EMPLOYMENT TRIBUNALS

Claimant: Ms L Parkinson

Respondent: British Telecommunications plc

Heard at: Watford Employment Tribunal (In public; In Person and By Video)

On: **4 to 8; 11 to 14 December 2023 and**
(in chambers) 15 December 2023 and 18 December 2023

Before: Employment Judge Quill; Ms B Robinson; Mr D Sutton

Appearances
For the claimant: In person
For the respondent: Ms A Jervis, advocate (employed by the Respondent)

RESERVED
LIABILITY JUDGMENT

(1) The claim is against the Claimant's former employer only. The claims against the other respondents originally named in claim form are dismissed on withdrawal (the withdrawal having been 13 April 2018).

(2) All and any Equal Pay complaints are dismissed upon withdrawal (the withdrawal having been Day 1 of this hearing).

(3) No complaint of sex discrimination or harassment related to sex has been presented. In the alternative, any such complaint is dismissed upon withdrawal (the withdrawal, if any were needed, having been Day 2 of this hearing).

(4) The complaints of race discrimination or harassment related to race are dismissed on withdrawal (the withdrawal having been Day 4 of this hearing).

(5) The complaint of unfair dismissal is well-founded. The Claimant was unfairly dismissed by the Respondent.

(6) The complaints of harassment related to disability all fail and are dismissed. (Rows 12 to 17 of Schedule of Equality Act allegations).

(7) There was disability discrimination within the definition in section 15 of the Equality Act 2010 ("EQA") (treating the Claimant unfavourably because of something arising in consequence of her disability) as follows:

- (i) Dismissing her (Row 8 of Schedule of Equality Act allegations)
- (ii) Performance Criticisms (Row 9a of Schedule of Equality Act allegations)
- (iii) Placing the Claimant in the AJS pool and applying its consequences to the Claimant (Rows 10 & 11 of Schedule of Equality Act allegations)

(8) The following allegation of disability discrimination within the definition in section 15 EQA fails and is dismissed.

- (i) Decisions regarding pay and bonuses (Row 9b of Schedule of Equality Act allegations)

(9) The complaint alleging that there was indirect disability discrimination is out of time and we do not extend time. (Row 7 of Schedule of Equality Act allegations). It would have failed on the merits in any event.

(10) The following complaints of failure to make reasonable adjustments are out of time, and time is not extended, and they are therefore outside the jurisdiction of the employment tribunal and are dismissed.

- (i) Failing to appoint the Claimant to work in FRU (as a homeworker) when there were vacancies
- (ii) Failing to disapply the location policy/strategy (Row 6)
- (iii) Failing to waive the requirement to have Tom Keeney sign off for home working (Row 6)

(11) The following complaints of disability discrimination within the definition in section 21 EQA (failure to make reasonable adjustments) succeed:

- (i) Failing to adjust a period of "six months" or less on AJS prior to giving notice of dismissal (Row 1)
- (ii) Failing to allow the Claimant to resit the Assessment Centre (Row 2)
- (iii) Failing to take the Claimant's disability into account when giving annual performance rating. (Row 5).

(12) All the other reasonable adjustments complaints fail and are dismissed.

(13) Neither of the following were "protected acts" (as defined in section 27 EQA) or "protected disclosures" (as defined in section 43A of the Employment Rights Act 1996):

- (i) First complaint to whistleblowing hot line

(ii) Second complaint to whistleblowing hot line

(14) The Claimant's appeal against dismissal was a "protected act". It was not a "protected disclosure".

(15) The Respondent victimised the Claimant by subjecting her to allegations, and a disciplinary process, in relation to expenses. (Row 17 of Schedule of Equality Act allegations)

(16) The other victimisation complaints fail and are dismissed. (Rows 18 and 19 of Schedule of Equality Act allegations)

(17) The complaints of direct age discrimination and of indirect age discrimination fail and are dismissed. (Rows 20 of Schedule of Equality Act allegations)

(18) The Claimant has not proven breach of contract in relation to pay rises, bonuses or expenses. She has not proven a contractual entitlement to any redundancy payment or severance payment. The breach of contract complaints fail and are dismissed.

(19) The complaint of failure pay in lieu of holiday entitlement on termination of employment succeeds.

(20) There will be a remedy hearing.

REASONS

Introduction

1. This is a claim brought by a former employee of the Respondent. It alleges unfair dismissal. It also alleges disability discrimination in relation to the dismissal, and also in relation to other alleged acts and omissions. There are complaints of victimisation and of disability related harassment. There are also age discrimination complaints and complaints of breach of contract.

2. Most of the time, the hearing took place with the panel, the Claimant, and the Respondent's representative all being physically present in the hearing room. On Day 8 (13 December), significant transport problems in the area delayed the Claimant's arrival, and meant that one of the panel members had to attend by video. On Day 9 (which was for submissions only), the Claimant attended by video. Most witnesses were in person, with some by video.

The Claims and Issues

3. On Day 2 of this hearing, we gave the parties a written case management order, which cross-referenced the summary of the procedural history is contained in EJ Bedeau's written reasons for refusing the Respondent's strike out application on 24 May 2022. We do not need to repeat the procedural history from those items.

4. There had been several previous preliminary hearings, but no agreed (or draft) list of issues was supplied to us.

5. On Day 2 of this hearing, we gave the parties what we considered to be an appropriate draft list of issues, which set out which complaints we believed we needed to address (and which we did not), and what information we believed was potentially lacking.

6. As we went through this document with the parties:

   6.1 The Claimant confirmed that she agrees that she is not pursuing sex discrimination/harassment complaint.

   6.2 For race discrimination, the Claimant believes that this was never formally or expressly withdrawn. We invited her to confirm by Day 4 if she was seeking to pursue any race discrimination/harassment complaint, because, if she was not, then we would record it as formally withdrawn, whereas if she was, then we would need to hear from both sides, given that, subsequent to the Grounds of Complaint, there had been the "Schedule of Equality Act allegations" document(s) and the Respondent's response(s) to that. That document which did not seem to repeat or clarify any complaints in which the relevant protected characteristic was race.

   6.3 The Claimant thought that she might intend to allege whistleblowing detriment, or dismissal. We invited her to confirm by Day 4 if she was seeking to pursue any such complaint, because, if she was not, then we would simply not need to address it (given it was our opinion that no such complaint was included in the claim documents, including the later schedules mentioned in previous paragraph, albeit there was mention of protected disclosures having allegedly been made). Whereas if she was, then we would need to hear from both sides, and potentially deal with an application to amend.

7. Following the discussion on Day 4, we provided (on Day 5, 8 December 2023) a further written summary of discussions, and the updated the list of issues.

8. The list of issues cross-referenced the Schedule [Bundle 214 to 248] which contained 20 rows of allegations, with comments from each party. This also had "Appendix A" attached, and the version with the Respondent's comments was [Bundle 256 to 296].

9. The list of issues was, therefore, as follows:

Time limits / limitation issues

9.1. Were all of the claimant's complaints presented within the time limits set out in section 123 of the Equality Act 2010 ("EQA") and other applicable legislation.

9.2. Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred; whether there was an act or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended.

9.3. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 16 May 2017 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it, subject to consideration of the matters mentioned in the previous paragraph.

Unfair dismissal

9.4. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

The respondent asserts that it was "capability" or, in the alternative, some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (specifically, it alleges, this was: the continued failure to locate a suitable alternative permanent role for the Claimant that accommodated her health restrictions despite an extensive search)

9.5. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

9.6. If the claimant was unfairly dismissed:

9.6.1. Should reinstatement or re-engagement be ordered

9.6.2. What adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant might still have been dismissed had a fair and reasonable procedure been followed?

9.6.3. Would it be just and equitable to reduce the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2)? If so to what extent?

9.6.4. Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent? If so, is it just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Disability

9.7. Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times.

As per the Grounds of Resistance, "The Respondent accepts that the Claimant was a disabled person according to section 6 of the Equality Act 2010 by reason of multiple physical conditions which affect her mobility and by reason of depression"

The Respondent does not take issue with the details or effects of the Claimant's disabilities as described in paragraph 4 of amended Grounds of Complaint [Bundle 171].

EQA, section 26: harassment related to disability

9.8. Did the respondent engage in conduct as alleged in Rows 12 to 17 of Scott Schedule [Bundle 214 to 248, for version with the Respondent's comments]:

9.9. In each case, if so, was that conduct unwanted?

9.10. If so, did it relate to the protected characteristic of the Claimant's disability.

9.11. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

EQA, section 15: discrimination arising from disability

9.12. Did the following thing(s) arise in consequence of the claimant's disability:

9.12.1. For the unfavourable treatment alleged in Row 9 of Scott Schedule:

9.12.1.1. Style of communication.

9.12.1.2. Time Management for particular tasks.

9.12.1.3. Memory challenges.

9.12.1.4. Lack of mobility.

9.12.1.5. Being a homeworker.

9.12.2. For the unfavourable treatment alleged in Rows 8, 10, 11 of Scott Schedule:

9.12.2.1. Not to able to travel to office.

9.12.2.2. Interview process problems.

9.12.2.3. Assessment Centre problems

9.12.2.4. Problems driving long distances in a car especially on a heavily congested motorway.

9.12.2.5. Problems with stairs and with walking distances.

9.12.2.6. Not being able to find hardwired job.

9.12.2.7. The need for reasonable adjustments.

9.13. Did the respondent treat the claimant unfavourably as alleged in Rows 8 to 11 of Scott Schedule

9.14. In each case, if the respondent did treat the claimant unfavourably then was that because of the thing arising consequence of the claimant's disability?

9.15. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the legitimate aim(s) set out in the Scott Schedule.

9.16. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

EQA, section 19: indirect disability discrimination

9.17. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

9.17.1. From around 2014, all contractual home-workers had to move their location to a BT Hub location unless specific approval was given for home-working. Obtaining such approval could be a lengthy process.

9.18. Did the respondent apply the PCP(s) to the claimant at any relevant time?

9.19. Did the respondent apply (or would the respondent have applied) the PCP(s) to persons with whom the claimant does not share the protected characteristic of disability?

9.20. Did the PCP(s) put persons with whom the claimant shares the characteristic, at one or more particular disadvantages when compared with persons with whom the claimant does not share the characteristic, as alleged in Row 7 of the Scott Schedule?

9.21. Did the PCP(s) put the claimant at that/those disadvantage(s) at any relevant time?

Reasonable adjustments: EQA, sections 20 & 21

9.22. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

9.23. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

9.23.1. As identified in Rows 1 to 6 of Scott Schedule?

9.24. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: [As identified in Rows 1 to 6 of Scott Schedule]?

9.25. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

9.26. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

9.26.1. [As identified in Rows 1 to 6 of Scott Schedule]

9.27. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Equality Act, section 27: victimisation

9.28. Did the claimant do a protected act, The claimant relies upon the following:

(a) C's appeal against dismissal (March 2017)

(b) First complaint to whistleblowing hot line (May 2017)

(c) Second complaint to whistleblowing hot line (May 2017).

9.29. Did the respondent subject the claimant to any detriments as follows:

9.29.1. As identified in Rows 17 to 19 of Scott Schedule

9.30. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

EQA, section 13: direct discrimination because of age

9.31. Did the respondent subject the claimant to the following treatment:

9.31.1. As identified in Row 20 of Scott Schedule.

9.32. Was that treatment “less favourable treatment”, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on comparators under 50.

9.33. If so, was this because of the claimant’s age and/or because of the protected characteristic of age more generally?

EQA, section 19: indirect age discrimination

9.34. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

9.34.1. Targeting of employees with membership of Pension Scheme A or Pension Scheme B for exit

9.35. Did the respondent apply the PCP(s) to the claimant at any relevant time?

9.36. Did the respondent apply (or would the respondent have applied) the PCP(s) to persons with whom the claimant does not share the age group 50 and over?

9.37. Did the PCP(s) put persons with whom the claimant shares the characteristic, at one or more particular disadvantages when compared with persons with whom the claimant does not share the characteristic, as alleged in Row 7 of the Scott Schedule?

9.38. Did the PCP(s) put the claimant at that/those disadvantage(s) at any relevant time?

Breach of contract

9.39. Did the Claimant have a contractual entitlement to:

9.40. pay award (for 2016/17; on the Claimant's argument for 2015/16 also)

9.41. bonus (for 2016/17; on the Claimant's argument for 2015/16 also)

9.42. expenses.

9.43. If so, has the Respondent breached the contract, and is the Claimant (therefore) entitled to damages?

Remedy

9.44. If the claimant succeeds, in whole or part, the Tribunal will hold a remedy hearing.

10. In addition, during the hearing, it was identified that the Claimant was pursuing the claim for failure to pay (full entitlement) pay in lieu of unused for holiday.

10.1 The Respondent's position being that the correct amount had been paid (relying on the calculation on [Bundle 1658]) namely zero.

10.2 The Claimant's position being that there was a shortfall of 67 hours, and relied on the Respondent's letter [Bundle 1791] of 3 August 2017.

The hearing and the evidence

11. On Day 1, in the morning, we went through the documents with the parties. We granted the Claimant's application to audio record, subject to the conditions which we imposed, which included that she would use the recordings as a transcription

aid (for voice recognition software) and then delete each day, and that she would not allow anyone else to listen to them, and would not publish them. She was warned about possible contempt of court proceedings if she breached these conditions, and was told that a breach could also lead to strike out of her claims.

12. The panel had received an electronic bundle of 3552 pages (without bookmarks or character recognition) in which the electronic pages matched the pdf page numbers. A hard copy version, in 8 lever arch files, was supplied for the witness table.

13. By agreement of all concerned, the Claimant was permitted to use the electronic version of the bundle on her laptop during her oral evidence.

14. The Respondent told us that pages 2662 to 3552 were all in dispute (save for some limited exceptions) based on arguments about alleged late disclosure from the Claimant, and relevance, and alleged duplication. Around 400 of these pages (2662 to 3078) were not separately identified in the index (they were labelled "additional documents", the Respondent's position being that they were disclosed by the Claimant within the two week period immediately preceding Day 1 of this final hearing). The remainder were transcripts, some of which purported to identify the speaker, some of which were apparently produced by voice recognition software, but with no differentiation of who was (said to be) making which comments.

15. The Respondent did not object to:

    2828

    2834

    2909

    2732

    2883

    2975

    3070 to 3077

    from the miscellaneous documents.

16. The Respondent did not object to the transcripts (3331 to 3376 and 3377 to 3433 said to relate to the appeal hearing).

17. The Claimant's position was that she disputed what the Respondent said about lateness. She was not immediately able to tell us when each of the documents had been disclosed, but part of her argument was that she had previously received a version of the bundle which included (some of) the disputed items, and the Respondent's representative had removed them without her agreement.

18. We said that we would not make a decision on the disputed items on Day 1. If the Respondent was right, and the documents were not relevant, and no witness was going to be asked about them, then it would be disproportionate to seek to go through them item by item to consider relevance (and certainly not to identify duplication). Whereas if, in fact, the Claimant was going to be seeking to cross-examine any witnesses, or to refer to the documents in her own evidence, then she would need to locate the emails by which she had sent these items to the Respondent and/or asked for them to be included in the bundle, if she was asserting that this was earlier than November 2023.

19. We had an electronic bundle of witness statements. There were paper copies for witness table.

20. We also received a 72 page, 230 paragraph version of the Claimant witness statement. This was different to the version that had been exchanged (on Thursday 30 November 2023). Apparently it was the second purported revision. The Claimant accepted that it was not merely adding page numbers to documents (indeed, it did not do that, in most cases), but believed it added important clarity. As of Day 1, the Respondent's representative had only seen the first version (66 pages we were told). Taking account of the Claimant's disabilities which were part of her explanation for the situation, we agreed that we would pre-read (only) this 72 page, 230 paragraph, signed (electronically) 4 December 2023, but that the Respondent was free to refer the older versions as well (if any relevant discrepancy existed) during cross-examination if it wished to do so. By agreement, it was decided that the Claimant would give evidence as the final witness, to give the Respondent's representative time to review the new statement (which she had not received by the time of the discussions on Day 1).

21. The Claimant also provided written witness statements from:

    21.1 Peter Hancock.

    21.2 Alan Gooden.

    21.3 Marcia Reid Thomas.

    21.4 Pat Brooks.

    21.5 Bhaveshwari Amin

    21.6 Lyn Oualah

22. The Respondent provided written witness statements from:

    22.1 Jo Willis.

    22.2 Sharon Gissane.

22.3 Ian French

22.4 Jill Halson

22.5 Kelly Chambers

22.6 Mandy Meir

22.7 David Linton

22.8 Dawn Dobson

22.9 Sarah Jaji

23. The Respondent did not call Sarah Jaji. Although we had pre-read her statement by the time we were informed of this, we have disregarded it. In some cases, the Respondent had no questions (relevant to liability) for the Claimant's witnesses. If the Respondent has questions relevant to remedy for those witnesses, that can be dealt with in due course.

The findings of fact

24. The claimant started employment with the respondent in 1986. She was a full-time permanent employee. She had a number of roles during her employment.

25. During the 1990s the claimant had a role which required a significant amount of travel. In the late 1990s she was involved in a car accident which left her with physical injuries and also caused some mental issues, including difficulties with motorway driving.

26. In around 2009, the claimant had a substantive post in Global Services. The respondent decided that it wanted to reduce the headcount of people in the claimant's role on her team.

27. At that time, the respondent did not implement compulsory redundancies. Voluntary redundancy was possible.

28. When an employee was displaced from their substantive post, in the absence of a voluntary redundancy, they were placed in BT transition centre.

29. The claimant volunteered to become displaced from her substantive role. She did not wish to take voluntary redundancy and therefore she went into the transition centre.

30. We do not have the 2009 persons of the policies in the bundle. However, we are satisfied that the 2015 and 2016 versions of the policies relating to redeployment and the transition centre are sufficient.

31. The document, “our approach to redeployment” [bundle 425] states:

    31.1 that the first priority for redeployment was given to people who have changed capabilities, defined as people who had developed a long term health condition (or such a condition worsened) or who had a disability.

    31.2 The second priority was redeployees.

    31.3 In both cases, recruiting managers were told that they must consider whether any such people had a reasonable match for the role before opening up the post for wider recruitment

32. In terms of the “first priority” group (people displaced from an existing job for health reasons), the respondent has had a number of policies over the years.

    32.1 The claimant had been, at one point, a “managing capabilities candidate” or “MCC”. However, that was prior to her leaving her substantive post in 20019 and being placed in the transition centre.

    32.2 The respondent had a policy called “enabling workplace adjustments” or “EWA”. Later that became known as “enabling workplace redeployment” or “EWR”.

    32.3 According to the Respondent, EWR was replaced by the “adjusted job search” scheme or “AJS”. That is, according to the Respondent, they never operated at the same time.

33. We have version 2 of the AJS policy dated 4 October 2016 in the bundle at page 375. The policy specifically applies in cases where individuals potentially have to change their existing job for health reasons or disability reasons. As late as 22 July 2016, policy documents were cross-referencing EWR, so AJS apparently commenced not long after after.

34. The policy applies where reasonable adjustments have already been considered, but either have not been sufficient to enable the employee to remain in the job or, alternatively, where the respondent has decided that the adjustments that would be needed to retain the employee in the job would not be reasonable, or else where no adjustments would enable the employee to remain in their job.

35. Prior to reaching the stage of placing someone into AJS, the respondent had other policies, which potentially would have had to be implemented by its managers. For example, there is “making working place adjustments policy” [Bundle page 345]. That is supplemented by the guidance for managers at [Bundle 356] and the guidance for employees at [Bundle 370].

36. The predecessor of AJS, the enabling workforce redeployment scheme (EWR) required that the respondent's workforce redeployment team would carry out

vacancy matching in order to assist people who were covered by that scheme in their own search for a new role. People covered by that scheme were to be reviewed as a first priority for new vacancies: potentially roles at higher grades and lower grades as well as the same grade would be considered as potential matches.

37. AJS was similar.

37.1 It stated that anybody accepted onto the scheme would be employed ahead of anybody else if they were suitable for the position. This would potentially apply regardless of whether the job had yet been advertised.

37.2 It confirmed that individuals who are members of that scheme would be considered as priority, even ahead of somebody from the transition centre. Individuals on AJS did not need to have a full interview for the post.

37.3 The priority afforded by the AJS scheme was limited to 6 months. After six months of being on AJS, it was possible that there would be termination of employment under the attendance policy. This was because, to go onto AJS in the first place, the Respondent had to be satisfied that they could not continue in their existing post.

37.4 AJS re-emphasised, as did the previous schemes, that it was for people who needed to find a new role because of a material change in their health condition. It was expressly stated that the scheme was not appropriate for anybody who was displaced for another reason, regardless if such people had a disability or not. This point was considered important enough to be mentioned twice on the same page [Bundle 376] (first bullet point and further down the page) at the outset of the policy.

37.5 As the respondent is a large employer with tens of thousands of employees and, because of the potential advantages in finding a new job that were conferred by been accepted onto the AJS scheme, and there was a strict process to be followed and local line managers did not have the authority to place individuals on the scheme.

37.6 Prior to making an application for somebody to be put onto the scheme, the employee's manager needed to obtain specific HR advice and guidance. There needed to be a "local job search" and the employee's line manager needed to involve their own line manager at that part of the process.

37.7 Only if the attempt, by way of "local job search", to redeploy the individual for these disability-related reasons was unsuccessful would there be consideration of placing them on the AJS scheme.

37.8 The requirements included that a business case be prepared, which included the evidence that there had been attempts locally to redeploy the person.

There also needed to be an occupational health report that was preferably no more than three months old. There needed to be a copy of the employees adjustments plans.

37.9 Our finding is that nothing in the written scheme suggests that these steps should be taken without the involvement of the employee.

37.10 On the contrary, our finding is that the fact that there should be a local job search as well as up-to-date occupational health advice implies that the authors of the policy anticipated that the employee should be involved.

37.11 The respondent's witnesses informed us that a practice had developed that individuals would be considered for AJS, and placed on it, without having been told in advance. It was said that this was because it was perceived informing the employees might cause the employee to go on long-term sickness absence.

37.12 We accept the evidence that this is a practice which the Respondent's managers had started to follow. However, the AJS scheme does not state or imply that it cannot operate while somebody is on long-term sickness absence. [Save to the extent that the scheme specifies that if AJS is approved, then within seven days afterwards, there should be a face-to-face meeting between the manager and the employee at which certain actions will be taken and that the matching process in accordance with the AJS scheme will not commence until after the manager has confirmed that that has been done.] On the contrary, the AJS scheme document makes it explicitly clear that AJS does not operate as a freeze on other processes. In particular, if it becomes apparent that the employee is no longer capable of working then consideration of potential dismissal under the attendance procedure can be carried out and there is no need to wait for the six months AJS period to expire.

37.13 Page 8 of the scheme [Bundle 382] discusses, amongst other things, work allocation during the period of the adjusted job search. It makes clear that there are no hard and fast rules, but that the majority of the employee's time should be allocated to the job search. It is noted that they might not need to spend all day on the job search and therefore other duties can potentially be allocated to them at. It is made clear that finding a job during AJS is intended to take priority.

37.14 During AJS, individuals have the right, but not the obligation, to apply for short-term assignments (STAs). If on an STA, the AJS process continues (and should be the priority). Being on a short-term assignment would not stop the clock on the six months for AJS.

37.15 In contrast, individuals can potentially start a secondment after the AJS commenced. This would in fact stop the clock on the six month period.

37.16 A secondment would not necessarily be in the expectation that there would be a permanent job at the end of it. In contrast, during AJS employees might be offered a trial period in a new job to see whether it was suitable. Any such trial periods would stop the clock on AJS.

37.17 Page 9 of the policy deals with what might happen if the search is not successful and cross references the attendance procedure. We discuss both in more detail in our analysis and conclusions below.

38. As mentioned, the "first priority" redeployees were those displaced for health reasons. However, that was not the route by which the claimant was placed in the transition centre in 2009. The circumstances of her becoming (voluntarily) displaced were such that she was in the "second priority" group.

39. The December 2015 versions of the guidance about the transition centre are in the bundle. Page 432 is the guide for managers and page 444 is the guide for the employees.

39.1 There was no specified time limit on how long an individual could remain in the transition centre. Individuals in the transition centre were known as redeployees.

39.2 The scheme operated such that the individual would have a job description as a redeployee in the transition centre as well as in line manager, being a transition manager.

39.3 Performance standards set by their line manager. The job description and the performance standards were related to the individuals job search.

39.4 The individual did not necessarily have specific duties other than looking for work. However, they could potentially be allocated to short-term assignments, and be required to do them. (Unlike AJS, it was not a voluntary activity.)

39.5 The respondent agreed that it would assist with role matching. In other words, there would be attempts to match the individual's existing skills and abilities to potential new roles.

39.6 Roles at a lower level than the person's existing grade would be considered.

39.7 While in the transition centre employees would continue to receive the pay level for the job that they had left. The Claimant's grade was as "manager" rather than "team member".

39.8 If the Claimant had accepted a lower grade post as a result of job matching then she would not suffer an immediate decrease in salary. Contractually her pay range would be amended to that for the new job. She could potentially still get salary increases, provided they would not take her above the top of

the salary range for the new job. However, if her existing salary was already above the top of the salary range for the new job, then pay would effectively be frozen unless and until that pay range caught up with her existing salary.

39.9 The special priority for individuals in the transition centre only applied where they sought jobs either at their existing grade or below the existing grade.

39.10 The role matching that was carried out by the respondent - drawing redeployees' attention to specific jobs - would not be done for jobs at a higher grade. Likewise, if an employee attempted to seek the priority status when applying for a job at a higher grade, then that would be rejected.

39.11 There was no barrier to a redeployee applying for a job at a higher grade. However, they would not have any priority status in such applications.

39.12 Redeployees were encouraged and required to apply for jobs other than those that were specifically drawn to their attention by the role matching process.

40. Employees who were part of the transition centre (as well as those who were not) had the opportunity to benefit from the Two Ticks scheme. Two Ticks is scheme operated by JobCentre Plus, which employers could sign up to. The respondent had done so. The scheme offered a guarantee that applicants with disabilities who met the minimum requirements for the role they were applying for would be interviewed.

41. From the Claimant's first placement in Transition Centre, until around 2015, employees in the transition centre had the opportunity to potentially be placed on secondments. A secondment would potentially result in the employee having their services paid for by the team to which they were seconded. That could either be within the respondent, or external to the respondent.

42. By their nature secondments were temporary and were not permanent posts. This therefore meant that, once the secondment came to an end, the individual would not have a permanent post and therefore would return to the transition centre on their previous terms and conditions.

43. Since secondments could potentially interfere with the possibility of being appointed to a permanent role, they would only occur where there was mutual, three-way agreement between the employee in question, their transition centre manager and the manager to whom they were to be seconded.

44. An employee in the transition centre was contractually obliged to carry out short-term assignments if allocated to them. Short-term assignments (STAs) were temporary roles which were not expected to lead to a permanent job at the end. They would usually last for up to a month. While an employee was on a short-term assignment, they were expected to spend 80% of their working time carrying out

the short-term assignment and to use the remainder of the time, the other 20%, to look for a permanent post.

45. Individuals within the transition centre were expected to look for short-term assignments and draw their managers attention to possible assignments that they could be allocated to. This was not intended to be instead of looking for, and being appointed to, a permanent post, but was a means of seeking to ensure that employees who were in the transition centre supplied value in return for the salary they received while they were seeking a permanent substantive post.

46. After the claimant entered the transition centre in 2009, she was never appointed to a permanent post outside the transition centre. Between 2009 and 2014, the claimant had a number of secondments. These were periods when she was not actually in the transition centre - reporting to a transition manager - but rather she was working on a secondment and therefore reporting, on a day-to-day basis, to the manager responsible for that work. As per the requirements of the redeployment policy and she was still obliged during that period to be searching for work.

47. From around April 2014 onwards, the claimant returned to the transition centre and had no more secondments after that. She did continue to do short-term assignments, during which her line manager was her transition manager.

48. In the claimant's most recent substantive role prior to entering the transition centre in 2009, the contract of employment had classed her as a home worker. Her job involved a lot of travel, but she was not under an obligation to work in an office when not travelling.

49. The claimant had an occupational health assessment in December 2011. [Bundle 617].

    49.1 This reported on her current physical condition and stated that there was nothing in particular that the claimant was unable to do at provided the necessary aids and adjustments were in place.

    49.2 These included adjustments in relation to her short-term memory.

    49.3 The report mentioned that it was not possible to give a blanket assessment of what adjustments would be required, without knowing the details of the particular job. It said that, once a specific job was identified for the claimant, there should be consideration about the specific adjustments needed for that particular job.

    49.4 One of the suggested adjustment was that, if a job involved multiple meetings, the claimant should be provided with recording equipment to enable her to

audio record the meeting to enable her to remember what happened in the meeting.

49.5 The report confirmed that the claimant was high functioning and articulate and very well motivated.

49.6 The report suggested that there would need to be a tailoring of the recruitment process when the Claimant was applying for new jobs. In particular, it was mentioned that the claimant should be allowed extra time for tests and/or able to take tests under different circumstances to other candidates.

49.7 The report stated that the claimant would not be able to compete with other candidates who did not have her mental, cognitive and physical impairment, and that necessary adjustments should therefore be potentially considered.

49.8 The report expressed the opinion that the claimant was likely to satisfy the definition of disability contained in EQA, while, quite correctly, making the observation that that would be a legal determination rather than matter to be decided by occupational health.

49.9 The report mentioned meetings that the claimant had travelled to in the previous few weeks and that she done so by using public transport. The report commented that the claimant had confirmed that she had been able to attend these meetings and do this travel, but had been left exhausted, physically and mentally. There was a recommendation that adjustments be considered in relation to how much travelling to different locations was required.

49.10 The report did not state that as a reasonable adjustment, the respondent should ensure that the claimant worked from home. Our finding is that it was not one of the questions which was expressly asked, and that therefore the lack of express mention is neutral as to whether working from home would have been required as a reasonable adjustment. At the time, there was no requirement that the Claimant be office-based.

50. In around May 2014, the claimant expressed interest in becoming a project manager on the respondent's flexible resource unit.

51. As a result of the creation of the flexible resource unit, there was no further opportunities for the claimant to carry out secondments on an ad hoc basis. The work that she had been previously been able to obtain via that route was now all sourced via the flexible resource unit.

52. The claimant was informed that to be on the flexible resources unit, she would be office-based, rather than home worker, and she was asked if she understood that. The claimant replied on 28 May 2014 to state that she wished to carry out the role

while being a home worker. She asserted that this would be a reasonable adjustment for her.

53. She was asked to supply the business case which confirmed that as a reasonable adjustment home worker status had been approved for her. She did not have such a document because home working had not been approved for her as a reasonable adjustment, but rather she had continued to be a home worker on the basis that that had been part of the contract for her substantive role prior to entering the transition centre.

54. Dawn Dobson, who was in charge of the unit at the time replied to state that while it was the preference to have office-based workers on that team. If there was a need for a reasonable adjustment for to work from home, then that would be considered. However, the process was for her to have that signed off by Tom Keeney.

55. Following Ms Dobson's email of 29 May 2014, the claimant took steps to obtain the business case sign off.

56. As part of that process. She was referred to occupational health and report at [Bundle 814] was produced. It was not made until 25 October 2014.

56.1 The report confirmed that the claimant used aids in order to accept her with assist her with memory issues, including dictation software. It confirmed she had a modified desk and other aids at home. It confirmed that the claimant struggled with driving following a car accident; long car journeys were difficult.

56.2 The report commented that because of the claimant's difficulties with driving and, travel in general, it would potentially be beneficial for her to be largely home based, and to attend office on an as and when required basis, perhaps no more than once or twice a week. In addition to physical problems. It was noted that doing a daily per journey to an office base was likely to lead to an aggravation of the claimant's anxiety.

56.3 It recommended some potential psychological therapy and stated that while the claimant could not attend the office five days a week in the short to medium term, subject to the outcome of that therapy, the situation could be reviewed in the future.

56.4 The report did not state that in and of themselves, the claimant's physical disabilities would prevent her travelling to a workplace five days a week.

56.5 The report was subsequently amended on 3 November.

56.6 The updated advice addressed a question about examinations. The consultant occupational physician advised that she saw no reason to depart from the

previous advice (which had been that the Claimant might require adjustments). She stated that in her opinion, once the specific examination process was known, specific OH advice could be supplied.

57. The claimant's then line manager, Martin Grimmer, had noted the contents of the original, 25 October, version. On 30 October 2014, he recommended that the claimant remain as a home worker. [Bundle 817],

58. At around the same time, the claimant chased up on the application to be project manager within the flexible resources team.

59. In accordance with the occupational health recommendation a rehab works plan was drawn up following an interview with the claimant in November 2014. [Bundle 822.]

60. On 1 December 2014, the claimant chased again for formal approval of her home worker status. [Bundle 828].

61. In internal correspondence with HR, the Claimant's transition manager, Martin Grimmer, on 23 December 2014 expressed the opinion that the flexible resource unit was not prepared to take the claimant on the basis that she could not attend a hub. He noted that he was aware that the claimant was willing and able to travel intermittently for roles and that she believed that reasonable adjustments would enable her to carry out roles. He mentioned that he was still awaiting a formal sign off from Tom Keeney in relation to the business case.

62. The contemporaneous documents from around this time demonstrate that there had been consideration of termination of employment and discussion of a severance package with the claimant and that no agreement had been reached.

63. On 16 February 2015, the claimant's line manager, Martin Grimmer, confirmed to the Claimant that she had been signed off to have home worker status in the transition centre. This email stated that the sign off was for 90 days and would potentially need to be reviewed at the end of that period. By implication, it would have to be repeatedly reviewed (perhaps every 90 days) while she remained in the transition centre. However, it is common ground that the sign off became indefinite from around March 2015.

64. As soon as the claimant was aware that she had the sign off, she notified the Flexible Resources Unit, on 26 February 2015. [Bundle 858].

65. The claimant was, however, aware that the flexible resources unit now had a recruitment freeze.

66. We accept Ms Dobson's evidence that that was genuinely the case. She had been in charge of the unit from when it commenced in 2013 to when it was disbanded in

2017. During 2014, when the claimant first expressed interest in that role, the team had been expanding. However, by 2015, when the claimant obtained the sign off for homeworking a recruitment freeze had already been implemented. In other words, we accept that the respondent did not just invent an excuse to avoid appointing the claimant to that role, but things genuinely had changed.

67. We also accept that the claimant was not responsible for the delay between 2014 and February 2015 in obtaining the sign off. None of the respondent's witnesses have been able to give a first-hand explanation for why it took so long in the claimant's case, or whether that is typical.

68. The claimant's annual performance review by Mr Grimmer, for the year ending around 31 March 2015, the last one he did with her is at [Bundle 851]. At the time both Mr Grimmer and the claimant were aware that the claimant would have a new transition manager for the year, starting in April and that was to be Ms Sharon Gissane

68.1 It contains a summary from the claimant's point of view of what she done in the previous year, from resuming her position in the transition centre in April 2014, at the end of a secondment.

68.2 She had considered a large number of jobs and had applied for some. She done short-term assignments as well as attending interviews.

68.3 The Respondents Annual Performance ratings were: E = Excellent; VG = Very Good; AS = Achieves Standards; DN = Development Needed; U = Unsatisfactory

68.4 Mr Grimmer gave the Claimant “AS”, achieved standards.

68.5 Mr Grimmer noted that the claimant had worked hard to obtain a new role and had been unlucky. He said that that performance rating was well-deserved and in particular she had had good feedback from the short-term assignment.

68.6 He noted that the claimant was conscientious and punctual and was looking at innovative ways to obtain a new permanent role including seeking a mentor and volunteering various activities. He noted that she done three Project manager short-term assignments.

69. From April 2014 until the end of her employment (June 2017), the claimant's transition manager, and therefore her line manager was Ms Gissane.

70. Ms Gissane’s line manager was Ms Jo Willis.

71. As mentioned above, the reason the claimant had found its difficult to obtain secondments after April 2014 was that these were now being run by the flexible resources unit.

72. In previous substantive roles, and in previous secondments, the claimant's work had included work as project manager.

73. In January 2015, the respondent introduced a mandatory requirement for any post-holder - whether temporary or permanent - in either business improvement roles or project and programme management roles.

74. This was a requirement to take an assessment centre exam. This only had to be done once. If the candidate was successful then they would effectively have a licence to do any such roles within the respondent. Whereas if they were not successful, they would not be able to do any such roles.

75. The claimant mentions that the scheme was abandoned after the termination of her employment. However, we accept it was a genuine requirement across the respondent from January 2015 at all relevant times, being up to the end of the appeal process and the end of the claimant's employment.

76. Although the assessment centre process was something existing postholders had to go through, as well as potential new recruits, when it first came in there was no requirement for the claimant to undergo the assessment straight away because she was not a current post-holder. However, it did mean that if the claimant was to be appointed to any such posts in the future, she would first have to sit the assessment. This was something recruiting managers were aware of, and so, if the Claimant applied for such a job, she would be asked for confirmation that she had passed the assessment centre, and the application was not progressed further if she did not. It would not necessarily be rejected out of hand, but would be put on hold (at best) pending notification to the recruiting manager that the Claimant had passed the Assessment Centre.

77. In March 2015, the claimant's then manager, Mr Grimmer requested a psycho vocational assessment (PVA) for the claimant [Bundle 863] to help assess what adjustments to the assessment centre process might be required.

78. There was some pushback at the time, not from Martin Grimmer, but from Paula Thomas. However, the HR advice was that the PVA should be processed. In particular, Philippa Greenwood, who was in charge of the assessments for business improvement insisted that the claimant have the assessment to establish what reasonable adjustments needed to be made.

79. On 5 June 2015, the Claimant emails Ms Gissane to highlight that, in her opinion, she required reasonable adjustments for the process and that she was still awaiting the PVA assessment.

80. The report was produced on 16 June 2015 [Bundle 892.}

80.1 The recommendation was "*the employee has rehabilitation potential is likely to succeed*."

80.2 The claimant asked the author, Dr Cheeseman, whether she might be classified under EWR. Dr Cheeseman commented that the claimant had permanent disabilities and would benefit from as much support from her employer as possible to ensure she was able to perform to the best of her ability.

80.3 The report commented on the claimant's problems with memory and on the fact that she was slow to process information and complete tasks compared to before the accident. She needed to check and recheck her work and she needed time to prepare.

80.4 It commented on the claimant's poor memory and her need to make detailed notes.

80.5 The report commented on some general adjustments that might be made in response to the claimant's psychological needs and fatigue, including flexible working, including at home as often as possible and also regular breaks.

80.6 For exams and similar, the recommendation was that the claimant should have an increase in the time available of 25% compared to others. For coursework, it was suggested that she have flexibility in terms of deadlines. It was also suggested that she would potentially have access to course notes prior to lectures. In terms of targets a 20% reduction was mentioned as something that the employer should consider. It was suggested that this 20% adjustment could be amended as the claimant spent more time in a new role and became more familiar with it.

80.7 As part of the background information referred to in the report, there were comments on other issues, including the claimant's personal circumstances, and including the physical pain that she was experiencing, as well as mobility issues.

80.8 The author of report, Dr Cheeseman included a passage from the claimant's previous occupational health advice - at the claimant's request - to the effect that the claimant would benefit from adjustments to the recruitment process, including extra time for tests and potentially taking tests under different circumstances.

81. An assessment centre, which included the adjustments did not take place in the remainder of 2015.

82. The respondent had internal discussions in January 2016 about potentially requiring further advice from Dr Cheeseman prior to implementing the

adjustments. [Bundle 945]. It was considered that it might be necessary to submit details of specific tests that would be done during the assessment centre as outlined.

83. Around the same time, the respondent also had internal discussions about whether candidates who had not sat the assessment centre could potentially be considered.

84. The opinion of recruitment specialist, Sarah Jaji, was that recruiting managers should potentially be willing to progress the Claimant's application and if she was suitable bar the assessment centre requirement, then that could be addressed. (By implication, by seeking to ensure that the Claimant took the assessment asap; Ms Jaji stated she could "fast track" it). [Bundle 947].

85. By April 2016, an assessment centre with adjustments for the claimant had not taken place. There was further consideration given to severance, including retirement in the interests of efficiency. This was mentioned to the claimant and she was not interested.

86. Dates in May were proposed. One of the adjustments for the Claimant was that she would not take it all on the same day (which other candidates did) but take approximately half one day, and the remainder a different day. The respondent had proposed to include the 25% extra time and other adjustments

87. The Claimant suggested that to the assessment team that she would prefer later dates. On 12 April 2016, that team contacted Ms Gissane. The reason given by the claimant was that she needed to practice with her workplace adjustment software. Ms Gissane stated that she did not think a postponement should be permitted. [Bundle 1001 to 999].

88. In an email sent to the claimant on 20 April, forwarding the previous exchange. It was confirmed to the claimant that she would be offered 25% additional time in both preparation and debrief and numerical. She would be able to use Dragon and Read software and would be able to use her own laptop. Her laptop was to be free of any documents and would be checked before and after the assessment. She was to be allowed to use two screens. A high backed chair was to be provided and the claimant was to bring her own lumbar support. The printed material was to be 12 font with 1.5 spacing. The claimant was permitted to bring at one A4 piece of paper with her own notes into the room.

89. The claimant queried whether these adjustments were sufficient and suggested that further advice from Dr Cheeseman be obtained as to whether or not 25% extra time was sufficient and about whether any other adjustments should be made. She also wanted confirmation that the other mentioned adjustments would be in place and in particular, she commented that her Dragon software was not working fully at the time.

90. On 12 May, the assessment centre was cancelled by the respondent and postponed. This was not a result of the Claimant's request, which had not been granted, but for other reasons.

91. In around June or July 2016, the respondent made a referral to occupational health. The first of several versions of the report was dated 27 July 2016 [Bundle 1057]. There were subsequent amendments on the dates stated at the top of the page.

91.1 The referral had stated that the claimant had been asked to sit the assessment centre and that the recommended adjustments had been implemented, but the claimant had refused to do so. The claimant disputed that statement in the referral and the occupational health adviser suggested that the matter be discussed with her.

91.2 The referral suggested that the previous advice from occupational health be taken into consideration.

91.3 On the second page, in the second paragraph, the occupational health report documented the adjustments which the claimant accepted had been put in place for her.

91.4 In the third paragraph, it noted that the claimant accepted that her Dragon and Read/write software training had been around four months previously.

91.5 It documented that the claimant believed that she was being put under immense pressure by the employer to accept roles that did not take into account her disabilities.

91.6 It refers to the issue about the interview in Preston which we mention below.

91.7 It comments that she had driven only a thousand miles in her own vehicle in the last year but made no reference to what mileage the claimant had done in other vehicles. For example, taxis or hire cars.

91.8 At the bottom of 1059, it says, is able to travel by car for short distances, and very infrequently.

91.9 The recommendation was that the claimant was fit for work with adjustments as previously recommended in the past.

91.10 Having noted what the claimant said about her cognitive challenges, the report did not make any additional recommendations over and above those that had been made previously.

91.11 It noted the claimant's difficulty in travelling a long distance to the assessment centre and said that should be taken into account.

91.12 It noted the comments made by AbilityNet about the recommendations to assist her in relation to her cognitive abilities.

91.13 It mentioned that the claimant would struggle to travel by public transport.

91.14 It mentioned occasional travel to the office or to work to attend meetings. Two days or so a week could be feasible. (We observe this is consistent with earlier reports).

91.15 The report comments that there is no deterioration in the claimant's memory (which, in context, clearly means since the previous occupational health advice had been given).

91.16 It suggests that there be a discussion with the claimant about providing written notes of one-to-one meetings.

91.17 In response to the question whether the claimant is able to or likely to render reliable service in attendance in the future. The occupational health advice is that it is considered that the claimant could do so provided suitable workplace adjustments are in place.

91.18 It observed that the Claimant had not had any significant period away from work because of her disability.

91.19 There was no routine requirement to see the claimant again.

92. The rearranged assessment centre was due to take place in September. The claimant was aware of this date from no later than 14th of June. [Bundle 1032].

93. The Claimant was told that her application to take a project manager role on flexible resources units would be considered after her assessment centre and on 23 June 2016 the claimant said that she hoped the assessment would not be postponed again. [Bundle 1034.] As of June, the claimant was willing to take the assessment on the basis of the adjustments previously notified, and with a date in September.

94. Furthermore, as per her comments to the occupational health adviser, she believed she now had had sufficient training on the relevant software.

95. In the run-up to the September assessment, the team contacted the claimant to confirm the adjustments that would be in place for her. [Bundle 1053]. On 15 September 2016, amongst other things she was told to bring her own laptop, and that it was her responsibility to make sure all of the content was wiped other than the Dragon and read software that she required. She was told that she could bring one “A4” with her own notes into the room. This was in bold. At the claimant's request, the timetable was modified. [Bundle 1051]

96. On 22 September the claimant emailed the assessment team to say that her PC had crashed. She had headed to the assessment but had to leave her laptop behind.

97. On that day, 22 September 2016, at the assessment centre, the Claimant and Fran Peck had a discussion about the laptop problems. Ms Peck offered the claimant two options. One of which was to go ahead with one of the modules which did not require a laptop that day and for the other 3 to be taken the following week. The alternative was for the claimant to use one of the laptops that was available at the assessment centre. Ms Peck made it clear to the claimant that if she chose the latter option and then it would not be grounds for appeal going forwards.

98. The claimant decided to go ahead using the laptop provided.

99. Between 22 September (day one) and 29 of September (day two of the assessment centre) the Claimant informed Ms Gissane that the IT department had decided that replacing her laptop was the best solution.

100. The claimant emailed Ms Gissane on 20 Septembe [Bundle 1081] to say that the second part of the assessment should be postponed because while she had agreed to take part one (and waive any right to appeal) even though the assistive software was not available on the respondent's pool laptops at the assessment centre, she did not wish to do the same for part two.

101. She listed the various software that was required and the arrangements that she would have to make to upload it to her new laptop when it was received.

102. Ms Gissane's informed the claimant that she should, as previously planned, bring her existing laptop with the existing software on it (and as previously discussed, should make sure it was cleanable the documents). Ms Gissane said that if that laptop then crashed during the assessment, the respondent would allow her to use a different laptop. There was no express answer to the claimant's query about whether by doing so she would be waving her rights to appeal. The Claimant took the remainder of the assessment on 29 September, as scheduled.

103. An assessment centre feedback report was produced.

    103.1 It stated that the grade which had been assessed was Band 2 Junior.

    103.2 It said that as the claimant's overall scores below 60% reassessment would be required, and she should consult her line manager for next steps. The Respondent has not satisfied us that a "re-sit" could not have been offered to the Claimant. To the extent that re-sits were usually only offered to current postholders who might be dismissed from the post if they did not pass the Assessment Centre, at around this time, as discussed in more detail below,

the Respondent implemented a process which would potentially lead to the Claimant's dismissal if she did not have a post.

103.3 It said that the overall outcome was a fail with a score of 43%.

103.4 There were four modules plus a numeric test. The claimant's overall score on the numerical test was 50% and this was said to be better than 50% of a comparison group.

103.5 There were various subcategories within each of the four modules and five possible ratings: insufficient evidence; basic; intermediate; full; expert.

103.6 Each of the claimant scores was either insufficient evidence or basic.

104. To be appointed as "Band 2 Junior", a candidate needed to score no less than "intermediate" on each of the subcategories, and there were five particular items for which they needed to score at least "full".

105. "Band 2 Senior" would have required a score of "full" on almost every category other than innovation for which intermediate was sufficient.

106. To be appointed as "Band 1", then the candidate would have had to have scored intermediate on each one of the categories, no less and no more.

107. Comments from the initial assessment were produced. They appear [Bundle 1064].

107.1 The comments in relation to module three included mention that she had transposed all of her notes onto the flipchart but did not use them effectively to guide her through the conversations.

107.2 The comments from module four included a comment that the evidence presented was a direct lift from the notes, which the claimant had brought into the room with her and therefore did not demonstrate a thorough knowledge application of closure or handover activities.

108. The appeals process for the assessment centre is at [Bundle 1090]. The claimant submitted her appeal, [Bundle 1092]. The document was dated 20 October 2016.

108.1 As required by the form she set out what her own suggested rating should be. She accepted that potentially she should have been graded basic for "outcome benefits and margin management". [Bundle 1098].

108.2 She did refer to suggestions that the agreed adjustments had not been in place. She highlighted that she did not think that the correct version of Microsoft software (the one she was most used to) had been available. The layout for the two screens was also not what she was used to.

108.3 She also referred to wrist pain.

108.4 As well as making those comments, however, the claimant gave detailed arguments throughout the appeal for why she believed that she had sufficiently demonstrated what the assessors ought to have been looking for in order to score her more highly.

109. The appeal outcome was that, on 25 October 2016, the claimant was informed that the appeal was unsuccessful. [Bundle 1118].

110. On 27 September 2016, Ms Gissane sent an email to Mandy Meir of HR and to Jill Halson the email.

110.1 The attachment referred to it being a business justification for seeking support to remove to move the claimant to job search as part of “enabling workforce redeployment”.

110.2 It accurately stated that the claimant was in the transition centre rather than having a permanent job.

110.3 It referred to the claimant having various medical conditions and that the claimant had applied for several roles under the respondent's Two Ticks policy.

110.4 It commented that it appeared that some of the roles which the claimant had applied for had been offered to an EWR candidate instead of to her. This would have been in accordance with the respondent's policies. As discussed above, redeployees, such as the claimant had higher priority then everyone other than those who were being redeployed for medical reasons.

110.5 The draft report referred to the adjustments made for the assessment centre which was not yet complete.

110.6 In section 4, the form required the manager to include the individual's comments. Ms Gissane, without specifically consulting with the claimant wrote down what she considered the claimant's opinions were. She correctly noted that the claimant's opinion was that her disabilities did not stop her from applying for posts. It listed the adjustments which Ms Gissane believed were in place.

110.7 At section 6. Reference was made to the 27 July 2016 occupational health report. That report expressly stated that previous advice was still applicable, and expressly stated it was not setting out the contents of the earlier reports because of the length.

110.8 It referred to the PVA which had been done the previous year.

110.9 At section 7, it stated that EWR was welcomed by the claimant.

110.10 It referred to psychological problems that the claimant had in driving long distances in the car, and struggling to travel by public transport.

110.11 It mentioned that occasional travel to the office to work or attend meetings (two days or so per week) could be feasible.

110.12 It stated that the interview process had been challenging to the claimant because of her cognitive challenges and suggested that part of the rationale for producing the document was that it had been said that the respondent should consider alternative suitable roles for the claimant.

111. In making the comments about travel, although not expressly referred to, Ms Gissane had in mind, amongst other things, the interaction between the claimant and herself the previous June about a role in which the recruiting manager was based in Preston.

111.1 A telephone conversation with the recruiting manager was available to the claimant. The claimant requested a face-to-face meeting. Ms Gissane was content to arrange this. But the claimant informed her that the claimant believed she would not be able to travel because of a flareup of her physical pain symptoms.

111.2 Mr Gissane's immediate response was that in that case, the claimant should be signed off sick and the claimant took issue with that. She subsequently provided notes from her GP on the issue.

111.3 Ms Gissane stated that she was content for the claimant to travel by taxi to the interview in Preston or Manchester at the respondent's expense. The claimant replied that it was not just driving her own car or travelling by public transport that would cause the difficulties and what that she would not be able to sit in a taxi for that length of time either.

112. On 28 September 2016, there was a discussion between the claimant and Ms Gissane. Some of what was discussed is recorded at [Bundle 1084]. That particular document was never forwarded to the Claimant, but we accept Ms Gissane's recollection that the subjects were discussed.

112.1 Ms Gissane's document, had a heading about nature and the duration of the adjustments and there was a tick with various options, one of which was 12 to 26 weeks. However, none of the specific time periods were ticked and instead the option "long term" was selected.

112.2 The document mentioned a six month plan which included the suggestion that in around Enable Plus Skills referral would be made, and which would be reviewed around March or April 2017.

112.3 Even on the face of Ms Gissane's document, there is no confirmation that Ms Gissane told the Claimant that she had already sent a request for EWR or that she had been told it was now AJS. The claimant was informed, and therefore did not agree, that if she was placed on AJS (as opposed to EWR), the process would be time limited to 6 months; she was not informed that it might be the Respondent's intention that if she agreed to being placed on AJS (or EWR, for that matter) she would be agreeing to potentially be dismissed at the end of the six months if no job was found.

113. On 6 October 2016, Mandy Meir had a conversation with Ms Gissane and Ms Halson. She outlined what job search would look like.

114. On 17 October, Ms Halson reported to Ms Meir that it had been agreed that the claimant's case would move to job search. Ms Halson mentioned requirements before Ms Halson would approve AJS.

114.1 Ms Halson mentioned that Ms Gissane should speak to the claimant about possible medical retirement (immediately), but should also let the claimant know that that was a possible outcome at the end of AJS.

114.2 Ms Halson also suggested that Ms Gissane needed to update the business case. [Bundle 2326.]

114.3 Ms Halson said that a "gatekeeper call" would be required before she would formally sign off on AJS and asked for that to be arranged.

114.4 She also wanted the Claimant to be informed that the Respondent was "moving towards AJS". Ms Halson clearly did not regard the situation as being that AJS had already commenced, and she would know, because it was her decision to make.

115. On 18 October, Ms Meir sent a further email to Ms Gissane requesting the updated business case.

116. Our finding is that full approval for AJS had not occurred by 18 October as the updated business case was still being chased, and Ms Halson's other conditions had not been met either.

117. That being said, we do accept that a job search had been authorised to start on 17 October. As mentioned above, the policy states that "local job search" is supposed to be carried out before the start of the formal AJS process.

118. Furthermore, on 25 November, Ms Meir contacted Ms Gissane to ask about the Enable Plus referral. Ms Gissane's reply of 8 December 2016 stated that it was "now underway". We are entirely satisfied that means that it had not already been done prior to 8 December.

119. As per Ms Meir's email of 18 October [Bundle 1105], Ms Gissane was clearly informed of Jill Halson's (WISH consultant) requirements before formally approving the start of the formal AJS job search. Those things were not done by 17 October 2016, and Ms Meir and Ms Gissane both knew at the time that those things had not been done.

120. On 25 October, Ms Gissane sent an email to the claimant with attachments. The first of these was dated 24 October and had heading "adjusted job search". It said that this followed on from the meetings that had previously taken place.

    120.1 On the penultimate paragraph of the first page, it stated: "*I do however need to make you aware that if the job search does not result in finding you an alternative position within BT, then as a business we will need to consider your own future within the BT*".

    120.2 This was the first time that the claimant had been alerted to the possibility that EWR (or "AJS", which the Respondent was asserting had replaced EWR) status for the Claimant would mean that she might be dismissed.

121. The claimant was due to go on annual leave, returning around 18 November 2016. She requested a delay in the start of the AJS process for that reason, amongst others. The Claimant disputed having been told on 17 October that she had already been registered as a priority candidate with effect from that date. On balance of probabilities, our finding is that the claimant is correct.

122. The recruitment team had been told to start treating the Claimant as AJS. The respondent started seeking to match the claimant to jobs not long after 25 October. For example, on 14 November, Sarah Jaji notified her colleagues that they should be actively looking for roles for the claimant in accordance with AJS. She received replies from colleagues in relation to whether or not they had any suitable vacancies for the claimant.

123. The claimant and Ms Gissane met on 18 November 2016, and Ms Gissane sent an email to confirm the outcome on 28 November. Some job matches had been notified to the claimant by then.

124. The claimant and Ms Gissane had a further meeting on 28 November and Ms Gissane sent the notes on 7 November. Further job matches were identified to the claimant and applications were noted.

125. It was acknowledged that the claimant would potentially have the opportunity to take a second assessment centre. Ms Gissane stated that the claimant should not focus solely on those roles in case she did not pass it.

126. The comments were repeated in Ms Gissane's notes from the 7 December discussion.

127. On 14 December 2016, Ms Willis wrote to the claimant to state that they would meet on 20 December 2016. It stated that this was a normal part of the adjusted job search process. The final paragraph stated that if the job search does not result in finding an alternative position within BT, she would need to reconsider the arrangements for covering the Claimant's duties and the Claimant's future within BT. This is presumably a lift from a standard document as it was not directly applicable to the claimant's circumstances.

128. On 19 December, Ms Gissane sent further notes to the claimant about their meeting the same day. These which included again comments that the claimant should focus on roles that other than project manager and business improvement because those would be dependent on the claimant passing a second assessment centre.

129. The meeting with Ms Willis took place on 9 January and the claimant was accompanied by a union representative.

129.1 The notes are [Bundle 1162].

129.2 As part of the introduction, Ms Willis stated that she was letting the claimant know that if a successful resolution was not found, then the respondent would need to consider her future employment and there might be termination of her contract.

129.3 Within the meeting, there was a discussion about the claimant's CV and when it had been up to updated and when it had been circulated for potential vacancies.

129.4 During the meeting, Ms Willis confirmed that EQA applied in the claimant's circumstances and that the respondent had a duty to make reasonable adjustments.

129.5 There was a discussion about the fact that the Claimant was disputing that any six month time limit should run from 17 October 2016. Ms Willis suggested that there had been an initial call and that, while it was accepted that the first face-to-face meeting was on 18 November 2016, that did not stop the Respondent treating the process as having commenced on 17 October 2016.

129.6 The claimant mentioned that she was were aware that a referral to Remploy was supposed to be part of the process and that her understanding was that the referral had been made just before Christmas and that because of the Christmas break she had not been contacted yet. [In fact, the Claimant was unaware that the referral had been rejected and closed because Ms Halson had not authorised the AJS by that date.]

129.7 The claimant was alerted to the fact that as part of the adjusted job search the respondent's resource specialists would look at vacancies before they were released onto the Respondent's "job news" (and thus became more widely available) and that the claimant therefore had the opportunity to be matched prior to the vacancy ever going to "job news" (and it would never go to "job news" if the Claimant was deemed suitable and was appointed).

129.8 Ms Willis encouraged the claimant to speak to those resource specialists (members of the workforce deployment team) and follow their advice and to try to make sure that she applied for posts that she was interested in before they were released to job news.

129.9 The claimant expressed the view that she had only been informed of matches to two roles since the process had (supposedly) started. Ms Willis said she would check that.

129.10 Ms Willis asked if the claimant accepted that she needed to follow up on every single opportunity that she was a match for regardless of grade or location and the claimant said that she did. Ms Willis said that - in relation to location - the respondent would take into account the need for reasonable adjustments. Ms Willis asked the claimant if she was able to travel with adjustments and the claimant confirmed that she could.

129.11 Ms Willis asked the claimant if she was looking for team member roles as well as manager roles. The claimant said she was not. The claimant said that she did not think it was appropriate for her to potentially accept a lower grade given her skills and ability. Ms Willis said that it was important that she considered that and said there was a limit to the amount of time for the claimant to find herself a new job.

129.12 The claimant's union representative asked the Claimant if she had looked into what the salary difference actually would be if she took a lower graded job. The claimant said that it was not necessarily about that; it was that, because of her skills and experience, she was of the opinion that as an AJS candidate, she should be able to get a job at the correct grade and did not need to take one at a lower level.

129.13 The Claimant said that she thought she was being pushed to accept a lower graded job and Ms Willis disputed that. She reminded the Claimant that her

pay would not immediately drop and that, if successful, the recruiting manager would be funding her existing salary regardless of the pay range for the new job.

129.14 Ms Willis raised the issue of occupational health and she suggested that since there was a report from 27 July, there was nothing outstanding. The claimant suggested that another occupational health report be obtained. The union representative and Ms Willis both seemed to accept that it might not be crucial to obtain it straightaway, but it might be necessary in the future. [They did not necessarily agree about what circumstances might cause the need for further OH advice, but they did not discuss that point in more detail.]

130. After the meeting, Ms Willis produced the document at [Bundle 1189].

130.1 The actions included that Ms Willis would liaise with Ms Gissane and Ms Gissane would discuss further with the claimant why the EWR was commenced in October and would check that the Two Ticks process was working correctly.

130.2 The audio recording and the pro forma were both sent to the claimant on 11 January. [Bundle 1202].

131. Part of the AJS process was an Enable Plus referral from Ms Gissane. This should have been completed as soon as possible. It should have been done within a week of AJS being approved (so by 24 October 2016 if, as the Respondent argues, AJS commenced 17 October 2016), with the expectation being that the referral would be completed by manager and employee at the first face to face meeting. It was not completed at the meeting on 18 November. It was submitted to the relevant team on 12 December. [Bundle 1232]. As of that date was not on the AJS list which the team had access to. A query was raised with Ms Halson. The same day, 12 December 2016, Ms Halson emailed Ms Meir to say that the gatekeeper call had not yet taken place. On 22 December, she wrote:

> Hi Mandy
>
> Just to flag that I don't appear to have had a response from you on this. From my perspective this case still isn't AJS and hasn't had the Enable Plus referral
>
> Can you update me once you are back from leave please
>
> Thank you
>
> Jill

132. We do not agree with the Respondent's stance during this litigation that Ms Halson was actually in error and that, actually, the claimant had been fully approved to go on AJS previously as a result of a 10 October 2016 call (with Mr Wallington, rather than Ms Halson) or at all. The documentation makes clear that, as far as Ms Halson was concerned, Ms Meir and Ms Gissane had given instructions to do

various things, including produce a revised business case and hold a face-to-face meeting with the claimant, and these had not happened, and so AJS had not yet been formally approved. (Even though, Ms Jaji and her colleagues were looking for job matches in the same way that they would have done had the AJS been formally approved; indeed, they were unaware that there was an issue.)

133. On 17 January 2027, Ms Gissane informed the claimant that the Enable Plus referral had been completed. On 20 January 2017 [Bundle 1240], the claimant contacted the team about the enable plus referral and the reply was that she should speak to Ms Gissane about it, who was copied in. Ms Gissane had not told the Claimant that, on 11 January, she and Ms Halson had received an email to say the referral would be closed (given lack of response to earlier queries) by the end of that week.

134. The Claimant's chasing prompted, on 25 January, Ms Halson to review an email she had received from Ms Meir around 6 January 2017. Referring back to Ms Halson's October 2016 email, Ms Meir commented:

> My understanding was that the call you held in my absence on 10th October with Sharon and Dave Wallington was the gatekeeper call - this was also Sharon's view
>
> With regards to medical retirement, we certainly wouldn't broach the subject this early on in the process We only ever discuss it at the resolution stage should it come to that.
>
> The enable referral is ongoing, there has been some delay with this so Sharon will be chasing this up
>
> When I read your email fully - I have to admit I didn't read the end immediately - I can see that you asked for a Gatekeeper call As the move to AJS had been agreed on the call with Sharon, I'm not sure what the benefit of a further call would have been

135. Ms Halson's 25 January 2017 email [Bundle 1250] accurately confirmed that she had asked for a final business case. She also said that she had been waiting the results of the local job search. She had not received either of those, and still wanted them, and that on receipt she would approve AJS. She said that, in the meantime, she was willing in any event, to write to the enable team and tell them they should proceed with the enable plus referral.

136. She wrote to the enable team the same day 25 January 2017 to ask them to action the enable plus referral.

137. The medical retirement referral was done by Ms Meir on 26 January 2017. [Bundle 1259.]

138. The reply from the head of health was to say that medical retirement criteria were unlikely to be met. However, retirement in the interests of efficiency could be

considered. It was stated that if a more definitive opinion was required, then the claimant would have to consent, and there would have to be a formal referral.

139. On 31 January 2017, Ms Meir requested approval for retirement in interests of efficiency. That approval was supplied on 6 February 2017 by the relevant director.

140. On 8 February, Ms Gissane emailed the claimant the details of their discussions on 23 January. The email repeated several pieces of information from previous discussions, but also included feedback from a recruiting manager about why she had not been in a point above for a particular role.

141. On 10 February, Ms Gissane sent the claimant the notes from 8 February.

142. The claimant had queried with Ms Gissane when the resit for the assessment centre would take place. She emailed Ms Gissane on 24th of February to remind her that this had been discussed orally and she had not yet had a reply. [Bundle 1289.]

143. On 27 February, 2017 Jo Willis wrote to the claimant to invite her to a meeting on 9 March 2017.

143.1 It was stated that Ms Willis was becoming concerned about the claimant's ability to provide regular and effective service.

143.2 It was said that the meeting would discuss medical retirement and stated that Ms had sought advice from occupational health about this. [Our finding is that that statement was inaccurate as she had only obtained a provisional opinion from the Head of Health, who had stated that a full referral would be required for “Medical Retirement” as opposed to “retirement in interests of efficiency” to be decided. The former is potentially more valuable to an employee and more costly to the Respondent.]

143.3 The letter said that one of the things to be considered was termination of the claimant's employment on the grounds of impaired capabilities due to ill health with retirement in the interests of efficiency. The letter mentioned the attendance procedure.

143.4 The letter stated that if the decision was made to terminate the claimant's employment she would receive written confirmation of that fact and of the termination date.

144. The enable plus report was produced on 27 February 2017. This was following a meeting on 9 February 2017.

144.1 It was noted that a suggestion was that the claimant should not have to carry out short-term assignments during the AJS search.

144.2 Dr Cheeseman's report was discussed. The report suggested that the recommendations would potentially be reviewed once the claimant had a new role. This was in line with Dr Cheeseman's suggestion that there would be an adjusted target for the claimant at the outset of any new role, but this could be revised once she became more familiar with it.

144.3 It was noted that the claimant would like to secure a post with homeworking, but was able to travel 1 to 2 days per week. It was suggested her preferred method of travel was train for longer journeys.

144.4 It commented that even with the adjustments made for the assessment centre, the claimant might have difficulties. It suggested that the respondent consider whether, as a reasonable adjustment, the respondent would waive the requirement to pass the assessment centre.

144.5 For informal interviews, it noted that the claimant believed she did not come over well by a telephone interview and she found it difficult because of her disability is to express her skills salient play in a short period of time. It was suggested that face-to-face interaction be considered.

144.6 Her CV was reviewed and was found to be excellent.

144.7 It was suggested that she might wish to undertake the enable plus skills training modules.

144.8 An action plan was attached to the report. [Bundle 1305].

145. Ms Gissane sent the meeting notes from 24 February to the claimant on 10 March.

146. The meeting between the claimant and Ms Willis took place on 14 March 2017.

146.1 The notes are [Bundle 1334.]

146.2 Ms Willis stated that the meeting was a resolution meeting as part of AJS. She said the reason for the meeting was the length of the job search and the fact that the claimant had not yet secured a permanent role.

146.3 Ms Willis stated that the situation could not continue indefinitely, and that termination was a possibility, but said that no decision would be made at that particular meeting.

146.4 Ms Willis stated that the three possible outcomes were: continue the job search; to terminate employment on the grounds of capability due to ill health; or potentially, if something exceptional that had not previously been considered arose during the meeting, then there could potentially be a different outcome, and that might include referral to occupational health.

146.5 Ms Willis stated that retirement in interests of efficiency pension benefits would apply if there was a decision to terminate employment.

146.6 The claimant stated that she believed the decision to potentially terminate was being rushed and that she had not been in the AJS for six months. Ms Willis disputed that. She stated the claimant had been a priority job search candidate for a lengthy period of time, (and, in context, she was referring to the fact that while in the transition centre the claimant had been a priority candidate, albeit with lower priority than, EWR candidates).

146.7 The claimant correctly pointed out that that was separate to AJS and Ms Willis' comment did not address her point that she had not been in AJS for six months.

146.8 There was a discussion about some particular job applications which the claimant had made and whether Ms Willis would be able to assist the claimant with challenging the recruiting managers decisions not to appoint her.

146.9 There was a discussion about the assessment centre. The claimant referred to the difficulties she perceived she had had on the dates of the previous assessments, including the stress caused by it and the fact that the laptop had not had the suitable software on it. She asked if Ms Willis had seen the Remploy (Enable Plus) report. Ms Willis confirmed she had seen it, but not read it in detail. The claimant quoted from the section about the assessment centre and whether or not an adjustment to waive the requirement could be made.

146.10 The claimant raised the issue about the delays in the enable plus referral having been made.

146.11 The claimant also referred to the requirement as per the written AJS process that within seven days of the Respondent's (and it would have to be Ms Halson's) approval for AJS, Ms Gissane was supposed to carry out various actions, including a face-to-face interview. The Claimant noted that the Respondent was claiming that the process started on 17 October, but commented that she had not even been told about that until the 26 October and there had been no face-to-face interview until 18 November.

146.12 The claimant referred to the fact that she believed she would have been eligible to be appointed into the flexible resources unit, but that initially that was delayed because she needed to sign off for homeworking by the time that had been obtained, there were no vacancies.

146.13 Ms Willis asked if the Claimant had put across all her points and claimant confirmed that she had. Ms Willis said that the two things she had to look into was about the AJS policy in terms of the timing queries that the claimant had

raised and the second thing was to find out whether the enable plus report was part of the AJS process.

146.14 Ms Wills said that she noted the claimant had asked for the job search to be extended. The claimant had asked her for details of the retirement in interests of efficiency figures which Ms Willis had said would be available to the claimant if she was dismissed. The claimant made clear that she was passionate about working for the respondent and she did not want that outcome.

146.15 Ms Willis said that she would look at the action points and then make a decision.

147. Ms Meir assisted Ms Willis with the drafting of the outcome letter and the rationale document, but we are satisfied that the opinions stated are Ms Willis's opinion, and that it was Ms Willis (not Ms Meir, or anyone else) who made the decision.

148. At 1642 on 22 March 2017, Ms Willis emailed the claimant with the outcome letter and rationale. The letter stated that the claimant was dismissed and her last day of employment was to be 15 June 2017. We discuss the letter and the rationale in more detail in our analysis and conclusions.

149. Ms Meir informed Ms Halson that the Claimant's AJS priority status would continue throughout the period of the claimant's employment up to 15 June 2017.

150. The claimant appealed within the relevant timescale. Details of which communications and documents she sent as part of the appeal, and on which dates, are discussed in our analysis and conclusions below.

151. In July 2015 [Bundle 908], the claimant's transition manager, Ms Gissane received an email from the finance team which appears to have been auto-generated. In any event, it listed transactions that the claimant had made using her company credit card, some of which dated back to November or December 2013 and some others of which were around a year old and most of the remainder were several months old.

152. The message stated that there was a requirement that the evidence to support such transactions was supposed to be submitted within 45 days and that this had apparently not been done in this case. As the claimant's manager, Ms Gissane was asked to ensure that the claimant did this.

153. On 7 July 2015, Ms Gissane forwarded that email to the claimant and asked her to action it, including by confirming to Ms Gissane what the expenses were for and how they were relevant to the transition centre.

154. On 7 March 2017, Ms Gissane received an email similar to the previous one about the claimant's expenses [Bundle 1318]. She sent an email to the claimant asking

the claimant to ensure that they were processed the same day. On 9 March, she sent a reminder stating that she had made a reasonable management request that the claimant perform this and, furthermore, stating that it was part of the claimant's job description to respond to requests from Ms Gissane, the transition manager.

155. The claimant replied the same day, 9 March to say that she was working on it, but she had been prioritising some of the matters related to her job search.

156. During the claimant's notice period, Ms Gissane held a fact find meeting with the claimant in relation to expenses submissions which the claimant had submitted. As noted above, Ms Gissane had chased the claimant to do this on 7 March and 9 March. The details of the fact find, and the subsequent investigation report dated 10 May sent to Ms Willis and Ms Wallace's subsequent actions in response to that report are discussed in our analysis and conclusions below.

157. Ms Dobson sent the dismissal appeal outcome to the claimant at 1712 on 6 June 2017. [Bundle 1584].

157.1 The appeal was rejected. It was confirmed that the claimant's employment would end on 15 June.

157.2 The letter made clear that Ms Dobson regarded it as an appeal decision which she had taken in accordance with the attendance procedure.

157.3 As part of the appeal, Ms Dobson accepted that the claimant had been in AJS since 17 October. She acknowledged that the most recent occupational health advice had been July 2016.

157.4 She noted that the enable plus referral had been made in December, but without commenting on why it had not happened in October. She also made no findings about the fact that, although submitted in December the referral had not been accepted by the relevant team and the case had been closed in mid-January. It was not acknowledged that it was not until 25 January 2017 that it was confirmed to the enable plus team that the referral should be processed. Nor were any findings made about the fact that the Enable team had closed the referral because they had not had the Claimant on the AJS list, or the fact that Ms Halson had agreed with the Enable team’s stance that the Claimant was not yet on AJS – as of mid-December 2016 – and that Ms Gissane and Ms Meir had further action points to complete prior to approval.

157.5 The appeal stated that the claimant had welcomed EWR. There was no findings made about the fact that the claimant had not welcomed AJS or any the six month time limits associated with it or the fact that dismissal might be the end result of being offered the benefit of AJS.

157.6 In terms of the claimant's dispute that she should not have been put on the AJS because there had not been a change of health, the appeal decision simply quoted from the business case which had said that the claimant would benefit from adjustments to the recruitment process. It did not address the specific issue that the AJS scheme was for people who had had a change of health.

157.7 In relation to whether the claimant should have been put on AJS given that she was in the transition centre, the appeal outcome commented on the fact that the AJS adjustments would potentially benefit the claimant but again made no specific findings about whether the AJS scheme – with its limit on the amount of time that such adjustments would be in place - was appropriate in the claimant's circumstances.

157.8 Ms Dobson was satisfied that the AJS process had been adequately explained to the claimant on 25 October and 18 November.

157.9 The appeal made a decision about why the claimant was being retired in interests of efficiency. It was acknowledged that the claimant's attendance was good, but it was asserted that a meeting under the attendance process had been held because no permanent solution had been found. In our judgement, there was no reasonable basis for that assertion. The AJS process makes clear that the six month review is not part of the attendance procedure, but is separate. The correspondence sent to the claimant in advance of the March 2017 meeting with Jo Willis had said that the meeting was part of the AJS. At the outset of the meeting, it had been stated that no decision about termination of employment would be made during the meeting. (It was said that termination of employment was a potential decision.)

157.10 Ms Dobson stated that the fact that approval for retirement in interests of efficiency had been received in February, based on a request made in January, did not imply that the decision to dismiss the claimant had been predetermined.

157.11 The appeal made specific decisions on the specific jobs which the claimant said it should have been offered to her, but had not been. It rejected the claimant's assertion that the assessment centre should have been waived for the claimant.

157.12 It was Ms Dobson's opinion that the delays in obtaining the enable plus referral not grounds to uphold the appeal because in our opinion, the enable plus referral added nothing.

158. During the notice period, the Claimant had a performance review for the period 1 April 2016 to 16 May 2017. The outcome was "DN".

158.1 Within the document, and as part of the justification fore the DN rating, Ms Gissane asserted that the claimant did not accept criticism well. It said that, she should learn to accept it.

158.2 Ms Gissane wrote that the claimant needed to take on board the development area of listening to a question and then also allowing a response to her own questions.

158.3 She stated that items had not been carried out on time.

158.4 She said that, for the last three months, the claimant had not done short term assignments.

159. The previous year's assessment is at [Bundle 1012]. That also gave the Claimant "DN". The stated reasons / areas for improvement included:

- Open dialogue with Manager
- Consider response before taking action
- Improving time management skills

160. On 15 June 2017 the claimant submitted a grievance about not being paid for her expense claims.

160.1 Within it, she stated that lies had been told about her to manage her out of the business. She claimed that the refusal to sign off her business expenses was done after the claimant had made it known that she was challenging the process and the evidence used to dismiss her.

160.2 She stated that it was soon after she told Ms Dobson about her opinions on those matters that her line manager had alleged gross misconduct in relation to late submission of the expenses.

160.3 She reiterated that she been in contact with the respondent at various times over the years about her expenses, but had never been told that it might be considered gross misconduct that she had not yet submitted the claims and documentations.

160.4 She accepted that the expense claims had been submitted outside the time limit, but invited the respondent to pay them as a goodwill gesture.

161. On the same date, 15 June 2017, the claimant submitted a different grievance. She said that it had been incorrect to place her in the transition centre in the first place. She also disputed the validity of the decisions to place her on AJS with effect from 17 October 2016. She referred again to the dispute had previously been raised as part of appeal against dismissal about the timings of the various

meetings and about the information that should have been given to her, and the timings of the enable plus referral and enable plus outcome report.

162. By letter dated 19 June 2017, from Ian French, the respondent replied to the two grievances.

162.1 It was stated that the grievance about the business expenses claims would not be progressed further without additional information from the claimant.

162.2 It was said that the grievance about the AJS scheme would not be taken further as the appropriate process to challenge that was to appeal against dismissal, and that had already taken place.

163. The claimant responded to Mr French on 16 September 2017. She did not supply the information about expenses that he referred to in his 19th of June communication. She stated, however, that she gave her consent for there to be a formal referral in order to potentially receive a medical retirement certificate.

164. Our finding in terms of the medical retirement certificate is that the Respondent did not – as per the comments made by Head of Health in January 2017 – submit the matter for a formal decision. They did not have the Claimant's consent to do so any earlier than 16 September 2017.

The Law

Equality Act 2010 ("EQA")

165. The burden of proof provisions are codified in s136 EQA and s136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

166. It is a two stage approach.

166.1 At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

At this first stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

166.2 If the claimant succeeds at the first stage then that means the burden of proof is shifted to the respondent and the claim is to be upheld unless the respondent proves the contravention did not occur.

167. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

168. The burden of proof does not shift simply because, for example, the claimant proves that there was a difference in treatment (in comparison to someone whose relevant protected characteristics were different) and/or that there was unwanted conduct and/or that there was a protected act. Those things only indicate the possibility of discrimination or harassment or victimisation. They are not sufficient in themselves to shift the burden of proof; something more is needed.

169. It does not necessarily have to be a great deal more and it could in an appropriate case be a non-response from a respondent or an evasive or untruthful answer from an important witness.

170. As per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof is shifted in relation to each one. That does not mean that we must ignore the rest of the evidence when considering one particular allegation. It just means that we assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

Time Limits for EQA complaints

171. In EQA, time limits are covered in s123, which states (in part):

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 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.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it

172. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

173. A crucial distinction is between – on the one hand – an invariable rule which will inevitably result in a discriminatory outcome each time and – on the other hand – a discretionary decision made under a policy, in which the discretionary decision may sometimes result in an employee getting the desired outcome, and sometimes not. In the latter case, the discretionary decision causes the time to run (for a complaint based on that decision), regardless of arguments about whether the policy itself is discriminatory.

174. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

175. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have

regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

176. The factors that may helpfully be considered include, but are not limited to:

176.1 the length of, and the reasons for, the delay on the part of the claimant;

176.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

176.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

177. In particular, it will usually be important for the Tribunal to pay attention to (and, where necessary, make specific findings about) "whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)": Abertawe Bro Morgannwg University Local Health Board v Morgan Neutral Citation Number: [2018] EWCA Civ 640.

Definition of Direct Discrimination – section 13 EQA

178. Direct discrimination is defined in s.13 EQA.

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

179. There are two questions: whether the respondent has treated the claimant less favourably than it treated others ("the less favourable treatment question") and whether the respondent has done so because of the protected characteristic ("the reason why question").

180. For the less favourable treatment question, the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. However, the less favourable treatment question and the reason why question are intertwined. Sometimes an approach can be taken where the Tribunal deals with the reason why question first. If the Tribunal decides that the protected characteristic was not the reason, even if part, for the treatment complained of then it will necessarily follow that person whose circumstances are not materially different would have been treated the same and that might mean that in those circumstances there is no need to construct the hypothetical comparator.

181. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the respondent's various acts, omissions and decisions.

182. Section 13(2) states:

> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

Harassment – section 26 EQA

183. Harassment is defined in s.26 of the Act.

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

184. It needs to be established on the balance of probabilities that the claimant has been subjected to unwanted conduct which had the prohibited purpose or effect. However, to succeed in a claim of harassment, it is not sufficient for a claimant to prove that the conduct was unwanted or that it had the purpose or effect described in s.26(1)(b). The conduct also has to be related to the particular characteristic.

185. Section 136 EQA applies and so the claimant does not necessarily need to prove on the balance of probabilities that the conduct was related to the protected characteristic. If the tribunal finds facts from which it could conclude that the conduct was related to the protected characteristic then the burden of proof shifts.

186. The use of the word "or" in s26(b) (twice) is important.

187. "Purpose" and "effect" are two different things, and must be considered separately. Where it was the wrongdoer's "purpose" to do the things listed in s26(b), then the complaint can succeed even if the conduct did not successfully have that effect. Correspondingly, where the conduct does have the effect described in s26(b), then

the complaint can succeed even if the Respondent (or the person whose conduct it was) did not have the intention of causing that effect.

188. In Land Registry v Grant Neutral citation [2011] EWCA Civ 769, the Court of Appel said that when considering the effect of the unwanted conduct, and when analysing s.26(4), it is important not to cheapen the words used in s.26(1).

> Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.

189. When assessing the effects of any one incident of several alleged acts of harassment then it is not sufficient really to consider each instant by itself. We obviously must consider each incident by itself, but, in addition, we must stand back and look at the impact of the alleged incidents as a whole (see Qureshi v Victoria University of Manchester EAT/484/95). This is particularly important when considering whether it would be reasonable to regard the conduct as having the prohibited effect and also when considering whether to draw inferences that the conduct was related to the protected characteristic

Discrimination arising from disability

190. Discrimination arising from disability is defined in s.15 of the Act.

> **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.

191. The elements that must be made out in order for the claimant to succeed are that: there must be unfavourable treatment; there must be something that arises in consequence of the claimant's disability; the unfavourable treatment must be because of, in other words caused by, the something that arises in consequence of the disability. Furthermore, the alleged discriminator must also be unable to show either that the unfavourable treatment was a proportionate means of achieving a legitimate aim or, alternatively, that it did not know and could not reasonably have been expected to know that the claimant had the disability.

192. The word ”unfavourably” in s.15 is not separately defined in the legislation but should be interpreted consistently with case law and the EHRC Code of Practice. Dismissal, for example, can amount to unfavourable treatment but so can treatment which is much less disadvantageous to an employee than dismissal.

193. Where there is more than one step in the chain of causation - between the claimant’s unfavourable treatment and the “something” that arises in consequence of the disability - that can be sufficient.

194. When considering what the respondent knew or could have reasonably been expected to know, the relevant time is the time at which the alleged unfavourable treatment occurred. Thus, where there are different allegations, then the respondent’s knowledge has to be assessed at the time of each alleged act or omission. For that reason, for example, what the Respondent knew (or could have been expected to know) at the time of a dismissal might be different than what it knew (or could have been expected to know) at the time of an appeal hearing.

195. The complaint will not succeed if the respondent is able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim relied upon should be legal, should not be discriminatory in itself, and must represent a real objective consideration. Business needs and economic efficiency may be legitimate aims, but simply demonstrating that one course of action was less costly than another is not likely to be sufficient.

196. In relation to proportionality, the respondent is not obliged to go as far as proving that the discriminatory course of action was the only possible way of achieving the legitimate aim. However, if there are less discriminatory measures which could have been taken to achieve the same objective then that might imply that the treatment was not proportionate.

197. It is necessary for there to be a balancing exercise which takes into account the importance of the respondent achieving its legitimate aim in comparison weighed against to the discriminatory effect of the treatment. Regardless of whether the respondent carried out that balancing exercise at the time (and it is not necessary for the Respondent to prove that it did), the tribunal carries out its own balancing exercise - based on the evidence presented at the hearing – in order to decide if the section 15(1)(b) defence succeeds.

198. If a respondent has failed to make reasonable adjustments which could have prevented or minimised the unfavourable treatment, then it is going to be very difficult for the respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

199. Section136 EQA applies to alleged contraventions of section 15 EQA.

Failure to make reasonable adjustments,

200. Section 20 EQA defines the duty. S.21 and schedule 8 also apply.

20 Duty to make adjustments

(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.

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

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

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

21 Failure to comply with duty

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8, Part 3, paragraph 20: Lack of knowledge of disability, etc.

> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

201. The expression "provision, criterion or practice" [usually shortened to "PCP"] is not expressly defined in the legislation. We have regard to the guidance given by EHRC to the effect that the expression should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, pre-requisites, qualifications or provisions.

202. The claimant must clearly identify the alleged PCPs to which the adjustments should have been made. The tribunal must only consider those PCPs as identified. See Secretary of State for Justice v Prospere [2015] UKEAT 0412/14/3004.

203. When considering whether there has been a breach of s.21 we must precisely identify the nature and extent of each disadvantage to which the claimant was allegedly subjected. Furthermore, we must consider whether there is a substantial disadvantage when the relevant alleged PCP is applied to the claimant in comparison to when the same PCP is applied to persons who are not disabled.

204. The claimant has the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred that the duty may have been breached. If she does then we need to identify the step or steps (if any) which the respondent could have taken to prevent the claimant suffering the disadvantage in question, or to reduce that disadvantage. If there appear to be such steps, then the burden is on the respondent to show that the disadvantage could not have been eliminated or reduced by such potential adjustments or, alternatively, that the adjustment was not a reasonable one for it to have had to make.

205. There is no breach of s.21 if the employer did not know and could not reasonably have been expected to know, that the claimant had the disability.

206. Furthermore, in relation to a particular disadvantage, there is no breach of s.21 if the employer did not know and could not reasonably have been expected to know, that the PCP would place the claimant at that disadvantage.

207. Where an employee is unable to continue in their current job because of a disability, then it might be a reasonable adjustment to transfer the employee to another job which they are capable of doing. That *might* be a step which it reasonable for the employer "to have to take" (as per section 20(3) EQA) even if, by doing so, the result is that another person, who was better suited to the role, loses out on it. This was the decision of the House of Lords in Archibald v Fife Council 2004 ICR 954. However, the decision does not mean that, in all cases,

the employer has to take such a step. The Tribunal must consider each case on its merits when an argument of this nature is raised.

208. Where a particular recruitment selection method places a candidate (including an existing employee applying for a new role) at a disadvantage, then a reasonable adjustment *might* be to use some alternative method of selection, including, for example, appointing without an interview. However, that does not mean that an employer is obliged to appoint someone to a job for which they do not meet the criteria. Using a different assessment method to decide whether they meet the criteria is not the same thing as waiving the criteria themselves. See Wade v Sheffield Hallam University UKEAT/0194/12/LA.

Victimisation

209. Victimisation definition is in s.27 EQA.

> **27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

210. There is an infringement if a claimant is subjected to a detriment and the claimant was subjected to that detriment because of a protected act.

211. The alleged victimiser's improper motivation could be conscious or it could be unconscious.

212. A person subjected to a detriment if they are placed at a disadvantage and there is no need for either claimant to prove that their treatment was less favourable than a comparator's treatment.

213. For the Claimant to succeed in a claim of victimisation, we must be satisfied (having taken into account the burden of proof provisions) that the claimant was

subjected to the detriment because she did a protected act or because the employer believed that she had done or might do a protected act.

214. Where there is a detriment and a protected act, then those two things alone are not sufficient for the claimant to succeed. The Tribunal has to consider the reason for the treatment and decide what consciously or otherwise motivated the respondent. That requires identification of which decision makers made the relevant decisions as well as consideration of their mental processes.

215. The claimant does not have to demonstrate that the protected act was the only reason for the detriment. Furthermore, if the employer has more than one reason for subjecting the Claimant to the detriment, then the claimant does not have to establish that the protected act was the principal reason. The victimisation complaint can succeed provided the protected act has a significant influence on the decision making. An influence can be significant even if it was not of huge importance to the decision maker. A significant influence is one which is more than trivial.

216. A victimisation complaint might fail where the reason for the detriment was not a protected act itself but something else which (while being in some way connected to the protected act) could properly be treated as separate. See Martin v Devonshires Solicitors [2010] UKEAT 0086/10.

217. S.136 applies and so the initial burden is on the claimant to demonstrate that there are facts from which the Tribunal might conclude that the detriment was because of the protected act.

Indirect discrimination

218. Section 19 EQA states, in part:

> **19 Indirect discrimination**
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

219. Disability and age are each protected characteristics listed in section 19(3).

220. The phrase "provision, criterion or practice" is commonly abbreviated to "PCP". It is not separately defined in the Equality Act 2010. Tribunals must interpret it in accordance with guidance in the EHRC Code and in appellate court decisions.

221. The PCP does not have to be a complete barrier preventing the claimant from performing their job for section 19 to be triggered. Furthermore, a PCP might be "applied" even if the employee is not necessarily disciplined or dismissed if they fail to meet the requirement. In Carreras v United First Partners Research, the EAT concluded that an expectation or assumption that an employee would work late into the evening could constitute a PCP, even if the employee was not "forced" to do so.

222. There are two aspects to the "particular disadvantage" limb of the test for indirect discrimination.

222.1 that the PCP puts (or would put) persons who share the claimant's protected characteristic at a particular disadvantage when compared with persons who do not share it. This is sometimes referred to as "group disadvantage".

222.2 that the claimant must personally be placed at that disadvantage.

223. The word "disadvantage" is not specifically defined in the Equality Act 2010. The Code of Practice suggests that disadvantage can include denial of an opportunity or choice, deterrence, rejection or exclusion. A person might be able to show a particular disadvantage even if they have complied with the PCP in order, for example, to avoid losing their job. It is sufficient that the PCP caused the claimant "great difficulty" in meeting their obligations.

224. If the PCP is shown to exist and to place persons with the relevant protected characteristic, and the claimant , at a particular disadvantage, the burden of proof switches to the respondent to show that the PCP is nevertheless a proportionate means of achieving a legitimate aim.

225. The "legitimate aim" of the PCP should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.

226. Reasonable business needs and economic efficiency may be legitimate aims. However, a discriminatory rule or practice will not necessarily be justified simply by showing that the less discriminatory alternatives cost more.

227. Once a legitimate aim has been established, the tribunal must consider whether the discriminatory PCP is a proportionate means of achieving that aim.

228. Tribunals considering whether a PCP is a proportionate means of achieving a legitimate aim must undertake a comparison of the impact of the PCP on the affected group as against the importance of the aim to the employer.

229. The tribunal must consider whether there are less discriminatory alternative means of achieving the aim relied upon. However, the existence of a possible alternative non-discriminatory means of achieving the aim of a measure or policy does not, in itself, make it impossible for the respondent to succeed in justifying a discriminatory PCP. The existence of an alternative is only one factor to be taken into account when assessing proportionality.

230. The tribunal must make an objective determination and not (for example) apply a range of reasonable employers test.

231. The defence to a section 19 claim can, in principle, rely on a legitimate aim which was not in fact the reason for imposing the PCP at the relevant time.

Unfair Dismissal

232. Section 98 of the Employment Rights Act 1996 ("ERA") deals with fairness.

> **98.— General.**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) In subsection (2)(a)—
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
>
> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

233. The respondent has the burden of proving, on the balance of probabilities, that the claimant was dismissed for the reason relied upon. The reason in this sense is the set of facts known to the person taking the decision on behalf of the employer (or the set of beliefs held by that person) which cause the employer to dismiss the employee. See the court of appeal decision in Abernethy v Mott [1974] I.C.R. 323. We will call this "the factual reason".

234. Furthermore, the employer must also satisfy us that this factual reason falls within one of the definitions in either section 98(2) or section 98(1)(b).

235. In this case, the Respondent asserts that the reason fell into the category "capability" or, in the alternative, some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held ("SOSR").

236. If the respondent fails to persuade us that it genuinely dismissed for the factual reason relied on, then the dismissal is unfair. However, if it does show that it dismissed for that factual reason, it is not required to demonstrate that it supplied the correct label (for example, "capability") to the Claimant at the time. A failure to use the correct label might be relevant to whether there was procedural unfairness (for example, the question of whether the Claimant was denied any appeals or safeguards that might have been available had the correct label, and the employer's procedure for that particular type of dismissal process, been used). However, an incorrect label, in and of itself, does not render the dismissal unfair.

237. In considering the general reasonableness, we take into account the respondent's size and administrative resources and decide whether the respondent acted reasonably or unreasonably in treating the situation as a sufficient reason for dismissal.

238. In considering the question of reasonableness, part of our analysis is to decide whether:

238.1 (for the capability reason) whether the respondent had a reasonable basis to believe that the employee was not capable of doing her job within a reasonable period time or else

238.2 (for the SOSR reason) alternatively whether the respondent had a reasonable basis to believe that that (i) there was a "continued failure to locate a suitable alternative permanent role for the Claimant that accommodated her health restrictions despite an extensive search".

239. In the former case the EAT decision in *Spencer v Paragon Wallpapers Ltd [1976] IRLR 373* gives valuable guidance.

239.1 It is important to scrutinise all the relevant factors.

239.2 Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?

240. In the latter case there are a range of factors to consider. It is not the role of this tribunal to assess the evidence and to decide whether or not we think that the Claimant ought to have been dismissed for the SOSR reason in question. We must not substitute our own decisions for the decisions made by the Respondent. That being said, the mere fact alone that the employer decided that dismissal was the appropriate outcome does not automatically mean that we are obliged to decide that their decision was one which a reasonable employer might reach. We may take into account all the circumstances, including what caused the state of affairs that led to the dismissal. See Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11.

241. There is no principle that the mere fact that an employee is fit at the time of dismissal makes the dismissal unfair. We have to decide whether or not the dismissal decision was withing the band of reasonable responses. For the factual reason relied on in this case (and the two alternative labels put forward), assessing whether the decision was within the band of reasonable responses requires us to look at the whole picture, as at the time of dismissal, and the history which led to that situation. A dismissal for this type of reason does not necessarily require formal "warnings", in the sense that that word is used in conduct dismissals. However, the issue of whether the decision to dismiss was within the band of responses (and the issue of whether the procedure which led to it was within the band of reasonable responses) will include analysis of whether the claimant had been given sufficient information that dismissal was a possible outcome, and whether the claimant had had sufficient time to seek to take steps to avoid dismissal.

242. As confirmed by the EAT in *Williamson v Alcan (UK) Ltd [1978] I.C.R. 104 (1977),* in an appropriate case, fairness will require the employer to consider a change of circumstances between the original date of giving notice of dismissal and the date on which notice was due to expire.

243. While the Tribunal does have to make decisions about fairness at the time notice was given, the Tribunal also has to judge the reasonableness of the employer's actions as at the date of the termination and should not wrongly confine its focus solely on the reasonableness of the initial decision to give notice dismiss.

244. In some circumstances unfairness at the original dismissal stage might be cured at the result of an appeals process. That depends on all the circumstances of the case. Lack of an appeal is something that can potentially be taken into account when considering the overall fairness of the decision to dismiss (which, of course, requires analysis of why there was no appeal hearing).

Dismissal contravening Equality Act vs Unfair Dismissal

245. For example, when considering, as we must, in accordance with s15 EQA, whether a dismissal was proportionate, we must perform our own balancing exercise. But when considering whether the dismissal was unfair we must instead look at the employer's rationale. A dismissal which is discriminatory is not always a dismissal which is unfair.

Breach of contract

246. The Tribunal has jurisdiction to consider complaints of breach of contract, subject to the conditions, requirements and limitations set out in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

247. The Tribunal will take a similar approach to other courts, including interpreting the contract to decide what obligations existed, and whether they have been breached.

Analysis and conclusions

248. We will deal with the Equality Act complaints first. We will address those in approximately the same order that they are set out in the Schedule of Allegations [Bundle 214 to 248].

Row 1

249. There are seven alleged PCPs. We will number them 1.1 to 1.7. Our decisions for whether the Respondent did or did not have the alleged PCP in question are shown in the following table.

Alleged PCP	Decision
1.1. That in the absence of a permanent hard-wired role, employees are at risk of dismissal.	Yes

1.2. That such employees must be able to satisfy the recruiting manager as to their suitability for an alternative role.	Yes
1.3. That candidates put in the BT Transition Centre (BTTC) must compete with each other and with others, in seeking alternative roles.	Yes
1.4. That candidates in the BTTC are limited to applying for roles at the same or a lower banding.	No
1.5. That candidates put on the Adjusted Job Search (AJS) process have a time limited period in which to secure suitable alternative employment before consideration of dismissal.	Yes
1.6. That candidates who were unable to secure a hardwired role by the end of the standard AJS period are liable to be dismissed.	Yes
1.7. That candidates on the AJS are not encouraged or supported to secure roles graded higher than their own substantive banding.	No

250. We think it is clear from what we have said in the findings of fact why we decided to that PCPs 1.1 to 1.3 and 1.5 and 1.6 were found to be PCPs which the Respondent did have, and which it applied to the Claimant and others. In any event, in its closing submissions, the Respondent conceded each of those.

251. The Respondent did not have PCP 1.4. Employees who were in BTTC could apply for any role, and be considered for it. They were not instructed that they could only apply for roles at same grade or lower. They had the same opportunities to apply for roles (at higher grade) that employees who were not in BTTC had.

252. As worded, PCP 1.7 is not accurate. As per page 10 of "Managers guide to adjusted job search" [Bundle 384], the provisions of AJS applied to roles at the employee's "*own substantive grade, plus lower and slightly higher grades as appropriate*". The wording "not encouraged" and "not supported" is vague and unspecific. It is accurate that the Respondent did not proactively seek matches for all jobs, irrespective of grade, during AJS. That is, jobs which were at grades

which were more than "slightly higher" than the employees substantive grade were not proactively identified and forwarded to the employee by the Workforce Deployment team. There was no rule or policy which barred an employee on AJS from identifying such jobs themselves. Ms Gissane frequently told the Claimant to focus on the matches presented to her; however, that was simply Ms Gissane expressing her opinion that those were the roles that the Claimant was most likely to be successful with. It was not Ms Gissane saying that there would be any adverse consequences (apart from the time that the Claimant might spend fruitlessly) if the Claimant applied for other roles, as well or instead, of those she was matched to by the Workforce Development Team.

253. For the above-mentioned PCPs, the Claimant alleged that she was at five disadvantages in comparisons with persons who are not disabled. The numbering of the disadvantages is not intended to match up the corresponding PCP. We have considered each disadvantage for each of PCPs 1.1, 1.2, 1.3, 1.5 and 1.6 Our decisions on each disadvantage, and whether there was a failure to make reasonable adjustments are as follows.

Disadvantage 1.1. C was taken out of her existing role (a secondment which became a hardwired/permanent role, for which she had to train her replacement) and struggled to obtain a hardwired permanent role due to the effects of her disability, as a result of which she was at risk of dismissal and had no job security or career development plan within R.

254. The part of the sentence "*C was taken out of her existing role (a secondment which became a hardwired/permanent role, for which she had to train her replacement)"* is irrelevant to the issue of whether the Claimant was at a disadvantage for the PCPs in Row 1.

255. It is true, however, that the Claimant had left her substantive role, in 2009, for the reasons set out in the findings of fact. [None of the secondments that she did between 2009 and 2014 were substantive role; furthermore, if there had been a specific complaint based on the cessation of any such secondment, it would have been more than three years out of time.]

256. It is true that, because of her disability, after she had left her substantive role, the Claimant struggled to find a permanent and substantive role. Thus PCPs 1.1, 1.2, 1.3, 1.5 and 1.6 did place her at a disadvantage, as alleged in the last 3 lines of Disadvantage 1.1.

257. It is correct that a person without the Claimant's disability was also potentially disadvantaged by the possibility of being dismissed if (having left their previous substantive post) they were unable to obtain a new substantive role. However, because of her disability, it was more difficult for the Claimant

258. The Claimant's first suggestion was: "To have simply transferred the Claimant to a suitable alternative vacancy without the need for a formal interview." She cross-referenced her Appendix A.

259. Hypothetically, slotting an existing employee into an existing vacancy is something which the Respondent had the power to do; it was not beyond its legal or technical capabilities. Thus, taking account of the burden of proof provisions, the Respondent must persuade us that it was not reasonable for it to have to do that on the facts of this case.

260. A large number of potential job vacancies were referred to in the evidence in the bundle. We have not been taken through, job by job, everyone of those jobs, and heard specific arguments from the Claimant about why she met all the requirements for the post and specific arguments from the Respondent about why she did not. The Respondent's case, however, is that regardless of whether the Claimant potentially met the requirements, it had a specific procedure (AJS) by which employees were not required to have a formal interview. For non-AJS employees, it was not reasonable for the Respondent to have to appoint those employees straight into a job, without a formal interview, as there might be other people (AJS or otherwise) who also met the requirements as well as, or better than, the Claimant. Furthermore, once the Claimant was in the AJS scheme, the formal interview part was not required, but there still had to be some assessment of (a) whether the Claimant met the requirements for the post and (b) whether another AJS candidate was potentially better-suited.

261. Even taking account of section 136, we have not been satisfied that there was any specific vacancy such that it was reasonable for the Respondent to have had to slotted the Claimant into that vacancy so as to remove or alleviate Disadvantage 1.1 caused to the Claimant by the PCPs in Row 1 (PCPs 1.1, 1.2, 1.3, 1.5 and 1.6).

262. The second suggested adjustment was "to have removed the need for C to compete with others when recruiting to potentially suitable vacancies". However, this is really no different to the one just mentioned. It is simply another way of phrasing the suggestion that the Claimant should have been slotted into some job. For the reasons just mentioned when discussing the first suggested adjustment, this was not a step which it was reasonable for the Respondent to have had to take so as to remove or alleviate Disadvantage 1.1 caused to the Claimant by the PCPs in Row 1 (PCPs 1.1, 1.2, 1.3, 1.5 and 1.6).

263. The Claimant's third suggestion was: "To have permitted C to continue to work on secondments via Flexible Resource Centre (FRU) or in project-specific roles pending a permanent hard-wired role being found identified post that it".

264. It would not have been a reasonable adjustment for the Respondent to have had to allow the Claimant to remain indefinitely "on the bench" waiting for suitable secondment opportunities to arise.

265. However, where there were suitable secondment opportunities, then a reasonable step for the Respondent to have had to take, to alleviate Disadvantage 1.1 caused to the Claimant by the PCPs in Row 1 (PCPs 1.1, 1.2, 1.3, 1.5 and 1.6) and not to prematurely bring those secondments to an end just because the Claimant was in BTTC. However, the period during which the Claimant was denied entry to FRU (by the failure to sign off homeworking) ended no later than the sign off of homeworking in February or March 2015. By that time, it was no longer the failure to approve home working that was the issue, but the fact that there were no vacancies in FRU. As per the findings of fact, we accepted that was genuinely the position, and the Claimant was not lied to or deceived by the stated reasons given to her. She knew by no later than February 2015 that the Respondent was not going to appoint her to FRU because it was "full". It was clear to her by then that the Respondent was not going to appoint her to FRU as a reasonable adjustment. Thus, as per section 123(3)(b) EQA, and section 123(4)(a), the time limit clock started running no later than February 2015. To be in time, the claim needed to be presented (or early conciliation commenced, at least) by no later than the end of May 2015. The claim was presented more than 26 months out of time. It is not just and equitable to extend time.

266. The Claimant's next suggested adjustment was: To have desisted from placing C in the BTTC scheme (which occurred on 5 occasions), when this was expressly stated to not be suitable for disabled employees due to lack of level playing field. The Claimant should instead have been dealt with via the Enabling Workplace Redeployment (EWR) process.

267. The Claimant was placed in BTTC for the reasons stated in the findings of fact, namely, on the Claimant's team, for the Claimant's substantive post, the Respondent required fewer employees, and the Claimant volunteered to be the employee who would leave that substantive post. In those circumstances, and at the time, there were two choices: take a voluntary redundancy package or enter BTTC [that is, remain as an employee, without a substantive post, unless and until appointed to a substantive post (or, in the Claimant's words, to a " a hardwired permanent role")]. The Claimant chose the latter. It would not have been a reasonable adjustment to make the Claimant compulsorily redundant, in 2009, instead of placing her into BTTC, and it would not have been a reasonable adjustment, in 2009, to say that the Claimant had to remain in her (then) substantive post. Either of those options would have been contrary to the choice that the Claimant made. Furthermore, and in any event, any complaint that the act of placing the Claimant in BTTC in 2009 (or any alleged associated omission) was a failure to make an adjustment is long out of time, and it would not be just and equitable to extend time for it, given the changes in the Respondent's personnel

since then, and that fact that memories about the specific and exact discussions that were held, and considerations that were taken into account, will have faded.

268. We do not agree with the Claimant's characterisation that, since 2009, she was placed into BTTC four more times. Rather she was placed in it once, and never exited it. There was only one method of exiting (other than termination of employment) and that was to obtain a permanent post within the Respondent. That never happened. She was sometimes temporarily working outside of BTTC, as a result of secondments, but that was always on the basis that, she would return to BTTC once the secondment ended. There was no "fresh" decision each time to put the Claimant into BTTC anew. The return to BTTC was the inevitable consequence which followed from (a) the original 2009 decision and (b) the fact that, during the periods working away from BTTC, the Claimant was not appointed to a permanent position.

269. The Claimant's next suggested adjustment was: To have desisted from placing C on the time limited AJS process when she did not meet the criteria for inclusion.

270. We will discuss the Respondent's decision in our analysis below and explain why we have decided that it was a contravention of EQA.

271. The Claimant's next suggested adjustment was: To have pro-actively worked with C to find a suitable alternative role, making any necessary adjustments to the timescales for securing a role, the role itself and where appropriate, offering any training and/or trial periods.

272. In relation to Disadvantage 1.1:

272.1 There was not a failure to work with the Claimant to *attempt* to find a suitable alternative role. Those attempts were not successful. We address the lack of success elsewhere in our analysis.

272.2 We do agree that some variation of timescales is potentially appropriate, but we address that elsewhere in our analysis. The same can be said about some training being offered and some trial period being considered.

273. The Claimant's next suggested adjustment was: To have refrained from dismissing C when she had a skill-set that could be utilised by R and when at the point of dismissal, R had 4 suitable 'open' vacancies.

274. We address the dismissal below.

Disadvantage 1.2. As a disabled employee, C required adjustments to search alternative roles/responsibilities, meaning it was more difficult for her to secure them.

275. The first part of this relates to the Claimant's ability to search for roles. We accept that she was at that disadvantage.

276. We do not accept that the Respondent failed to make reasonable adjustments to seek to alleviate that disadvantage. The Respondent offered her reasonable assistance in drawing potential opportunities to her attention.

277. In terms of the Claimant's suggested 7 adjustments for Row 1, none of those was a step that it was reasonable for the Respondent to have had to take in order to remove or alleviate the first part of Disadvantage 1.2.

278. The second part of Disadvantage 1.2 (difficulty in securing roles) is covered by what we say about Disadvantages 1.3 and 1.4.

> *Disadvantage 1.3. As a result of her disability, C was likely to find it difficult to secure an alternative role when required to compete for it with others*
>
> *Disadvantage 1.4. As a result of her disability, C faced an additional hurdle of having to persuade hiring managers that the role was suitable for her, and vice versa*

279. Each of these two is saying something similar, though 1.3 is specifically about competing, whereas 1.4 applies regardless of whether the Claimant was competing, or was given the chance to be appointed prior to anyone else being considered.

280. We accept that the Claimant was at these disadvantages.

281. When we accepted that, in comparison with persons who are not disabled, the Claimant was at Disadvantage 1.1, these were the things that we had in mind. That is, in comparison with persons who are not disabled, it was harder for the Claimant to demonstrate that she was the best candidate (of several) for the role, and it was harder for the Claimant to demonstrate that (even if she was the first person being considered, without having to show she was "better" than a rival candidate) she was suitable for the role.

282. Therefore what we say about potential reasonable adjustments for Disadvantage 1.3 and Disadvantage 1.4 is already covered by our analysis regarding Disadvantage 1.1 above.

> *Disadvantage 1.5. C was readily capable of fulfilling a higher-grade role and indeed, had done so on many occasions. The pool of roles available to C was artificially limited, increasing the likelihood of dismissal.*

283. This is not a disadvantage that the Claimant was placed at (in comparison with persons who are not disabled) by any of the PCPs in Row 1: PCPs 1.1, 1.2, 1.3, 1.5 and 1.6.

284. The Claimant was not prevented from applying for higher-graded posts (and since, that is what the Claimant meant by "artificially limited") the factual assertion not correct.

Row 2

285. There are six alleged PCPs. We will number them 2.1 to 2.6. Our decisions for whether the Respondent did or did not have the alleged PCP in question are shown in the following table.

Alleged PCP	Decision
2.1 That in Business Improvement (BI) and Project and Programme Management (PPM), candidates are required to pass the Assessment Centre as a condition of being considered for various roles in their respective job families.	Yes
2.2 That candidates are not excused from the requirement to pass the assessment, based on their particular circumstances.	Yes
2.3 That candidates are expected to complete the assessment even in the absence of recommended and/or previously agreed adjustments and auxiliary aids.	No
2.4 That not all candidates are permitted to re-sit the assessment.	Yes
2.5 That not all candidates who fail the assessment at Band 2 are considered for lower Band 1 vacancies.	*
2.6 That candidates for whom adjustments are made may be penalised for having such adjustments.	No

286. We think it is clear from what we have said in the findings of fact why we decided that PCPs 2.1, 2.2 and 2.4 were found to be PCPs which the Respondent did have, and which it applied to the Claimant and others. In any event, in its closing submissions, the Respondent conceded each of those.

287. We have put an asterisk by PCP 2.5. Whether or not a candidate was considered eligible for a Band 1 vacancy depended on their mark. So, to the extent that that 2.5 simply means that those whose mark was too low were not further considered for Band 1 roles, the alleged PCP did exist. However, all candidates did have the opportunity to score a high enough mark so that they were further considered for Band 1 roles. By entering the assessment, all candidates therefore did have the opportunity to be considered for lower Band 1 vacancies; in that sense, the Respondent did not have PCP 2.5. We therefore consider it below on the basis of the former interpretation.

288. We are not satisfied that the Respondent did have either PCP 2.3 or PCP 2.6.

288.1 For PCP 2.3, as we discussed in the findings of fact, the Claimant was offered the opportunity to defer the assessment to another day, and she declined. The Respondent did not ultimately insist that she go ahead on the day, even though we accept that it was Ms Peck on the day who offered her the chance to defer, rather than Ms Gissane.

288.2 For PCP 2.5, that is the Claimant's perception of comments made, but we disagree with her perception/interpretation. The comment that she had not gone further in her answer than repeating what she had written in her notes was not a criticism that she had made use of notes; it was an observation that what was written in her notes was not enough for a higher mark, and that she had been given the chance orally to go further than her aide memoires, but had not done so.

PCP 2.1

Disadvantage 2.1. By reason of her disability, C would find it much more difficult to pass the assessment (for the reasons identified in the various reports available to R) and was therefore not on a level playing field with non-disabled candidates.

289. We accept that PCP 2.1 did put the Claimant at Disadvantage 2.1 in comparison with persons who are not disabled

Disadvantage 2.2. Unless C passed the assessment, she would be unable to access various vacant roles which would otherwise have been suitable for her. For as long as this persisted, the Claimant was at risk of dismissal.

290. This was not a disadvantage in comparison with persons who are not disabled. PCP 2.1 meant that all candidates were unable to access the various vacant roles if they did not pass the assessment.

Disadvantage 2.3. C`s difficulties in passing the assessment would be compounded by the previously agreed adjustments and auxiliary aids not being available on the day, which made the assessment far more stressful.

291. This is not a freestanding disadvantage caused by PCP 2.1. However, the contents of alleged Disadvantage 2.3 will be taken into account when we decide there was a failure to make reasonable adjustments for PCP 2.1.

Disadvantage 2.4. Being penalised for having the limited adjustments she did have further prejudiced the outcome of her assessment and R`s opinion of her performance.

292. This is based on alleged PCP 2.5, and we found that the Respondent did not have that.

293. The Claimant was not placed at Disadvantage 2.4 by any of the alleged PCPs which we upheld for Row 2, including PCP 2.1.

Adjustments

294. The Claimant suggested the following adjustments for Row 2. The numbering is not intended to cross-reference either the alleged PCPs or the alleged disadvantages.

2.1. To have excused C from the requirement to sit the assessment.

2.2. To have used an alternative method of assessing C`s suitability for the available roles.

2.3. To have delayed C`s assessment until all recommended adjustments were in place and C was comfortable with proceeding.

2.4. To have allowed C to bring and use her auxiliary aids, including her suite of assistive software, that had been previously agreed could be used at the assessment.

2.5. To have allowed C to re-sit the assessment with the benefit of all the reasonable adjustments she required.

2.6. To provide proper coaching and support to C prior to any assessment.

2.7. To have desisted from penalising C for being allowed additional time /notes at the assessment.

2.8. To have allowed C to have her paper re-marked for Band 1 grade.

2.9. To have allowed C to be considered for roles in both the Business Improvement and Project and Programme Management job families (and any other roles for which C was potentially suitable).

295. For PCP 2.1, it would not have been a reasonable adjustment for the Respondent to have had to excuse the Claimant from the requirement (suggested adjustment 2.1). While it is true that the Claimant had qualifications, so did other people. The Respondent had decided that, notwithstanding any qualifications or experience its existing employees (or external candidates) might have, there was an important business need to carry out a standardised internal assessment of their skills and abilities. Making sure that it took disabilities into account when (for example)

setting time limits for the test and when making other practical arrangements for (for example) how the questions would be conveyed and how the answers would be recorded were requirements of EQA. However, we are satisfied that – provided such adjustments were made – it would not have been reasonable for the Respondent to have had to decide that the Claimant could be appointed to such jobs without sitting the assessment at all.

296. For PCP 2.1, the second suggested adjustment (to have used an alternative method of assessing C`s suitability for the roles in question) is no different to the first (not requiring her to sit the assessment). The same applies to the ninth suggested adjustment. Our analysis in the previous paragraph applies to both of those too.

297. For PCP 2.1, the Claimant's third suggested adjustment is potentially a reasonable one. However, in any event, on the facts, the Respondent did not fail to do that. It did offer her the opportunity to defer, and she decided to go ahead on the day. We do think that matters could probably have been handled better by the Respondent; in particular, the opportunity to defer could have been offered sooner, and by Ms Gissane. However, it was the Claimant's choice to proceed on the day, and any specific complaint about Ms Gissane's failure, prior to the adjustment being offered, is out of time and it would not be just and equitable to extend time.

298. For PCP 2.1, the Claimant's fourth suggested adjustment is potentially a reasonable one. However, there was no failure by the Respondent to implement such an adjustment. She was allowed to do that.

299. For PCP 2.1, for the fifth suggested adjustment we agree that the Respondent should have offered the Claimant the opportunity to re-sit. It would have been a reasonable step for the Respondent to have had to take in all the circumstances.

300. Allowing the Claimant to re-sit would not have created a precedent, or at least not one that would have applied across the board. Allowing the Claimant to re-sit, as a reasonable adjustment, would not have set a precedent that non-disabled employees would have been allowed to re-sit. Furthermore, if other disabled employees requested re-sits, then their own applications would have had to have been considered on their own merits, and if they were unable to demonstrate that the requirements of EQA, to offer a re-sit as a reasonable adjustment, were met, then they could have been refused.

301. However, if there was an obligation, based on the Claimant's own individual circumstances, to offer a re-sit as a reasonable adjustment, then that had to be done. Our reasons for deciding that it was a step which the Respondent had to take were that the consequences for the Claimant, of not passing the test, were potentially severe. Furthermore, although it is true the Claimant was offered the chance to defer, it is also true that she made the Respondent aware that there had

been difficulties on the day. She explained what they were. They were related to her disability and were about the arrangements that were in place on the day. the Respondent has not satisfied us that there would have been any practical or technical difficulties in offering the Claimant a re-sit. The assessments were conducted from time to time and the Claimant could simply have been added to the list of names taking the assessment on one of the later dates. If she failed again, even with the adjustments in place, then the Respondent would have its answer; whereas if she passed the next time, then that would potentially demonstrate that the Claimant had been right, and her mark was artificially low, because of her disability, and the failure to assess her performance based on the same arrangements that would have been in place for her had she been successfully appointed to a role. The Assessment Centre report did not state that re-sits were impossible. It said that they should be discussed with line manager.

302. The Respondent has not persuaded us that section 21(3) EQA did not require it to allow the Claimant to sit the assessment again. We do not accept that the fact that, based on the Enable Plus report, the Claimant asked for the requirement to be waived meant that she was not willing to take a re-sit if offered (instead of a waiver).

303. Furthermore, this is in time on the basis that there was no clear and unequivocal decision that the Claimant would not be allowed to re-sit any earlier than the decision to dismiss. Alternatively, if it had been necessary to do so, we would have extended the time limit on just and equitable grounds.

304. For PCP 2.1, we consider the Claimant's suggested sixth adjustment to be too vague. The Claimant's position is that she did, in fact, have the necessary attributes for the role. She has not identified any particular weaknesses in her ability to do the role for which she required coaching, and it would not be consistent with her other arguments for her to suggest that there were such weaknesses. As we said in relation to alleged Disadvantage 2.2, the Respondent was imposing the assessment requirement on everyone, including those people who were already in the roles. To the extent that the Claimant is suggesting that, because of her disability, the Respondent should have offered specific coaching in how to go about performing well in the assessment, we do not uphold that argument; potentially all candidates might have benefited from some coaching about techniques for doing well in the assessment (that is, making sure they demonstrated their existing skills and abilities as part of the assessment), but we have not found that there were any specific actions that the Respondent needed to take in that respect to alleviate the disadvantages caused by PCP 2.1 for the Claimant. She was given training on the adaptive software, and OH did not recommend more.

305. For PCP 2.1, we consider the Claimant's suggested seventh adjustment to be misconceived. The Respondent did not penalise her in the manner suggested,

and so her suggestion reveals no step that they ought to have taken but failed to take.

306. For PCP 2.1, we consider the Claimant's suggested eighth adjustment is not something that was required to alleviate the disadvantages (as we have found them to be) in comparison with persons who are not disabled. The Respondent did not need to "re-mark" specifically for a Band 1 role. The marking that was done was sufficient for it to decide that the Claimant did not meet the criteria for Band 1, based on the September 2016 assessment. Had the Claimant retaken the assessment centre, then she would have had the further opportunity to achieve a Band 1 mark (or higher), but there was no need to re-mark the September 2016 assessment.

307. Candidates were marked "Not sufficient evidence", "basic", "intermediate", "full" or "expert" for each of the categories within each 4 modules. Scoring "intermediate" across the board was sufficient for Band 1 (and scoring less than that was not). The Band 2 Junior, Band 2 Senior and Band 3 posts required more than that, as set out in the marking scheme. "Intermediate" was still sufficient in some categories for the Band 2 Junior Role, with "Full" being required in some specific categories, and "Full" was required in every category (bar 'innovation') for Band 2 Senior.

308. The Claimant is incorrect to believe that separate marking was required, in general, for the Respondent to decide whether a candidate was suitable for Band 1; it was all part of the same assessment.

PCP 2.2

309. This is more or less the same as PCP 2.1. It is simply saying that the Respondent did not make exceptions to PCP.

310. Our analysis of disadvantage and adjustments is the same as justification discussed in relation to PCP 2.1.

PCP 2.4

311. Our judgement is that there was a failure to make reasonable adjustments in relation to PCP 2.4.

312. Allowing the Claimant to re-sit the assessment would have been a reasonable step for the Respondent to have had to take, for the reasons mentioned above when analysing PCP 2.1.

313. The disadvantages to the Claimant caused by PCPs 2.1 and 2.4 are closely inter-related. The disadvantage to PCP 2.1 could have been alleviated by allowing, as a reasonable adjustment, the Claimant re-sit the assessment.

314. The Respondent's arguments for not taking that step (and for why it would not have been a requirement of section 21(3) EQA that it do so) included that its policy was that re-sits were not allowed for people in the Claimant's situation. We have decided that that was not a good enough justification; that is, it was not an argument that persuaded us that it was not reasonable that it should have had to allow a re-sit for the Claimant in the particular circumstances of her case.

315. There was no other adjustment (apart from allowing the re-sit) specifically required to alleviate the disadvantage caused by PCP 2.4 (and our analysis of disadvantage is similar to that discussed in relation to PCP 2.1).

PCP 2.5

316. The Claimant was not placed at a disadvantage, in comparison with persons who are not disabled, by this PCP.

317. Had she demonstrated, in the assessment, that she met each criteria to (at least) the grade of "intermediate" then she could have been considered for Band 1. If she failed to do so, she could not. That was the same for all candidates whether disabled or not.

318. If the implication is that some lower standard should have been accepted in the Claimant's case (which is not the specific argument raised for PCP 2.5) then we have already covered that above in our analysis for PCP 2.1. We do not consider that making a reasonable adjustment required the Respondent to simply do away with the assessment process (in the Claimant's case).

319. Furthermore, on the facts, it was not the case that the Claimant narrowly missed the mark for Band 1. Rather than gaining "Intermediate" on every category, she did not achieve it on any. She got ten "Basic" and seven "Insufficient Evidence".

320. As we have said, a re-sit would have been a reasonable adjustment; however, in the absence of a re-sit, it would not have been reasonable for the Respondent to have had to allow the Claimant to be considered for Band 1 roles on the basis of these scores.

Row 3

321. There are four alleged PCPs. We will number them 3.1 to 3.4. Our decisions for whether the Respondent did or did not have the alleged PCP in question are shown in the following table.

Alleged PCP	Decision

1. Practice of failing to ensure that the "Two Ticks" scheme (now called "The Disability Confident" Scheme) for disabled applicants was being adhered to and was working effectively.	No
2. Practice of arranging short telephone interviews for candidates, during which they are required to demonstrate their suitability for the role.	Yes
3. Practice of failing to provide support in preparing candidates for telephone or face to face interviews.	No
4. Practice of requiring candidates undertaking short term assignments to undertake the 80% or more of the full role, whilst at the same time, leading on the process of finding an alternative role.	Yes

322. The Respondent denies having PCP 3.1, and it is up to the Claimant to prove that they did. However, we accept Kelly Chambers evidence that the Respondent did seek to adhere to the scheme, and did seek to ensure that it was working effectively.

323. Even on the assumption that there were any particular examples in which an individual ought to have (from an objective standpoint) been offered an interview, and was not offered an interview, that would not demonstrate that the Respondent had a PCP of failing to take sufficient steps to try to ensure the policy was complied with. Having a policy in place which (on this hypothesis) was sometimes not followed (by one or more of the Respondent's tens of thousands of employees) does not, in our judgment, amount to a PCP, within the intended meaning of the phrase in section 20(3) EQA.

324. The Respondent accepts that it had PCP 3.2. From around October 2016, the Respondent did have PCP 3.2.

325. The wording of alleged PCP 3.3 is vague. However, and in any event, we are satisfied that, within BTTC, candidates were offered support in preparing for interviews and telephone assessments.

326. We accept that PCP 3.4 was a PCP to the extent that the Claimant was told that, if there was a short term assignment, she was potentially required to spend 80% of her time working on that STA, and (therefore) no more than 20% of her time

working on the job search. That, at least, was the position while in BTTC, and prior to AJS. It is not correct, however, that the Claimant was always on an STA, even prior to AJS. When she as not, she was free to (and encouraged to) spend 100% of her paid working time on attempting to find, and be successfully recruited to, a permanent post. We do accept that in her final performance review, there was criticism by Ms Gissane of the Claimant for not undertaking STAs in the previous three months. We address the performance reviews below.

Disadvantage 3.1. In the absence of the Two Ticks Scheme working effectively, C was less likely to even gain an interview, let alone have the interviewer alerted to the fact that adjustments may need to be made.

Disadvantage 3.2. C`s disability made it extremely difficult to present well at short telephone interviews, especially when done at short notice and in an unstructured way. As a result of which she was being rejected for roles that were suitable for her.

Disadvantage 3.3. Lack of support in preparing for interviews of any type made it more difficult for C to secure a role.

Disadvantage 3.4. C was, at key stages, fulfilling challenging business critical full-time temporary roles at the same time she was trying to secure a permanent role. This meant that C was not always able to engage as fully with the process as she would otherwise have done, reducing her prospect of success.

327. We do not find that the Claimant was placed at Disadvantage 3.1 or 3.3 by any of the PCPs that we upheld for Row 3 (PCPs 3.2 and 3.4).

328. The last sentence of alleged Disadvantage 3.2 is the Claimant's conclusion or opinion, but we accept that she was placed at Disadvantage 3.2 (the first sentence of it) by PCP 3.2. (She was not placed at Disadvantage 3.2, in comparison with persons who are not disabled, by PCP 3.4).

329. However, our decision is that there was no failure to make reasonable adjustments in relation to PCP 3.2.

330. The Claimant was at the disadvantage, when taking part in a telephone assessment, in comparison to a person without her disability who was taking part in a telephone assessment. However, it does not follow that the Claimant was at a disadvantage, when taking part in a telephone assessment, in comparison to herself when taking part in a face to face assessment. The Claimant was at a disadvantage, in comparison with persons who are not disabled, whether the interview was in person or by phone.

331. The Claimant's role, when working, often required her to work from home, and perform her duties by telephone (or other remote means).

332. The advice from Genius in January 2016 [Bundle 972] did not state that she could not/should not do telephone work; rather it gave her advice applicable to all types of work, which could be adapted accordingly.

333. The advice from Remploy, February 2017, [Bundle 1293] discussed the Claimant's excellent communications skills and recommended that she should continue to work from home (with some travel, but limited). It did also address [Bundle 1300] what the Claimant had said about telephone interviews. It relied on the Claimant's own opinion (expressed to it in February 2017) that she thought face to face might be preferable. It made no attempt to cross-reference this preference to the other findings and recommendations, and did not comment on whether there was medical evidence about it. All forms of travel were potentially difficult for the Claimant, and the discussion with the recruiting manager would potentially be short. This is a point the Claimant herself, in June 2016, made about meeting a recruiting manager in Preston. So the options were: (i) face to face interview, which would disadvantage the Claimant in comparison with persons who are not disabled because of the travel issues or (ii) telephone interview, which might disadvantage the Claimant in comparison with persons who are not disabled, for the reasons mentioned by Remploy. However, the Claimant was not asserting that she would not be fit to use telephone meetings as part of job duties if she was appointed; she was, however, clear that there were potential travel difficulties (and that, for example, home-worker status was essential).

334. The Respondent did not know, and could not reasonably have been expected to know, before around 27 February 2017, that the Claimant was at (in her own opinion, at least) more of disadvantage when doing the interview by phone, than by face to face. When the Claimant requested face to face, it was offered to her. She did not always accept.

335. It would not have been a reasonable adjustment for the Respondent to have had to offer the Claimant no telephone interviews, and to only offer her face to face.

336. It would not have been a reasonable adjustment for the Respondent to ensure that the interviewer always travelled to close to the Claimant's location so that a face to face interview could take place. In some hypothetical circumstances, that might have been a reasonable adjustment to have had to make for a particular vacancy (for example, if the vacancy required no, or little, travel, and the interviewer was based far from the Claimant's home). However, we are not persuaded, that, in any of the specific examples shown by the evidence, it was a failure to make reasonable adjustments by not offering an interview closer to the Claimant's home. The Claimant's case is that she was able to do some limited travel where required by the job.

337. The Respondent offered the Claimant both options. A telephone interview by default, and a face to face interview, when she requested it, following receipt of the Enable Plus Remploy report.

338. There was no failure to make reasonable adjustments for PCP 3.2.

339. For PCP 3.4, the Claimant relies on Disadvantage 3.4.

340. We are satisfied by the Respondent, that there was no failure to make reasonable adjustments. The Respondent draws attention to the fact that a person who was in a job (but under threat of redundancy, or potentially needing to find a new job for disability-related reasons) would be working full-time, and have to fit their job search activities.

341. The Claimant meanwhile draws attention to the fact that someone who, for disability-related reasons, was unable to fulfil the duties of their post might be on long-term sickness absence and thus, in principle, free to devote the whole of their time to obtaining a new post.

342. Neither of these comparisons is directly relevant. A complaint of failure to make reasonable adjustments does not require a claimant to point to a comparator in order to succeed, and nor can a respondent successfully defend such a claim by arguing that the claimant was treated no worse than other people.

343. The Claimant's suggested comparison is, in any event, raising an entirely different scenario. It does follow, of course, that, if someone is too ill to work their normal job, then they cannot be forced to do so. Hypothetically, however, if the employer had other work they could do, it might be a failure to make a reasonable adjustment to have the employee at home on sickness absence, rather than in the workplace performing some duties (that were not their normal job).

344. However, the Claimant's scenario was not that she was too ill to work. She did not have a permanent job, and the PCP was that, when required to do so, she should spend 80% of her time on STAs. She is not alleging that she was too ill to work on STAs, just that she should not have had to spend 80% (or any) of her time on such activities.

345. It would not have been a reasonable adjustment for the Respondent to have had to decide that it could never require her to do work on STAs. It would not have been a reasonable adjustment for the Respondent to have had to decide that it could not, in any given week or month (or other time period), require her to spend up to 80% of her time on STAs.

346. Our reading of the AJS policy is that, in fact, for the (perhaps six month maximum) period on that scheme, the policy requirements were to allow the Claimant to give precedence to job search over STAs. On its own case, the Respondent was

treating AJS as trumping the BTTC policies, and so it would not have been more consistent with that argument for the Respondent to have expressly acknowledged that the Claimant could spend a reduced amount of time (less than 80%) on STAs during the AJS period.

347. However, and in any event, in practice, she often did spend considerably less than 80% of her time, over a particular period, on STAs, and therefore had more than 20% of her time available for job search activities.

Row 4

348. There is one alleged PCP, PCP 4, as follows.

> PCP 4. Inconsistent application of R`s own policies and procedures and the requirements thereunder, to the facts of a particular case, including in respect of (a) BTTC; (b) AJS; (c) EWR; (d) Attendance / sickness management.

349. On the evidence presented to us, the Claimant has not shown that this was a PCP which the Respondent applied to its employees generally.

350. The alleged wording is too vague. Furthermore, there is an inconsistency between the phrase “inconsistent application” and the phrase "to the facts of a particular case”. The latter implies that the Claimant’s stance is that there should be different treatment of different individuals (as per policy requirements) based on an individual's particular circumstances. The former appears to allege that the Respondent has a PCP of treating people differently.

351. The Respondent did have, at various times: an Adjusted Job Search policy (“AJS”) and an Enabling Work through Redeployment policy (“EWR”). It also had an Attendance Procedure.

352. It did not have a PCP whereby it disregarded those policies and/or that its managers and HR staff were not obliged to (attempt to) follow them. There was no PCP to be deliberately inconsistent; the PCP was to seek to apply the policies to the individual’s specific circumstances.

353. There was no breach of the duty to make reasonable adjustments in relation to Row 4.

Row 5

354. There is one alleged PCP, PCP 5, as follows.

> PCP 5. C`s line manager had a practice of taking little no account of disability, adjustments and their impacts when assessing and providing performance feedback.

355. This alleged PCP is not one which is said to be based on the Claimant's own personal circumstances only. It is alleged that the PCP was applied to all of the employees reporting to Ms Gissane.

356. It is not alleged (as part of PCP 5) that the PCP was applied to all of the Respondent's employees, or to all of those in the BTTC.

357. The evidence we have received from the Claimant and from Ms Amin is that they received performance feedback from Ms Gissane.

358. It is not appropriate to define an alleged PCP in a way which is circular. (For example, to allege that the PCP is to mistreat those who have a particular protected characteristic, and then to allege that the PCP creates indirect discrimination and/or requires reasonable adjustments to be made.) We must also take care to only deal with the PCP as alleged by the Claimant, and not to create our own.

359. That being said, we are satisfied that it was clear to the Respondent that the alleged PCP was that performance feedback was provided.

360. The Claimant's wording for the PCP amalgamates into the alleged PCP itself the suggested disadvantage and/or adjustment.

361. However, it would be unfair to take an overly technical approach to the litigant in person's wording. The Respondent did have the PCP of providing performance feedback.

362. The Respondent has denied that PCP as specifically alleged by the Claimant, and rather it asserts, in its closing submissions, that "Performance feedback was fair and constructive, having consideration to the Claimant's performance, behaviour, and her own recognised development points".

363. The alleged disadvantage is:

> C`s performance was not fairly assessed in the light of her disability, as a result of which it was unduly negative, heightening her risk of being subjected to unfair criticism and reduced career and pay progression

364. The suggested appropriate adjustment was:

> To have assessed C`s performance in the light of her disability and making any necessary allowances for its effects, to ensure she was placed on a level playing field with others.

365. Row 5 as a whole makes it clear what the allegation is, and we are satisfied that the Respondent has had the chance to present all the evidence and make all the submissions that it wishes to.

366. The PCP (of giving performance feedback) did place the Claimant at a disadvantage because her performance was affected by disability.

367. It was reasonable for the Respondent to have had to make an adjustment to its PCP, and to have taken disability into account when assessing performance.

368. The Claimant was given feedback, for example, the May 2016 feedback [Bundle 1012] which, on its face, gave no indication of having taken into account the Claimant's disability, or made any adjustments to the expectations required of the employee to take into account her disabilities.

369. Similarly, the May 2017 report criticised the claimant for the way she spoke to her manager and for time management issues.

370. In both cases, the Respondent failed to make adjustments to the rating process for the performance reviews, and failed to take into account that time management and time necessary to absorb information in conversations were features of the Claimant's disability. It would have been reasonable for the Respondent to have had to take those things into account, and not to have given the Claimant "DN" on account of those things.

371. The May 2016 report was part of a continuing act with the May 2017 report. ACAS early conciliation commenced within 3 months of the May 2017 report, and the claim was presented within a month of the end of conciliation, and thus is in time.

Row 6

372. There are two alleged PCPs. We will number them 6.1 and 6.2.

> PCP 6.1. Under R`s Location policy, employees who wanted to move into a hardwired role who required a home working arrangement required specific authority for this at Vice president level.
>
> PCP 6.2. There may be a substantial delay in obtaining such authority.

373. The Respondent did have PCP 6.1.

374. It is true that in the Claimant's case there was a substantial delay. However, we do not regard the delay as a separate PCP in its own right. Rather it is a feature of PCP 6.1 that potentially an employee would be unable to:

374.1 Take up home working roles at all, if the authority was never forthcoming

374.2 Take up home working roles for a period of time, until the authority was received

375. The Claimant alleges that the disadvantage was:

> Whilst awaiting this authority, various permanent hardwired roles which had been offered to C were withdrawn by R. This meant that C remained without a permanent hard-wired role and at risk of dismissal.

376. This does not allege a disadvantage in comparison with persons who are not disabled. In any event, on the Claimant's own account, in March 2015, her former line manager (Martin Grimmer) informed her that her home working had been signed off by the relevant individual (Tom Keeney). This pre-dated Ms Gissane becoming her line manager (which was around April 2015).

377. Since any disadvantage caused by this PCP ceased in March 2015, because the Claimant was no longer prevented from working from home by the PCP, the time limit to bring a claim was some time before the end of June 2015. The Claimant presented her claim more than two years later (12 October 2017) having started ACAS conciliation (in August 2017) after the time limit had expired.

378. The Respondent is disadvantaged by the Claimant's failure to present the claim within the time limit. The evidence about what specific reasons it had for the (alleged) delay in obtaining the sign off is not as readily available as it would have been had the claim been brought in time, especially as the claim was brought more than a year after Martin Grimmer had ceased to be her manager and more than 18 months after he had told her that home working had been approved.

379. It is not just and equitable to extend time for this allegation. It is out of time and the Tribunal has no jurisdiction to deal with it.

Row 7

380. This is an allegation of indirect disability discrimination.

381. The alleged PCP is:

> From around 2014, all contractual home-workers had to move their location to a BT Hub location unless specific approval was given for home-working. Obtaining such approval could be a lengthy process.

382. The Respondent did have this PCP.

383. The Respondent applied this characteristic to people with the Claimant's disabilities and people without the Claimant's disabilities.

384. The Claimant alleges:

> This put disabled persons at a particular disadvantage because it placed yet another hurdle in the way of finding an alternative role (which disabled employees were more likely to need to do and also, to find more challenging to

achieve than non-disabled employees). Disabled employees were also more likely to require a home working arrangement than those without disabilities.

C herself was put to this disadvantage. There were various roles available to her during the 10 months period in which she was awaiting approval (she had been successful at interview but could not be offered the roles until the approval had been given). By the time this was finally done, those roles were no longer available to her and therefore C remained without a permanent hard-wired post.

385. We accept the part of the argument that states that persons with disabilities were more likely to require a home working arrangement than those without disabilities.

386. The PCP had the potential, at least, to disadvantage a higher proportion of people with disabilities, than people without. A requirement to cease homeworking was one which was likely to be one which could cause hardship or inconvenience to any home worker, but it is likely that the percentage of those with disabilities who could not comply at all, or were very seriously affected by the cessation of homeworking was likely to have been higher amongst those with disabilities.

387. The Claimant herself was no longer at that disadvantage from around March 2015 onwards. The claim was therefore out of time for similar reasons to those mentioned in relation to Row 6 (the failure to make reasonable adjustments complaint based on the similar PCP).

388. We have, in any event, considered the Respondent's defence.

389. The Respondent sought to pursue legitimate aims: improving customer service; assisting learning and coaching; improving teamwork.

390. It did not insist that every single individual ultimately had to work from an office. Rather it required that an individual, who had previously had a contract which required or enabled them to work from home, submit a business case that they could do so.

391. As in the Claimant's case, an argument could be presented that there were health reasons to work from home (including an argument that home working was a reasonable adjustment).

392. As in the Claimant's case, the approval could potentially be granted. It was granted in the Claimant's case, and we do not have evidence about the circumstances of individuals for whom it was refused.

393. The existence of the opportunity to apply for homeworking approval, on a case by case basis, satisfies us that the policy was a proportionate means of pursuing a legitimate aim.

394. Thus this claim is out of time, and we do not extend time for it. However, and in any event, it would have been unsuccessful on the merits, as the Respondent would have met its burden of proving that section 19(2)(d) was not satisfied.

Row 8

395. This is a complaint of disability discrimination within the definition in section 15 EQA, and the alleged unfavourable treatment is dismissal.

396. As clarified in the list of issues drawn up in the hearing, the alleged "something arising" in consequence of disability are as follows:

    9.12.2.1. Not to able to travel to office.

    9.12.2.2. Interview process problems.

    9.12.2.3. Assessment Centre problems

    9.12.2.4. Problems driving long distances in a car especially on a heavily congested motorway.

    9.12.2.5. Problems with stairs and with walking distances.

    9.12.2.6. Not being able to find hardwired job.

    9.12.2.7. The need for reasonable adjustments.

397. For the first of these, the Claimant was not able to travel to the office every day because of her disability. She was able to do it some of the time. This was something arising in consequence of her disability.

398. For the sixth of these, the Claimant's ability to be successfully appointed to a permanent position was affected by her disability. Her disability made it more difficult for her to fulfil all the criteria of the post (without reasonable adjustments being made) and made it more difficult for her to convince appointing managers that she met their requirements. This was something arising in consequence of her disability.

399. Subject to those clarifications, we accept that all seven things did arise in consequence of the Claimant's disability.

400. When the Claimant was dismissed, by Ms Willis' 22 March 2017 letter [Bundle 1363], the letter stated that the Claimant was being dismissed "*on grounds of impaired capability due to ill health with retirement in the interests of efficiency benefits in accordance with the Attendance Procedure*". The rationale given included:

400.1 that the Claimant had failed the Assessment Centre (the third "something arising" from the list above) and had failed by such a margin that the pass requirement would not be waived

400.2 that the Claimant had numerous recommendations from OH (item 7)

400.3 that the Claimant was a home worker (with occasional travel) based on OH advice (item 1 and 4)

400.4 that the Claimant had expressed difficulties with telephone interviews (item 2), but should attempt them where possible

401. Ultimately, the overarching reason given was that the Claimant had not obtained a permanent job during her time in BTTC ("she entered the BTTC in April 2014 and this is her 6th lifecycle, she has now been resident for 1067 days during this 6th lifecycle. Between 6th July 2009 to present across the six lifecycles, Lorraine has spent 1650 days in the TC totalling four and a half years") and it was assessed that she would not be likely to find one in (according to section 2.5 of the rationale) "the foreseeable future". The letter also asserts that six months is the maximum time for AJS and, by implication, the decision is based on the opinion that she would not obtain a job by the end of that six month period (with the letter asserting that the search could/would continue during the notice period, so three months from date of the letter and eight months from the alleged start date of the AJS). The Claimant's difficulties in finding a permanent role were something arising in consequence of her disability (item 6 from the list above).

402. The dismissal was caused by something arising in consequence of the Claimant's disability, for the reasons mentioned in the previous paragraph.

403. The Respondent submits that the dismissal was a proportionate means of achieving legitimate aims, namely for employees to provide regular and effective service, to ensure operational efficiency in that the business is seeing return from her employment.

404. For proportionality, it relies on the fact that the Claimant had not found a permanent role at any stage during her time in BTTC from 2009, and argues that the Claimant was not providing value for money, especially from 2014 onwards.

405. We accept that the Respondent did have the stated aims and that they are legitimate.

406. However, we must balance the discriminatory effect on the Claimant (of dismissing her for reasons which arose in consequence of her disability) against the importance of the aims to the Respondent, and we must consider whether there were less discriminatory measures.

407. Some of the features of AJS benefited the Claimant, including the opportunity to be considered ahead of non-AJS candidates, and (for that purpose) to only have to have a telephone (or face to face) interview with the recruiting manager. There was assistance provided to her in identifying suitable vacancies.

408. However, the Respondent did not provide that additional assistance unconditionally. These were all reasonable steps for it to have taken on account of the Claimant's disability. However, the Respondent provided them on the basis that (a) they would only be offered for six months, starting October 2016 and (b) that the Claimant's employment would potentially be terminated if she did not obtain a job within the six month period.

409. In all the circumstances, it was not proportionate to dismiss the Claimant in these circumstances, and the Respondent showed no flexibility:

409.1 In relation to the start date from which the six months would run, notwithstanding the lack of clear information to the Claimant at the start, and the fact that she was on holiday.

409.2 In relation to the end date of AJS, notwithstanding the lateness of the Remploy Enable Plus report, which was delayed because of internal wrangling within the Respondent about whether the proper authorisation had been obtained.

410. It did not even wait until the end of its own, self-imposed, six month time period for the AJS assistance to be provided. Six months from 17 October 2016 would have been around 17 April 2017. Six months from 18 November 2016 would have been around 18 May 2017.

411. Furthermore, the Respondent misapplied the AJS and failed to follow the Attendance Procedure. The Respondent used the "6 month" AJS meeting as a dismissal meeting. In the meeting, Ms Willis said that no decision would be made "in the meeting", which was technically true in the sense that she wrote to the Claimant afterwards to dismiss her. However, that is not what AJS is stating should happen. Rather the "6 month" meeting will give consideration to whether to extend or end AJS. However, if there is no AJS extension, then the decisions about continued employment are "handed over" to the Attendance Procedure. No meeting under that procedure was arranged. Furthermore, the Claimant did not meet the criteria for dismissal under the Attendance Procedure.

412. Furthermore, as discussed above, there had been relevant failures to make adjustments during the period prior to dismissal. Had they been implemented, dismissal might have been avoided, and we also take that into account when deciding that the Respondent has not discharged its burden of showing that the Claimant has failed to satisfy section 15(1)(b) EQA.

413. There was disability discrimination by dismissing the Claimant.

Row 9

414. For Row 9, the alleged unfavourable treatment is as follows:

> At each performance / pay review cycle, C`s performance was criticised. [9a]
>
> This had a negative on her pay progression in terms of both basic pay and bonuses. [9b]

415. We have labelled the two sentences 9a and 9b for ease of exposition, as they refer to different treatment, albeit, on the Claimant's case, the second is a consequence of the first.

416. The alleged "something arising" for the Row 9 allegations are

> 9.12.1.1. Style of communication.
>
> 9.12.1.2. Time Management for particular tasks.
>
> 9.12.1.3. Memory challenges.
>
> 9.12.1.4. Lack of mobility.
>
> 9.12.1.5. Being a homeworker.

417. In each case, we are satisfied that those five things did arise in consequence of the Claimant's disability.

418. The criticisms made of the Claimant in the performance reviews from Ms Gissane were caused by the Claimant's style of communication and time management and memory challenges. They were caused, therefore, by things which arose in consequence of the Claimant's disability.

419. The Respondent disputes the unfavourable treatment and disputes causation. In relation to legitimate aim, it argues that: identifying time management as an area for development was in aid of achieving a legitimate aim, namely helping the Claimant to manage time effectively to complete tasks and carry out tasks in a reasonable time.

420. It argues that the comments made in the reviews were proportionate for reasons which include that the Claimant identified this time management as a development need for herself too

421. The treatment identified by sentence 9a was unfavourable, in relation to both the comments made in the reviews and the outcomes being "DN".

422. As discussed above, for Row 5, there was a failure to make reasonable adjustments in relation to the performance reviews in that the Claimant's disability

was not taken into account as a potential reason for some of the alleged defects in the Claimant's performance, as identified by Ms Gissane.

423. The comments and the ratings were not a proportionate means of achieving a legitimate aim. Less discriminatory measures would have included taking account of the Claimant's disability and discussion of what reasonable adjustments might help with time management, or communication style.

424. For sentence 9b, we are not satisfied that this is something that was caused by the performance reviews, or that it was caused by any of the "somethings" relied on for Row 9.

Row 10 and Row 11

425. For Row 10, the alleged unfavourable treatment is:

> Placing C in the AJS pool when she should not have been, which limited the timescale during which she would have to find a hard-wired permanent role if she was to avoid dismissal.

426. For Row 11, it is:

> Subjecting C to an AJS process which was materially non-compliant with R`s own policy in various respects.

427. The first part of Row 11, "subjecting C to an AJS process", is no different to the treatment identified by Row 10. Whereas the second part, relating to what the policies actually said, is relevant to the legitimate aim and proportionality argument for Row 10. We will therefore consider both together.

428. The same list of "something arising" is relied upon as for Row 8. Our decisions for that list are as stated for Row 8.

429. The Claimant was subjected to the treatment of being placed in AJS pool. As discussed with Row 8, there were some benefits associated with being in AJS pool. We do not accept that those benefits could not have been offered to the Claimant other than by deciding that all of the limitations of AJS (in particular, threat of dismissal) also applied

430. The Claimant was subjected to the treatment of being told that she would potentially be dismissed, after a maximum of 6 months in the AJS pool, if she did not find a permanent substantive post. This was unfavourable treatment.

431. A significant cause of the decision to place the Claimant in AJS was that she had not found a job by October 2016 (which, as per the sixth item on her list, was something arising in consequence of disability). The Respondent accepts that a

cause of the treatment was something arising in consequence of the Claimant's disability.

432. The Respondent states that its legitimate aim was to help the Claimant secure a permanent hardwired role so that she could provide effective and continuous employment, which in turn would help preserve her employment.

433. We accept that giving the Claimant the benefits of AJS was done for that purpose. Giving the Claimant the benefits of AJS was not unfavourable, in any event.

434. We do not accept that that limiting the time for which the Claimant could have those benefits to a maximum of six months was pursuant to the legitimate aim just mentioned.

435. Furthermore, even it had been done as a means to seek to achieve that legitimate aim, we do not consider it proportionate for reasons similar to those mentioned when discussing dismissal, albeit, we accept that, at the start of the period, the Respondent would not have known that there would be problems and delays in obtaining the Enable Plus report.

436. We find that placing the Claimant on the time limited AJS, in around October 2016, was a continuing act with the dismissal, and that time does not start to run until the date of termination, and that the complaint in Row 10 is therefore in time. The decision made, in October 2016, was that she was at risk of dismissal within 6 months if she did not obtain a job. Furthermore, the dismissal decision referred back to (what the Respondent regarded) as a maximum period of 6 months commencing from October 2016.

437. If we had not decided that the complaint in Row 10 had been submitted within the time limit, we would have extended time on just and equitable grounds.

438. This claim therefore succeeds.

439. Row 11 does not add anything meaningful. We do agree that the Respondent did not follow its own AJS policy (the Claimant did not meet the criteria to be placed in AJS, in October 2016, or at all) or its own Attendance Policy and Procedure (when dismissing the Claimant in March 2017). However, these have already been found to be discrimination as per Rows 8 and 10.

Row 12

440. This is a harassment allegation. The unwanted conduct which is said to be related to the Claimant's disability is:

> R compiled and relied on a materially inaccurate and out of date business case to support placing C in the AJS pool at all.

441. Compiling the report, and placing the Claimant in the AJS pool, was conduct that was unwanted, because the AJS, if approved was to be time limited, and, importantly, from the Claimant's perspective, the report was submitted without her being consulted as to the contents, the aims, or the accuracy, or about any omissions.

442. The conduct did relate to the Claimant's disability.

443. The report in question in [Bundle 1071].

444. It asserts that the Claimant "*has a number of medical conditions which are both psychological and physical, which are preventing her from securing a permanent role*", which is not a statement that the Claimant agreed with, as it was her opinion that, with adjustments, she would be able to perform well in a role, and that if adjustments were made to the recruitment process, so that she could be successfully appointed to such a role.

445. The comment (which we have bolded) in the sentence "*Lorraine is **unable to travel or work in an office** due to her health and this is severely impacting on the jobs she can apply for meaning her residency in the BTTC will continue to accrue*" was inaccurate. The Claimant was able to travel to and work from offices some of the time (but not all of the time). Thus the conclusion drawn in the remainder of the sentence was based on a false premise.

446. We are satisfied that it was not Ms Gissane's purpose to (a) violate the Claimant's dignity or to (b) create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Her intention was to persuade the decision-makers to approve AJS for the Claimant.

447. The inaccuracies were partly the result of the failure to consult the Claimant over the contents and partly because Ms Gissane's honest understanding of the documents. For example, the OH report on which it was based did include the comments:

447.1 "*Miss Parkinson is able to travel by car for short distances and very infrequently*." And

447.2 "*However, she would find it difficult to travel a long distance if the Centre is far from where she lives due to likely aggravation of her back pains when she is seated for more than 30 minutes. However, taking regular breaks on the journey may help to alleviate discomfort as long as the journey is not too long*."

448. Our decision is that it is not reasonable that the specific conduct of compiling the report (with the inaccuracies) and submitting it with a view to placing the Claimant on AJS should have the effect of (a) violating Claimant's dignity or (b) creating an

intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

449. Ultimately, the Claimant's objections to the AJS process were not the fact that (if placed on it) she would have certain priority in relation to vacancies. Her objection was to the separate issues that (i) if placed on AJS, as far as the Respondent was concerned, it would only last 6 months and (ii) that, if there was no job within those 6 months, the outcome would be dismissal, rather than return to the previous status quo.

450. The aspects of the report which highlighted the Claimant's needs, and said why she might benefit from some adjustments to the Respondent's standard internal recruitment process (for those in BTTC) were not the things which offended the Claimant.

451. This harassment complaint fails.

Row 13

452. This is a harassment allegation. The unwanted conduct which is said to be related to the Claimant's disability is:

> Failures to comply with R`s own AJS policy and guidance.

453. Our assessment is that the Claimant did not meet the criteria to be placed on AJS.

454. The policy stated that the Respondent should make reasonable adjustments. However, sometimes, the adjustments made might be insufficient to allow the person to remain their job, or else the adjustments required might be such that the Respondent did not think it could reasonably make them. The policy guidance for managers stated [Bundle 376]:

> Adjusted Job Search (AJS) is an HR-supported scheme for people who need to find a new role in BT **because of a material change in their health condition** - it is not appropriate for people who are displaced for other reasons (regardless of their health or disability status).

455. The bolding is in the original.

456. The Claimant was not someone who needed to find a new role because of a change in her health condition. Indeed, the need to find a new role was not because of her heath/disability at all, let alone a (recent) change.

457. The Claimant was, in fact, someone who had been "displaced for other reasons", namely that, in 2009, when the Respondent had a surplus of staff in her role, on her team, she volunteered to leave the role.

458. So the Respondent's conduct, in placing the Claimant on AJS, was related to her disability. Ms Gissane's report expressly referred to the Claimant's disability.

459. The unwanted aspect of the Respondent's conduct was that AJS was (according to the Respondent) for a maximum of 6 months, following which there would be dismissal.

460. It was a breach of the Respondent's policies to place the Claimant on the AJS. If the Respondent decided that the Claimant needed the adjustments to the recruitment process that AJS could offer, the Respondent did not need to confine itself to deciding that the only option was to disregard the entry criteria for AJS and place her in it. It could, for example, have decided that she did not meet the criteria and therefore would not be placed in it. Alternatively, it could have sought and obtained her agreement. Alternatively, it could have placed her in AJS by ignoring the exit criteria (dismissal after 6 months under attendance procedure) as well as ignoring the entry criteria.

461. However, we are satisfied that, when it ignored the entry criteria for AJS, and placed the Claimant in it, the Respondent's purpose was not to (a) violate the Claimant's dignity or (b) to create an intimidating, hostile, degrading, humiliating or offensive environment for her. Its purpose was for the Claimant to have the potential benefits that being in the AJS pool could bring.

462. We are also satisfied that it would not be reasonable to treat the breach of the policy, by placing the Claimant in the AJS pool, as having the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

463. The thing which upset the Claimant was not that the Respondent breached its policy by commencing the AJS process with her. It was that the Respondent rigidly sought to apply (Ms Willis' interpretation of) the 6 month criteria and was not willing to "breach" or be flexible about that (alleged) part of the AJS policy.

464. This harassment allegation fails.

Row 14

465. This is a harassment allegation. The unwanted conduct which is said to be related to the Claimant's disability is:

> Failures to comply with R`s own attendance policy.

466. The AJS itself states:

> Any action to terminate someone's employment after an unsuccessful AJS will be conducted under BT's Attendance Procedure. The usual grounds for termination will be Impaired Capability due to Ill-Health and indicative eligibility for any enhanced

> pension benefits (e.g. medical retirement) should, whenever possible, be established before a Resolution Meeting.

467. So, the AJS itself does not contain a dismissal procedure, but rather it cross-references a different procedure (the Attendance Procedure) which does.

468. It is notable that the first 4 words "any action to terminate" do not assert that termination (or even the commencement of action to terminate) are inevitable. The words quoted above are part of the section "WHAT HAPPENS IF ADJUSTED JOB SEARCH IS NOT SUCCESSFUL" and follow on immediately from the section which describes the obligation (in those circumstances) to hold a 3 month and 6 month meeting. The introduction to those meetings emphasises the need for regular dialogue to avoid "surprises" which, in context, clearly means that the possibility that dismissal might occur must be flagged up through the process (and that was done in the Claimant's case, albeit only after the Respondent had decided that AJS had started). However, it is clear that the 6 month meeting on AJS is not intended to be a dismissal meeting. The text, in full, reads:

> At 6 months - If a permanent role has still to be identified, consideration should be given to termination of the individual's employment. You should consider all the circumstances of the case and make sure that people are treated both fairly and with dignity and respect. Exceptionally, it may be appropriate to extend the period on AJS but that could only be justified where someone had been unable to engage with the process (e.g. an extended hospital admission) and you may be required to justify your actions.

469. Then that leads into the passage about the Attendance Procedure quoted above. It is clear to us that the AJS policy is stating that, at the 6 month mark, there will be a meeting and one outcome might be extension (though only in exceptional circumstances; examples given include prolonged hospital stay during the 6 months) or another outcome might be to inform the employee that, the Attendance Procedure is being invoked and that, in accordance with the Attendance Procedure, there might be a dismissal.

470. The AJS policy also makes clear that potentially the Attendance Procedure can run in parallel to the AJS; it does not have to be put on hold, necessarily, during the AJS. So potentially, an employee might not be starting at Stage 1 of the Attendance Procedure once the AJS has completed. However, the point is that the decisions that have been made, or will be made, under the Attendance Procedure, are governed by the Attendance Procedure, and not the AJS.

471. The Attendance Policy is [Bundle 399]. Neither the Attendance Policy nor the AJS policy states that the cessation of the AJS (or the decision not to extend) will, in and of itself, be a reason to dismiss.

472. [Bundle 403] states that formal action under the Attendance Policy will be considered:

> When health issues are preventing the individual from giving regular and effective service (through e.g. short spells, patterns of attendance, long absence or a combination of all three), it is important that the individual is fully supported and that all of the elements of the Attendance (and associated) policy and process are fully considered and actioned as appropriate.
>
> This may include actions such as warnings, second line manager review, resolution hearings or a combination of all as appropriate.
>
> Failure to comply with the Attendance policy and process by either the individual or the appropriate manager may lead to action under the discipline or performance policy and procedure as appropriate.

473. The procedure commences at [Bundle 405].

474. Section 4 refers to “extended absence” which was not applicable in the Claimant’s case, as she was not absent at all, let alone on extended absence. The dismissal criteria set out in section 4 are:

> Every reasonable effort should be made to accommodate permanent adjustments within the business unit but, where that is not possible, a comprehensive search for alternative duties must be undertaken. Details of how to support the individual and conduct an alternative duty search are given in the Adjusted Job Search procedure.
>
> If a spell of absence becomes extended to the point where it is operationally unacceptable or permanent adjustments are required to effect a return to work and neither these nor alternative duties are viable, then termination of employment must be considered. Such action requires most careful consideration which must include appropriate input from the HR Services Case Management Team Services and the OHS. Specialist input can help line managers not only with the decision making process but also with advice on associated issues such as pension or benefit entitlement and how best to communicate messages of particular sensitivity

475. Section 5 refers to "repeated absence” which was also not applicable in the Claimant's case. It discusses a process of escalating warnings, culminating in a decision by the “second line manager”. That is, by the manager who line manages the employee’s line manager. It states:

> If the decision is made to dismiss, the second line manager must prepare a robust business rationale which takes into account all of the circumstances of the case. Grounds for dismissal may be unsatisfactory attendance or, more usually where there is a specific underlying health problem, impaired capability due to ill health. In cases of dismissal the letter to the individual must include:
>
> - the reason for the decision.
> - any pension terms that will apply

- the notice period and arrangements that will apply,
- the last day of employment.
- the right to appeal against the decision.

Where the grounds for dismissal are impaired capability due to ill health and Core OHS has indicated at the resolution stage that the individual is likely to meet the criteria for medical retirement, the case should not normally move to termination of employment until a definitive opinion on eligibility has been provided. However, termination may be progressed in these cases if there is a material delay in providing a definitive judgement caused by a failure of the individual or their medical advisers to co-operate or respond to reasonable requests for supporting evidence

476. The procedure contains an appeal process (section 6) that is common to both section 4 and section 5 dismissals. The same applies to section 7 (right to be accompanied) and section 8 (Notice period).

477. As with Row 13, our decision is that the Respondent did not follow its own procedures.

478. There was no proper basis, in the Attendance Procedure, to dismiss the Claimant under Section 4 or to dismiss the Claimant under Section 5.

479. For Section 4, apart from the criteria not being met, nor did the Respondent obtain up to date OHS advice.

480. For Section 5, apart from the criteria not being met, nor did the Respondent follow the escalating warnings.

481. It did allow appeals.

482. By its failures to follow the Attendance Procedure, the Respondent did not have the purpose of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

483. Given the importance of not cheapening the words, we do not regard it as reasonable for the conduct (failing to comply with Attendance Procedure) to have the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

484. The harassment allegation fails.

Row 15

485. This is a harassment allegation. The unwanted conduct which is said to be related to the Claimant’s disability is:

Refusals to offer posts to C.

486. The conduct was unwanted, because the Claimant wanted the posts to be offered. In some cases at least, the refusal was related to the Claimant's disability; for example, where the Claimant's difficulties with travel were highlighted as a reason that the post was not suitable.

487. Reasons were given to the Claimant for not appointing her to specific posts. It is common ground that in some cases, the reasons were related to disability, for example difficulties in achieving the travel requirements for the post in the South West.

488. By refusing to offer the Claimant any post, it was not the Respondent's intention to violate the Claimant's dignity, or create an environment as described in section 26(1)(b)(ii) EQA.

489. Our decision is that the conduct did not have the effect set out in Section 26(1)(b) and that, in any event, it would not have been reasonable for the conduct to have that effect.

490. This harassment allegation fails.

Row 16

491. This is a harassment allegation. The unwanted conduct which is said to be related to the Claimant's disability is:

> Failures to act on and/or address C`s concerns about the processes to which she was being subjected

492. This allegation is too vague. There was unwanted conduct in that the Claimant did raise objections to certain decisions made by the Respondent and did not want an answer that did not result in the Respondent changing the prior decision. The Respondent responded to the Claimant's correspondence, albeit not necessarily agreeing to change their minds. The Claimant has not highlighted, in her pleaded case, which particular complaints by her, or which particular inadequate responses by the Respondent, are said to be the subject matter of Row 16.

493. Where decisions by the Respondent have been raised as a separate complaint, we have addressed them there. For such allegations as we have upheld, where the Claimant can demonstrate, at the remedy hearing, that there was a loss / injury that was caused by the Respondent not addressing concerns, then we will take that into account.

494. As a separate allegation in its own right, this harassment allegation fails.

Row 17 (harassment)

495. This is a harassment allegation. [Row 17 is also a victimisation allegation; see below]. The unwanted conduct which is said to be related to the Claimant's disability is:

> Spurious gross misconduct complaints / subjecting C to disciplinary process.

496. We have taken into account the burden of proof provisions. We are satisfied that the Respondent has shown that this was not conduct which was related to the Claimant's disability.

497. As we discuss elsewhere in the reasons, the Respondent's conduct is surprising and, in our judgment, unreasonable. However, it was a reaction to other matters, not the fact that the Claimant has disabilities.

498. For the avoidance of doubt, we reject an argument that if the Claimant's late submission of the expense claim was because of her disability, then the Respondent's disciplinary action was related to disability. On the balance of probabilities, the Claimant has not shown that the lateness of the claims was because of disability. She had the information in her possession somewhere, and she had the ability to submit the claim, once she was in her notice period.

499. This harassment allegation fails.

Row 17 (victimisation)

500. This is a victimisation allegation. The alleged detrimental treatment is:

> C was subjected to spurious gross misconduct allegations regarding her expenses and subjected to a disciplinary process (which the Respondent only withdrew when C`s dismissal had taken effect).

501. The alleged protected acts are:

> (a) C's appeal against dismissal (March 2017)
>
> (b) First complaint to whistleblowing hot line (May 2017)
>
> (c) Second complaint to whistleblowing hot line (May 2017).

502. We are not satisfied that either (b) or (c) were protected acts. We have had no clear evidence of specifically what was said by the Claimant on those occasions. We do not decide, on balance of probabilities, that the Claimant was making an allegation of breach of EQA.

503. Even if, in fact, the Claimant's calls to whistleblowing hotline did contain any protected acts, we are sure that the contents did not come to the attention of Ms

Gissane or Ms Willis. The Claimant did not tell them, and there is no evidence that anyone else did, and we believe them when they say that they did not know.

504. The Claimant's appeal did amount to a protected act.

504.1 Her email on 27 March 2017 was not a protected act. [Bundle 1373]. It just stated that she was appealing.

504.2 The Claimant's comments at the meeting on 24 April 2017 [Bundle 3331] contained protected acts. Throughout the meeting she referred to the fact that she had disabilities, and an entitlement to reasonable adjustments, and commented that the Respondent was treating her unfavourably for things arising in consequence of her disability and failing to make adjustments.

504.3 She did so again the next day when the meeting continued. [Bundle 3378]

504.4 Furthermore, as part of the appeal, the Claimant's emails and attachments 16, 19 and 19 May 2017 in relation to her appeal. [Bundle 1552 – 1553; 1556 – 1565] also contain protected acts.

505. Between Ms Dobson's meetings with the Claimant in April 2017, and the further emails sent by the Claimant in May, Ms Dobson contacted each of Ms Willis and Ms Gissane to request information and details from them. They were aware that the Claimant was objecting to the decisions they had respectively made, and was suggesting that (whether the allegation was express or implied) EQA had not been followed and there had been disability discrimination. For example, Ms Gissane's email to Ms Dobson on 15 May 2017 [Bundle 1566] followed prior discussions, and set out adjustments which Ms Gissane said had been made.

506. Furthermore, on 20 April 2017, Ms Gissane and Ms Willis were informed by the Claimant that her intended appeal included challenges to various decisions that they were involved with, and the Claimant requested certain documents from them.

507. It was after Ms Gissane (and Ms Willis) had received the Claimant's document requests, to support the appeal, that Ms Gissane held a "fact find" with the Claimant.

508. She subsequently prepared the investigation report [Bundle 1399] which is dated 10 May 2017. In it, she says that she is referring to her manager (Ms Willis) for consideration under the "gross misconduct procedure".

509. There is no allegation of expense fraud in the report. It refers to the fact that the Claimant had submitted, on 23 March 2017, a claim for expenses for May 2016 to February 2017, and a claim for expenses for November 2013 to March 2017. It asserts that there were no mitigating circumstances, and that the Claimant knew

a policy existed and ought to have been aware that the requirement was for the claims to be much more prompt.

510. Ms Gissane's account is that it was only on around 12 April 2017, after she had been contracted by Finance Officer, Mel Burton, that Ms Gissane came to know that the claim had been submitted on 27 March. However, the appendices to her own report show that she was sent email (auto-generated, we infer) alerting her to the expenses claims, and the amounts, and to the fact that they did not comply with policy, actually on 23 March. [Bundle 1410 and 1418.]

511. The report referred back to a reminder that Ms Gissane said she had given to the Claimant in 2016. It does not allege that there had been further reminders since, or that there had been any previous threat of disciplinary action. As stated in the findings of fact, Ms Gissane had asked the Claimant to submit the expense claims in 2015, and again on 7 and 9 March 2017.

512. On 24 May 2017, [Bundle 1573], Ms Willis wrote to the Claimant. The letter informed her that the sanction that would be considered would include Summary Dismissal, or Dismissal with Notice, or a range of other options including demotion and "Asking for compensation (where loss or theft of equipment has occurred.)"

513. The letter referred to the following, which were said to potentially constitute gross misconduct:

> 1. SERIOUS BREACH OF BT'S EXPENSES POLICY.
>
> 2. FAILURE TO COMPLY WITH A REASONABLE MANAGERIAL REQUEST.
>
> In that:
>
> • On 23rd March 2017 you submitted expense claims B7809988 and B7799325 which contained expenses claimed outside of the specified timescales permitted, contrary to BT's expenses policy.
>
> • The receipts submitted in support of the claims specified above were illegible.
>
> • You failed to act on at least one previous reminder was sent in June 2016 and you also failed to comply with your manager's request to submit claims for centrally settled transactions

514. The disciplinary hearing was scheduled for 5 June 2017.

515. The Claimant was too ill, and it was deferred at her request. On 7 June 2017 [Bundle 1594] to state that she did not anticipate being well enough to attend the hearing prior to 15 June 2017, the last day of employment. The accompany Fit Note, however, only covered the period to 10 June 2017. By letter dated 8 June 2017 [Bundle 1598], Ms Willis invited the Claimant to a disciplinary hearing on 12 June 2017.

516. Following further correspondence, the Claimant, as requested, provided an update on 12 June 2017 at 2pm [Bundle 1612] with a fit note up to 25 June 2017.

517. On 15 June 2017, [Bundle 1649], Ms Willis wrote to the Claimant acknowledging that it was her last day of employment and the disciplinary hearing had not taken place. The letter stated "I have, therefore, been unable to conclude this disciplinary matter".

518. It concluded that

> I have carefully reviewed and considered the details of the case provided to me which was reviewed by your first line manager Following this careful consideration, I believe that you are in breach of BT's business expenses policy As your employment has been terminated via BT's attendance process and your last day of service is tomorrow 15/06/17, this letter concludes proceedings in respect of this disciplinary matter

519. Our decision is that subjecting an individual to a formal fact find meeting for late submission of expenses is potentially a detriment. It is a disadvantage to an employee. It is worse, for example, than simply being told that the evidence is not good enough for there to be approval. It is worse, for example, than simply having it highlighted what the issues that might lead to non-approval are and being asked if there could be rectification. Regardless of whether those things happened too, a formal fact find is a detriment of sorts.

520. The 10 May 2017 investigation report from Ms Gissane which recommended consideration of "gross misconduct" was a detriment. It had the potential to – and did in fact – lead to a disciplinary hearing, and to correspondence referring to the possibility of dismissal for alleged gross misconduct.

521. The letters of 24 May (first invite to disciplinary hearing) and 8 June 2017 (invite to disciplinary hearing) on 12 June were detriments. They each set out that the Claimant might be dismissed without notice (though that was not the only option) and suggested that her actions could be seen as gross misconduct.

522. The letter of 15 June 2017 was a detriment. Although in one part of the letter, it acknowledged that there had been no hearing, and so the matter had not been concluded, it also contained Ms Willis' opinion that the allegations were accurate.

523. The letter from Ms Willis does not actually say that the Claimant would have been dismissed; however, we infer from the urgency of seeking to have the hearing before 15 June 2017 (as well as the express wording of the letters) that that was considered to be a genuine possibility. Indeed, in written submissions for this hearing, the Respondent has invited us to decide that, even if the dismissal is found to be unfair, there should be a Polkey deduction which reflects (amongst other things) the likelihood of being dismissed for this expenses issue.

524. The Claimant did do protected acts in the course of her appeal, and Ms Willis and Ms Gissane were aware of that. At the least, by 20 April 2017, they were aware that, even if the Claimant had not yet done a protected act in connection with the appeal, she "may" do so (in the wording of section 27(1)(b) EQA). The likelihood was a lot higher than "may do so"; it was clear to them that the Claimant did intend to allege disability discrimination (regardless of whether she used those words, or any other exact citations from EQA) and, in particular, to allegations that her dismissal was disability discrimination and that there had been failures to make reasonable adjustments.

525. We have to decide whether the burden of proof shifts. The mere fact alone of a detriment occurring later than a protected act is not sufficient. There has to be something more.

526. We have to bear in mind that for the Claimant to succeed, we do not have to decide that the protected act was the only, or even the main, reason for the detriment, so long as it is a significant influence. Furthermore, an unconscious motivation is sufficient.

527. It is very surprising to us that the Claimant's actions, in submitting her expenses claims, about 8 days or so after being notified of dismissal, was considered to be, even arguably, gross misconduct that might justify summary dismissal.

528. We do not ignore what Ms Gissane and Ms Willis state as their reasons. In particular, that they believe that the policy was clear and that the Claimant should have known that she was supposed to submit the documents much sooner than she did.

529. We also do not ignore that there was no suggestion put forward that the Claimant had not actually genuinely incurred the expenses for which she was seeking payment.

530. The Respondent's conduct in this matter, is so surprising, and so heavy-handed that we have decided that the burden of proof has shifted. On the Respondent's case, the Claimant had been told in 2016 that she needed to put her expense claims in order. While relied on as supporting the suggestion that the problem had been identified and raised with the Claimant prior to any protected act, in our judgment it shows that the Respondent had been aware much earlier (and we have referred to the 2015 reminder) that the Claimant had failed to submit documents to support expense claims (including for credit card usage) but, at the time, had seen it as something which required a reminder rather than a "fact find" meeting, let alone a disciplinary hearing to consider gross misconduct.

531. From these facts, we could conclude that the disciplinary process was because of the Claimant's protected acts (or anticipated protected acts) as part of the appeal against the dismissal. The burden of proof therefore shifts to the Respondent.

532. The Respondent has not discharged its burden, either in relation to Ms Gissane's initial actions, or in relation to Ms Willis's letters calling the Claimant to a disciplinary and then (on 15 June 2017) expressing the opinion mentioned above.

533. This victimisation allegation succeeds.

Row 18

534. This is a victimisation allegation. The alleged detrimental treatment is:

> At the point of dismissal, there were four vacant permanent hard-wired roles for which C was suitable. One was a role she had successful filled before. R refused to appoint C to, or even to consider her for, any of these roles on the alleged basis that the closing dates for applications post-dated termination of her employment. As C was still in the AJS programme at this point, the roles should have been made available to her immediately, she should not have been required to compete with others or await any closing date.

535. The same protected acts as for Row 17 are relied upon.

536. The Claimant applied for the posts on 14 and 15 June 2017. The applications were processed and was considered. Two of them required a candidate who had passed the assessment centre. Another was withdrawn for budgetary reasons. For the fourth, the Respondent's position was that the Claimant lacked the required experience.

537. The burden of proof does not shift. There are no facts from which we could conclude that there was a refusal to consider the Claimant for the final four roles because of any protected act.

538. The Claimant had been refused posts for similar reasons in the past, and there is nothing surprising or suspicious, and nothing that might cause us to infer a link ith what the Claimant did in connection with her dismissal appeal.

539. This victimisation complaint fails.

Row 19

540. This is a victimisation allegation. The alleged detrimental treatment is:

> Refusal to allow C to benefit from R`s Foundation Programme which would have supported her in finding a new role outside BT.
>
> This programme was available to employees who had been on the Adjusted Job Search process and were not successfully redeployed internally. C was told that this programme would not be made available to her, despite the fact that she had

worked for R for over 31 years and therefore believed herself to be somewhat institutionalised.

541. The same protected acts as for Row 17 are relied upon.

542. The Claimant would have been able to take a one off session had she not been on sick leave at the time that it would otherwise have taken place.

543. There are no facts from which we could conclude that she would have been allowed to take it post employment if she had not done the protected acts.

544. This victimisation complaint fails.

Row 20 (direct age discrimination)

545. The alleged less favourable treatment is:

> the process that led to C`s dismissal from October 2016 onwards, the various failures to comply with R`s own policies (as set out above) and timescales thereunder, the refusals to redeploy C and make the adjustments necessary to facilitate this and C`s dismissal, when R had suitable vacancies.

546. The reason for the alleged treatment is said to be:

> C was treated less favourably than younger employees who did not have C`s length of service and therefore the benefit having built up highly valuable (and for R, expensive) rights under the scheme.
>
> R has a black hole in this pension fund and removing long serving employees with such rights is a way of reducing its liabilities. Such employees have therefore been targeted for exit.

547. This is simply a bare assertion that, in the Claimant's opinion, is supported by the evidence of Mr Hancock. However, while we do not doubt that he genuinely hold the opinions which he stated, his evidence lacked specific detail. Furthermore, he was discussing matters that pre-dated the events connected to the Claimant's dismissal, and his evidence did not relate to the decision-makers involved in the Claimant's case.

548. There are no facts that could lead us to decide that the Claimant's dismissal was (even unconsciously, and even partially) because of age. In any event, the allegation is of a conscious and deliberate scheme, and our finding is that there was no such scheme.

549. This allegation fails.

Row 20 (indirect age discrimination)

550. The alleged PCP is:

> the practice of targeting of employees with such rights for exit amounts to a PCP.

551. The allegations for sections 19(2)(b) and 19(2)(c) were:

> This put older employees with longer periods of service at a substantial disadvantage. C was one of those employees targeted and exited

552. The Claimant has not proven that the Respondent had this PCP.

553. The allegation fails.

Unfair Dismissal

554. The person who took the decision to dismiss the Claimant, acting on behalf of, and with full authority of, the Respondent, was Jo Willis.

555. Ms Willis accurately states her own beliefs and opinions in the letter of 22 March 2017 [Bundle 1363] and accompanying rationale. [Bundle 1365].

556. The label which Ms Willis used in the rationale was "*1.3 Termination of employment on the grounds of impaired capability due to ill health*".

557. The label she used in the letter itself was: "*termination of your employment on grounds impaired capability due to ill health with retirement in the interests of efficiency benefits in accordance with the Attendance Procedure*"

558. Although the wording is slightly different, there is no contradiction. The label on the letter merely goes on to state that the Respondent has decided that the circumstances are such that the Claimant qualifies for certain entitlements under the pension scheme. In both cases, the label given to the reason refers to ill-health, and refers to Ms Willis's opinion that ill-health has impaired the Claimant's ability to do work for the Respondent.

559. Ms Willis sets out the background at paragraphs 2.1 to 2.5 of her rationale. She addressed the Claimant's queries at paragraphs 3.1 to 3.6. These all form part of her decision-making, that is form part of the thought process by which she decided that dismissal was appropriate. Her thought process included:

559.1 That the Claimant had been in BTTC since 2009 in 6 "life cycles". That is her time in BTTC had been punctuated by times when she was on secondments or temporary contracts.

559.2 That she had had a total of 1650 days in BTTC.

559.3 That, since April 2014, she had had an uninterrupted spell of 1067 days in BTTC.

559.4 That the Claimant required various reasonable adjustments (which, in Ms Willis' opinion, had all been implemented).

559.5 That one of the adjustments which the Respondent had agreed and implemented was that, the Claimant should remain a home worker with occasional travel.

559.6 That the Claimant had been placed in the AJS.

559.7 That in AJS, the Claimant had reviewed: "*around 1080 roles (pre job news 570, job news 495, STA's 6) and applied for 8 permanent opportunities and been matched to four permanent opportunities*".

559.8 That Ms Willis had conducted a review on 9 January 2017

559.9 That, according to Ms Willis' interpretation of the Respondent's policies, AJS (the adjusted job search process) gave priority access for up to six months (and no longer).

559.10 That the Claimant's search (with AJS priority) had been ongoing for five months

559.11 That, if the Claimant was dismissed, she would be able to continue the search throughout her notice period up to and including her last day of service.

559.12 That the Claimant had failed the Assessment Centre, and had done so so badly (with a 43% score as against 60% pass mark), there could be no waiver or variation

559.13 That adjustments had been made agreed and implemented for the Assessment Centre (being 25% extra time).

559.14 That AJS would not be extended.

560. The explanation of her dismissal decision, having taken into account the other matters set out in the rationale, was in paragraph 2.5, which stated:

> 2.5 In conclusion, Lorraine's search for an appropriate permanent role via the AJS process has been going on for five months with no success. It is important for the business to receive regular and effective service from employees and any recommendations for adjustments from both her OHS reports and Enable referral have been made. Given the length of time she has been searching for permanent employment, I think it unlikely that Lorraine will be successful in the foreseeable future in securing a permanent role.

561. Thus, our decision is that Ms Willis immediate reason for the dismissal was:

561.1 The Claimant had not secured a job during the AJS period

561.2 The AJS period could not or would not be extended

562. However, if the AJS period could not be extended, then, rather than return the Claimant to the position that she had been in immediately prior to the start of the AJS (that is, as a displaced employee, without a permanent job, and looking for a permanent job via BTTC), Ms Willis decided to dismiss the Claimant, and to do so because:

562.1 Ms Willis had decided that it was "unlikely" that the Claimant would be successful in the "foreseeable future"

562.2 That the Claimant was not giving "regular and effective service" while in BTTC (whether on AJS or not)

562.3 That, therefore, dismissal was appropriate.

563. The Respondent has argued that the factual reasons stated above can/should be categorised as "capability". As per section 98 ERA, a reason falls within that category if it:

> relates to the capability or qualifications of the employee for performing work of the kind which [they were] employed by the employer to do
>
> (a) "capability", in relation to an employee, means [their] capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
>
> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which [they] held.

564. In this case, the Claimant did not enter the BTTC in 2009 (or resume her membership in April 2014) because of ill-health, or anything else that falls within the definition of "capability". She entered into BTTC because she no longer had a permanent job, and the reason that she no longer had a permanent job was that she volunteered to give it up. Had she not done so, there would have been – presumably – a selection process (assuming no-one else volunteered either). However, she was not selected to leave that job for capability reasons.

565. Our decision is that there was no change of circumstances in 2016 (or earlier) such that the Claimant became incapable of performing any job whatsoever for the Respondent. She was not dismissed because she was incapable of performing any job whatsoever for the Respondent (and the Respondent does not argue that she was).

566. The Respondent's capability argument is that her health conditions prevented her finding a job such that (a) she could perform it (with adjustments) and (b) she could persuade the recruiting manager to appoint her. However, it does not argue that it had no jobs at all such that the Claimant could perform it (with adjustments).

567. The category/label, "capability", as per section 98(2)(a) ERA, does not apply to the Respondent's dismissal reason in our judgment. Contractually, the Claimant had the right to remain in BTTC. The justification given for commencing the AJS was that there was a change of circumstances, but we do not agree that there had been such a change of circumstances. The change of circumstances relied on is the OH report dated 27 July 2016 [Bundle 1057 to 1062]. However, that document was neither a change of circumstances (since it referred back to adjustments and needs for adjustments that had been highlighted previously) and nor was it a document which stated that the Claimant was incapable, if she remained in BTTC, of securing a permanent role.

568. In Ms Gissane's rationale for placing the Claimant in AJS, she had stated: "*Lorraine has a number of medical conditions which are both psychological and physical, which are preventing her from securing a permanent role.*" However, Ms Willis' own analysis contained no specific finding that the Claimant's health/disabilities were "preventing" her from securing a permanent role.

569. The Respondent's alternative categorisation of the reason is that it was, as per section 98(1)(b), "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". In particular, it summarises the reason as being "the continued failure to locate a suitable alternative permanent role for the Claimant that accommodated her health restrictions despite an extensive search"

570. Our decision is that this is a better match for Ms Willis' actual thought processes as described in the letter/rationale. That is, she was not deciding that the Claimant was incapable of working in any specific job (that is, there was no decision that the Claimant was not able to do the work for which she had been employed, and no decision that she left that substantive job for reasons related capability), but rather Ms Willis was deciding that – to paraphrase – the Claimant had had long enough to find a new job, and had not done so, and it was reasonable for the Respondent to decide that it would not allow her any longer.

571. In any event, regardless of whether the dismissal reason falls into the definition in section 98(2)(a) or section 98(1)(b), our decision is that the dismissal was unfair.

572. The procedure which was followed between October 2016 (purported start of AJS) and March (2017) was so unreasonable that no reasonable employer would have adopted it. These were not minor defects, and they were not cured on appeal. We

do not ignore that the Claimant had (as stated in the dismissal rationale) been in BTTC for a long time prior to October 2016.

573. Further, the decision to dismiss, in March 2017, was outside the band of reasonable responses.

574. Our reasons are as follows:

574.1 The Attendance Procedure was not followed (as discussed above)

574.2 Even if it had been followed, no reasonable employer could have concluded that the Claimant met the criteria to be dismissed under the Attendance Procedure

574.3 AJS processes were not followed at the outset. No reasonable employer could have decided that the delays in Enable Plus referral, which were all caused by the Respondent not the Claimant, were not a reason to extend the AJS period

574.4 The Respondent insisted that the "6 month" period commenced from 17 October 2016, even though the Claimant was not notified until about a week later, and did not have face to face meeting until a month later, and even though the decision-maker for AJS approval, Ms Halson, was very clear in December 2016 that she had not yet formally approved it.

574.5 The Respondent did not even wait the full 6 months even counting from its own alleged 17 October 2016 start date.

575. Not every discriminatory dismissal is an unfair dismissal. We have found the dismissal was unfair in any event, without relying on the facts that some of the EQA complaints have been upheld. However, the treatment mentioned above at Rows 6 and 10 was also outside the band of reasonable responses on the facts of this case.

Breach of Contract

Pay Rise Entitlement and/or Bonus Entitlement

576. It would be for the Claimant to satisfy the Tribunal that firstly, she had a specific contractual entitlement to a pay increase (or to a bonus), and secondly, that the Respondent breached that entitlement.

577. Or, alternatively, it would be for the Claimant to satisfy the Tribunal that firstly, she had some contractual entitlement to a pay review, and secondly, that the Respondent breached that entitlement, and thirdly that she should be entitled to some award of damages for loss of chance.

578. Or alternatively, it would be for the Claimant to demonstrate that, in relation to some discretionary decision in relation to bonus (or pay increase), there was an implied term of the contract that the Respondent would not make that particular decision irrationally or perversely AND THAT it had actually made a decision that was irrational or perverse (or else had, irrationally or perversely, omitted to make any decision).

579. In short, the Claimant has not successfully demonstrated any of these in relation to either bonus or to pay rise.

580. She has not shown us any clause of the contract which entitled her to have her pay rise, to a level greater than that which the Respondent paid to her. Nor has she proven that the Respondent failed to carry out a review that it was contractually obliged to do, or that any decision about pay increase was perverse or irrational.

581. Furthermore, in relation to bonus, the Claimant has not shown that, in connection with any secondment or project work or STA work that she did, she was entitled to any success fee or other bonus payment. Nor has she shown that there was any particular discretionary scheme such that the Respondent made any decisions which were irrational or perverse. For the time that she was working in BTTC, and not on any secondment or project work or STA work, she had no entitlement to any bonus.

Expenses

582. The Claimant was provisionally entitled to reimbursement of expenses which were incurred in the performance of her duties.

583. To become entitled to receive any particular sum by way of reimbursement, the Claimant had to comply with the rules and policies for such claims.

584. As a minimum, she would have to be able to supply some proof of the expenditure to the Respondent (in a format and of a type which the Respondent deemed acceptable) and an explanation of why the expenditure had been necessary in the performance of her duties.

585. The Claimant has referred to documents in the bundle which she asserts are her expenses, dating back several years. She submitted some or all of these expenses to the Respondent in the last few weeks of employment (during her notice period). She has not proven that she made any contemporaneous claim for these expenses.

586. As the Respondent's accounts department has mentioned in the emails on the topic, some of the items are very hard to read.

587. The Claimant requires more than a good faith belief that the Respondent was liable to her for these sums. In any event, her 15 June 2017 grievance accepted that she was out of time for some of the items. We have not been satisfied, taking into account the timings of the expense claims, and the quality of the information and evidence supplied by the Claimant to the Respondent, that she had any contractual entitlement to be paid any additional sum by way of reimbursement of expenses.

Holiday – payment in lieu entitlement

588. The parties are in agreement that if, by the termination date, the Claimant had any unused entitlement, then she was entitled to be paid for it.

589. One potential source of disagreement was over what obligations (if any) the Claimant had to use her entitlement during the notice period and what rights (if any) the Respondent had to insist that she did so.

590. However, the dispute is actually simpler than that.

591. On 15 June 2017, Ms Gissane wrote to the Claimant [Bundle 1658]. The email asserted the following:

591.1 Carry over from previous leave year was 5 days

591.2 Leave year started 1 April

591.3 From 1 April 2017 to termination date, the Claimant's entitlement for the part year was 7 days (being one quarter of "statutory" entitlement of 28 days)

591.4 So entitlement was 5 + 7 = 12 days

591.5 The Claimant had taken 8 chosen days as holiday

591.6 The Claimant had also had paid time off on 4 bank holidays

591.7 Thus the entitlement which had been used was 8 + 4 = 12

591.8 Therefore the balance was zero.

592. The Claimant does not take issue with the number of days of carry over, or used as holiday. She does not accept, however, that her entitlement was to (only) "statutory". That is, she does not accept that she had no entitlement to anything more than the 28 days provided for by of the Working Time Regulations 1998.

593. The Claimant believes that her contractual entitlement was to more than that, though neither side has produced reliable documentary evidence of a specific written agreement between the Claimant and Respondent in relation to holiday entitlement.

594. The Claimant relies, in support of her assertion that she was entitled (contractually) to more than WTR minimum on the letter from HR at [Bundle 1791].

595. If that letter is correct, then the Claimant was entitled to “67 hours' pay for your outstanding annual leave”. It is common ground that she was not paid that.

596. The Respondent argues that the letter is wrong, though has provided no specific evidence of what caused the error. The Respondent points out – correctly – that there is a significant error in the letter in that it refers to the Claimant’s last day of service as being 15 June 2017 (which is correct) but mentions entitlement to pay in lieu of notice (which is incorrect, notice that the termination date would be 15 June 2017 having been given by letter dated 22 March).

597. On the balance of probabilities, we are persuaded by the Claimant that her entitlement to annual leave was to more than WTR minimum, and that Ms Gissane made an error on 15 June 2017 when computing the entitlement just based on 28 days per year; it should have been calculated at a higher rate. On balance of probabilities, the correct calculation was performed by the Respondent’s HR department when it notified the Claimant that, after her employment was ended, and (presumably) all carry over and leave actually taken was correctly accounted for, the Claimant had a remaining entitlement to 67 hours pay.

Outcome and next steps

598. There will be a remedy hearing. Dates and case management orders will be sent separately.

Employment Judge Quill

Date 13 March 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
14 March 2024

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FOR EMPLOYMENT TRIBUNALS