228 to 229). Nor on the 18 June 2019 when there are meetings between the Claimant, JR and DL about performance and delivery of objectives (see pages 242 to 245).

65. This does become an issue raised by the Claimant in her letter dated 18 July 2019 (pages 347 to 353) headed "Attempt at Informal Resolution of Bullying / Harassment Allegation".

66. As an aside about this document, it was raised on behalf of the Claimant in cross examination that this letter should have been treated as a formal grievance. This was not accepted by the Respondent's witnesses who noted it was submitted as an informal letter and the Claimant wanted it addressed in that way. This is clearly right as the Claimant herself says at the conclusion of her letter (page 353) that she will consider making a formal complaint against DL and JR if she is not happy with their response or the behaviour referred to continues. In any event it was not disputed that this process was in line with the relevant policy.

67. We can see from page 363 that DL gets advice about the notional attendance concession. This then forms part of the response letter (pages 375 to 379) and in particular page 376. It refers to if the Claimant did need to take some sick leave it is understood that would be recorded before any pay adjustments would be made or trigger points reached. They would not want the Claimant to stay at work if she felt unwell or unable to cope, the above are the recording mechanisms. Perhaps this is not as clear as it could be, that no negative action will be taken, but it is consistent with what DL and JR say they were telling the Claimant.

68. As is noted in an email dated 11 September 2019 (page 453) the notional attendance concession was reinstated following the three-month period.

69. The Claimant's case also asserts that the Respondent could have provided feedback in a positive and supportive fashion rather than in a critical and confrontational context. The Respondent denied it didn't do this.

70. We note from an email 18 June 2019 (page 242) that JR advises that the Claimant doesn't works extra hours. This appears to be a constructive message from JR to help the Claimant manage her health. It also notes that the Respondent is reacting to what the Claimant is telling them about how she feels.

71. The Claimant in reply to that email on the 18 June 2019 (page 245) writes … "And yet despite that, despite me finally gaining some confidence from getting the

EMTC report completed, you and Debbie have destroyed the little part of me that was finally feeling ok.". We understand from considering paragraph 39 of the Claimant's statement that this follows JR indicating to the Claimant that she will be given a formal warning interview. It is not in dispute that arrangements are then made to set up that interview with the Claimant being able to attend with union assistance.

72. What was clearly in dispute though between the Claimant and JR was the way JR conducted herself at the meeting on the 18 June 2019. The Claimant describes in paragraph 39 that when … "I walked in she was sat the other side of a desk, arms folded, shaking her head. She didn't say a word for an extended period. I sat down opposite her. When she continued to do this I said, 'What? What is it?' I felt like a child walking in to a head teacher's office.".

73. JR denied she would act in this way and usually they would sit side by side, offer comfort to each other and the meetings would take time.

74. We accept what JR says. We found her recall of matters to be consistent with the contemporaneous documents and it is of note the Claimant does not raise this concern in her email that follows the meeting (page 245).

75. On the 26 June 2019 the Claimant attended occupational health, the report was provided to JR (see pages 257 to 259).

76. In her evidence the Claimant asserted that the Respondent did not follow what was recommended in this report, in short to provide supportive and empathetic management. DL and JR did not agree with this. They maintained that they did provide such support, DL explaining that she was committing around 4 to 5 hours a week to just that for the Claimant and that JR would be more than that. We also note as an example the message at page 796, where a system was in place for the Claimant to discreetly request assistance from JR. We accept the evidence of the Respondent in this matter.

77. On the 2 July 2019 there is a further Stress reduction meeting (see pages 297 to 298). We note there is no reference to there being issues concerning the Claimant's desk location or of the notional sick allowance.

78. On the 3 July 2019 there is a Formal Performance Interview (see pages 322 to 325). The Claimant attends this with union representation.

79. The Claimant asserts in her evidence that she was given a warning at that meeting which is her third allegation of unfavourable treatment. JR denied this.

80. The notes for this meeting are at pages 311 to 319. Looking at page 319 it is clear that no decision has been made as at the 3 July 2019.

81. We also note that it is stated in the agreed chronology that on the 10 July 2019 the Claimant is issued with a first warning for poor performance under the Managing Poor Performance (MPP) procedure. The Claimant is placed on a 4-week formal review period to achieve the improvements required. The support provided is set out. The Claimant did not appeal this warning. (see pages 322 to 325).

82. The Claimant's second allegation of unfavourable treatment can be considered here as the Claimant asserts that the issuing of this warning is truncating the three-month anticipated course of the process started on the 24 April 2019.

83. The Claimant addresses the second and third allegations of unfavourable treatment in paragraph 42 of her witness statement … "42. On 03 July 2019 I was called into a meeting with Joan. At the meeting she confirmed that my performance was underachieving and placed me on a first warning for poor performance. This was less than the three month timescale advised. Joan followed this up with a formal warning letter. At no point did she talk through any appeal process. I was so distressed and ashamed that I couldn't even read the letter. They had made me feel this is what I deserved. I did not have the mental capacity to appeal it and I believe they knew that. [Please see pages 279 – 281, 284 – 290, 295 – 325, 330 - 333 of the bundle]".

84. This is address by JR in paragraphs 30 and 31 of her statement. In paragraph 31 JR explains … "31. The Claimant claims that I truncated the informal process. However, after 10 weeks it was clear that little or no progress had been made and further measures were needed to help her. I had held 3 stress meetings and the Claimant had completed the SAT twice. Her scores overall were not high risk and I addressed any individual areas that scored higher than the norm i.e. she said her deadlines were unachievable, so she set her own deadlines.".

85. We find that the warning is not confirmed until the 10 July 2019 (see pages 322 to 325).

86. As to the truncating, as we have already noted the reference to 3 months is the offer of support (see page 162). It is not that no action will be taken for that period. It is acknowledged by the Claimant's union representative that there is a misunderstanding (see page 317). We find that there is a misunderstanding on the part of the Claimant about this matter which would mean that there was no truncation as she asserts, and this asserted unfavourable treatment has therefore not been proven on the balance of probability.

87. Being issued the first warning though we accept is unfavourable treatment to the Claimant. We note that the Claimant confirms in paragraph 42 that she was so distressed and ashamed that she couldn't even read the letter. The warning also notes that the Claimant is to be monitored to the 29 August 2019 (page 324).

88. We note that when the warning is given (10 July 2019) the Claimant is advised of her right of appeal (see page 325).

89. As already referred to chronologically on the 18 July 2019 the Claimant submitted the informal bullying and harassment letter to JR and DL (see pages 338 to 344).

90. On the 18 July 2019 there is a Progress meeting (see pages 354 to 355).

91. On the 25 July 2019 DL responded to the informal bullying and harassment letter on behalf of herself and JR (see pages 375 to 379).

92. On the 25 July 2019 there is an updating of spreadsheets as an aid for the Claimant during the performance review process (see page 380).

93. On the 1 August 2019 there is a Performance review meeting and extension of review period to give the Claimant the opportunity to demonstrate her improved performance (see pages 392 to 399).

94. On the 22 August 2019 there is a Stress reduction meeting (see pages 412 to 413).

95. On the 27 August 2019 there is Performance review meeting (see pages 408 to 410).

96. On the 29 August 2019 there is an Email from JR to the Claimant referring to the fact that the Claimant had told her that the Claimant 'felt suicidal at the weekend' and expressing concern about her working excess hours (see page 414).

97. JR was challenged in cross examination about this, saying she had under-recorded the seriousness. JR gave a cogent explanation as to why she viewed the matter as she recorded it at that time, including how the Claimant viewed the miracle of her [the Claimant's] son. We accept what JR says on this matter.

98. On the 5 September 2019 there is a Performance review meeting (See pages 439 to 441).

99. We then chronologically get to the fourth allegation of unfavourable treatment, that on the 9 September 2019 JR informed the Claimant she was placed on a Final Written Warning for poor performance (see pages 427 to 432).

100. The Claimant addresses this in paragraph 56 of her witness statement … "56. On 9 September, I met again with Joan in relation to my performance. Due to the delay of the report, I was issued with a Final Written Warning. I was disgusted and shocked. The delay was down to a change that Debbie made in the review meeting. It didn't matter to Joan, despite her knowing how desperately unwell I was mentally. I couldn't fight it, I was so exhausted and weak. [Please see pages 427 – 436, 439 – 452, 455 – 461 of the bundle].".

101. JR addresses this in paragraph 41 of her witness statement … "Given the Claimant's performance I initiated Stage 2 of the MPP process and issued the Claimant with a Final Written Warning p.446-452. The reasons for my decision are set out in the letter, all of which were raised in the 1st Written Warning and there had been no improvement.".

102. As with the previous warning this escalation of warning is something that we view as unfavourable treatment to the Claimant.

103. From the evidence of the Claimant, she attributes the issuing of the warning to the delay of the report, and that the delay was down to a change that DL made in the review meeting. The Claimant is not herself therefore attributing this to something arising from her disability. However, despite this, it does not appear to be in dispute that the Claimant's performance difficulties stem from things arising from her disability.

104. On the 12 September 2019 the Claimant is signed off work until 17 November 2019 (See page 454).

105. On the 16 September 2019 the monitoring for the final warning for poor performance is paused due to illness.

106. On the 18 September 2019 the Claimant attended occupational health, the report was provided to JR (see pages 466 to 468).

107. On the 20 September 2019 the Claimant submitted her written appeal against the final warning for poor performance (see pages 471 to 479).

108. On the 23 September 2019 the Claimant attended occupational health, the report was provided to JR (see pages 480 to 481).

109. On the 26 September 2019 the Claimant's GP confirmed in writing that the Claimant had been: "re-assessed by the gynaecologists who feel her mental health symptoms are being significantly contributed to by her hormonal abnormalities post-surgery" (see page 486).

110. On the 27 September 2019 the Claimant provided the GP's letter to DL.

111. The Claimant refers to this in paragraph 62 of her witness statement … "62. On or around 27 September, I gave this letter plus a sick note to Debbie. It was therefore obvious that I was suffering mentally and not in a position to be able to work. [Please see pages 471 – 479, 486 - 488, 489 – 495 of the bundle]".

112. On the 10 October 2019 the Claimant attended occupational health, the report was provided to JR. It notes that the Claimant's mental ill health is likely to improve in time/with treatment, but that may take several more months; however, she may be well enough to attempt a gradual return to work before that, with temporary work adjustments e.g., initial reduced hours/work demands/pressures/deadlines etc. The Claimant remains on sick leave (see pages 492 to 494).

113. On the 18 November 2019 the Claimant returns to work on phased return (see pages 494, 506, 522 to 523).

114. Also, noted in the agreed chronology, on the 18 November 2019 there is a Return-to-Work meeting setting out a phased return; an offer to use the conference room for work; and continuation of stress assessment. It was agreed that the Claimant's appeal could be paused and that she would not be monitored under the performance process until her hours returned to 25 hours per week (see pages 530 to 531).

115. On the 21 November 2019 the Claimant attended occupational health, the report was provided to JR (see pages 535 to 537). This report confirms management should consider a phased return.

116. On the 4 December 2019 there is a Stress reduction meeting between the Claimant and JR (see pages 566 to 568).

117. Chronologically we then get to the fifth allegation of unfavourable treatment. That is at the meeting of 7 January 2020, reiterating that the Claimant was still not working to the required standard expected of someone of her grade and experience and criticising the quality of the work done by her.

118. It is recorded in the agreed chronology as on the 7 January 2020 that DL has a Performance Meeting with the Claimant which amongst other things reviewed as per the MPP the performance in the week commencing 9 September 2019 which had been deferred (see pages 574 to 582).

119. The Claimant addresses the matter in paragraph 67 of here witness statement … "67. On 07 January [2020], Debbie held the first review meeting. This was the first week of me working under the second warning and was a continuation from 16 September 2019. The conclusion of which was that I still not working to the required standard for my grade and experience. Debbie reminded me that I was subject to a final warning for performance. [Please see pages 572 – 597 of the bundle]."

120. DL addresses it very briefly in her witness statement at paragraph 42 … "42. We had a meeting with the Claimant after the Christmas break on 7th January 2020 (p.574-577)."

121. In the follow up email from DL to the Claimant (dated 7 January 2020 and timed at 15:56 – pages 575 to 577) reference is made to the performance review aspect.

122. We have noted that at page 575 it says about the Claimant's health and well-being … "you said you were feeling fine and your dad is out of hospital but very frail.".

123. At page 576 it says … "Now you are on full working hours I needed to give you feedback about your first week of your next performance period. I have included a bit of information prior and after the period to provide context.".

124. The email then goes on to record a review of work done in August and September 2019. It concludes … "You are on a final warning for performance and you are still not working to the required standard for your grade and experience… We have made many adjustments and given you support in recognition of your health issues. I asked if there was anything else we could do and your were unable to think of anything. Please take some time to consider what other support can be given in order for your performance to improve.". It notes that the Claimant was upset after the meeting concluded.

125. The allegation of unfavourable treatment is that at the meeting of 7 January 2020, reiterating that the Claimant was still not working to the required standard expected of someone of her grade and experience and criticising the quality of the work done by her. This happens and we accept it is unfavourable to the Claimant.

126. We have found that the warnings and this re-iteration are unfavourable to the Claimant.

127. Although the Claimant does not attribute the final warning to matters arsing from her disability, logically it would appear so as both DL and JR accepted that they

did what they did because of the Claimant's poor performance and they accepted the cause of that was linked to mental health.

128. The issue for us therefore is to consider was the treatment a proportionate means of achieving a legitimate aim

129. The Respondent's legitimate aim is ensuring that customer deadlines were met, that work that was produced for customers was accurate and of a high quality and that employees performed work in accordance with their level of experience and qualifications so the team could be run efficiently for the benefit of all.

130. The Claimant has not disputed this legitimate aim.

131. The Claimant does not dispute poor performance on her part. The Respondent has put forward undisputed evidence as the impact of poor performance (see DL's witness statement at paragraphs 31, 47 and 48).

132. The Respondent has a performance process, and with input from OH and the Claimant with union assistance she has gone through that process.

133. Considering matters following the meeting on the 7 January 2020.

134. In the email from the Claimant to DL in reply and cc to JR dated 7 January 2020 and timed at 17:06 the Claimant says … "I even have proof from the hospital and my GP that the hormones have meant I could never get better until they were resolved and they still aren't, I have improved but not enough yet – there hasn't been enough time to measure the impact)…. And now you're saying it wasn't good enough. My efforts, whilst incredibly poorly, were pointless, detrimental in fact because you're now holding it against me.".

135. The Claimant does not ask in this email for the MPP to be suspended. However, we have noted in paragraph 64 of the Claimant's witness statement … "64. On 19 November [2019] Joan and I had an informal meeting. I pleaded with Joan to stop the MPP as it was impacting on my mental health.".

136. This is addressed in an email from JR to the Claimant on the 26 November 2019 (see pages 543 to 546) timed at 8:53.

137. About the MPP (at page 546) … "I mentioned that at present all MPP action is held in abeyance but that once you return to your full contractual hours and duties, the process would recommence. Due to having concerns over your metal health and wellbeing I sought some advice from DBS and they reassured that it is not unusual for any employee being taken through any formal process to feel stress/anxious but that it was recognised that having commenced a formal administrative process, the conclusion of those processes, in whatever format that may take can alleviate those stressors.". This highlights the thinking of the Respondent at that time, that recognising that a formal administrative process has been commenced, the conclusion of those processes, in whatever format that may take can alleviate those stressors.

138. A cessation of the performance process is not mentioned by OH in its reports. Further, the letter from the GP dated 26 September 2019 does not suggest it. DL

says she was aware of that letter in her meeting with the Claimant, but she did not explore with the Claimant what impact the hormone imbalance may have been having on her performance back in September 2019.

139. It is in the email from the Claimant dated 8 January 2020 timed at 12:07 to DL and JR (page 584 to 586) that the Claimant's position is made clear. It says (see page 586) …

> "You holding that week in September against me, that report was comprehensive but contained a few aesthetic errors, has sent me right back again. I clearly seem as useless and pointless by you, that I shouldn't be here, I add no value, I'm just an invitation to be got rid of. If you actually wanted me to get well you would use the 'line manager's discretion' to say 'actually, the MPP processes is destroying her and preventing her from getting better' (as I have told you many times) so we won't implement it. I did exactly that for a staff member at NCHQ, she needed support not punishment."

> "I should not be made to cry at work. I need you to stop the MPP and stop it now. I just need support and guidance, what I thought you were giving me, please stop punishing me for having disabilities and being female. I cannot work under the MPP process, it is destroying me. I'm not someone who sits playing minesweeper on their computer but I am slower than I would like to be. I suggested booking some of my time to sick leave or to add time to my tasks to show that I cannot work at full speed yet, until I am better, this would take some of the pressures off and help me to get better support me to do so."

> "I cannot work effectively when I feel so low, all that's in my head are negative thoughts you have put there. So I am now going to leave the office and class the rest of the day as sick. I will see my GP tomorrow to get a sick note and I will look to increasing my hormones again, hopefully enough time has passed to prove that it's still not at the level it needs to be."

> "The MPP, if not stopped, has to go ahead in terms of the appeal. I cannot work in an environment with that stress, it is damaging my mental health in an alarming way my recovery has now been wiped out by the meeting yesterday. I can't work at this level of stress/pettiness, I just want to be treated normally given support to help me get better."

140. In an email to Sue Phillips, DL seeks advice about the email and provides a draft response that she proposes to send to the Claimant which includes … "It is not my intention at the moment to stop the MPP process. (not sure about this)."

141. In reply DL is told to leave out that sentence and instead to discuss that when they meet her.

142. On the 9 January 2020 the Claimant was signed off sick from work (see pages 668 to 669).

143. On the 13 January 2020 the Claimant met with Sam Des Forges ("SF") (see pages 600 to 603).

144. On the 15 January 2020 the Claimant met with Kathryn Wearmouth ("KW") (see page 600).

145. On the 22 January 2020 the Claimant attended occupational health, the report was provided to JR (see pages 611 to 612).

146. On the 27 January 2020 Sue Phillips confirmed to JR, DL and the Claimant that the performance warnings would be cancelled and the attendance meeting and the MPP appeal was no longer taking place (see pages 624 to 625).

147. At the end of January beginning of February 2020 the Claimant was placed on secondment under the temporary line management of Clare Jones (see pages 630 and 639 to 642).

148. As KW says in paragraph 7 of her witness statement … "7. What concerned me was that the Claimant said that in September (which was well into the process), her doctor had diagnosed that her oestrogen levels were so low she wouldn't be able to perform properly. This was information that had impacted on her performance but it had not been picked up in the OH reports previously. As this was information that I was not previously aware of, I was not comfortable that we carry on with the poor performance issue. I discussed this with Sam des Forges (my line manager who had had a similar conversation with the Claimant) and we came to the view that everyone could benefit from some breathing space as Debbie and Joan were very stressed about the situation and we have a duty of care to all three individuals.".

149. What KW says was not in dispute. The new information led to the change of process. A question for us is whether the cessation of the process and the secondment could have been done sooner. It short from when were those adjustments reasonable?

150. It is not in dispute that the Claimant is at no time prior to the involvement of SF or KW expressing a desire to move. It is not recommended by OH. It is also not clear until the 8 January 2020 that the Claimant seeks a cessation of the performance process. This then happens on the 27 January 2020.

151. The Respondent accepts in broad terms that it applied the following PCPs in this case (see paragraph 26 of the amended grounds of resistance (at page 39)):

151.1 the Respondent's performance standards and/or expectations for the completion of work within specified deadlines ("the Deadline PCP");

151.2 the Respondent's performance standards and/or expectations for the accuracy and quality of work ("the Quality PCP");

151.3 the Respondent's performance standards and/or expectations for the volume of work to be allocated to a Cost Accountant, grade C 2 ("the Volume PCP");

151.4 the Respondent's performance standards and/or expectations of the level of complexity of work to be allocated to a Cost Accountant, grade C 2 ("the Complexity PCP).

152. We have already noted that the alleged substantial disadvantage is because, of the Claimant's ability to concentrate, to achieve the same output or to achieve the same output within time constraints and to do so with the accuracy which was required, were each significantly impaired by her disability.

153. Considering the adjustments suggested by the Claimant we would comment on each from our fact find as follows:

153.1 We accept that the Respondent did create greater flexibility in deadlines to allow for non-productive time caused by the symptoms of the menopause.

153.2 The Claimant did not request to return to the desk she had occupied prior to August 2018 when she had her hysterectomy. Further, it has not been proven on the balance of probability that this location would avoid the distraction of noise and the frequent movement of personnel nor that such a location would potentially alleviate any substantial disadvantage.

153.3 We find that the Respondent did allow the Claimant to work from home so that the Claimant could have done so when she was adversely affected by menopausal symptoms particularly those of poor concentration and anxiety.

153.4 It has not been proven on the balance of probability that the Respondent provided feedback in a critical and confrontational context as asserted by the Claimant. The Respondent does appear to have acted positively and supportively to the Claimant for example by having a system in place to allow the Claimant to make a discrete request for assistance.

153.5 We find that the Respondent did provided assistance by way of JR or another team member sitting alongside the Claimant and working through tasks together with her.

153.6 The notional attendance concession was reinstated after a period of three months. We accept the Respondent's evidence that it was communicated to the Claimant that its removal was not to her detriment, further it has not been proven to us on the balance of probability that such an adjustment would alleviate the Claimant's asserted disadvantage.

153.7 We accept that the Respondent had allocated less demanding work to the Claimant on a temporary basis.

153.8 The Respondent did transfer the Claimant temporarily to a different and less demanding role pending her recovery from her mental ill-health as at the end of January 2020. This was not an action step that was raised as being reasonable by any party, including OH, until it was considered necessary by SF and KW when interacting with the Claimant and the other parties involved during January 2020.

153.9 The Respondent did pause and then ultimately cease as of the 27 January 2020 the performance procedure pending the beneficial effects of properly titrated hormone therapy. A cessation was not something the Claimant expressed as desirable until the 8 January 2020, and it was actioned following her interaction with SF and KW during January 2020.

154. We would note that the Claimant has not raised issues of concern or complaint about the conduct of SF or KW.

The Law

Disability

155. As set out in ***section 6 and schedule 1 of the Equality Act 2010*** a person P has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person.

156. It is not in dispute in this claim that the Claimant is a disabled person at times material to the matters complained about.

157. As to the other legal matters we are to consider we were assisted by full written submissions on the relevant law by both Counsel in this case.

Discrimination arising from disability (S.15)

158. S.15 of the Equality Act states:

15 Discrimination arising from disability

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

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

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

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

159. We are reminded that the correct approach to the operation of section 15 was set out at paragraph 31 by Simler P in the case of ***Pnaiser v NHS England [2016] IRLR 170***. In essence, as summarised by Harvey at Q[1468], the position is:

(1) Was there unfavourable treatment and by whom?

(2) What caused the impugned treatment, or what was the reason for it?

(3) Motive is irrelevant.

(4) Was the cause/reason 'something' arising in consequence of the claimant's disability?

(5) The more links in the chain of causation, the harder it will be to establish the necessary connection.

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

(7) The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.

(8) It does not matter in which order these matters are considered by the tribunal.

160. Section 15 raises two simple questions of fact: (1) what was the relevant treatment and (2) was it unfavourable to the claimant? (***Williams v trustees of Swansea University pension and insurance scheme [2018] UKSC 65)***.

161. In ***The Trustees of Swansea University Pension & Assurances Scheme and another v Williams [2015] IRLR 885***, the EAT held that treatment cannot be 'unfavourable' merely because it is thought it could have been more advantageous, or is insufficiently advantageous (upheld on appeal [2017] IRLR 882 and [2019] IRLR 306).

162. In ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305***, Langstaff P (at paragraphs 26-27), it was emphasised that the s.15(1)(a) EqA 2010 analysis required the Employment Tribunal to focus on two separate stages (in whichever order it considers appropriate), firstly the 'something' and secondly the fact that the 'something' must be 'something arising in consequence of 'B's disability', which constitutes a second causative (consequential) link. (See also ***City of York Council v Grosset [2018] IRLR 746 CA*** at paragraph 36).

163. In terms of causation, or to identify the link, there are two causative issues to determine … "On causation, the approach to *s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment, then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence. (See City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746)" -* ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** (paragraph 62).

164. At paragraph 31(b) of ***Pnaiser***, Simler P emphasised the focus of the analysis to be on the state of mind of the alleged discriminator as to the underlying reason for the allegedly unfavourable treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but it must have at least a significant (or more than trivial) influence on the mind of the person alleged to have caused the unfavourable treatment. See further: ***Dunn v SOSJ [2019] IRLR 298***.

165. In terms of knowledge, there need only be actual or constructive knowledge as to the disabilities themselves, not to the causal link between the disability and its consequent effects which led to the unfavourable treatment6. 6 See summary of the authorities by HHJ Eady ***QC in A ltd v Z, [2019] IRLR 952*** (paragraph 23).

166. Discrimination arising from disability is broadly defined and requires objective justification, see ***Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43***.

167. The test of justification is an objective one, according to which the employment tribunal must make its own assessment, see ***City of York Council v Grosset [2018] IRLR 746, CA***.

168. Claimant's Counsel submits that this is a case where the tribunal should consider the application of the policies to this particular claimant, rather than any justification for policy itself (see ***Buchanan v Commissioner of Police for the Metropolis [2016] IRLR 918 47-49***), because the line manager and/or CSO retained discretion.

169. Whether an aim is 'legitimate' is a question of fact for the Employment Tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim. As was stated by Mummery L.J. in ***R (Elias) v Secretary of State for Defence [2006] IRLR 934 CA*** … *" … the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end."*

170. As for proportionality, in the same case it was held that a three-fold criteria should be applied, firstly whether the objective is sufficiently important to justify limiting a fundamental right, secondly whether the measure is rationally connected to the objective and thirdly whether the means chosen are no more than is necessary to accomplish the objective. There is a further consideration that is separable from the third criterion, namely whether the steps complained of strike a fair balance between the need to accomplish the aim and the detriment suffered, see ***DWP v Boyers [2022] IRLR 741*** at paragraph 23.

171. The Employment Tribunal should conduct a fair and detailed analysis of the working practices and business considerations involved, including the business needs of the employer. See further: ***Hensman v Ministry of Defence [2014] EqLR 670*** at paragraph 45 and the discussion in ***The Trustees of Swansea University Pension & Assurances Scheme and another v Williams (EAT)*** above at paragraphs 41-43.

172. In the case of ***Birtenshaw v Oldfield [2019] IRLR 946***, the EAT emphasised the difference in the analysis required in considering justification in a section 15 EqA 2010 claim as opposed to the reasonableness of adjustments in a section 20 EqA 2010 claim. The EAT also highlighted, amongst other things, that in considering the objective question of the employer's justification, the Employment Tribunal should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted rationally and responsibly. See paragraph 38.

Reasonable adjustments

173. S.20 of the Equality Act states:

(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.

174. ***Paragraph 20(1) of Schedule 8 to the EqA*** provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid — ***paragraph 20(1)(b)***.

175. The Tribunal must identify:

175.1 The provision, criterion or practice applied by or on behalf of the Respondent;

175.2 the Identity of any non-disabled comparators (if appropriate): and

175.3 the nature and extent of the substantial disadvantage suffered by the Claimant. ***Environment Agency v Rowan [2008] IRLR 20*** paragraph 27.

176. The identification of the applicable PCP is the crucial first step that the Claimant is required to take. If the PCP relates to a procedure, it must apply to others than the Claimant. Otherwise, there can be no comparative disadvantage. Only once the Employment Tribunal has gone through the steps in ***Rowan*** will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice on Employment (2011) (which reflect s.18B DDA 1995).

177. A substantial disadvantage is one which is more than minor or trivial, Equality Act 2010 section 212(1). It is a question of fact assessed on an objective basis and

measured by comparison with what the position would be if the disabled person in question did not have a disability, ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090 EAT*** paragraph 49.

178. The duty to make adjustment arises by operation of law, a claimant is not required to identify what should be done, although commonly this happens.

179. It is important to note that an employer can be in breach of the duty to make adjustments even though it is not aware that steps were available that could have addressed the disadvantage, ***Camden London Borough v Price-Job UKEAT/0507/06***.

180. The test of reasonableness imports an objective standard, Maurice Kay LJ in ***Smith v Churchills Stairlifts plc [2006] IRLR 41*** at paragraph 45.

181. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. See further: ***Salford NHS Primary Care Trust v Smith [2011] EqLR 1119***. However, the threshold that is required is that the adjustment had 'a prospect' of alleviating the substantial disadvantage, there is no higher requirement. See further: ***Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075***.

182. In the recent case of ***Rakova v London North West Healthcare NHS Trust [2020] IRLR 503***, the EAT held that where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable her to be more efficient would indeed relate to the substantial disadvantage she would otherwise suffer.

183. However, the fundamental question is 'what steps it was reasonable for a respondent to have to take in order to avoid a particular disadvantage', not what ought 'reasonably have been offered'. See further: ***Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins UKEAT/0579/12/DM***.

184. A respondent must have actual or constructive knowledge that the employee was a disabled person, but only to the extent of having actual or constructive knowledge of the facts constituting the Claimant's disability. In order to have that requisite knowledge, it is not necessary for a respondent to know the consequence of those facts (as a matter of law) under s.6 EqA 2010. See further: ***Gallop v Newport City Council [2014] IRLR 211 CA*** at paragraph 36. The issue is what should the employer have reasonably been expected to know. See further: ***A Ltd v Z [2019] IRLR 952***.

Time limits

185. Section 120 of the EqA 2010 confers jurisdiction on claims to employment tribunals, and section 123(1) provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months

starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.

186. Section 123(3)(a) of the EqA 2010 provides for conduct that extends over a period to be treated as being done at the end of that period.

187. Section 123(3)(b) of the EqA 2010, failure to do something, is to be treated as occurring when the person in question decided upon it. Where there is no evidence to the contrary, s.123(4) of the EqA 2010 provides a default means by which the date of the 'decision' can be identified, either when there is an inconsistent act or alternatively the expiry of the period in which the employer might reasonably have been expected to do it.

188. An ongoing situation or continuing state of affairs amounting to discrimination was considered in ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96***. As Respondent's Counsel reminds us in his submissions it is not sufficient to rely on an alleged overarching or floating discriminatory state of affairs without that state of affairs being anchored by discrete acts of discrimination. See further: ***South Western Ambulance Service NHS Trust v King [2020] IRLR*** 168 at paragraphs 21-23 and 35 36 per Chaudhury P.

189. The identification of the period in which the employer might reasonably have been expected to comply with its duty to make reasonable adjustments (if established) should be taken from the point of view of the Claimant, having regard to facts known or which ought reasonably to have been known by the Claimant at the relevant time. see, ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** at paragraph 14.

190. The Employment Tribunal has jurisdiction to extend time on a just and equitable basis. The discretion to extend time is very wide, see, ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** at paragraphs 18-19, although factors that will almost always be relevant to consider in this context are (a) the length of, and reasons for the delay and (b) whether the delay has prejudiced the Respondent.

191. Claimant's Counsel submits that whilst there is no direct evidence as to why the Claimant did not commence ACAS early conciliation and/or present her claim earlier, that is not a prerequisite. Whilst that is a factor to consider in favour of the Respondent, it does not obviate the need to consider the balance of prejudice and the exercise of discretion. See ***Szmidt v AC Produce Imports Ltd EAT, UKEAT/0291/14/MC*** paragraph 5.

The Decision

192. The Claimant makes complaints of disability discrimination against her current employer alleging something arising and failure to make reasonable adjustments.

193. The Respondent denies any discrimination, also asserting that it had justification to act the way it did and made adjustments that were reasonable.

194. This is not a case where the question of whether the Claimant is a disabled person or not within the meaning of the Equality Act 2010 is in dispute. The Respondent has admitted disability from 29 August 2018 for reason of mental health condition which was caused by early-onset menopause.

195. **Discrimination arising from disability (Equality Act 2010 section 15)**

196. Did the Respondent treat the Claimant unfavourably?

197. Considering each of the allegations:

197.1 Initiating an informal performance plan. We do not find this to be unfavourable treatment. Looking carefully at the contemporaneous correspondence to this matter at page 162 we note that it does say they will be giving the Claimant extra support for at least the next three months. We prefer the contemporaneous notes and JR's evidence about this matter. The Claimant's interpretation is wrong. This was an offer of support to the Claimant in knowledge of her undisputed performance difficulties. They also agreed a referral to OH to seek input about the Claimant's condition. The Claimant agrees it is a good idea to go to OH (see page 162). It could also be argued that the Respondent not taking action in knowledge of the Claimant's circumstances and not offering support would be unfavourable treatment.

197.2 Truncating it before it had run its anticipated course. We find that there is a misunderstanding on the part of the Claimant about this matter which would mean that there was no truncation as she asserts, and this asserted unfavourable treatment has therefore not been proven on the balance of probability.

197.3 As to the other three, that is giving the Claimant a First Warning; thereafter giving the Claimant a Final Written Warning; and at the meeting of 7 January 2020, reiterating that the Claimant was still not working to the required standard expected of someone of her grade and experience and criticising the quality of the work done by her. We accept these three things happened and are unfavourable treatment to the Claimant by the Respondent.

198. What caused or what was the reason for the giving of a First Warning; then a Final Written Warning; and what was said at the meeting of 7 January 2020? We find that these things were caused or the reason for them was the Claimant's undisputed performance difficulties.

199. We accept that the following things arose in consequence of the Claimant's mental health impairment:

199.1 In meeting deadlines;

199.2 Producing work of the accuracy and quality required;

199.3 Managing the expected volume of work and performing at the level which her experience and qualifications implied.

200. We accept that these things result in the Claimant's undisputed performance difficulties, so we find that the unfavourable treatment was because of those things.

201. We find that the Respondent knew or could reasonably have been expected to know that the Claimant had the disability prior to the proven unfavourable treatment.

202. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent relies upon the legitimate aim(s) of ensuring that customer deadlines were met, that work that was produced for customers was accurate and of a high quality and that employees performed work in accordance with their level of experience and qualifications so the team could be run efficiently for the benefit of all.

203. The Claimant has not disputed this legitimate aim.

204. Was the treatment an appropriate and reasonably necessary way to achieve those aims? We believe it was, as performance had to be managed. The Claimant does not dispute poor performance on her part.

205. Could something less discriminatory have been done instead; We do not believe so particularly as we find that the adjustments suggested to assist performance improvement were implemented.

206. How should the needs of the Claimant and the Respondent be balanced? The Respondent has put forward undisputed evidence as to the impact of poor performance (see DL's witness statement at paragraphs 31, 47 and 48). The process of performance management is balanced with input from OH, union support for the Claimant and work adjustments being made.

207. For all these reasons we find that the Respondent has demonstrated that what it did was a proportionate means of achieving a legitimate aim.

208. **Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)**

209. We find that the Respondent knew or could reasonably have been expected to know that the Claimant had the disability prior to the alleged unfavourable treatment.

210. The Respondent accepts in broad terms that it applied the following PCPs in this case (see paragraph 26 of the amended grounds of resistance (page 39)):

210.1 the Respondent's performance standards and/or expectations for the completion of work within specified deadlines ("the Deadline PCP");

210.2 the Respondent's performance standards and/or expectations for the accuracy and quality of work ("the Quality PCP");

210.3 the Respondent's performance standards and/or expectations for the volume of work to be allocated to a Cost Accountant, grade C 2 ("the Volume PCP");

210.4 the Respondent's performance standards and/or expectations of the level of complexity of work to be allocated to a Cost Accountant, grade C 2 ("the Complexity PCP).

211. Considering then whether these PCPs put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.

212. The alleged substantial disadvantage is because of the Claimant's ability to concentrate, to achieve the same output or to achieve the same output within time constraints and to do so with the accuracy which was required, were each significantly impaired by her disability.

213. We understand this to mean that the Claimant cannot meet the performance standards and/or expectations required by the four PCPs when compared to Respondent employees and those at Cost Accountant, grade C 2, who are not disabled. This results in the Claimant's undisputed poor performance which is then managed by way of warnings through the performance management process.

214. So then to assess whether any adjustment is reasonable in the circumstances of the case, to avoid this disadvantage.

215. The suggested adjustments are as follows and we would comment on each as follows based on our findings of fact:

215.1 The Respondent could have created greater flexibility in deadlines to allow for non-productive time caused by the symptoms of the menopause. We accept this was in place. Although the Claimant disputed her ability to set her own deadlines in cross examination this was contrary to the contemporaneous documents we were taken to and the witness evidence of JR, which we accept.

215.2 The Respondent could have allowed the Claimant to return to the desk she had occupied prior to August 2018 when she had her hysterectomy to avoid the distraction of noise and the frequent movement of personnel. We do not find that this was requested, and it has not been proven on the balance of probability that it could have alleviated any substantial disadvantage.

215.3 The Respondent could have allowed the Claimant to work from home when she was adversely affected by menopausal symptoms particularly those of poor concentration and anxiety. We find the Claimant was allowed to do this.

215.4 The Respondent could have provided feedback in a positive and supportive fashion rather than in a critical and confrontational context. We find the Respondent did do this, in that it has not been proven on the

balance of probability that it provided feedback in a critical and confrontational context.

215.5 The Respondent could have provided assistance by way of Joan or another team member sitting alongside the Claimant and working through tasks together with her. We find that this did happen accepting the evidence of the Respondent on this matter.

215.6 Reinstating the notional attendance concession. This was reinstated after three months. So, to consider if it were an adjustment that should have been done sooner. We do not find that it was as we accept the Respondent's evidence that it was not to the Claimant's detriment with the reassurances they gave. Further, even if it was accepted that it was to the Claimant's detriment, it has not been proven on the balance of probability that it is an adjustment that would alleviate the Claimant's asserted disadvantage. Even if we were to find that it was, it would be an allegation that was potentially out of time, and as it was not an ongoing matter, we could only then consider whether it was just and equitable to extend time. About this we would observe that the Claimant has not advanced a positive case as to why she could not have lodged her claim before she did.

215.7 The Respondent could have allocated less demanding work on a temporary basis. This appears to have been happening as we accept the evidence of the Respondent on this matter.

215.8 The Respondent could have transferred her temporarily to a different and less demanding role pending her recovery from her mental ill-health. This did happen on the 27 January 2020 and we consider this to have been actioned within a reasonable time period, in view of matters being clarified by the Claimant during her interaction with SF and KW in January 2020, about which the Claimant has no complaint.

215.9 The Respondent could have paused or ceased the performance procedure pending the beneficial effects of properly titrated hormone therapy. The process ceased at the end of January 2020 and we consider this to have been actioned within a reasonable time period, in view of matters being clarified by the Claimant on the 8 January 2020, followed by her interaction then with SF and KW in January 2020, about which the Claimant has no complaint.

216. For all these reasons we do not find that the Respondent has failed in its duty to make reasonable adjustments.

217. With these determinations, there is no need for us to go on and consider the time limit jurisdictional matters.

218. The unanimous judgment of the tribunal therefore is that the complaints of discrimination arising from disability and for failure in the duty to make reasonable adjustments, all fail and are dismissed.

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Employment Judge Gray
Dated 27 April 2023

Judgment & Reasons sent to Parties on 11 May 2023

For the Tribunal Office