Case number: 2601594 /2022

RESERVED LIABILITY JUDGMENT WITH REASONS

Claimant: Mrs N Hulait

Respondent: Leicestershire Partnership Trust

Heard at: Midlands East – Leicester **On:** 18 March to 4 April 2024

Deliberations: 29, 30 April 2024 and 2 August 2024.

Before: Employment Judge Broughton sitting with Members; Ms McLeod and Mr Rose.

Representatives

Claimant: Ms Tanya Jones counsel
Respondent: Mr Jonathan Heard – counsel

JUDGEMENT

The complaints withdrawn are all dismissed on withdrawal.

The complaints are not well founded and are dismissed apart from the following complaints which **succeed**:

(1) That the claimant was dismissed for something arising from her disability in breach of section 15 Equality Act 2010 (EqA) on 20 January 2023

(2) That the termination of the claimant's employment was unfair pursuant to section 94 and 98 Employment Rights Act 1996 (ERA).

(3) That the respondent failed to make a reasonable adjustment by not extending further Work Trial 3 resulting in the claimant's dismissal, contrary to section 20/21 EqA.

REASONS

Background

1. The claimant presented her claim to the Employment Tribunal on **13 July 2022** following a period of ACAS early conciliation from **29 April 2022 to 10 June 2022.**

Preliminary Hearing

2. Employment Judge M. Butler recorded in a judgment dated 30 March 2023 that by consent the claimant was disabled for the purposes of section 6 of the Equality Act 2010 by reason of the following disabilities:

   2.1 Asthma from January 2022
   2.2 Anxiety and depression from April 2020
   2.3 ADHD from May 2022
   2.4 Bronchiectasis from April 2020

3. There was a preliminary hearing on 15 June 2023 to determine an application by the claimant to amend her claim. The application included a number of amendments and the judgment of the 6 July 2023 records those which were agreed and those which were refused.

The Final Hearing - Adjustments

4. The claimant had written into the Tribunal on 29 January 2024 requesting a number of adjustments, for the final hearing, to accommodate her disabilities.

5. After some discussion with the parties, a number of adjustments were made for the claimant, namely that she was permitted to write down the questions she was being asked during cross examination, the temperature of the hearing room was adjusted to ensure the claimant was comfortable and breaks took place as and when the claimant required them to manage her diabetes.

6. Adjustments were also accommodated, as requested, for a number of the respondent's witnesses who gave evidence and who had various health issues.

List of Issues

7. The parties had prepared an agreed list of issues and presented the list to the Tribunal. After some discussion with the parties on the second day of the hearing (the first day being reading in time for the panel), Ms Jones requested time to review the claims and take further instructions with a view to withdrawing certain claims. There were some agreed changes to the issues during this hearing and at the conclusion of the evidence further claims were withdrawn. Attached to this judgment is the final list of issues agreed between the parties on 4 April 2024 which included agreement that the claimant was disabled because of Type 1 diabetes from December 1989.

8. Following the hearing, (because there had been so many amendments and withdrawal of claims) the Judge sent a list of issues inviting the parties to inform the Tribunal if this list did not set out the updated position. Neither party responded, however, the Tribunal has noted that this did not reflect the withdrawal on 26 March 2024 of the victimisation claim concerning the delay in the grievance process (which it was alleged was intended to reduce the claimant's pay to nil and was then referenced as claim 106.2).

The evidence

9. The bundle, including some additional, numbered 2064.

10. The parties attended the hearing in person, although claimant's counsel was permitted to attend via CVP to present oral submissions.

Witnesses

11. The claimant provided a witness statement and under an affirmation to tell the truth was cross examined. She did not call any supporting witnesses.

12. The Tribunal have had regard to the claimant's health conditions and considered the guidance in the Equal Treatment Bench book. The claimant's evidence in chief, as set out in her witness statement, was not consistently presented in chronological order and discursive in style, running to 200 pages (large print) however, the Tribunal appreciate that the claimant's conditions (in particular ADHD) may make preparing a statement of this nature challenging and make no criticism of it. In terms of her memory and recollection of events, in cross examination the claimant gave evidence that because she had to relive all that had happened in preparing her witness statement, she was able to recall events if given sufficient time where they were '*that bad'*, however the Tribunal were careful about findings of credibility based on an inability to recall accurately events.

13. The respondent presented witness statements for Lyndsay Wright, Administrative Support Manager, Jinny Kaur, Administration Manager, Claire Taylor, Head of Operational HR, Lisa Laws, Human Resources Manager, Caroline Dunkley, Administrative Support Manager, Sarah Physick, Healthy City Team Leader, Andrew Moonesinghe, Operation Lead for Pharmacy Services, Mandy White, Senior HR Business Partner, Julie Hamore, HR Business Partner, Rosie Bond, Senior Clinical Secretary, Mark Roberts, Assistant Director of Families , Young Person's, Learning Disabilities and Autism Directorate. The witnesses were cross examined under oath or an affirmation. Witness statements were also produced by the respondent for the witnesses involved in the grievance process; Mr. Amrik Singh and Ms. Gail Philipson, however, as result of the victimisation claims being withdrawn against them during the hearing (on 26 March 2024), the claimant agreed the content of their statements and the claimant decided not to challenge their evidence under cross examination. As a result of withdrawing a claim relating to the respondent's response to a subject access request from the claimant, the witness statement of Hannah Plowright was also admitted into evidence by agreement and the claimant confirmed that she did not want to challenge her evidence under cross examination.

Findings of facts

14. All findings of fact are based on a balance of probabilities and while all the evidence has been considered, only the evidence relevant to the determination of the issues is addressed in this judgment.

Employment – background

15. The claimant was employed by the respondent from 21 February 1995 until her employment ended on 20 January 2023.

16. The claimant originally joined the respondent as a full time Clerical Officer (Band 2) with the Wheelchair Service, she was promoted to Clinical Coordinator in around 2002. She joined the Adult Mental Health Community Mental Health Team in 2010 and then from 2010 to 2015 she worked as a Receptionist, Outpatient Clerk. From 2014 to 2016 the

claimant moved up a grade from a Band 2 to 3 as a Lead Administrator. The claimant worked as a Team Secretary (Band 3) in Adult Mental Health from 2016 to 2020.

17. Throughout her employment, the claimant acquired new skills and qualifications, including stock auditing and ordering, taking minutes and completing data on Excel spreadsheets [para 22. b claimant's w/s].

Diabetes

18. It is accepted that the claimant was disabled because of diabetes from **1989.**

19. The claimant's undisputed evidence, which the Tribunal accept [w/s para 3 & 8] is that she had to take a couple of weeks off work in **2004** because of complications arising from her diabetes and the respondent was notified of this at the time via her then line manager.

20. The Tribunal find that the respondent had constructive, if not actual knowledge, that the claimant had a disability from this date. While the Tribunal heard no evidence about the details of the effects of the condition which the claimant provided to her line manager at the time, the respondent was on notice that the claimant had a health condition which, it is common knowledge, is of a type likely to be long term (in the context of the section 6 test under the EqA) and likely, without the benefit of medication, to have a substantial effect on day to day activities. Therefore from 2004, there was an obligation on the respondent to consider reasonable adjustments for this condition which they did.

Tailored Adjustment Agreement

21. In August **2017,** a Tailored Adjustment Agreement (TAA) was however put in place for the claimant which she signed [p.287]. This is a document which records the reasonable adjustments agreed between an employee and their line manager and the adjustments needed. It recorded two health conditions: a frozen shoulder and muscular back pain. There is no evidence that the TAA was provided to subsequent line managers. The respondent did not produce a policy regarding the use of TAA's by the respondent. The TAA clearly did not deal with all the claimant's known disabilities at the time because it did not make reference to diabetes, probably the Tribunal find, because adjustments were already in place for that condition i.e., short breaks during the working day to allow the claimant to manage her condition.

22. The Tribunal find that there was, no policy or practice in place at this time, or if there was a policy it was not followed, which regulated/instructed managers on whether and how to ensure information about medical conditions (and what adjustments may be required), was passed on to a new line manager where the employee moved jobs within the respondent organisation.

Bank staff

23. In November 2018 the claimant started working as bank staff on a regular basis for about 2 years.

24. This case is concerned primarily however with events during the period of her employment from January 2020 onwards.

January 2020

25. In **January 2020** the claimant was interviewed for another post as a Personal Assistant (PA) (Band 3) The claimant was interviewed by Ms Jinny Kaur, Administration Manager in the Rehabilitation and Huntington's Disease Services. The claimant's own evidence is that she had many transferable skills from her role as Team Secretary, Lead Administrator and outpatient Clerk, although no specific PA experience. The claimant was, however, initially unsuccessful.

26. The UK then had a period of 'lockdown' from **March 2020** due to the Covid 19 pandemic and the claimant had to shield at home because of two conditions; asthma and diabetes.

27. The successful candidate for the PA role withdrew a month later and the role was then offered to the claimant who accepted it after being contacted on the **9 April 2020** by Ms Kaur.

28. The claimant's oral submissions are that during the interview process or before she secured the role, the claimant told Ms Kaur that she had all the pleaded disabilities including anxiety and depression. However, in her evidence in chief the claimant states that she [para 24 w/s] did not disclose her disabilities initially to Ms Kaur because she would not have been offered the job otherwise and would later accept that she only told Ms Kaur the reasons for her shielding, later in June 2020.

29. The Tribunal do not accept that the claimant therefore discussed her medical conditions at this time with Ms Kaur and nor did Ms Kaur enquire, and that is consistent with the evidence of Ms Kaur and the contemporaneous documents.

Acceptance of the role

30. The claimant accepts that she had positive interactions with Ms Kaur but that this was prior to the claimant confirming that she was shielding and thereafter her attitude toward the claimant changed. However, the Tribunal do not accept that this is correct.

31. The claimant alleges that Ms Kaur became less engaging and very distant with her once she realised the impact and length of time the claimant would need before she could start the PA role because of shielding. There is a chain of emails on 9 April 2020 [p.291] in which Ms Kaur enquires whether the claimant is interested in the role, and the claimant confirms that she is but is shielding *"for now".* The claimant does not say why she is shielding. The response from Ms Kaur is supportive and sets no time frame for when she would need to return to take up this role. The Tribunal find that despite what the claimant alleges, Ms Kaur was in fact relaxed about a start time and supportive; "*Don't worry about a start date – we can defer that until you're ready to come back to work. Given the current situation, there is no rush*." As the claimant herself, in cross examination accepted, that this was a positive message from Ms Kaur.

32. On the 26 May 2020 Ms Kaur contacted the claimant to ask when her shielding period would be over and the claimant informs her that it is 30 June 2020, Ms Kaur does not express any frustration but replies [p.292]; "*Fab thank you*".

33. The Tribunal find that even when Ms Kaur knew the claimant needed to shield, she continued to be supportive but was not aware at this time, until 3 June 2020 of the reason why she needed to shield on medical advice.

Covid Risk Assessment

34. Ms Kaur prepared a timeline in June 2020 and added entries to it, it is a record of discussions and meetings with the claimant. [Ms Kaur's w/s para 97].

35. The timeline includes an entry for **3 June 2020** [p.471] where Ms Kaur records a discussion with the claimant where the claimant states that initially she was shielding due to a family member being asymptomatic. An email from the claimant to Ms Kaur on 4 June 2020 however refers to a discussion between them the day before and states that she is writing to confirm as discussed, that has had been shielding due to having Type 1 Diabetece [sic]: "*I also have asthma which I believe to be severe as I have a constant cough. I am undergoing treatment at the Respiratory Service and waiting for a CT scan for a diagnose [sic] to determine if I have a lung condition. As I had not been diagnosed France could not include this on my risk assessment*." [302]

36. The entry for 3 June goes on to refer to seeking medical treatment/advice due to respiratory difficulties. It also states that:

    "*It was agreed that Navdeep would provide all details via email and JK to contact HR adviser JH and/or seek advice from OH about making arrangements for Navdeep to come to work*".

37. The claimant could not recall the conversation of the 3 June but under cross examination accepted that this conversation could have taken place and largely accepted the accuracy of the notes of 3 June.

Covid Risk Assessment: June 2020

38. The claimant in June 2020, because she had yet to start the new PA role, remained under the line management of Ms Smitheringale. Ms Smitheringale completed a Covid 19 Risk Assessment for the claimant on 11 June 2020 [p.296]. This recorded that the claimant had Type 1 diabetes controlled by injection and that she has contacted her GP about *constant* chest infections.

39. Ms Kaur accepted that she had seen this Covid risk assessment 'early on'. The Tribunal find that this was sent to her by the claimant on **25 June 2020** [p.297].

Knowledge – diabetes and asthma

40. The respondent accepts that Ms Kaur had **actual knowledg**e that the claimant had the **impairments** of diabetes and asthma from **25 June 2020**, but not necessarily knowledge that they were disabilities as defined by section 6 EqA.

41. The previous judgment of the Tribunal records by consent, that the condition of **asthma** was not a disability for the purposes of the EqA until **January 2022,** but **diabetes was from December 1989.**

42. The Tribunal find that had the respondent made reasonable enquires at this stage, whether directly with the claimant or OH, she would have known that the condition of **diabetes** was long term (since1989) and what the effects on her normal day to day activities were. The respondent and Ms Kaur were aware that the claimant controlled her diabetes with injections because this is recorded in the June Covid risk assessment.

43. In terms of whether Ms Kaur personally knew that the **diabetes** was a disability, the Tribunal find that while raised with her, the evidence does not support a finding that the claimant had detailed the effects of it to her at this stage and Ms Kaur had not enquired. However, it is common knowledge that Type 1 diabetes is a life-long condition and life threatening if not treated. Ms Kaur may not have known for how long she had, had diabetes, but the Tribunal find she would have known that it was likely to last at least 12 months. Ms Kaur accepted in cross examination that the 11 June 2020 Covid risk

assessment put her on notice that the claimant may require adjustments to the workplace.

44. Ms Kaur however expected OH who would be involved in the recruitment process, to let her know if the applicant had any disabilities, and if any adjustments were required. Ms Kaur would not seek an OH report herself therefore until November 2020.

45. It is not in dispute that the claimant needs to eat regularly to manage her diabetes and it had been agreed with Ms Kaur that the claimant could **eat at her desk** if alone or go to the staff room while she was working at Stewart House. However, due to a failure in policy to have in place an effective system to transfer information between line managers about adjustments, this information would not be passed on to other line managers later in her employment.

Ms Kaur- knowledge of bronchiectasis

46. By this stage, all that is known by the respondent, and indeed the claimant is that she had a constant cough and chest infections. This appears to be a fairly recent health concern and it was not clear whether this was a long-term condition or not. Further steps to understand the condition at this stage would have the Tribunal find, established that her doctors from May 2020, considered that she *may* have the condition of bronchiectasis, but this was yet to be determined by further investigations.

47. On the **15 June 2020** the claimant in discussions about her return to work, indicated that she felt more comfortable after a discussion with Ms Kaur about the control measures in place in the work environment and that if she was exposed to patients in the corridors; "*with the added control measures of face covering would equally reduce the risk to me further" [p.301].*

48. Ms Kaur on **24 June 2020** contacted the claimant again and refers to the shielding period being extended, asks the claimant for a shielding letter, if she has one, from the government and ends; "*Any problems please don't hesitate to contact me*".

49. Ms Kaur sent the claimant a BAME risk assessment to complete which is dated **25 June 2020** and signed by Ms Kaur and the claimant [p.306- 308].The document records that the claimant also worked for as an audio typist for BigHand's 12 hours per week (BigHand's is an Audio Typing Service in Adult Mental Health and BigHand's is the name of the digital software) but will only return to this role when she returns also to her permanent role.

50. In terms of her medical conditions, this risk assessment refers to Type 1 diabetes, asthma and bronchiectasis [p.308]:

*"I have also have Asthma **since 2010** but **over the last few years symptoms have increased**. I take **Airfusal and Ventolin**" and*

*"…Since November 2018 I have had symptoms that I thought were related to my Asthma. I produce a large amount of secretions and will have episodes of constant cough that require me to remove the secretions before symptoms settle down. These episodes last a few minutes. I have been having **investigations since last year** and in January 2019 I was referred to the Respiratory Service. I have been assessed at the **end of May** by a Doctor over the phone **who suggested I might have Bronchiectasis and would need a CT** Thorax scan to confirm this," and*

"I believe the control measures that have been suggested, greatly reduce the risk associated with my conditions. However, with appropriate PPE and adjustment this will further enhance the overall risk involved in my working environment. I feel comfortable and reassured that my welling is met in the workplace."

51. The BAME risk assessment [337] makes no mention of anxiety and depression.

52. The correspondence from Ms Kaur, during this period, the Tribunal remains polite and supportive.

53. On 27 July 2020, the claimant emailed Ms Kaur [p.319] to inform her that she had a diagnosis from the Respiratory Clinic who confirm that she has bronchiectasis and explains that it is **a lung condition which needs treating with antibiotics and steroids when she has an infection and Respiratory physiotherapy.** The claimant provided no details regarding the impact on her normal day to day activities. As a result of the lung condition, the claimant now informed Ms Kaur that she will have **to continue shielding due to taking steroids (because they lower the immune system)** and needed to discuss the option of working from home. There was no reply from Ms Kaur and the claimant followed that up on 29 July to inform Ms Kaur that no letter would be generated from Occupational Health (OH) and that if Ms Kaur wanted written information, then she will need to refer the claimant.

54. There is an obligation on line managers under the respondent's Reasonable Adjustment Policy [204] to involve HR where they are notified that a member of staff has a long term health condition [para 4.2]. As described, this was clearly indicating a long term condition. Ms Kaur did not seek OH advice on the lung condition or involve HR, although she states she believes she would have, there is no evidence to support this, and she could not provide any details. The Tribunal find that she did not seek further advice at this stage.

55. The earlier judgment of the Tribunal is that the claimant was disabled with this condition from April 2020.

56. The Tribunal find that the respondent had sufficient information by this stage in **July 2020 to** alert it to the fact that the claimant may have a disability. A simple internet search of the condition would show that this condition is a long-term condition where the airways of the lungs become widened, leading to a build-up of excess mucus that can make the lungs more vulnerable to infection, with a common symptom being a persistent cough.

57. The Tribunal also find however that Ms Kaur had by **27 July 2020** actual knowledge that the claimant was disabled because of bronchiectasis. Ms Kaur knew that it was a lung condition, that it was likely to be long term because the claimant refers to needing treatment if she has an infection and in the BAME risk assessment dated 25 June 2020 she mentioned that she has been having investigations since the year before and refers to producing large amounts of secretions since November 2018. The claimant had also explained that going forward she will need steroids and antibiotics when she has infections which clearly indicated that without such treatment, the effects on her normal day to day activities were likely to be substantial.

Knowledge – anxiety and depression

58. The judgment of the Tribunal is that the claimant was disabled due to anxiety and depression from April 2020. As the judgment recorded an agreed position between the parties, there are not written reasons to explain how this date was determined.

59. Ms Kaur's evidence is that she was not aware that the claimant had anxiety and depression at this time. The claimant had not mentioned anxiety and depression to Ms Kaur by July 2020, and neither was this recorded on the Covid risk assessment and nor does the claimant mention it in any email correspondence at this time. The claimant in her evidence in chief mentions Ms Kaur having extensive knowledge about this condition but does not set out what she actually told her about the effects of it.

60. The claimant had deliberately withheld information about her disability during the recruitment process for the role and the Tribunal find that it is more likely than not, that she withheld information about this health condition at this time.

Shielding – August 2020

61. On the **4 August 2020,** Ms Kaur forwards to the claimant advice from the Head of Nursing which states that as it is a PA role, if social distancing can be managed in a Covid secure setting she cannot see why the claimant cannot return to work once shielding is over. Ms Kaur informs the claimant that the shielding period ends on 17 August which means that she would come to work on 18 August 2020. It is a perfectly polite and professional letter which starts; "*I hope you are well*." [p.323].

62. The claimant complains that Ms Kaur had little contact with her while she was shielding and did not enquire about her welfare but also under cross examination gave evidence that it was not made clear when the start date was in the new role and when Ms Kaur had officially become her new line manager. The Tribunal find that the claimant did not formally transfer into the PA role until 18 August 2020 and prior to that the claimant remained under the line management of her previous manager, Francis Smitheringale. Thus, the Tribunal consider that it was understandable that Ms Kaur did not consider that she yet had day to day line management responsibility for the claimant and would not therefore have considered that she was responsible for maintaining regular contact. Therefore, the Tribunal find that a lack of concern by Ms Kaur cannot reasonably be inferred from the limited contact she had with the claimant during this period in the circumstances.

Between 18 August 2020 and 7 November 2021

63. The claimant returned to work and at that point officially transferred into the PA role on **18 August 2020** She complains that she did not meet with either manager or was offered support for the transition into the role.

64. The claimant's main duties in the PA role were providing administrative support to Sara Le-Butt and Marie McConaughey, two Team Managers in the Rehabilitation and Recovery Services. This was to include duties such as organising their diaries, taking minutes, circulation of meeting documents, typing documents including supervision notes and completing spreadsheets to include all data on Covid tests/jabs for approximately 100 or more ward.

Mask wearing

65. The respondent had rehabilitation inpatient units at two locations: Stewart House and The Willows. The claimant worked from Stewart House at this time. There was a need to reduce numbers of people working on site because of ongoing concerns around Covid infection. Ms Sara Le-Butt was physically present on site at The Willows, two days per work and two days at Stewart House and shared an office with the claimant. Ms Kaur was contactable via MS Teams or email.

66. The claimant does not complain about having to wear a mask between August 2020 (when she started in the role) and before her return on 7 October 2021 because she could remove it when working alone, and, as she explained under cross examination, she had no problems wearing one in communal areas. It was wearing one long term which due to her lung condition causes a build-up of mucus and led to her coughing while wearing a mask.

Knowledge – anxiety and depression

67. The claimant complains that she had a work induction in August 2020 and that Ms Kaur only followed the standard form and ticked off questions and alleges that she repeated the information about her disabilities to her including information about her diabetes, anxiety and depression, asthma and bronchiectasis which they had previously discussed in June 2020 as part of the risk assessment [306-316]. However, the Covid risk assessment which the claimant had signed in June 2020, had in fact made no reference to anxiety and depression and Ms Kaur denies that anxiety and depression was mentioned to her and there are no contemporaneous documents to evidence that it was.

68. The Tribunal find that the claimant did not raise with Mr Kaur at this time when she first began working in the role during the induction period, that she had anxiety and depression.

Training

69. The claimant also complains that between 18 August 2020 and 7 November 2021, Ms Kaur did not provide her with suitable training and in their first meeting the claimant was thrown into the deep by being required to take minutes/make an action plan, of complex medical matters which the claimant had no prior knowledge of. The claimant claims that she found this difficult because she had a disability namely **depression and anxiety** (not ADHD or any of the other conditions).

70. The Tribunal find that the evidence, however, does not support a finding that Ms Kaur was aware, nor can she be argued to have constructive knowledge, that the claimant had this disability when she returned to work in August 2020.

August 2021: training

71. The evidence of Ms Kaur is that there is a lot of 'on the job training' and training needs are identified as the need arises and that discussions during supervision and appraisals ensure that necessary training is provided. Under cross examination the claimant accepted that a lot of the training was provided 'on the job'. The Tribunal find that the absence of a structured programme of training for this role was usual and not unique to the claimant. Ms Kaur did not decide to have in place a structured training programme or not to have a formal induction process, because of any of the claimant's health conditions.

Thrown in at the deep end.

72. The claimant complains that in the first week of starting the job she was told that she would be shadowing to learn the role and that 3 or 4 days later she attended a clinical meeting, someone else was taking minutes but the claimant was asked on the spot by Sara Le- Butt to take minutes/create an action plan . She complains that it was a complex meeting to do with Covid and CQC work which she did not understand. The claimant in

cross examination accepted that she had in previous role taken minutes, she did not feel she needed training on taking minutes, but this was an area she was not familiar with.

73. Ms Kaur's evidence is that she was not aware that the claimant had been required to take notes at this meeting, Ms Kaur had not attended the meeting but that in any event, the claimant was shadowing a fellow Band 3 colleagues in the meeting who would have taken the minutes but it would have been good practice for the claimant to have also attempted to take notes. As the claimant herself states in her evidence in chief [page 57/para 38] she was not actually tasked with taking minutes but an action list: "*An experienced colleague was already taking minutes; however, Sara instructed me to make a list of actions from the meeting."* The claimant does not allege that she raised any concern, and while that may be understandable not to do so I the meeting itself, she does not allege she raised any concern with the management team at any point thereafter.

74. The claimant in cross examination accepted that Ms Kaur did not know about her being 'thrown in at the deep end' at this meeting but that the claimant had raised in supervision meetings that she wanted more shadowing.

75. The Tribunal find that the claimant had experience of taking minutes in her previous role as Team Secretary, Ms Kaur was not aware of Sara Le-Butt asking the claimant to practice taking minutes/action list but that someone else was responsible for the official minutes of that meeting and that this was an opportunity for the claimant to practice taking notes. The claimant does not allege that she raised any objection at the time to the task.

76. The Tribunal find that the claimant never raised any concern about a lack of training and never asked Ms Kaur for any further training that she felt she needed for the role. The Tribunal find that the claimant did not raise any complaints or concerns about a lack of training or identifying any training she felt she lacked other than mentioning that she may benefit from some IT training on Excel and spreadsheets. The claimant accepted in cross examination that she did not raise issues about training:

"*I did not fully understand what the job required, I discussed issues in supervision, she did offer some training but I had done it, no training at that point could be identified – I needed shadowing but I was expected to get on with it on my own" and " I could not identify training until further into the job and then I had been thrown in .. I did not identify what training I needed "*

77. The Tribunal find, as the claimant accepted in cross examination, that she had a meeting with Ms Kaur when she started the job and discussed what she would be doing and was given information about the role.

78. It is not clear to the Tribunal what training the claimant alleges she required (other than IT training).

79. The claimant alleges that Ms Kaur would tell her how to do things and when the claimant made suggestions, she was 'cut down' and in cross examination alleged that: "*she told me how to do things, but not how to resolve the issues".*

80. The claimant supported the two Team Managers; Sara Le-Butt and Maire Mc Granaghan, who are senior to Ms Kaur and the Tribunal accept the evidence of Ms Kaur that it was for those the Team Managers to discuss their specific requirements with the claimant and Ms Kaur would then arrange any training that may be required following discussions with the claimant. However, the Tribunal find that this was not a role which

required materially different skills from the claimant which she had employed in previous roles. The claimant had worked as a Team Secretary before and she also says in her evidence in chief [para 24 w/s], she had many `*transferable skills*`.

81. This was however a new department and the Tribunal accept that there would necessarily be new tasks she would not be familiar with and new ways of working. Arrangements were made however for the claimant to spend with the Team Managers and shadow other PA's. The claimant does not dispute that she also had regular one to one discussion with Ms Kaur [para 13 Ms Kaur's w/s].

Knowledge – anxiety and depression – from August 2020

82. There are notes of a meeting between the claimant and Ms Kaur on **26 August 2020** [p.324]. Ms Kaur's handwritten notes of this meeting state: *"NH settling in ok helpful, friendly, positive met with Team Managers".* While the claimant did not see the notes, she accepted she had a meeting in the second week in the role where she stated that she was settling in okay. However, the claimant alleges that she had told Ms Kaur that she felt 'thrown in at the deep end' and does not accept that she had made these positive comments about the Team Managers because she believes the meeting where she had been required to take notes had taken place by this stage and it is not mentioned in the notes. Ms Kaur maintains that the notes are accurate.

83. The notes also record include the following entry: "***formal anxiety -*** *Emotional Unstable Personality Disorder [EUPD]. medication.* ***contact OH*** *– underlying condition ???"* Tribunal *stress*

84. The Tribunal accept on balance that these notes accurately record a summary of the meeting and the claimant had not raised any concern about having to take minutes at a meeting/completing an action list. The Tribunal find that the claimant had mentioned having anxiety and EUPD. What was not made clear the Tribunal find, is whether the anxiety was related to EUPD or a condition in itself. However, in terms of knowledge what is relevant is not the cause of problems with someone's mental health, but the effects and likely longevity. There is no evidence however to suggest that the claimant went on to provide Ms Kaur with details of the day do day effects of her condition.

85. Ms Kaur did not make contact with OH at this time despite obviously forming a view that the claimant may have an underlying mental health condition.

17 September 2020: supervision

86. Ms Kaur made notes of a supervision meeting on 17 September 2020 [p.325-328] which include the following comments.

> *"Navdeep has confirmed that her health and wellbeing is good. Whilst working through the Covid – 19 pandemic has been challenging,* ***Navdeep has felt well supported whilst at work****" …*
>
> *"COVID 19 Risk Assessment – completed June 2020 –* ***to be reviewed ASAP. However, Navdeep did not report any significant changes during this meeting."***
>
> *"****Nav confirmed workload was manageable (Stewart House Team Manager) – no significant problems to report****." Tribunal stress*

87. The claimant refutes the accuracy of these notes and there is no evidence that the notes were sent to the claimant. There are no contemporaneous documents which undermine Ms Kaur's evidence about the accuracy of the comments recorded in these notes. There are no emails or other documents produced by the claimant which record her raising

concerns at this time about the support she was receiving. On balance the Tribunal accept the evidence of Ms Kaur that the notes are an accurate summary of that supervision meeting.

88. Ms Kaur did not immediately update the Covid risk assessment despite stating in the notes that it was to be reviewed asap. She could not explain the delay. Ms Kaur was now aware that the claimant had a lung condition**.** The claimant does not identify however any contemporaneous documents where she raised any concerns about the impact on her work or training. The Tribunal find that there is no evidence to support a finding that the claimant was mentioning any difficulties in completing the work due to her health issues but find that she was in fact reporting that there were no significant changes to her health, that she found the work manageable and felt well supported.

89. The claimant in cross examination clarified that her complaint is that Ms Kaur did not provide more shadowing and that the reason for this, was not just the anxiety and depression *but all of her health conditions*, because she required a lot of appointments and "*because it was a problem*." The list of issues however puts the complaint on the basis that Ms Kaur did not provide suitable training only because of the condition of anxiety and depression specifically. It was not put to Ms Kaur however in cross examination about the appointments, how long they were for and whether she considered her attendance at those to be problematic.

90. The claimant went on in cross examination however to make the following comment:

"*What is relevant is that I had not been diagnosed with ADHD, that is why it is not mentioned in the issues, but that would have <u>had a big impact</u>" Tribunal stress*

91. The claimant would later be diagnosed with ADHD on **27 May 2021**. The parties however have agreed that the claimant was not disabled because of ADHD until **May 2022** and therefore any effects of the ADHD cannot support a complaint of discrimination which predates May 2022, even if in fact the undiagnosed condition was having a big effect on her ability to carry out her job.

Performance: October 2020

92. Ms Kaur began to note concerns about the claimant's performance in this role. On the **8** October **2020** at a supervision meeting [330] Ms Kaur reported that the claimant was struggling with taking minutes and completing actions and spreadsheets and that the claimant should seek assistance from peers and her line managers. The claimant accepts that Ms Kaur raised these issues with her.

Knowledge of anxiety and depression: October

93. The Covid BAME risk assessment was updated by Ms Kaur on **31 October 2020 [337].** The claimant reports that her diabetes is until control and she is not due a blood test until December. In terms of bronchiectasis the claimant mentions how she is managing wearing a face mask to avoid Covid 19 infection risks.

"I share an office 2- 3 days week, and during this period I have difficulty wearing my mask at all times".

"I struggle with PPE- masks when my breathing is difficult due to congestion from my chest but as I do not need to wear the mask when I am on my own this helps with the discomfort . I need to bring up secretions often by mouth and nose, I am managing to use the mask for when I leave the office, and this is only for short periods of time."

"I am very concerned about the rate of infections currently and also working in an inpatient facility (Stewart House/Mill Lodge). I pass patients in the corridor. I would struggle immensely with my mental health if I was not able to come to work again or being given the option to work from home."

94. Under cross examination Ms Kaur stated that she knew the claimant had anxiety and depression at some point before 31 October 2020, but she was not sure when, but referred to the claimant informing her when completing this BAME risk assessment however, she understood from the claimant that the problems were related to Covid and the impact of not being able to work from home. That is consistent with the notes with what is recorded in the risk assessment [337]. Those notes are signed off by the claimant.

95. While Ms Kaur was aware that the claimant had concerns about her mental health, (whatever the actual diagnosis or cause) and there had been some discussion back in August 2020 about some mental health issues and whether there may be an underlying condition, Ms Kaur had the Tribunal find, limited information still about her mental health. The evidence does not support a finding that while she was on notice that there was some mental health concerns, she did not have information at this stage about the extent of those issues, the impact on her normal day to day activities, the treatment, if any, she required and whether those issues were long term or likely to be. The reference to worrying about her mental health in the context of Covid and potentially having to shield again, would not indicate long term effects. Ms Kaur would go on to request that information from OH in November 2020 [347].

96. Ms Kaur however would have known had she made reasonable enquiries that the effects (discounting medication) of anxiety and depression would mean that the condition qualified as a disability (the parties accept that the condition qualified under section 6 EqA as at April 2020).The comments the claimant had made about her health and having formal anxiety, alerted Ms Kaur to possibility that these were connected to a disability and indeed she had asked herself the question whether there was an underlying condition. Ms Kaur did not at this stage do all that she reasonably could have been expected to do to find out whether the claimant had a disability. She made no further enquiries of the claimant, as her own notes attest to and although she would in November prepare an OH referral, no OH report was obtained. It appears that Ms Kaur took no steps to chase the OH report or seek an alternative advice, perhaps from the claimant's own doctor if for Covid related reasons she was not able to obtain a report from OH.

97. The Tribunal conclude that had Ms Kaur taken reasonable steps to obtain further information at this stage, she would have had actual knowledge that the claimant was disabled because of anxiety and depression.

Working from home

98. On 4 November 2020 the government brought in guidance that clinically extremely vulnerable people would need to work from home. The claimant was provided with equipment and allowed to work from home. This removed any requirement for her to wear a mask.

November 2020

99. The claimant returned to working in the Audio Typing Service (BigHand's) from November 2021.

Performance Issues

100. On the **16 November 2020** there was a one-to-one meeting between Ms Kaur and the claimant. Ms Kaur has produced minutes [345] and although the claimant had not seen the minutes prior to these proceedings, she did not dispute that there probably had been a meeting and that she had mentioned that her mental health was *deteriorating* and Covid 19 *was a '*factor'*,* her anti-depressants had increased but she felt safe working at home. She also accepts that it was correct that at this time she felt well enough to be working. The notes also record that she was:

"*Trying hard to improve performance. Navdeep was encouraged to be transparent and seek support, advice and guidance as required – JK reassured Navdeep of her continued support. Navdeep confirmed she had insight into her mental health and knew the symptoms /triggers."*

101. The claimant disputes that she made the comment about trying to improve her performance, pointing out that it is not clear what part of her performance was being discussed. The minutes record that the claimant felt that her workload was manageable and not causing her stress, however the claimant denies she said this and alleges that Ms Kaur was always trying to increase her workload. The evidence of Ms Kaur was these comments were made and recorded. Given the conflict of evidence and the fact that the claimant agrees that most of the recorded comments she was taken to are correct, the Tribunal on a balance of probabilities, find that the claimant did make these comments and that she was keen to prove that she could perform in this role but did say that she was struggling to type up the minutes in the required time [Ms Kaur's w/s para 32]. However, the Tribunal also accept that she was not working to full capacity and only really doing work for Sarah Le But.

102. The Tribunal find that the claimant was aware that there were issues with her performance in this role from October/November 2020.

OH referral: 16 November 2020 [351]

103. While continuing to shield and work from home, there was a referral to OH on **16 November 2020** [351] (as mentioned above). The claimant could not recall seeing this referral although she accepted that more often than not, she was sent the referral forms. The Tribunal on balance, accept that the referral accurately records the information the claimant provided to Ms Kaur at this time.

104. The referral confirmed the support the claimant was receiving from the respondent in this role; ongoing support from managers and peers and one to one meetings /supervision which have increased while she was working from home. The claimant does not allege that she would have challenged what was in the referral if she had seen it, but that she would have told OH at the appointment that she did not feel supported. The claimant accepts however that while working from home the supervision meetings took place about three times a week.

105. The OH referral form sets out the information the claimant had provided which included information about Type1 Diabetes since 1989, Emotional Unstable Personality Disorder and Thyroid. In terms of new diagnosis, it records a diagnosis of bronchiectasis in June 2019 and reports that the claimant has had asthma for 10 years.

106. In terms of her mental health, the referral reports that the clamant has said that her mood was not good, there had been a deterioration in her mental health and her **anti-depressants** had been increased.

107. Ms Kaur in her evidence in chief states that the only evidence that she was aware of as at 16 November 2020 was EUPD and that she believed her mental health issues "*were*

otherwise related to pressures from Covid" [w/s para 30], which indicates at least an understanding at the time that there were other mental health issues in play. The medication would have alerted her to the possibility of depression (whatever the cause). Ms Kaur asks OH in this referral whether the claimant's mental health condition is an underlying condition.

108. In terms of the effects of her mental health condition, the referral confirms that Ms Kaur has been provided with some further information about its effects and suggests that work is not causing the claimant any stress:

"*Navdeep has confirmed that work is not causing her any stress however Navdeep is not yet working to capacity. It is expected that over the next 3 – 4 months Navdeep is working to full capacity, in providing the services with a high quality administrative and clerical support." And.*

"Mental Health – (Emotional Unstable Personality Disorder) - I am under Cedars CMHT – Dr Kestleman I have a review every 6 months usually. ***I am under Psycho- Dynamic service and seeing a Psychologist. I am having weekly 1 hour session*** *(currently via phone)."*

109. In terms of a Covid 19 risk assessment, the referral reports that the claimant states that she struggles to wear a face mask and asks for advice for when the claimant returns to the office. However, it appears that an OH report was never received. Neither party were able to produce a copy of it and Ms Kaur believes that this may have been because of the country going into another lockdown. The claimant does not suggest any alternative explanation for the lack of a OH report.

30 November 2020

110. The claimant accepted that a one-to-one meeting probably took place on 30 November 2020. The respondent has produced minutes of that meeting [370], which the claimant disputes.

111. Those minutes record that the claimant was reporting feeling good and that she had a positive discussion with a psychiatrist on 23 November who confirmed that the claimant was not suffering with extreme anxiety but stress brought on by what was going on around Covid 19 and she was not having a '*relapse'.* The notes also record that the claimant said she was more relaxed and more herself. The Tribunal find that this reference to 'relapse' would indicate that the claimant in the past has had a more serious mental condition.

112. It also records some discussions about preparing minutes for Q and A sessions and improving how long it takes the claimant to provide the minutes of meetings.

113. The claimant accepts that she had an appointment with a psychiatrist as recorded and was not sure whether she had referred to this as a positive discussion but accepted "*it may be how worded*". The claimant's evidence on what had been said at this meeting was less than equivocal, however she had conceded that certain matters which Ms Kaur had noted had indeed been discussed between them. On a balance of probabilities, while the Tribunal does not find that it reflects on the claimant's credibility, the Tribunal prefer the evidence of Ms Kaur and find that the content of the document is an accurate summary of what was discussed at the meeting.

22 December 2020

114. There is a record of a further meeting on 22 December 2020 [372]. The claimant did not dispute that the conversation took place, in cross examination accepting that it was more likely than not that a conversation had taken place.

115. Counsel confirmed that the claimant takes no issue with no being permitted to wear a visor.

116. The claimant denies that she had told Ms Kaur, as is recorded, that she was finding the workload 'manageable'. However, the Tribunal find on balance that this was said by the claimant. The claimant had said at the 30 November meeting that she confident about producing the minutes in the time required and the Tribunal find it is more likely than not that the claimant was attempting to present a positive impression of her ability to carry out the role.

117. On the 12 January 2021 [472] at another one-to-one meeting, the claimant informed Ms Kaur that she was getting use to home working and her mental health was 'ok'. The claimant now said that she felt that she would benefit from training on Excel, creating spreadsheets and merging etc and it was discussed that she would contact the IT training provider (**HIS**) to book some training. This is the Tribunal find, the first time the claimant had disclosed that she felt she needed IT training and she was tasked with contacting IT to arrange that training.

22 January 2021 – imbedded documents

118. It is not in dispute that there was a further one to one discussion on 22 January 2021 [473].

119. The claimant complains that she was having problems sending out the agenda to the various attendees at the meeting when she needed to attach documents a number of documents to it and in her claim complains of a lack of support helping her resolve this issue. At this meeting, it is not in dispute that the claimant discussed this issue with Ms Kaur. The claimant reported, as set out in Ms Kaur's record of that meeting, that she had been in touch with HIS, and they had told her that the documents she was trying to send were too large and to reduce them, Alternatives were discussed at this meeting with Ms Kaur which included to have a Shared Drive accessible to the senior meeting members or ask peers to email them from site which Ms Kaur felt may be a better option and while the claimant mentioned she had difficulties when sending the agenda from site, there is no mention that the claimant had yet explored asking her peers to assist, in any event it is clear that Ms Kaur discussed this problem with the claimant.

120. While the claimant under cross examination said she did not agree with the notes, in cross examination when asked what was inaccurate, she did not refer to the discussion about the embedded documents issue but a reference in the notes to her confirming that she was well to be at work and that the half days had been helpful. The claimant asserts, that she had asked to reduce her days to half a day because she felt she needed structure due to her ADHD (she made no reference in cross examination to this being relevant to any other impairment) and this was put in place.

121. The Tribunal find on balance that the notes do record accurately, albeit in summary form.

122. The claimant complained in cross examination that it was not practical for her colleagues to help her email out of the documents from site because everyone was so busy.

123. The claimant had contacted IT and been referred to a manager who (in around September/ October 2020) had showed her how to upload the documents to Teams by creating a separate Chat site however, Ms Kaur told the claimant in a supervision session that she and the clinicians were not happy for her to do so in case there was any patient information referred to in the meetings.

124. The claimant in answer to a question from the Judge, clarified that she did not refer back to IT for further support or suggestions after September/October 2020 because she felt that Ms Kaur wanted it done; "*the way it had been done*" and Ms Kaur had not told her to get further advice from IT. The Tribunal find that the claimant was not it seems proactive in resolving this issue herself. The claimant believed that creating a Shared drive would be the solution, after discussing this with Ms Chaliss, a PA who used a Shared drive to share documents however, the claimant was waiting for Ms Kaur to set up that Shared drive, but it did not happen. She does not appear however to have been proactive in chasing Ms Kaur to set this up or speaking to HIS/IT about other possible solutions.

125. Ms Kaur clarified in response to a question from the Tribunal that she considered that the delays in the claimant sending out the agenda was probably due to two issues: the claimant's lack of self-organisation and the IT difficulty in getting all the documents out as an attachment with the agenda by email.

2 February 2021: performance issues

126. It is not in dispute that there was a one-to-one supervision meeting on 2 February 2021 with Ms Kaur which is recorded in Ms Kaur diary [474]. The claimant was on sick leave due to a lung infection. The claimant gave evidence under cross examination, which is supported by entries in the notes and which the Tribunal accept, that she felt under pressure while off work sick to perform and complete and send out the meetings minutes. Ms Kaur the Tribunal accept, did inform the claimant not to work but rest while off sick. The claimant self-certified for 7 days.

11 March 2021

127. The claimant did not refer back to HIS to explore other options. The claimant could not recall but does not positively dispute that she had a meeting with Ms Kaur on 11 March 2021 which is recorded in Ms Kaur's timeline [475]. In this meeting it was explained to the claimant by Ms Kaur that concerns had been expressed by manager/s senior clinicians about the claimant's ability to manage the meetings, agendas, minutes and actions in a timely and efficient manner. At this meeting the claimant was asked to set out the process she followed, which she does. The Tribunal accept that this was to address the objectives recorded in the timeline, namely, to implement changes to improve the overall running of the meetings and meeting the needs of the service users.

128. The claimant confirmed that she was at that time saving the documents the attendees needed to access (agenda, minutes and related documents) in 3 separate shared drives because there was no one shared drive on the system they could all access. The claimant was of the view this was not a problem and was manageable however, Ms Kaur is recorded as stating that the claimant could continue with that process, but an alternative solution would need to be found to ensure time and resources were used more effectively. The claimant also informed Ms Kaur that the meetings were recorded, and she used the recordings to create the minutes, she was advised that she needed to develop her minute taking skills because in future not all meetings may be recorded. There was further engagement with the claimant on this topic albeit Ms Kaur did not present herself a successful solution, it seems, by this stage to the IT issues.

30 March 2021- return to the workplace.

129. At a meeting on the 30 March 2021, recorded in Ms Kaur's timeline, which the Tribunal accept on balance is a contemporaneous document [2024 -2048], the claimant and Ms Kaur discussed her return to work to Stewart House, after the shielding period [477].

130. The claimant agreed that a return to work was beneficial and a phased return to work was agreed starting on 8 April 2021.In terms of wearing a mask, the notes recorded that; *"Wearing a mask at all times was not comfortable. Happy to wear in communal areas. JK to contact HR advisory about wearing a visor - Nav to consider the visor if required…"*

9 April 2021

131. As set out in Ms Kaur's timeline, there was the Tribunal accept, discussion about a shared drive to enable all attendees of the meetings the claimant minutes, to access the relevant documents and that this was still outstanding and Ms Kaur agreed at this meeting on 9 April, to chase that up with HIS. There is no evidence that the claimant had herself spoken to HIS or chased Ms Kaur about this prior to this meeting or has explored other alternatives (such as e.g., programmes to compress files) .

Bed State Spreadsheet

132. The claimant complains that she was micromanaged by Ms Kaur because of her anxiety and depression or something arising from it. The claimant's counsel clarified in submissions that this relates to an Excel Bed State spreadsheet. It was part of the claimant's role to prepare an Excel spreadsheet showing the number of available beds on the wards. The information was provided to the claimant, she entered it into the spreadsheet and distributed it by email however, Ms Le-Butt complained that she received it in a different format and the data was not then presented at it should have been.

133. It is not in dispute that there was also discussion about the Bed State document at the 9 April 2021 meeting.

134. The Bed State spreadsheet had to be completed daily by the claimant and the following concerns were raised:

"Regretfully there had been errors on several occasions, date and formatting. It was agreed it was important that the bed state was accurate and sent in a timely manner. ***This information was paramount*** *to the work being undertaken by the Bed Management Team." Tribunal stress*

135. The claimant explained to Ms Kaur how the process she followed to complete the Bed State spreadsheet. It was noted that the format required attention, they discussed how to amend the footers and headers and had a discussion about how to view the documents in Word and Excel. Ms Kaur was therefore engaging in the issue and offering solutions to the problem.

136. It is the claimant's case that she could have been provided with a document setting out the standard operating procedures (SOP) for this role. The Health Passport (Passport) created later in September 2022 [1299] listed adjustments for ADHD which include that the claimant needed any SOPs. Ms Kaur confirmed that there were no SOPs in place for each administrative role and thus no specific SOP for the PA role. The Passport does not identify however any adjustments specifically required for anxiety and depression and specifically does not identify a need for SOP because of any disadvantage caused by the disability of anxiety and depression.

137. However, the difficulties the claimant had in this role, were not the Tribunal find, that she did not understand what she needed to do. The concerns were around the accuracy of her note taking, her ability to produce minutes in a timely manner, and IT/ technology related issues. The Tribunal are not persuaded that the absence of a SOP in this role, created of itself any identifiable disadvantage and no specific disadvantage was

identified specific to this by the claimant or put to Ms Kaur in cross examination (other than a general point about it creating a disadvantage) or identified in submissions.

29 April 2021

138. On the 29 April 2021 the claimant and Ms Kaur had another one-to-one meeting [479]. The discussion is also recorded in Ms Kaur's timeline. The claimant does not dispute that she had a meeting at around this time [479].

139. The notes record Ms Kaur recording that the claimant displayed limited understanding of the way in which the spreadsheet was formulated. The claimant in trying to address the problem Ms Le-Butt had in receiving it in a different format, had created an entirely new spreadsheet but this spreadsheet was not fit for purpose. In creating a new version, the claimant had deleted formulas in the original one. The recorded agreed action was for the claimant to revert back to using the original spreadsheet.

140. The claimant complains however, that she had contacted HIS and they had confirmed there was nothing wrong with the spreadsheet and it was received by them in the correct format and thus she had reverted to using the old version and had not been aware Ms Le- Butt was still having problems, although she does **not** allege that she was proactive and contacted Ms Le- Butt to check. The claimant questions in these proceedings why she was asked to use the old version when there was a formatting issue rather than correct the spreadsheet she had created. However, the instruction to use the previous version which included all the relevant formulas was the Tribunal find a reasonable one, not least given the concern about the claimant's Excel abilities. The claimant does not at this meeting, allege that the issues with the Excel spreadsheet had anything to do with any of her health conditions, and the Tribunal finds that it is more likely than not (given her request for training), that it was simply because of a lack of knowledge around using Excel.

141. The claimant in cross examination appeared to blame the deletion of the formula in the old Excel spreadsheet on a deterioration in her mental health but does not assert that she had raised this with anyone within the respondent. In further cross examination she gave evidence that her impairments did **not** cause the problems she had with the spreadsheet but the problems were used as an excuse to get rid of her, although she went on to assert that raising the problems with it and the problem with embedding documents while not due to any medical impairment she had, it caused her stress and anxiety.

142. The claimant also complains that in terms of the criticism about not taking accurate minutes, her laptop was old and was not replaced until January and when she used the old laptop the recordings of meetings 'would drop' but unless she recorded them, she was not able to take full minutes .Under cross examination she confirmed however that there was the ability to record the meetings (and make/check the minutes from the recording later) and it was not often that anyone objected to the meeting being recorded (because patient information was discussed). The inability to take accurate notes was not, according to her own evidence, something she could not do because of something arising from a disability; however, she asserts that she felt under pressure to get the minutes out and this caused her stress.

143. Ms Kaur had not prior to April 2021 had a formal discussion with the claimant along the lines that her performance was not meeting the required standard, rather Ms Kaur was clearly the Tribunal find, addressing issues as and when they arose but it was made clear that improvements were required.

Action Plan

144. At a one-to-one meeting on **30 April 2021**, the claimant accepts that an Action Plan was discussed with her [384]. This set out concerns about the claimant's work including not always meeting deadlines, errors in her work which have resulted in delays in the service meeting deadlines for reports/data, quality of minutes and not demonstrating a good understanding of adding and retrieving data from an Excel spreadsheet which has meant on occasion the claimant has retyped the whole spreadsheet [386/387]. An action plan to improve her performance was discussed and agreed.

145. The claimant clarifies in cross examination that she was not alleging that the reference in the Action Plan to incorrect data on occasion being sent to other departments was a mistake which had anything to do with disability but that had it been brought to her attention she could have rectified it.

146. However, in the grievance appeal in June 2022, the claimant would later accept that she felt at this time that was not able to perform in this role: "*There was no point in messing her about, I didn't want to mess her about I wanted her to have a PA that could give her what she needed and I knew that wasn't me*" [1195].

147. In terms of the criticisms around Ms Kaur, at the grievance appeal [1196], while the claimant refers to Ms Kaur not dealing with/stacking up emails, and despite the allegations she now makes that Ms Kaur was criticising certain aspects of her *performance* as an excuse to dismiss her because of her disabilities, she states: "*You know you are not ever going to get a perfect situation but I was happy to stay with Jinny*".

148. The Tribunal find that the above views, expressed in 2022, are not consistent with a genuine belief held by the claimant, that issues with her performance were either not genuine and/or were either not being raised with her, to remove her from her role because of her disabilities.

149. The Action Plan was produced pursuant to the Supporting Performance Policy and Procedure [243], this policy provides under the informal part of the process [254], for an *individualised* action plan to be put together and sets out that a realistic time scale for improvement should be set and recommended usually between 4 and 8 weeks "*but this can be longer or shorter where appropriate".*

150. The claimant did not deny in cross examination that she may have been told this was the *informal* stage of the process and gave evidence that she was actually relieved by the Action Plan because she felt she may get some support.

151. The Action Plan had to be agreed with the claimant but a follow up meeting to agree it did not *in* the event take place.

Warning

152. The Action Plan document was discussed with the claimant [384], albeit the Tribunal accept her evidence that she was not provided with a copy of the policy but was aware that the respondent's policies were accessible on the intranet, however, the Tribunal find that *this* Action Plan was clearly communicating performance issues and setting a 6 week timescale for improvement and the claimant considered it to be a supportive measure at the time and welcomed it.

10 May 2021

153. The claimant spoke with Ms Kaur on 10 May 2021, while the claimant alleges nothing was *discussed* other than she made Ms Kaur aware she needed to go on sick leave, Ms Kaur's record of that discussion [481] is that this was a quite detailed discussion about her health and that a family member had mentioned that the claimant may have ADHD and Ms Kaur comments in her note as follows: "***Nav felt that they might be right given that she struggled with her concentration and memory**."* [481]

154. On balance the Tribunal prefer the evidence of Ms Kaur as supported by this contemporaneous document, that it was a supportive discussion about the claimant's health. This is also supported by the email the claimant sent afterwards on 11 May [406] thanking Ms Kaur for her support. That is not consistent with the claimant's allegation now that *Ms* Kaur was wanting to remove her from the PA role because of her disabilities and because she was shielding. The claimant attempts to explain away her expression of thanks, by alleging that this message of thanks which she sent was intended to be *'sarcastic'*. The Tribunal do not find that plausible or credible, not least because she only alleged this during cross examination and further, attached with the message a smiling emoji. This expression of gratitude is also consistent with what she would say in 2022 about being happy to remain working with Ms Kaur. The Tribunal find that at the time, the claimant felt positive about the support she was receiving from Ms Kaur and did not consider that she was being treated unfairly, regardless of what she alleges to be shortfalls in line management support or training, because of her disabilities or because of the need to shield or attend medical appointments.

Sickness absence: 12 May – 6/7 October 2021

155. The claimant was then absent on sick leave from 12 May due to EUPD and anxiety [410]. During her absence the claimant accepts that Ms Kaur contacted her by telephone. Ms Kaur kept a log of the calls and notes of the discussions [481 – 483].

ADHD diagnosis

156. On the **27 May 2021** the notes record that the claimant had informed Ms Kaur that she had been diagnosed as having ADHD. This date is agreed between the parties and is supportive of the reliability of Ms Kaur's record of their discussions.

157. The claimant's GP records in their notes the reason for absence on 29 June as being Emotional Unstable Personality Disorder (EUPD) but the claimant wanted to change it to the new diagnosis of ADHD. The same reason for absence (EUPD) is recorded throughout this period [1918].

158. While the claimant complains now of Ms Kaur not being supportive generally and specifically during this period when she was off work sick, that is not consistent with not only with the email she had sent on 11 May 2021 but what she had told her GP. On the 13 *July* 2021 she does not deny reporting to her GP, as confirmed in the GP notes, that her manager was *"very understanding*" and goes on to refer to her manager allowing a phased return to work when the time comes [1918]. While in cross examination the claimant alleged that this would only have been a reference to a discussion about a phased return, at the same time in cross examination she was denying that a phased return to work was discussed and accepted that her evidence was contradictory. The claimant gave evidence that she did not know which was correct because she was suffering with her mental health at the time. However, the Tribunal find that that this further supports the finding that at the time, the claimant did not consider or feel, that she was being discriminated against and felt that Ms Kaur was trying to support her.

159. The Tribunal find that Ms Kaur was supportive when the claimant discussed her health with her, as the claimant herself confirmed in the contemporaneous documents at the time. Ms Kaur *did* refer the claimant for an OH assessment and the claimant was reassuring her that she is managing with the work, and they discussed the performance issues which the claimant was not alleging to be related to her health conditions.

July 2021

160. The Tribunal accept on balance, the claimant not being in a position to dispute it, that notes in the bundle [408] which appear to be dated July 2021 were made by Ms Le-Butt. Within those notes there are references which indicate a concern about how the claimant was performing in her role and on balance the Tribunal accept that Ms Le-Butt held those concerns. However, the Tribunal also accept on balance given the claimant's oral evidence and the lack of contemporaneous documents evidencing any discussion, that Ms Le-Butt did not at this stage discuss those concerns directly with the claimant. It is not in *dispute* that Ms Le-Butt had asked Ms Kaur to raise the issue over the attachments not being sent out with the agendas. What these entries support, is that there were concerns and indeed frustrations, expressed to Ms Kaur about the claimant's performance which is not supportive of the claimant's case that the real concern was not about how she was performing in the role but was about her health conditions and having to shield.

OH, Health Referral & Redeployment

161. On **2 August 2021** Ms Kaur made a referral to Occupational health (OH) [416]. This referred to the claimant having contacted Access to Work for support (because of the recent ADHD diagnosis) and the claimant deciding to defer the Access to Work assessment *to* when she returns to work. Ms Kaur enquires whether her illness is affecting her performance and asks whether redeployment should be considered [415].

162. The Attendance Management and Wellbeing Policy and Procedure (Policy) provides that [159 para 4.3.1 and 2] where an ongoing absence reaches **14 calendar days** there should be a *discussion* with the employee informally to include whether there should be an OH referral. After 28 calendar days the manager should make a OH referral.

163. Although the evidence was confusing on this point, Ms Kaur stated that she had a telephone conversation with the claimant, which would have been the informal stage of the process. [i.e., 4.3.1], however many of the matters set out for discussion in the Policy Ms Kaur accepted were not covered in that call, including what duties the employee could do to enable an earlier return to work.

164. The step of obtaining an OH report was not taken in accordance with the timeline in the Policy. The claimant had been absent from 12 May. The 14-day period for a discussion about a referral to OH therefore ended on **26 May**. On balance the Tribunal find Ms Kaur's *account* of what was discussed at meetings with the claimant, more reliable, and the Tribunal accept Ms Kaur's evidence that she had discussed an OH referral in her discussion with the claimant on **27 May 2021.**The 28-day period however for a referral ended on **9 June 2021.** Ms Kaur was therefore late in applying for an OH report when she did so on **2 August** and had no real explanation for the delay. There is no evidence before the Tribunal however, that an earlier OH referral would have enabled the claimant to return to work in the PA role sooner or at all.

165. The claimant denies that she spoke with Ms Kaur on 3 August 2021 and informed her that she did not wish to return to the PA role and wanted to consider redeployment. However, the Tribunal find on balance that she did. The claimant in cross examination

states that she was not aware of what was being discussed in conversations at this time because of her mental health, however Ms Kaur is clear in her evidence in chief that this was said by the claimant (para 62 w/s).

166. Further, there is an email from Ms Kaur to Ms Liggins dated 3 August 2021 [417] which references this discussion and an email from the claimant on 9 August 2021 [418] which confirms that she did not want to return to the PA role.

167. The Tribunal also find that the claimant had said that she felt she would still make errors in the PA role when well and that she struggled with time sensitive tasks, meeting deadlines and organising meetings.

168. The Tribunal find however, that when she discussed redeployment with Ms Kaur at this stage, it was not said to the claimant specifically, not until the Wellbeing Review meetings, that she would be dismissed under the redeployment policy unless she was found a suitable alternative role and succeeded in the trial. However, the Tribunal find that it must even at this stage, have been obvious, that if she did not secure another role she could not continue in the respondent's employment. The Tribunal consider that the claimant, however, was confident that getting another role would not be a problem, she had after all, had a number of different roles during her years of employment with the respondent.

169. At the grievance appeal, the Tribunal note that the claimant refers to her thought process at the time she decided to accept redeployment [1197].

> *"…I **have had situations in all my other jobs where I am not happy, things weren't going too good. What I do is start looking for another job, I have had many, many interviews and that is how I have lasted 27 years is because I go out there I look for a job that I want to do and I love doing and I have got myself a job**…" Tribunal stress*

170. In terms of the claimant's ability to make this decision, within the claimant's own GP records [1918] it records on 10 August that she is hoping to change her role because the last PA role was very high pressured. There is no record of any concern by the GP that the claimant is not capable or well enough to make those types of decisions or that this was something her manager had suggested which she did not want to do and was feeling forced into.

Redeployment policy

171. The Policy provides that for a 4 week trial period and [194-195]:

> *"..5. Twelve weeks' notice of termination on grounds of ill health will be issued to the employee at the beginning of the redeployment period. Notice period will run concurrently with the redeployment period."*
>
> *6. The employee will be offered an opportunity to apply for available post/s that have **been identified as suitable** by completing an application form and will be given preferential consideration. They will be interviewed with other applicants who have been awarded preferential status or are at risk due to redundancy or other reasons **and <u>still need to demonstrate suitability for the new position against essential criteria on the person specification</u>***
>
> *7. A post will be classified as suitable, under this procedure if it needs the following requirements;*
> *…*
>
> *The employee meets the essential criteria for the job or would meet the minimal training within a reasonable period of time.*

Duties of the post are consistent with the occupational health advice.

10. Where the employee has disability, reasonable adjustments need to be made to allow them to undertake the role. Where required, assistance and advice from agencies / professionals such as Occupational Health, Disability Employment Advisors, Remploy etc…" Tribunal stress

OH Report

172. The possibility of redeployment was raised in the referral to OH by Ms Kaur after discussion with Ms Julie Hamore of HR.

173. The OH report of the **18 August 2021** [419-420], does not state that the claimant was not capable of considering redeployment because of her mental health but advised as follows:

"*I do note that she described the role of a Personal Assistant as extremely busy, and she has to juggle various tasks with tight deadlines however this does not seem compatible with **her mental health and in particular the new diagnosis of ADHD**. She does bank work as an audio typist at weekends, and she stated that she can do this very well".*

*"Job role wise, **in view of the ADHD** I do think a role with a structured, stable and predictable work pattern would be more manageable for her.*

*With the above in mind, we did discuss redeployment on medical grounds which she did agree to. **She is aware of the time limits regarding a search for a new job which I explained to her**." Tribunal stress*

174. The OH advisor was clearly of the opinion that the main barrier to the claimant carrying out the PA role, were the effects of ADHD. There is also a brief mention to her mental health.

175. The Tribunal find that the claimant made a deliberate choice to step down from the PA role and that she was well enough to make that decision. Neither OH nor her GP expressed any concern that she did not have the mental capacity to make this decision at this stage.

176. The Tribunal also find that OH had made it clear that she had only 12 weeks to find another role and while the OH does not expressly state that she was told that she would be dismissed after that period had expired, it is more likely than not that this was mentioned butt in any event, the Tribunal find that it must have been obvious to her. The claimant does not allege whats he otherwise thought was going to happen.

Access to Work

177. The claimant made an application under the Access to Work scheme for coaching for ADHD in August 2021 [428]. The claimant had informed Ms Kaur that she had been in touch with Access to Work and wanted to defer the follow up assessment until she returned to work [413].

178. On 25 August 2021 Ms Gail an Access to Work Manager from the Department for Work and Pensions (DPW), contacted Ms Kaur [421] confirming (following a telephone call) that the claimant had applied for Access to Work for ADHD coaching support which is fully funded by the Access to Work scheme, however the employer has to pay for it upfront and then reclaim it. Ms Kaur is informed that Ms Gail was waiting to hear from the claimant about what support she needed along with the costings.

179. A plan for support was provided by a CBT Clinical Lead [436/437] which includes:

"*8-10 memory: These sessions will focus on various techniques to help improve memory as **forgetfulness can often be a very common symptom in ADHD**"; and*

"14-16 problem solving: These sessions will be focused on decision making…" Tribunal stress.

180. On **10 September 2021** Ms Gail, contacted Ms Kaur explaining that DPW cannot fund the requested CBT ADHD therapy but were looking to arrange an independent holistic workplace assessment and were awaiting the claimant's consent but would also require the consent of the respondent. Ms Kaur replied that same day asking what the cost of the assessment would be and that same day was told that it would be funded by DWP.

181. The claimant contacted Ms Kaur on Wednesday **22 September** and asked her to confirm that DWP can proceed with the assessment. On **Sunday 26 September 2021** Ms Kaur asks that they proceed with the assessment [456]. The claimant alleges that Ms Kaur was stalling. In response to a question from the Tribunal, the claimant alleged that believed Ms Kaur was stalling because of cost, because Ms Kaur kept asking about the cost and she had told her this could not be determined until she had the free assessment and also, because it meant 'implementing something' for the claimant.

182. The claimant would return to work on the 7 October 2021 [467] and an Access to Work assessment took place on her return, as she had requested, on 7 October 2021. The assessment [492-496] states that:

"*Navdeep reports difficulties with **short term memory and retention of information**, she further reported difficulties with **recall of spoken instructions and oral directions** in sequential order, She experience difficulties **processing information and making notes** at the same time and can often miss important points, Navdeep experiences **difficulties with concentration**. She reports she become **easily distracted by her environment.**" Tribunal stress*

183. Following this Ms Kaur was then contacted by Access to Work on 14 October 2021 [524] confirming that funding would be agreed but the respondent had to agree to support this within 65 working days. It is not in dispute that Ms Kaur approved it the same day and Ms Kaur and the claimant then received an approval email [525/526].

184. Ms Kaur refuted that any delay in September was deliberate but would have been because of work commitments and the need or her to liaise with HR. The Tribunal find that the most likely explanation for delay in September was work commitments because in October Ms Kaur immediately confirmed the respondent's support for the coaching. The Tribunal also find that any delay in September had no impact on the provision of the coaching because the claimant had made it clear that she did not want the assessment to take place until she returned to work, and this happened.

15 September 2021- Wellbeing Review

185. A Wellbeing Review meeting under the Policy was conducted with the claimant on 15 September 2021 with Ms Kaur and Ms Liggins of HR present. The claimant had been absent by this stage since 12 May 2021 and was still of work (she would not return until 7 October 2021 according to the agreed chronology).

186. The claimant had been asked to complete a Wellbeing Wheel, a copy was not in the bundle, but the Tribunal understand this to be an HR tool, a document which aims to help someone identify aspects of their life that may need attention and helps direct discussions about how their employer may support them at work, in areas such as workload. The claimant had not had time to complete this document, but the Tribunal accept that these are issues which can be discussed in meetings.

187. The Policy [155] provides that the actions coming out of the meetings should be documented in a Wellbeing Action Plan [para 4.2.1]. However, there is no evidence of any documented plan.

188. The respondent prepared notes of that meeting [442-443] but the claimant was not provided with a copy until 16 December 2021. On receiving a copy of all the Wellbeing Reviews in December, the claimant produced her own comments at that stage. Under cross examination the claimant confirmed that she had included in her comments, what her feelings were for example, after the first Work Trail, rather than limit her comments to what had actually been discussed in the relevant meeting and to what extent she accepted or disputed the content of the notes were an accurate record of that meeting. The Tribunal therefore accept that it is more likely than not, that the notes of the respondent are a more accurate account of what was actually discussed at those meetings rather than the claimant's additional comments [446].

189. The claimant accepted under cross examination that she had sufficient time to make the amendments to the notes of the meeting on 15 September. The claimant alleges that she asked Ms Kaur at this meeting to keep her in her department. This is not recorded in the notes or the claimant's comments on the notes. The claimant accepted under cross examination that she could have applied for any jobs which were available at that time in Ms Kaur's department. She did not apply for any. The claimant alleges that during September to December 2021 she was not well enough to apply for jobs and attend interviews, however that is not consistent with the fact that she was fit enough to return to work on 7 October 2021.

190. The allegation about other roles in Ms Kaur's department was never put to Ms Kaur in cross examination and nor did it form part of the claimant's submissions and nor was it specifically identified in the list of issues. In those circumstances, given no evidence was provided of other roles and the allegation was never put to Ms Kaur, the Tribunal do not find that other suitable roles were available in Ms Kaur's department which were not offered to the claimant.

191. Although the claimant complains that she was not well enough to decide on redeployment, the Tribunal take into account however, that during this period, the claimant was well enough to be liaising with the Access to Work team about what support she needed and had applied for a grant for coaching support. The claimant's ADHD medication had been increased and she felt well enough to return to work. The respondent's and claimant's own version of the notes of this meeting on 15 September 2021, record her stating that she felt a lot better mentally. The respondent records that the claimant had commented that she had longer concentration periods when undertaking tasks in her private life.

192. The Tribunal do not accept that the evidence supports a finding that the claimant was not well enough to make decisions at this time about her future employment.

193. The claimant accepted under cross examination that she had told the respondent at this meeting that she did not want to return to the role of personal assistant **even if a support plan was put in place for her** [445 para 6].

194. The Tribunal find that she made it clear that the problem was related to the effects of ADHD and not any other condition: "*Nav also confirmed **due to the increased symptoms of ADHD** and the outcome of the OH assessment that the personal assistant position was no longer suitable…" [445 para 6]" Tribunal stress.*

195. The claimant complains about the response of Ms Kaur when the claimant discussed issues surrounding face mask wearing, difficulties with trialling new medication, guidance from Access to Work and support from her GP. It is not clear what the claimant means by this but in her evidence in chief states that she did not find the discussions supportive, and they were overly formal [para 58.a w/s]. There is reference it would appear to these meetings, elsewhere in her witness statement where she complains of a lack of understanding of her illnesses, especially ADHD, and Ms Kaur making no attempt to show any interest in her health problems and what she had been doing to get help [para 59.h w/s].

196. There are references in the notes to the claimant mentioning issues with wearing a mask because of her lung condition and asthma. The claimant states that wearing a mask increases her production of mucus and she coughs when she is unable to breath [443]. There are quite detailed notes recording what the claimant was reporting were her problems when wearing a mask. The notes also record the change in her medication, that she had contacted Access to Work and that her GP was funding her prescriptions. The claimant does not allege that there was a failure to record what she was telling the respondent about her health and the claimant does not explain what she expected the respondent to do at this stage, and therefore why it is alleged that Ms Kaur was 'closed off' to these issues which were raised and recorded.

197. The new medication which was mentioned was related to her ADHD condition [442 para 5]. The support from Access to Work also related to ADHD and counselling to support the claimant managing the effects of the condition.

198. It is not clear what support from her GP the claimant is referring to in her complaint about Ms Kaur being closed off when issues were raised with her. The only apparent mention of the GP support is in respect of ADHD when she discusses that she has had to seek private healthcare but that her GP is funding her prescriptions. The claimant does not explain, and it was not put to Ms Kaur in cross examination, what else was raised by the claimant which was not discussed or recorded by Mr Kaur or what it is being alleged Ms Kaur should have done about the issues which were recorded.

199. There is no reference to a link between anxiety and depression and these issues which were discussed or the problems the claimant had performing in the PA role.

Wellbeing Review meeting: 24 September 2021

200. There was a further Wellbeing Review meeting on 24 September 2021 with the claimant and Ms Kaur and Ms Liggins. The respondent made notes [449] and again the claimant provided an amended copy [450-452]. The claimant makes no mention of any issues with the earlier meeting or of a lack of understanding around redeployment. In an expanded summary written by the claimant in December of the meeting of the 15 September 2021 she refers to redeployment being discussed and [451]:

> *"I was informed that if we start redeployment process then we should have **12 weeks** to find a suitable position which under the current pandemic and transformation of AMH **there are limited vacancies.***
>
> *Thoughts*
>
> *This process is distressing and hard to process and I need more time to consider what my options are and what can be offered in Rehab".*

201. The claimant's own notes appear to acknowledge that at the time, she was aware of the limited opportunities for redeployment, but the Tribunal find that she nonetheless decided to continue with the redeployment option.

202. There are, both in the respondent and claimant's notes, references to the claimant confirming that she does not want to return to the PA role. The Tribunal have regard to the fact that during the grievance appeal in August 2022 she would remain of the same view. In this meeting she would state; "*I recognised the post of PA would actually be more detrimental to my mental health which I discussed with JK". [*1174]

203. The claimant's sickness certificate was due to expire on 6 October 2021 and the claimant would then be returning to work. There is further discussion then in this meeting about mask wearing, given her imminent return. The respondent's and claimant's notes record [449/450] that the claimant may find it difficult wearing a mask for prolonged periods but that she had agreed to wear the mask in accordance with the respondent's guidelines. In the claimant's additional comments on the notes [452] she records that OH had supported her not having to wear a mask for long periods sitting at a desk but that she had agreed to try but asked to work part of the time at home. There is no comment about a lack of engagement with the issues she was raising with Ms Kaur during this meeting.

Wellbeing Review Meeting 6 October 2021

204. There was then a further review meeting held with the claimant and Ms Kaur and Ms Liggins on 6 October 2021. Again, the claimant was provided her comments on the notes when she received them in December 2021 [468/469].

205. It was agreed the tasks the claimant would be able to perform on her return and that this would be subject to a 4-week phased return. It was also agreed that the claimant would be added to the redeployment register for 12 weeks with effect from 7 October 2021.

206. The respondent's notes of the 6 October meeting contain the following: *"If a position had not been secured at the end of the 12- week period, Nav's contract of employment would* ***be*** terminated *in accordance with the policy.* ***Nav confirmed that she understood the process."*** *Tribunal stress*

207. The claimant does not in her own comments on the notes [468 – 470] disputes the above entry. The Tribunal find that this is further evidence that the claimant understood that she had 12 weeks to find another role, or her employment would be terminated under the redeployment policy.

Redeployment Process

208. The claimant proceeded to complete the redeployment application [502- 523] in which she disclosed her recent diagnosis of ADHD [510] and the recommendation of OH for stability and structure.

209. The claimant would be sent a letter in November 2021 which was dated 7 October 2021 [487]. The Tribunal on balance accept Ms Kaur's evidence, which is supported by an email she sent to HR on 5 November 2021 [572], that it was an honest oversight not to have sent the letter in October. The claimant received this letter and read it. The claimant had by this time started a trail in another role. The letter made it clear what would happen at the end of the 12 week period [487-488]; *"We are seeking to redeploy you purely due to ill health in line with appendix 15 of the Attendance Management and Wellbeing Policy. If you are unsuccessful in obtaining suitable alternative employment your contract of employment will be terminated on the 30th December 2021 on the grounds of ill health".*

210. The letter dated 7 October 2021 but sent in November, further invited the claimant to contact Ms Liggins if she had any queries regarding the content of the letter and was also advised of the right to appeal the decision to terminate her employment on the grounds of ill health. The Tribunal have taken into consideration that rather than make immediate contact with Ms Kaur or HR to express concern that she had not been told before that her employment would be terminated, the claimant did not take any action.

211. The claimant maintains that she had been led down this 'path' while vulnerable, however she was now fit enough to be back at work, and yet still did not protestor complain that she had not been well enough previously to agree to the redeployment process. The Tribunal do not consider it plausible that this was the first time the claimant was aware of the consequences of not being redeployed.

212. While the claimant does not complain that she was not given sufficient time in December to comment on the notes taken during the Wellbeing Review meeting, the Tribunal do **not** consider it to be an acceptable practice to take such a long time (2 to 3 months) to provide notes to an employee who suffers with her concentration and expect her to be able to check and provide her comments. The claimant did not attend the meetings with someone who may have been able to keep a record for her. Nonetheless the Tribunal find that the claimant made it clear that she did not want to return to the PA role, even if support/adjustments were offered and agreed to be placed on the redeployment register from 7 October 2021. She returned to work in the interim working at Stewart House with tasks which had been agreed for the 12-week period and pending securing another role.

Week of 7 – 14 October 2021: while based at Stewart House: mask wearing.

213. The claimant returned to work on 7 October 2021 in an HR administration role on a 50% phased return.

214. During the first week the claimant was working at Stewart House she did not return to the office which she had previously shared with Sara Le-Butt, she was moved to another office twice the size but shared it with 2 other staff. She confirmed under cross examination that the staff she shared with were seated some distance away from her and that her complaint is not about sharing the office with them but the people coming and going, patients would come to the door so she could not remove her mask for long enough periods.

215. It is not in dispute that 1 week later the claimant raised this issue with Ms Kaur, and she was then moved to The Willows office. She complains that she could have been moved to The Willows immediately on her return. After she was moved to The Willows, she gave evidence that she was in a safe environment in an office on her own and only had to wear a mask when she walked into the building and used the kitchen and does not complain about that. In terms of her transition back into work, this seems to be the only issue she raised. In her evidence in chief the claimant deal with her return to work [page 55 para 35] and complains only about working from Stewart House and having to wear a mask, which she alleges caused extreme anxiety from wearing the mask and exacerbated the symptoms of bronchiectasis.

216. The claimant complains that she should never have been placed at Stewart House after the risk assessment. The Tribunal find that the respondent was aware of the problems the claimant encountered wearing a mask, this had been made clear to them in the risk assessment but also the claimant had been clear in the Wellbeing Reviews. She had explained that wearing a mask increases the mucus and can cause coughing, and they could have arranged for her to work from The Willows immediately on her return but had not offered her that option. In the 15 September review meeting the following is recorded

[445]: *"Due to having Bronchiectasis she is unable to wear a mask as the mask exacerbates her mucus production resulting in coughing continuously until mucus has been removed. The Respiratory service has supported Nav with managing techniques, but she remains unable to wear a mask…. Nav also confirmed she utilises an inhaler for her asthma. Nav stated that she coughs when she is unable to breathe."*

Health Passport

217. The respondent introduced a Health Passport (Passport) in its updated policy on reasonable adjustments, in November 2021. The undisputed evidence of Claire Taylor, which the Tribunal accept is that new policies are usually communicated to staff through a monthly team briefing to all Band 7 managers and through a weekly newsletter for all staff. The Tribunal accept on balance that this is how the new policy on Health Passports was communicated. A Passport was not put in place for the claimant. The Tribunal accept the claimant's oral evidence, with no evidence rebutting it, that she was not aware of the introduction of the Passport until after the grievance appeal and before the 3rd work trial.

First Work Trial: 8 November 2021 – 3 December 2021

218. As part of the redeployment policy the claimant commenced a work trial with the Employee Services Team as an HR Administrator on 8 November 2021, her manager was Lisa Laws. Ms Laws contacted Ms Kaur by email on 8 November 2021 [566] for advice on what adjustments had been recommended. The Tribunal find that Ms Kaur provided no real guidance in that letter, beyond explaining that coaching sessions had been organised and the claimant had found Stewart House a distracting place to work: *"The work/duties being undertaken by Nav were discussed at Nav's wellbeing meeting – Nav reassured Julie and I she was confident about her ability to undertake the tasks discussed.- Nav has been supported accordingly."*

219. Ms Laws did not explore further what support may be required and neither Ms Kaur nor HR provided it.

220. Ms Kaur remained responsible for the adjustments the claimant would need in Work Trial 1, along with Lisa Laws. Ms Kaur had email contact only with Ms Laws however, the Tribunal accept the unchallenged evidence of Ms Kaur that she had understood that Julie Hamore of OH would provide the OH report to the new line manager and HR would communicate with Ms Laws about the adjustments required.

221. The claimant alleges that before starting the role she had a Teams call with Lisa Laws and Ms Lad, HR Lead and that she told them about her disabilities of diabetes, anxiety and depression, bronchiectasis, asthma and ADHD. It is also the claimant's case that she told them that she takes longer than others to learn and pick up new work and that it helps her to observe the task to be carried out and have some sort of standard operational procedure checklist, which helps her to embed what she has learned and build memory [w/s para 71.a].

222. Ms Laws accepts that during the interview the claimant discussed ADHD which was also referred to in her written application [510] and that she had the recent Access to Work assessment. The claimant was working from home so there was no need to organise breaks for her to manage her diabetes and there was also no issue about wearing a mask.

223. The Tribunal accept that the role was explained to the claimant at this meeting and that all training was undertaken remotely by MS Teams because their desks had been reallocated to another team during the Covid pandemic. Ms Laws acknowledges in her

evidence that it is more difficult to learn remotely. It was agreed that the claimant would undertake a Work Trial. Ms Laws did not investigate whether the 4-week trial would be sufficient, she was guided by the advisory team in HR, namely Ms Liggins.

224. A colleague (Sue Price) was appointed effectively as a 'buddy' to the claimant, but Ms Laws had no idea what instructions were given to her on how to support the claimant, this was left to Ms Price's line manager, Seema Lad. Ms Laws believed an induction plan would have been put together on an Excel spreadsheet [2049- 2054].

225. The training provided is set out in an email to Ms Laws [563] and took place over 3 days during the first week. On the first day, Ms Price spent over an hour with the claimant showing the claimant the reference checking process and the claimant made her own notes and from that created her own guide.

226. By the third day of the trial Ms Price recorded that she needed to amend each reference the claimant had checked.

227. The claimant was given with what was considered to be the easiest task, completing and issuing references for current and former employees to third parties.

228. While the feedback Ms Laws was receiving was that the claimant was not picking up the job as quickly as new starters (which surprised her as this was a Band 2 role and the claimant had performed a more senior Band 3 role in her last job), she could not recall making any training suggestions. The view Ms Laws admits she had is consistent the Tribunal find with the claimant's complaint that after only the first week Ms Laws had commented that she expected the claimant to be 'further on' and there were lots more processes for her to learn. The Tribunal accept such a comment would have been demotivating.

229. The Tribunal accept the evidence of Ms Laws, as supported by a statement she prepared on 7 March 2022, that Ms Price spoke with Ms Law on 10 November to express concern about her own workload given the time she was spending training and retraining the claimant. There was the Tribunal find, no discussion about an alternative to Ms Price only providing support.

230. On the 11 November 2021, there was a meeting between Ms Price and Ms Laws with the claimant where the claimant was complementary about the support from Ms Price and explained that she felt she was complicating things for herself and that she would follow up with Ms Kaur the provision of a coach for AHDH through the Access to Work Scheme. There was no discussion and the Tribunal find, no consideration given, by the respondent to whether the trial period should be extended.

231. Ms Kaur confirmed to Ms Laws by email of the 11 November that she had approved the Access to Work coaching sessions and the company would be in touch with the claimant to organise them.

232. By 15 November the claimant was emailing Ms Price and Ms Laws to advice that she was struggling in the role, she had initial issues with IT which impacted on her concentration that day, but she also referred to the difficulty of learning via Teams, waiting for help because colleagues had deadlines they had to meet but also she had:

"*Looked at the issues I am having and some are ADHD related that I am only realising that is only effecting the speed at which I retain information*". [577]

233. The claimant, because she was concerned how this job was going, started to apply for other roles as early as **16 November 2021** [579 / 597].

234. The claimant met with Lisa Laws on 24 November 2021 [598]. The claimant informed Ms Laws that she was struggling to get up to speed in the job and complained now that she was not given proper training, not given a standard operating procedure checklist and was given only one type of task to do which was reference checking.

235. The statement prepared by Ms Laws [973] documents that the expectation was that someone in the claimant's role would be expected to complete 12 references in half a day and a new starter 12 in a day. By 24 November the claimant had completed 12 references in a week with ongoing support from Ms Price, and she was making errors on the ones she completed. There were only 4 references which she completed that did not require any changes.

236. Ms Laws in cross examination stated that she was aware the ADHD may be making the claimant slower, but she did not consider it necessary to obtain an updated Access to Work report because one had only recently been provided, despite the fact this related to a different role with different tasks.

237. The Tribunal consider it quite remarkable that given Ms Laws accepts that she understood at the time that the claimant had ADHD, and this probably made her slower (and had been alerted by Ms Kaur to the issue of the claimant being distracted), that the IT issues were not sorted out before the official 4 week trial started. It is also the Tribunal consider, remiss of Ms Laws, Ms Kaur or HR not to have applied their mind to whether the standard 4 week trial should have been adjusted and sought OH and/or Access to Work advice on what an equivalent fair trial period would be, how much longer the claimant may need to learn given the effects of ADHD on the speed at which she could learn new tasks.

238. The claimant had also not found the standard operating procedure (SOP) provided useful and had decided to create her own notes to understand the processes she was learning rather than use the SOP. There was no consideration to giving her some additional time in the Work Trial, to spend preparing her own guidance notes [570]

239. Ms Laws in her evidence in chief alleges that the claimant at the 11 November meeting said that she was confident in her ability to do the work however, this is not recorded in the notes and is not consistent with what the claimant would later report on 15 November. While the claimant was the Tribunal consider, keen to make this trial work, on balance the Tribunal do not accept that she said she was 'confident' but even if she had, it was clear that she was not picking things up as quickly as other new starters and she was by 15 November expressing her concern about the impact of the ADHD. To simply rely on the fact that an employee had said they are confident when the evidence clearly indicates they are struggling, is to turn a deliberate blind eye to the obvious. She was in the invidious position of having to prove herself or risk at the end of the redeployment process, losing her employment.

240. Ms Laws accepted that the claimant struggled to learn via Teams but that all her team was sent home in 2020 because of Covid and the desks given over to another team who had to be in the office and could not work remotely and thus she had no office to take someone in to train. However, she does not allege she made any enquiries about being able to use a room to deliver some additional training.

241. During cross examination Ms Laws appeared to attempt to defend the lack of attention paid to what the claimant needed by explaining that at the time the claimant raised the

issues she was having with the work on 15 November, Ms Laws had to 'down tools' to "*sort out the payroll and anything not about paying 7,500 people "goes on the back burner."* What was put on the 'back burner' it seems, included the claimant.

242. Even if Ms Laws did not have time to consider what further training or support the claimant needed, she could have considered whether to ask for an extension to the trial or asked Ms Kaur or HR to assist, she did not take any of those steps. Nor did she check if Ms Price or Ms Lad could provide additional support to the claimant.

243. It has already been determined in a judgment reached by consent, that the claimant was not however disabled because of ADHD until **May 2022**. The reasons for that decision were not addressed in this hearing and the claimant has not sought to have that decision reconsidered, nonetheless in terms of basic fairness, this was not the Tribunal consider an employer acting within the band of a reasonable responses when faced with an employee with obvious learning challenges.

244. Ms Laws [973] produced a statement about this trial period when requested by Ms Liggins later in March 2022, when the claimant raised a grievance. It records that the claimant explained that by **24 November** she was still finding her way around the IT system, was struggling to pick up speed with the references and with the intense concentration required to do very repetitive tasks she felt she needed a role where she can change task frequently.

245. The handwritten notes of the meeting [598] held with the claimant on the 24 November 2021 includes an entry: '*distracted mental health'.*

246. Ms Laws in cross examination confirmed that she did not suggest another task when the claimant complained of concentration issues because of how repetitive the task was because the claimant was by this stage taking time out to attend other interviews. While the reference checking was the simplest task, there had been no discussion with the claimant or reference to OH or Access to work to understand whether the mere boredom of the repetition was would present a problem for the claimant's learning. The Tribunal however accept the undisputed evidence of Ms Laws that the nature of all the tasks the team in that department have to carry out, is repetitive.

247. It is no surprise the claimant was taking steps to find another role giving the impending date for the review to assess her suitability for this role was 29 November.

248. By **26 November 2021** the claimant had confirmed acceptance of an alternative post [618]. A meeting took place with the claimant, Ms Laws and Ms Liggins to discuss the claimant's performance, the claimant explained that she had decided to take up another role, she did not feel she was getting better in the Administrator role, she did not understand the process, was having to wait while her work was checked and was concerned about the backlog of work she had to clear.

249. At a meeting on 29 November [974] Ms Laws informed the claimant that at the conclusion of the 4-week trial period it was her assessment that the role was not suitable for the claimant. It records the claimant stating that her training had been sufficient, but she felt she needed a role with a variety of tasks that did not have strict deadlines.

Return to The Willows

250. The claimant returned to work at The Willows pending starting Work Trial 2 and worked in the Rehabilitation and Huntington's Disease Services Team, as a Personal Assistant until she was due to start Work Trial 2. There was some confusion in the cross

examination of Ms Kaur and submissions on behalf of the claimant, about when the claimant spent 1 week at Stewart House before being moved to The Willows, whether this was on her return to work on 7 October 2021 or during this period after Work Trial 2. However, the claimant was clear in cross examination that it was on her return from sickness on 7 October 2021 and Ms Kaur stated the same in cross examination.

Second work trial: 4 January 2022 – 15 September 2022

251. The claimant started the next Work Trail on 4 January 2022 in the Healthy Together team as an Administrative Assistant. This was a vacancy for a 12 month temporary contract.

Assessment

252. The Policy provides that there needs to be an assessment of suitability, although it does not proscribe what that involves.

253. A candidate for the role would normally have to undergo an interview which would include a typing test. The claimant was not required to undertake an interview because there was no competition for the role, and she was being considered as part of the redeployment process. The role included a variety of task [Ms Dunkley's w/s para 7 to 8] including call handling, arranging clinics, booking appointments etc. It was expected that the claimant would eventually learn all the tasks.

254. In the absence of an interview or typing test, the claimant's suitability for the role only consisted of recognising that the claimant had audio typing experience and the appropriate qualifications. Ms Hamore knew the claimant had been diagnosed with ADHD but despite that did not recommend any further suitability assessment.

255. The claimant's suitability was assessed by HR, Caroline Dunkley, Administrative Support Manager and Sarah Physick, Acting Healthy Together Team leader (Ms Dunkley's substantive role). The claimant's first reporting line was into Ms Physick.

Trial period

256. On the 21 December 2021 [657] it was confirmed to the claimant in writing that the second work trial, which could not start until 4 January 2022, would end on 1 February 2022 and the respondent confirmed that it would extend her at risk status from 12 weeks to 16 weeks to accommodate this final trial opportunity.

Training

257. Ms Dunkley received a shortened copy of the claimant's application for the job which mentioned **ADHD.** The claimant had started her first session with ADHD coach on 16 December 2021 [w/s para 79] and her next session was arranged for the week of the 4 January 2022 when she would be in post in the new role.

258. The claimant met with Sarah Physick on 4 January 2022 and told her about her conditions and that as a Type 1 diabetic she needed a regular meal breaks and would need a break of 15 minutes to eat and to take her insulin. Ms Dunkley contacted Julie Liggins on 14 January 2022 to ask about the ADHD [758] and they did meet in early January. The claimant had sent the Covid risks assessment and the 18 August 2021 OH report to Ms Physick and they were shared with Ms Dunkley on 17 January 2022 [306/316/335/-344/419/761/1941-1943), thus she was made aware that that the claimant also suffered with asthma and bronchiectasis.

259. A risk assessment was carried out at Ms Dunkley's request and completed on 19 January [765-789].

260. The claimant was allocated a mentor, Mr Bellchamber who provided most of the day-to-day training via MS Teams, although the claimant in cross examination gave evidence that her preference would have been for in person training.

261. The claimant under cross examination confirmed that she had a 'structured' training plan in place and shadowed people, that she was given an assignment to carry out when she felt confident with the process and the training was open ended, she could ask at any time for more training or shadowing. The claimant also accepted in cross examination that she was provided with a SOP. Her evidence however is that the 4-week plan was not designed for her disabilities, it was a standard plan.

262. Ms Dunkley's position is that the training had been adjusted due to the claimant's condition, the work had been reduced compared to previous new starters and they had limited the task list because the claimant's concentration is sporadic, and training provided 1 to 1. The Tribunal accept that these adjustments had been made.

263. It was Ms Physick who put the training plan together, but Ms Physick did not inform Mr Bellchamber about the claimant's disabilities or discuss with him to let her know if it appeared the claimant needed adjustments. It was Mr Bellchamber who was tasked with checking the claimant's work and signing her off as competent.

264. The claimant had quite few catch up meetings with Ms Physick including one on the **14 January 2022.** Ms Physick had taken minutes of the [756]. The claimant accepts that she said at this meeting that she was finding the training slower than she expected, she accepted that she had said she had a letter from OH about needing a 15 minute break due to her diabetes but denies that she was asked to provide a letter from OH with regards to not wearing a mask in the work place. However, the claimant otherwise accepts that what is recorded is accurate and on balance the Tribunal accept the evidence of Ms Physick and the contents of the contemporaneous document, that this was mentioned. By this stage, while Ms Kaur had accommodated the claimant regarding wearing a mask (by moving her to The Willows) by this stage OH had not advised on the impact of her lung condition or asthma on wearing a mask [419-420] and thus there was of yet, no OH letter.

Risk assessment

265. Ms Physick carried out a risk assessment and sent the forms to the claimant on **18 January 2022**, within these forms the claimant referred to having been shielding because she is a Type 1 Diabetic on insulin, that she has asthma and a lung condition diagnosed in August 2021 called bronchiectasis and sets out her medication. She also refers to the diagnosis of ADHD in June 2021. She also refers to having **anxiety and being on medication for that [**781 -783].

Adjustments

266. The risk assessment recorded what had been agreed as between the claimant and the management [767] which included social distancing in place in an open plan office, communicating through team and telephone, that home working could not be accommodated while the claimant was training, mask wearing on site and allowing the claimant breaks to manage the bronchiectasis when required [767/768].

267. Ms Dunkley's evidence was not in dispute and the Tribunal accept it, that there was an increased transmission risk of Covid during this period and the respondent's policy was that masks were required if clinical staff were in the building [800- 807/815-821].

268. The claimant worked in an open plan office, it was felt that the claimant needed to be near the team to train rather than isolated on her own in an office, but she was permitted to have a break when she needed to cough or remove her mask and she was placed near the corridor to have easy access from the office.

269. The Tribunal accept the claimant did not want to be trained remotely via Teams because she found that more difficult, thus homeworking was not something she would have wanted while training. The Tribunal also accept the evidence of Ms Dunkley that many of the tasks could only be performed in the office such as 'print of post'.

270. There was also an issue about a lack of office space however, the Tribunal is not persuaded on the evidence that a room could not have been arranged for the claimant to work in, at least during some periods in the day. Ms Dunkley had not carried out any enquiries into whether an office could be allocated to the claimant. She did not discuss this with HR.

Review

271. On 25 January 2022 the claimant was invited to a trial review on **28 January 2022**.

272. Ms Dunkley asked Ms Physick to refer the claimant for a OH referral [808]. However, there was by this stage only a few days until the end of the trial. It was the claimant who had pressed for an urgent referral. As Ms Dunkley confirmed in her evidence, the claimant "*made us push it through a bit quicker".*

273. The claimant sent a list of the adjustments she wanted on 27 January 2022 [813] after discussing this with the Access to Work team who was supporting her with managing the ADHD in the workplace. The adjustments included:

Time to focus on a task and see it through
Scheduled meetings with an agenda available a day before
To have time to process new things
Being trusted to self-manage her health conditions
Being able to practice new skills regularly
Learning news skills one or two at a time
Supportive environment
Being allowed to do tasks that she has been given
Given the time and space for other commitments; HR support coaching and ADHD reviews

274. There was no indication that these adjustments were required in connection with her anxiety rather than ADHD.

275. The claimant was then absent on sick leave for a short period. The meeting could not take place on 28 January, and it was rearranged to **2 February** [811] .

Performance

276. On the **28 January 2022** [811] Ms Dunkley wrote to Ms Liggins to report that the claimant had telephoned in sick the day before because her body was shutting down due to the medication and she could not function **due to ADHD.** Ms Dunkley recommended extending the trial period especially bearing in mind that the claimant was due to take some annual leave in February and March.

Review: 2 February

277. A meeting took place on **2 February 2022** with Ms Physick and Ms Dunkley and the claimant. The claimant was not meeting the standards expected, making errors, performing tasks slowly and needing a lot of support and this was communicated to her. The respondent had not yet received the OH report. There was the Tribunal find, no reason why this review could not have been taken place after the OH had been received or the respondent been more proactive about getting the OH report earlier.

278. The claimant had prepared notes with her ADHD coach to take to the meeting [825 - 832]. The claimant then prepared a record of the meeting based around the issues she had raised [825] and the Tribunal accept her evidence that she raised at the meeting; needing time to focus on a task, losing track of what she was going if she was interrupted during training and that she struggled if there was too much of a gap between training on a task and then continuing to carry it out.

279. The claimant also said that it would help her to have an agenda for formal or informal meetings however, Ms Dunkley refused this.

280. The notes also record her stating that she had asked OH for the letter confirming that she needed a mid-morning break because of diabetes but Ms Kaur had not responded and therefore she had contacted OH direct and was waiting for a response.

281. The claimant's notes also refer to the risk assessment not taking into account her lung condition and she makes recommendations for adjustments, including to be able to lower her mask when sat her desk and that during warmer weather she could sit near a window. The claimant in cross examination clarified however, that the problem of mask wearing in warm weather, had not been raised this in this meeting, she had raised it when she was completing the risk assessment with Ms Physick and that OH health had advised for her to sit next to a window, not straight away, but in preparation for when the weather warmed up.

282. The claimant at this meeting also asked for Ms Physick to attend her next ADHD coaching session to understand her condition better however, Ms Dunkley did not support this. The respondent's position is that Ms Physick felt that she did not need to attend because the claimant had the support of Access to Work, and the claimant did not explain how this would help.

283. The Tribunal find that the claimant was not told the reason for Ms Dunkley not agreeing to Ms Physick attending an Access to Work session, even though it accepts Ms Dunkley's evidence that she had discussed it with HR and Ms Physick. Had there been a real desire to support the claimant as much as possible, the Tribunal consider that Ms Dunkley could simply have asked the claimant to ask Access to Work to contact her and discussed with them how this may assist. It may well have given Ms Physick a better understanding of what would help the claimant in the workplace.

284. The Tribunal find on balance that the suggestion of attending an ADHD session with the claimant was not considered by the respondent in any meaningful way, however, it is not explained by the claimant what specific adjustment this would have given rise to. Of itself it may improve understanding but is not an adjustment. The Tribunal find on balance however, that there was no engagement by the respondent in whether this may be helpful.

285. It is accepted that during this meeting the claimant was told that she was not meeting the standards of the role.

286. The respondent did agree however to extend the trial period by 5 days and after the 2 February meeting the training plan was revised to focus on fewer tasks. However, the claimant complains that she was tasked during that extension of 5 days with learning 2 new processes and this tight deadline made her **ADHD worse**. (w/s page 132 para). She complains that she had 2 tasks to learn in a tight deadline and the time for each task was now restricted, all of which was contrary to the recommendations of Access to Work. In cross examination she was clear, that this deadline was a problem because of **ADHD**, she made no reference to it being a problem because of any other medical condition, including anxiety and depression.

287. The claimant became upset in this meeting, she complains that she had gone past the time she needed to take a break due to her diabetes and alleges that she was told they had meetings to go to and to 'hang on'. It was not put to the claimant in cross examination that she was not being truthful when she gave this evidence about being told to 'hang on' and that she had become tearful and upset and on balance the Tribunal accept her account.

288. The respondent never produced their own notes for this meeting. The Tribunal consider that failing to provide a written record for someone with issues with their concentration who attended this meeting unaccompanied and where serious issues of performance were discussed, suggests a lack of understanding around her conditions and/or an unsympathetic approach.

289. The Tribunal find that given the attitude toward the claimant needing a break and the failure to ensure she had a record in good time of what was discussed, that it is more likely than not that Ms Dunkley came across as was abrupt with the claimant in this meeting and perhaps, (given the lack of engagement with the suggestion of Ms Physick sitting in on an Access to Work session), she was slightly irritated by the suggestions she was making about further steps the respondent should take to accommodate her various conditions.

290. The evidence of the claimant is that she also had two chest infections in a short space of time while in this work trial, exacerbated she believes by wearing a mask. However, while this evidence was not challenged there is no medical evidence from her GP or any other medical professional about the infections she had or that wearing the mask was likely to have caused the claimant's chest infections or generally is likely to have such an effect.

291. The respondent does not allege they asked the claimant what extension she felt she required or referred to OH for advice. However, in response to questions from the Tribunal, the claimant gave evidence that she did not raise problems with the revised deadline for the end of the trial period or with the revised training plan because she was confident in her abilities: "*I had confidence in my ability, I was determined to prove I could, I was enjoying the work, happy with the staff- they were very supportive apart from Sarah and Caroline. if I had been left alone to do the training, I was confident I could, if Sarah not interrupting my training – any issues I had with training I raised with Steve, and we ironed out any issues we had."*

Grievance: 11 February 2022

292. The claimant complains that Ms Physick kept asking her about the OH letter (for diabetes).

293. The follow up review meeting took place on 11 February, to discuss whether the claimant had succeeded in the trial, however, the claimant mentioned that she had raised a

grievance and therefore Ms Liggins decided not to continue with the meeting. Ms Physick and Ms Dunkley were therefore aware that there was a grievance but Ms Physick denes knowing what it was about, although the Tribunal find that it is likely that Ms Physick assumed or suspected that it may involve her, but the claimant does not allege and there is no other evidence to suggest, that the content of her grievance was discussed.

294. The grievance had been submitted on 11 **February 2022** against Ms Kaur, Ms Laws and Ms Dunkley [869 – 874].

295. The claimant complained in her grievance about disability discrimination including a failure by Ms Kaur to make reasonable adjustments in the role of PA before re-deploying her, and in the Work Trials. In terms of the specifics, she complained that in the second Work Trial there has been a failure to support her and make adjustments and being compared in terms of performance with non-disabled employees. The claimant was asking for a further trial, an extension or to be offered the role.

296. Ms Liggins informed Ms Kaur about the grievance on 1 March 2022 [w/s Ms Kaur para 97]

297. As a result of the grievance, the notice period was extended until the grievance was resolved and the decision about whether the role was suitable or not would not be made until the grievance had been heard.

298. The claimant emailed to say she needed an OH referral on 15 February 2022 and this was arranged urgently [882/889]. The form referred to what Ms Dunkley's states were the only conditions they were at that time aware of, bronchiectasis , diabetes and ADHD. It neglected to mention asthma and anxiety which had been mentioned to Ms Physick in the risk assessment on 18 January 2022 [781-783].

299. The claimant then commenced a period of sick leave on **21 February until 6 March 2022**. This was certified by her GP to be [927] a result of underlying mental health conditions. The claimant wrote in on 11 February 2022 to Ms Kaur to complain of extreme insomnia caused by work **issues, stress and anxiety** [879].

300. On 2 March 2022 Ms Dunkley provided an account to Ms Liggins about the trial period for the purpose of the grievance [948-953].

OH report.

301. On 24 March the **OH report** was received [999] dated 23 March 2022 (dictated 22 March). It recommended a flexible working pattern, provision of her own room so she did not have to wear a face mask, to work where there was no excessive noise or provision of noise cancelling headphones, and **to implement a Passport.**

302. The claimant was on annual leave and returned from annual leave on **4 April.** She would go absent again shortly thereafter because she alleges, she was threatened with the removal of her diabetic breaks.

Grievance

303. Mr Amrik Singh heard the grievance which was not arranged until **29 March 2022**. It had initially been arranged for the 10 March however the claimant requested a face-to-face meeting rather than via Teams, and that was accommodated. The claimant attended

with her husband and Mr Singh was accompanied by Ms Gail Phillipson, interim Senior HR Business Partner.

304. Mr Singh in his evidence in chief explains that the delay was because of difficulties finding a date and due to his leave. The claimant in response to a question from the panel confirmed that she was not alleging that he had deliberately delayed the hearing at the beginning but alleges he delayed sending out the outcome because she had been told that she would have the outcome in 5 days.

305. The claimant was notified of the outcome of her grievance by letter dated **20 April 2022** i.e., about 20 days later rather than 5 days [1077]. The outcome letter dealt with each allegation.

306. She alleges that he delayed the outcome to cause her more anxiety because he would have known that he was to take some annual leave. However, while he was questioned on why he had not met that 5-day deadline (and he referred to the additional information the claimant produced but also the time he needed to take with the panel to complete the letter) it was not put to him in crosse examination that this was deliberate to cause the claimant distress or for an ulterior motive.

307. The claimant does not identify anyone else in similar circumstances, who received their outcome in 5 days. The grievance policy of November 2020 [p.119] provides that the manager will meet with the member of staff within 15 working days of receipt of the Grievance Notification Form and: " …*aim to reply, in writing within a further 5 working days. The written outcome should incorporate a summary of the considerations and conclusions*".

308. The Tribunal find that there was no deliberate delay on the part of Mr Singh and indeed this allegation was not put to him.

Diabetes - breaks

309. OH, produced a letter dated **26 January 2022** following a self-referral from the claimant. The advice was as follows [1029]:

> *"After my assessment today, it is apparent that Navdeep has an underlying health condition which requires her to eat and drink regularly throughout the day.*
>
> *I would recommend that Navdeep would benefit from frequent additional **breaks** during her working hours to help prevent her from developing symptoms relating to her underlying health condition".*

310. On 18 February 2022 an Administrator from OH sent a copy of the letter to Ms Kaur by email copying in Ms Dunkley [1028], however the email address for Ms Dunkley incorrectly spelt her name as 'Dunckly". The claimant was not copied in [1028].

311. Ms Kaur the Tribunal find, as confirmed by an email she would later send on 6 April 2022 [1032], had seen the email and letter but had not forwarded it to Ms Dunkley, because as she states in her email; "*Her new manager was also copied in*…" The Tribunal accept that neither Ms Kaur not the claimant had noticed that the email address for Ms Dunkley was incorrect.

312. On **the 6 April 2022** it is common between the parties that Ms Physick spoke to the claimant about her taking her diabetic *breaks away from her desk.* There is a dispute over what was said however, Ms Physick accepts that had the need for breaks been set out in a Passport she would 'definitely' have not questioned the claimant about having a break away from her desk.

313. The Tribunal also have regard to the fact that Ms Physick had first raised the issue of the claimant needing breaks, before the claimant had raised her grievance.

314. Ms Physick had made a note of the discussion [1026] in which she refers to the claimant having a 15-minute break every morning and Ms Physick stating that she would no longer be able to accommodate it because she had not received any documentation from OH. Ms Physick records asking the claimant if she can eat at her desk and the claimant explained that she eats porridge and would need to heat it up in the kitchen and had a document about it and would try and locate it.

315. The Tribunal find that the claimant did not produce any documents because she called OH and was told that the letter they had produced in January had been sent to Ms Dunkley and Ms Kaur in February. The fact that OH had not sent it to Ms Dunkley correct email address created some unnecessary confusion.

316. The claimant then sent an email on **6 April 2022** to Ms Physick later that day [1030] copied into Caroline Dunkley, Ms Kaur, Ms Phillipson and Mr Amrik. In this letter she complains about being deeply upset when she was pulled away from her desk for a chat in which: "*you told me that I was no longer allowed to take breaks to eat from tomorrow because you had not received the occupational health letter supporting my need to take breaks….You also told me that I should eat before coming to work* ***and have snacks at my desk*** *as I have pointed out I am physically unable to eat until mid- morning and I* ***usually eat a meal*** *i.e. porridge that requires using a spoon. I cannot eat snacks. I was embarrassed and humiliated."*

317. She goes on to state that she had contacted OH on 6 April who had told her that Ms Dunkley and Ms Kaur had both received the letter on 18 February and thus did not think she needed to mention this with Ms Physick and that she felt that she was being victimised for raising a grievance.

318. In response there is an email from Caroline Dunkley to Gail Phillipson [p.1030] on 6 April stating that she had **not** received the OH referral before that day, however on reading it she had noted that there is no mention of an additional **10- 15 minute** break for breakfast and that the claimant had been able to use break out rooms and the kitchen throughout the trial which has been enabled.

319. The respondent accepts in the list of issues, that the claimant required meal breaks during the day because of her diabetes but not necessarily that this had to be away from her desk.

320. Ms Physick gave unchallenged evidence, which the Tribunal accept, that she had experience of other staff in her team with diabetes who manage the condition by having a snack at their desk. The Tribunal accept Ms Physick's explanation which is also not challenged that she wanted the claimant to have a snack at her desk so that the clamant would remain available to answer the phone. The Tribunal find that the claimant could not reasonably have eaten porridge and been expected to answer the phone at the same time and the OH report does refer to having regular *breaks during work*, which on any common-sense reading, must mean time away from work (rather than being given the chance to eat a snack while working/during working time).

321. On 8 April 2022, after seeking guidance from HR and OH, Ms Dunkley wrote to the claimant [1056] to confirm that the claimant was entitled to a 15-minute break to consume her breakfast as a reasonable adjustment and these breaks would continue during her period with the team.

322. The Tribunal accept that Ms Physick had threatened to stop the claimant having additional breaks away from her desk without a letter from OH letter. The unchallenged

evidence of Ms Physick is that other employees who report to her have diabetes and manage it by eating at their desk and this is accommodated and there is no evidence that this type of adjustment was ever removed or threatened to be removed from them.

323. In March 2012 [2022] there is a letter from an OH nurse to Ms Calvert, Team Administrator in Adult Mental Health advising that the claimant be able to continue to adhere to agreed break times in order to check her blood glucose levels and consume a snack or administer her treatment if required. It does not actually specify that the claimant needs to eat away from her desk however, and the claimant had not specified at this time that it needed to be away from her desk [1958]. The Tribunal notes that at the grievance appeal hearing [1185] she explained how in a previous role she would warm up her food and eat at her desk but had not eaten at her desk in another role because it was patient facing. This role during Work Trial 2 was not patient facing:

"*So **I eat at my desk**, warm my food up, eat at my desk. So those are the adjustments that have always been in place. When I started in the Trust for LPT I was a receptionist out-patient clerk. You don't **eat** because your patients facing you, you go and make a cup of tea and why [sic] you are making a drink for the rest of the team that is when I was having my quick meal."*

324. Despite the OH letter of 26 January 2022, the Tribunal find that the claimant complains that she now needed during Work Trial 2, to have the break ***away from her desk*** because she wanted to warm up and eat porridge. There is no evidence that the choice of food was anything other than a preference and no evidence that she could not eat snacks but had to eat warmed up food like porridge. However, that said, Ms Physick's objection was because she wanted the claimant to continue, in effect, to work during the breaks when she needed to eat, and in terms of the reasonableness of the adjustment to eat away from her desk, this is at a time when staff were also required to wear face masks in the office.

325. The respondent had for many years, been aware of the need for the claimant to have diabetic breaks but in the absence of a Passport or updated TAA, this had not been communicated to the claimant's new managers.

326. The claimant has been found to be disabled because of Type1 diabetes from December 1989 and the respondent accepts that Ms Dunkley had actual knowledge of this impairment on or about 17 January 2022 and that Ms Physick had actual knowledge on or about 14 January 2022.

327. The claimant alleges that Ms Physick threatened to remove her adjustment because she had had put in a grievance and that this involved Ms Dunkley because Ms Physick would have spoken with her manager about this. While the claimant denies that such a conversation with Ms Dunkley took place is mere speculation, she could not identify any evidence to support her belief that such a conversation had taken place, and this is refuted by the respondent. The Tribunal do not find on balance, that the claimant has established that such a conversation had taken place before the review meeting on 2 February 2022 when the issue of the breaks was raised.

328. During an informal meeting on 18 October 2022 with Ms Rosie Jones, Acting Administration service Manager, to discuss the complaint raised in the 6 April 2022 letter, the claimant did not appear be pursuing the belief that Ms Physick had been acting maliciously and that her behaviour was because of the grievance. In cross examination the claimant accepted that the record by Ms Jones in the outcome letter of what the claimant had said in that meeting was correct, which was:

"You felt that Sarah [Physick] had been trying her best and acknowledged that it would have been difficult for her." [1386]

329. The claimant offered no explanation for why she had told Ms Jones that she felt Ms Physick had been trying her best. This does the Tribunal find, undermine the reliability of the claimant's perception now, of how Ms Physick behaved toward her at the time and of her belief in the reasons behind it.

330. The Tribunal find that the most likely explanation for the conduct of Ms Physick was that other staff in her team with diabetes manage the condition by eating at their desks and without OH advice, she could not understand why the claimant could not do the same.

Sick leave: 11 April – 18 September 2022.

331. The claimant then went on sick leave from **11 April** which lasted until 18 September 2022. The claimant returned to this Work Trial therefore for only a few days.

332. Ms Dunkley took really no action in response to the OH report of the **23 March 2022**, from the time she received it on **24 March to 11 April**; she did not take any steps to check whether a room could be located for the claimant and consider how that may work with training, she did not look at flexible working or ask the claimant what flexibility she needed although other employees have flexibility in their working arrangements, she did not arrange to provide noise cancelling headphones or contact HR to ask them to arrange this. While Ms Dunkley knew about the policy on Passports, she took no steps to put one in place or ask HR about arranging it. In cross examination, other than there was a short time before the claimant went on sick leave, Ms Dunkley really offered no explanation for making no efforts to implement the adjustments for a referral which had been 'pushed through' as urgent.

333. It was not put to Ms Dunkley however, in cross examination, that the adjustments were not made, and the break threatened to be removed, because of anything to do with the grievance. It was only put to her in cross examination that she did not make the adjustments; "*because you did not want to."*

Grievance - outcome

334. In terms of the outcome of the grievance, it was decided that the offer for the claimant work on her own at The Willows could have been considered sooner following her return to work with Ms Kaur after her sickness absence, and that would have a reasonable adjustments to put in place [1080] but otherwise found that sufficient support was provided.

335. In terms of Work Trial 1, it was decided that appropriate support was in place although it was appreciated that access to Ms Price may not have been as timely as the claimant would have expected.

336. In terms of Work Trial 2, it was noted that there were operating guides to refer to and a structured training plan. It was also noted that certain tasks which typically take up to 5 or 6 minutes to complete were taking the claimant 29 or 20 minutes, acknowledging that over time speed and accuracy can improve but that this was her rate during the trial. It was also pointed out that her at risk status had been extended to 16 weeks to allow for the delay in starting the trial.

337. In terms of a complaint that the support from Access to Work should have been allowed to conclude before the work trail was concluded, it was noted that the 6 sessions started in November 2022 and she was allowed time to access the sessions in January and February 2022 and her coaching plan adjusted accordingly but that the sessions were not to assist with specific tasks and this complaint was not upheld either.

338. A number of recommendations were made [1084/1085] including that the work Trials were IN structured and stable roles. It was decided that there would be no advantage in moving to another area and the claimant should continue in the Administration Assistant role within FYPC. Further, it was decided that adjustments in the OH report of 23 March 2022 were to be considered and supported where possible, the claimant to have continued coaching sessions with Access to Work, regular reviews twice per week with her current line manager to review progress and a formal review to discuss the outcome of the trial. It was also decided that the respondent should have collated information about the claimant's health and shared this information with the manager, to avoid the claimant having to repeat the same conversations around the adjustments she needs.

Grievance Appeal

339. The claimant appealed the grievance outcome on 26 April 2022 [1091] and complained that it was rigid and predetermined.

340. Ms Claire Taylor, Head of Operational HR dealt with the application.

341. The claimant challenged the findings of the grievance and alleged that the investigation was biased, not fair and not thorough. She requested a number of adjustments including a welfare contact which Ms Taylor agreed would be provided but for reasons Ms Taylor cloud not explain, one was not arranged. It was agreed to provide the documents for the hearing 3 weeks in advance rather than the usual 5 days.

342. The claimant asked for an external independent investigator to conduct the appeal. Ms Taylor, responded on 6 May 2022 stating that it was outside the respondent' policy to appoint an external investigator but this could be considered by the appeal panel and included within their outcomes. The claimant raised no connection between this request for an external investigator and any of her disabilities or their effects.

343. Ms Taylor also confirmed that a subject access requests the claimant has asked for, which was quite extensive [1087] was due to be returned by 25 May and this would be taken into account when arranging the appeal date and by agreement this would extend the time of the appeal outside the time scale set out in the policy [1104].

344. The claimant wrote on 31 May [1111-1112] explaining that she needed more time to prepare for the appeal because of a lung infection and asked to delay the hearing to accommodate further adjustments which included breaks, a separate room for her use, a colleague to accompany her, the management case to be provided **3 weeks in advance**, a transcript of the digital recording and minutes provided within 5 days of the hearing.

345. On 6 June Ms Taylor wrote to the claimant to explaining that she would be referring her to OH and that a number of the adjustments fell outside the grievance policy. The referral was made [1117-1120] and a report was obtained on 24 June 2022 [1123-1126]. The report dated **21 June** confirmed that the claimant had the following conditions:

"Insulin dependent diabetes duration – 30 years
Anxiety related disorder duration -12 years
ADHD – following diagnosis one year duration"

346. OH, stated that:

"She has a combination of multiple physical and mental health related and neurodevelopment impairments that impact on her activities of daily living especially if she was not taking medication:

She would be at risk of having hypoglycaemia i.e. low sugar potentially leading to confusion and collapse, if she did not have structured eating patterns

Stress and anxiety impact on her concentration, worsening fatigue, short term memory recall, potentially irritability and loss of confidence.

From a ***neurocognitive perspective e.g., learning, retaining, information, organisation capacity and impulsivity …"*** *Tribunal stress*

347. OH, set out in its report the claimant's suggestions which Professor Kaul was of the view should help alleviate some of the functional impairments, that included a companion, fluid/food breaks, advanced notice of the management case, timely access to a digital recording and written minutes after the meeting. He did **not** recommend an external investigator or otherwise comment on what the benefit of this may in terms of her health issues.

348. The claimant went on holiday from 9 and 18 July and 22 to 29 July.

Appeal Hearing

349. The panel for the appeal was chaired by Andrew Moonesinghe, Pharmacy Services Manager, accompanied by Simon Guild, Deputy Head of Nursing for Older Persons' Mental Health with HR support was provided by Mandy White, Senior HR Business Partner and the hearing arranged for **29 June 2022.** The claimant requested an extension to accommodate a number of adjustments and because she had been ill with a lung infection.

350. The appeal hearing itself was recorded and a transcript has been provided [1168 -1243].

The hearing on 2 August 2022

351. The hearing was arranged for the 2 August and on 8 July Ms Taylor had written to confirm the adjustments which would be accommodated [1130-1132]. Most of the adjustments were made; breaks were accommodated, the claimant was allowed to be accompanied by a colleague, the management case was provided on **13 July** (3 weeks in advance) but it was explained that the suggested time frame to provide a script and minutes was not feasible but the claimant was offered a copy of the recording of the hearing. Ms Taylor gave undisputed evidence to provide the transcript of the meeting would require a member of her team to focus solely on the transcribing for a week.

352. Mr Moonesinghe [1171] informed the claimant that if after deliberations a verbal decision could not be made that day, they would provide a written decision within 5 days (by about 7 August) On 5 August 2022, the claimant sent further information [1245]. Mr Moonesinghe replied on 9 August apologising that her email had gone into his junk email. This contributed to some delay.

353. The claimant was contacted by Ms White about an extension to the timescale and informed her that Mr Moonsinghe was on leave, but he had agreed to meet with the panel during his leave to deliberate on 12 August, in order to finalise the outcome letter [1249]. The outcome letter was sent on 15 August 2022.

354. The claimant in cross examination alleged the delay was deliberate but then accepted that there was **no** bad motive behind the delay.

355. The Tribunal find that while not all the adjustments were made, the appeal was not conducted in a 'rigid' manner in terms of the practical arrangements which were made.

Most adjustments were made, or alternatives made, OH advice was sought and Ms Moonsinghe was prepared to use some of his leave to finalise the process.

Appeal outcome

356. The panel did not consider that the grievance had been conducted unfairly and that there was any need for an external investigator. The claimant had not explained what disadvantage caused by her disability this would address, other than a general concern that the panel would be bias. Mr Moonsinghe was satisfied, taking into account the roles of those involved in the grievance process, that there was sufficient separation in terms of their positions within the respondent's organisation.

357. The appeal panel determined that grievance hearing had overran by 1 hour and could not be extended further as the meeting room was booked after this time but that the claimant did not, during the meeting, express concern about being rushed. They also found that the additional information the claimant had provided for the appeal did not include additional evidence not already considered by the investigation team.

358. The appeal was upheld in part because it concluded that while a number of reasonable adjustments had been made, it would have been helpful for the claimant to have been issued with a Passport and that during work Trial 1 it would have been reasonable to allow the claimant to record the MS Teams training sessions and that may have benefited her.

359. In terms of its finding that the claimant had asked for redeployment, the panel had been provided with a timeline prepared by Julie Liggins [943] which was wrong because it states that the claimant was sent her redeployment and notice of termination letter on 7 October. However, while Ms Moonsinghe was not sure whether he was aware that the letter had not been sent until November, he considered that the claimant had access to and should have read the redeployment policy.

360. In terms of the criticism that there had been no critical analysis of the evidence, (because all the grievance panel had considered was Jinny Kaur's account of having told the claimant verbally that her employment would terminate at the end of the redeployment period), the grievance panel had not asked for more clarification from Ms Kaur but had accepted her account as set out in her witness statement over the claimant's. Mr Moonsinghe considered that the panel had looked at both accounts and the timeline and had preferred Ms Kaur's account. The grievance outcome letter had not actually however addressed whether the claimant had known that she would be dismissed [1079] however, it was clear that Mr Moonsinghe had formed that view and understood that the grievance panel had, she had been aware.

361. Mr Moonsinghe informed the Tribunal that he had reached a view that the claimant was given the information that her employment would be terminated if she did not secure another job, at the end of the redeployment process, verbally. He was of the view that she was telling the truth when she was complaining that she had not been told this but believed this was because she had not processed the information.

362. The claimant complains the policy was not provided to her and Mr Moonsinghe in his evidence refers to it being available on the internet, but he had understood it had been provided to her and the claimant had not complained she had not been given a copy. On checking the timeline Ms Liggins had provided, this made no mention of the policy being provided at the review meetings. The Tribunal find that it is clear that at the time of the appeal he was operating on the understanding the policy was provided in the October letter but there was no evidence that it had been.

363. Mr Moonsinghe accepted that his decision may have been different on the issue about whether she had been provided with the redeployment policy had he known that the claimant had not had the October letter until November and accepted that at the grievance hearing, the issue of whether she had been sent the policy could have been looked at in more detail but maintained the belief that a conversation had been had with her about what would happen at the end of the redeployment period.

364. Mr Moonsinghe accepted that there could have been further critical assessment of the date she received the redeployment policy however, he remained of the view that it was still the claimant's decision to seek redeployment.

365. The claimant did try and provide her amended notes of the Wellbeing Review meetings at the grievance [1175] and complains these were not considered in support of her contention that she did not know her employment would be terminated [447]. However, Mr Moonsinghe had taken account of the fact that the respondent's notes of the meeting record that 12 weeks' notice would be issued at the start of the redeployment period and the claimant had not corrected that in her comments.

366. The Tribunal found Mr Moonsinghe to be a credible witness. He readily conceded that there could have been more critical analysis during the grievance on the issue of when she received the policy and admitted to not being clear about when the October letter had actually been sent. The Tribunal accept the evidence of Moonsinghe that he had seen the claimant's own notes of the Wellbeing Review meeting on the 15 September 2021 as part of the appeal and that he had formed the opinion that whether she had been sent the policy or not, she was told what would happen at the end of the redeployment process if she had she not secured new employment. The Tribunal consider that this opinion, based on the evidence presented, was a reasonable opinion to form. He had seen the letter sent in November and was aware that the claimant had not raised an appeal, grievance or challenged its contents at the time.

367. Ms White of HR confirmed that if the outcome of the grievance or grievance appeal was that the claimant had not been made aware that she would be put on notice of termination during the redeployment process, she would be given the option to withdraw from the process.

368. The Tribunal do not consider that the evidence supports a finding that the outcome of the grievance appeal was predetermined.

369. As for the issue about Ms Kaur delaying over the Access to Work sessions, Mr Moonsinghe felt this had been properly considered at the grievance stage, that it was as an employee led process and the claimant had not wanted to progress it until her return and therefore considered Ms Kaur was being proactive. The Tribunal also find that this was a reasonable view to take on the evidence as presented to him.

370. However, at the grievance it had been held that during Work Trial 2 the adjustments had been implemented as recommended by OH however, and as confirmed by Ms Dunkley, no action was taken between the report received on 24 March and when the claimant went off sick on 11 April. The outcome does not address this period, but states adjustments were made [1082]. Mr Moonsinghe in his outcome for the appeal, refers to the 22 /23 March 2022 OH report and that the recommendations had not been made because the claimant has not been at work. The claimant does not address that specifically during the hearing and while Mr Moonsinghe may be criticised for not finding that Mr Singh cannot have carried out sufficient investigation into what actually was done on the receipt of this OH report in Work Trial 2 by Ms Dunkley, his view is clearly that there had not been sufficient time to implement the adjustments i.e. from when she

returned on 4 April from leave to when she went in sick leave on 11 April (5 working days) . While it may well be argued some steps should have been taken, the claimant was only back a few days before she went absent again. The Tribunal do not find that this Mr Moonsinghe not identifying Mr Singh as failing to specifically address what was or was not doing during the short period since receipt of this 22/23 March, as evidence that the grievance appeal was predetermined or rigid.

Appeal decision – extension period

371. The normal Work Trial period under the redeployment policy is 4 weeks [195]. The claimant was granted an extended trial of 6 weeks as an outcome of the grievance process after a standard 4 week phased return, as provided for under the Policy.

372. The appeal panel decided that an extension to the normal trial period would have been reasonable had the claimant stayed in post and therefore it was recommended that an alternative trial would be sought, and the claimant afforded an extended period of 6 weeks. This was not a rigid approach (which would have been to follow the policy) but in the Tribunal's judgment Mr Moonsinghe gave insufficient consideration to what extension would be appropriate/

373. Mr Moonsinghe confirmed under cross examination that he did not refer back to OH but explained the rationale for the period of 6 weeks as being as follows:

"6 weeks had proven successful in other trials with people who needed adjustments".

*"I went with my gut instinct on that and felt that **6 weeks** would be sufficient"; and*

"I made a call that 6 weeks would be sufficient, it was above what was in the policy."

374. While Mr Moonsinghe's background is psychiatry and the other panel member Simon Guild, was a mental health nurse, no one on the panel was a OH expert and they did not have access to the claimant's medical records. It was not an informed decision, it was a 'gut instinct'.

375. It was not put to Mr Moonsinghe in cross examination that the way he managed the appeal process, his decisions or the length of the extension decided upon, was because of her disabilities (i.e., direct discrimination) and neither was it put to him that he had made those decisions because of any protected acts.

376. The claimant complains that the appeal was '*rigid and predetermined'* and that this PCP placed her at a substantial disadvantage in that an external investigator was not appointed, no critical assessment was carried out, the claimant's evidence was not considered, the impact of the actions on the claimant's ability to perform the work trials was not considered and a fair and thorough investigation was not carried out. However, the claimant did not lead any evidence on the way the grievance appeal process had been conducted for any other employees, she did not identify a comparator.

377. The Tribunal find that the respondent's policy is not to use external investigators normally to hear grievances or grievance appeal. The claimant's evidence was considered as is clear from the discussions recorded in the transcript of the meeting. The impact on her Work Trials was also considered, hence the decision to extend the period of the Work Trial.

378. On the 10 August 2022 the claimant reported to her GP [1924] that she: "...*doesn't want to return back at [sic] her job at all even if they agree to reasonable adjustments..."*

379. On 7 September 2022, she reports to her GP that [1924].

"…at work feels things gottenn bette rint had [sic] she is accepting she might not return to work, is being offered redeployment [sic] in a new role but feels cannot learn new skills and might well have to end her role.."

Work Trial 3 : 26 September 2022 – 2 December 2022: Audio Typist

380. Following a period of sickness and annual leave, the claimant was found another role. Ms Hamore sent an OH referral off on **23 September 2022** [1315]. The OH referral included a copy of the relevant job description and person specification. OH, health was asked to comment on whether the role was suitable for the claimant and what adjustments she may require. However, this advice was not provided. The claimant contacted Ms Hamore on 4 November 2022 to alert her to the fact that no OH advice had been received, following which Ms Hamore sent an urgent referral [1420-1421].

381. A Passport was prepared and sent to Ms Lyndsay Wright, the Administration Manager, on 23 September 2022 [1299]. This referred to her need for a 10-15 minute mid-morning break to eat away from her desk and with respect to **ADHD** stated [1294].

- *Does not need help with tasks but tasks **will take longer whilst learning.***
- *Ability to record training sessions to help with learning.*
- *Ability to take notes whilst being trained verbally.*
- *Needs any SOPs/notes from training sessions.*
- *Coaching sessions (Provided by Access to Work).*

382. The claimant started the new work trial on **26 September 2022** as an Audio Typist supporting consultants working in paediatric clinics. This was a role the claimant agreed to take on and believed would be suitable for her.

383. Ms Hamore was not aware that the 6 weeks for the Work Trial was not an OH recommendation and she considered that she could not extend the trial period further therefore even if she felt it was required. It was the responsibility however of Ms Hamore to ensure that the claimant had what she needed in the trial and to set up the Passport.

Noise cancelling headphones.

384. The OH report of 23 March 2022 [1000] had recommended noise cancelling headphones. Ms Hamore had sight of this report and accepts that it was an oversight on her part not to arrange this until the claimant raised this with her. These would not be provided until December 2022.

385. The Supporting Performance Policy and Procedure (SPP) [243] provides that managers will select new staff *'carefully'* [250]. However, while normally someone applying for this role would be interviewed and have to take a typing test, the claimant did not go through that 'careful' selection process.

386. The job involved the claimant typing letters dictated by consultants working in clinics, about 16 consultants in total. It is not in dispute that it was generally easier to understand the dictation of certain consultants and more difficult with others, for reasons including where English is not their first language. The typists are also required to restructure sentences where required. The claimant had 3 years-experience as an Audio Typist working for BigHands albeit in adult mental health services (rather than paediatrics) and therefore considered that this was a role she was able to do, however it proved to be a challenging role with high expectations regarding accuracy and output and the consultant' used different medical terminology.

387. The claimant did give evidence that had she been given a typing test before starting the job; "*I would have* known *on typing test that I would not have met the standards of this team."*

388. Given that those who manage this team are aware of the demands of this job and the complexity of it, had they given the claimant a typing test with the sort of dictation she would be doing, she could have considered an alternative role which may have been more suitable for her. Knowing that she had various disabilities including ADHD and had not succeeded in the other trials, and that working for BigHands in mental health is different to working in this type of team, it appears to his Tribunal to be remiss of the respondent in not giving the claimant a typing test before she committed to this job. The claimant would then have had a better understanding what was required of her and the respondent of what adjustments she may require and put those in place before she started.

389. The respondent also did not wait to get the opinion from OH on the suitability of the role and what adjustments may be required, before the claimant officially started the Work Trial on 24 October 2022. They had not made the initial September 2022 referral as an urgent referral and not been diligent in chasing it up.

390. A fellow typist, Luke Lockwood, was allocated to support the claimant. He would check her letters and provide feedback and did so throughout the trial period. The claimant was expected to reach the stage at the end of the trial, of not requiring regular checks, only 'spot checks'.

391. She was not required to wear a mask and was content to be at work without one.

392. The claimant had a 4 week phased return to work [1325].

393. The actual 6 week trial was to run from **24 October to 2 December 2022.**

394. HR had not provided the June OH report to Ms Wright along with the Passport but neither it seems did Ms Wright enquire whether there had been an OH report or would be one.

395. The Policy provides that on a **phased return** OH *where appropriate*, must provide management with a report [163 para 4.5.2].The report should specify the adjustments recommended in order to facilitate the return to work. The policy refers to a phased return being appropriate where someone has been off for a number of months. Ms Wright under cross examination seemed to consider that although a phased return to work had been deemed necessary and the claimant had various disabilities, because she did not know, and it seems had not taken steps to enquire, how long the claimant had been off work sick before she joined them, it did not occur to her that an OH may be appropriate.

396. It appears that neither HR nor Ms Wright applied their mind to whether assistance should be obtained from OH before the claimant started the trial. The OH report in June 2022 had focused on the adjustments which may assist with the grievance process, not with a specific role. It would transpire later when an OH report was obtained, that the recommendations would prove helpful to the claimant, but she would then be operating under the pressure of an impending deadline.

397. Ms Wright in cross examination accepted that she 'supposed' they should have had the OH advice before putting in place adjustments for this role and without it, they did not know the true extent of how to manage her conditions.

398. Ms Rosie Bond is the Senior Clinical Secretary and Team Leader for the 19 members of the medical secretary team and reported into Ms Wright. The claimant would be reporting directly into Ms Bond. Ms Bond was told the claimant was joining them under the redeployment process, she had no experience of the process and did not read the Policy and she had nothing to do with the phased return and did not discuss it with Ms Wright or HR.

399. The claimant was provided with a SOP which involved the competencies which would need to be signed off after 6 weeks [1364]. Ms Wright was provided with the Passport setting out her health conditions, on 23 September [1299]. The Passport did not however address what adjustments may be required in terms of how training should be delivered for example and therefore the claimant was provided with a standard training plan.

400. The training plan Mrs Wright accepted was a standard plan which applied to all new starters, there was no modification to the plan that was in place when the claimant started week 5 (after the 4 week phased return). Ms Wright argues that the claimant did not ask to change the plan to allow her more time to learn the new tasks, however, despite the Passport stating that those with ADHD taking longer to learn, she did not raise with the claimant that this was a standard plan, and they could extend or amend it to reflect her needs. The Tribunal consider that the claimant would not have known at least initially, what the job was going to involve and how long she may need to learn it and she was of course under pressure to perform to the required standard. The obligation nonetheless was on the respondent to make the adjustments which were reasonable.

401. The training plan was a fairly simple document which references out to the competencies for the role and the SOP [1371 -1475]. It provides that from week 5 the target is for one clinic to be completed with: "*minimum corrections".* That same standard target was set for the claimant.

402. The first 4 week phased return appears to have been a fairly unstructured, and involved the claimant becoming familiar with the team, starting to understand the SOP and competencies and carrying out some 'easy dictation'.

403. Ms Wright accepted that during the phased return the claimant's work was not 'tested', this period was she explained, about reading the SOP and getting use to the role. Three days into the role, according to the standard plan, Ms Wright accepted that the expectation or target was that she had minimal corrections to her work and to complete one clinic and highlight to the managers if this was not possible. However, she alleged that this is **not** 'set in stone' and if someone is struggling, they would look at flexibility. The Tribunal consider that Ms Wright was clearly of the understanding and view therefore that there is the ability within the department to allow it seems more time to reach the required standard however, this was not communicated to the claimant and the failure to do that would not doubt have made her feel under pressure to reach the set target.

404. Ms Bond in her evidence in chief confirmed that the usual training for new starters in the role is **10 weeks** [w/s para 9] with a **6 month** probationary period but the expectation is that they will be competent i.e., do not need their work to be checked (other than spot checks), after **8 weeks**. In cross examination she accepted that the usual training could not all be done in **6 weeks** but 'most of it' could and that the person may need further training after that period.

405. Ms Wright stated that they have not had anyone not pass the trial before, including employees with ADHD.

406. The evidence of Ms Wright is that she was not aware at any stage while the claimant worked with her that she had put in a grievance.

407. It was never put to Ms Bond in cross examination that she was aware of the claimant's grievance or that she did anything because of the grievance. There is no evidence to support any finding that Ms Bond knew about it or subjected the claimant to any detriment because of it. It would in any event be unjust to make such a finding where this allegation was not put to Ms Bond in cross examination . The Tribunal find that she did not know about the grievance.

Requiring minimal mistakes in week one of a work trial : work trial 3

408. The claimant was told that by the third day she needed to complete 1 clinic, with minimal mistakes. She was not told that she was expected to meet the competencies of the whole job with minimal mistakes in the first week.

409. There is an email from Ms Bond to the claimant on 31 October 2022 [1387] referring to the typing competency sign off: *"You will find your tasks increase once you start* completing *more clinics, but this is part of a typist's normal working day. It is also factored into your training plan hence why we ask for at least one clinic from start to find per day with no mistakes…"*

410. Ms Wright and Ms Bond under cross examination stated that the wording was incorrect and should have read minimal mistakes and Ms Bond in cross examination, stated minimal meant no clerical risk mistakes, just minor grammatical errors. The claimant would not meet that target.

Temperature in the room

411. The claimant worked in an open plan with one other person and complains of the temperature in her work area between **26 September 2022 and the first week in January** 2023**.**

412. On **24 October 2022** the team Leader, Rosie Bond provided a radiator for the room the claimant was using, to share [1381]. The claimant complains that the room was so cold she and her colleague had to sit in their coats, use blankets and a hot water bottle.

413. The Tribunal accept and Ms Wright gave undisputed evidence on this, that the boiler was working intermittently during December and January and the estate team came out on a couple of occasions to repair it. There had been a previous problem with it. However, while there were other rooms the claimant could have been moved to which Ms Wright confirmed in evidence. The Tribunal accept that the claimant elected not to move because by this stage her workstation was all set up and she did not want the upheaval. The Tribunal is mindful that the claimant believed she had only 6 weeks to reach the required performance and it is understandable that she wanted to avoid as much disruption as possible. However, it appears from the contemporaneous documents (see below), that she was initially told in November that she could not be moved and then when it seems the temperature had dropped further in December, was told they may need to.

414. Ms Wright confirmed that it was the responsibility of the Administration Support managers to inform the Health and Safety team if the temperature in the room was too low but while there were thermostats, she did not check them and did not know if anyone

else did. She therefore did not know what the temperature was. It seems no one was actually monitoring the temperature despite the known problems with the heating in the building.

415. The claimant complains that a cold temperature makes her asthma and bronchiectasis worse. The Passport did not mention asthma and it did not raise the issue of the impact of cold weather. Ms Wright denied any knowledge of the claimant having asthma or of the effect of cold weather on those conditions.

416. It is denied that Lyndsey Wright or Rosie Bond had knowledge that the claimant had asthma during the period of the alleged acts of discrimination.

417. It is accepted that Lyndsey Wright had knowledge that the claimant had bronchiectasis on or about **23 September 2022**. It is accepted that Ms Kaur had knowledge that the claimant has asthma from January 2022, Andrew Moonsinghe from about 25 May 2022 and Mandy White from about 25 May 2022 .

418. The respondent accepts in the agreed list of issues that the claimant can have difficulty, due to both conditions, breathing at times.

419. It was not put to the claimant in cross examination, that the cold temperature did not cause her any difficulties because of breathing due to her conditions of asthma and bronchiectasis. It was put to her that Ms Bond reacted positively in finding a radiator when she found out the claimant had a problem with the temperature in the room and was trying to help her. However, the burden is on the claimant to establish the symptoms of her disabilities and she produced no evidence to suggest that cold temperature causes difficulties for those with asthma or bronchiectasis or for her in particular.

420. On **3 November 2022** [1389] the claimant contacted Ms Hamore and raised concern about the temperature of the room she was working in. Ms Hamore spoke to Ms Wright about getting heaters for the room.

421. On the **30 November 2022** it is clear from the contemporaneous documents that the temperature in the room remained a problem. Ms Bond wrote to the claimant, copying in others including Ms Wright [1455]:

"I have just spoken to Nav about the heaters. ***Nav has underlying health conditions*** *so is averse to feeing a lot more colder [sic].* ***We are unable to move her due*** *to her training with the typists.*

Please can you tell the team that if they borrow the heater from the row if they could replace it at the end of the day ? *She also told me that she struggles to get under the desk to plug it back in.*

I will email Urmilia to see where we are with the air conditioning…." Tribunal stress

422. Ms Bond gave evidence under cross examination that she did not know which health conditions were impacted by the cold and it seems did not make any enquiries and did not concern herself with understanding which they were and what the impact was, which suggests a lack of real engagement with the claimant's needs and health issues.

423. Ms Bond was also unfamiliar with the condition bronchiectasis, did not ask the claimant about it, did not enquire of HR and did not carry out any research to understand the effects of it, this is despite the fact Ms Bond had management responsibility for the claimant including matters concerning her welfare and training needs.

424. It is the Tribunal find, remiss of HR not to meet with the managers and the claimant and ensure they understood what her conditions were, the impact and her needs.

425. The Tribunal find that others working in that office clearly felt cold and there we insufficient heaters to go round because staff were being told to replace the one borrowed from the room where the claimant was working.

426. On **21 December 2022** following a meeting with the claimant, Ms Bond wrote [1678] that they had discussed how cold it was over the cold spell in the HR area and" *if this happens again we may need to move you for the day*". She refers to it being difficult to set up at another desk for the day, but her wellbeing was just as important. That the temperature was impacting on her wellbeing was therefore being acknowledged.

427. On the 4 January 2023 [1677] Ms Bond refers to the claimant again highlighting the cold in the HR area the day before due to the boiler breaking down again and Ms Bond refers to this as an on-going issue for many years. The claimant is told that if she has difficulties she can be relocated to a desk in another area for that day or period of time but appreciates that this would be difficult because the claimant's desk and hard drive is set up just as she needs it.

428. The Tribunal appreciate why the claimant may, despite being cold, be concerned about time being spent moving to another area in circumstances where she is not being told that the time it would take to resettle her will be taken into account in terms of the length of the remaining trial, which would understandable deter somewhere concerned about not passing the trial and losing their employment.

Meeting the competencies

429. There is an email on 9 November 2022 [1419] from Ms Wright to Julie Wright reporting what Ms Bond had told her about a meeting she had held with the claimant that day. It refers to the claimant informing Ms Bond that the role was not heading in the direction she wanted and feels that it is not for her.; *"She is such a lovely lady, gives 100% and really tries her hardest…she did mention only typing for -2 clinician's she understands, but this isn't something we could sustain and wouldn't be fair on Nav or the rest of the team."*

430. The claimant complains that she was told in the first review meeting during the first week by Ms Bond that she did not feel that the role was right for the claimant and that the standards expected were very high. The Tribunal consider that it is likely, give the concerns about her performance that something along these lines was said to her.

431. However, Ms Hamore replies shortly afterwards that same day [1417] (after the claimant had called her) and refers to there being crossed wires, that the claimant indicated she was finding certain aspects difficult, and it may not be suitable for her but does not want to fail and has asked for reasonable adjustments regarding the clinics she supports. Ms Hamore informs Ms Wright: *"It is very important that we consider any adjustments which would reasonable, so she had the best opportunity to meet what is expected over the trial period."*

432. Ms Wright replies referring to the conversations she and Ms Bond had with the claimant and refers to the following issues [1417]: the claimant can only type for 3 out of the 9 consultants, she is not to a level expected with the consultants it is easier to type for, the impact on the team workload because of the support the claimant is receiving and the team are behind in clinic typing, the numbers are the highest they have had in a long time

433. On the 11 November 2022 the claimant sent a letter to Ms Hamore [1422].The claimant refers to finding 3 to 4 doctors manageable but felt the standards she was required to reach within 6 weeks were not reasonable without a number of adjustments, namely: to have the acceptable standards at competent level and not excellent and reduce the workload to 3- 4 doctors and have support from Access to Work.

Referral to OH

26 Ms Hamore made a referral to OH for advice on **22 November 2022** [1427]. The OH advice on 23 November 2022 [1433] is that:

"Functionally ADHD has been associated with time management and organisational challenges in the workplace . She has received some limited psychological support and ideally would have had a trial of medication but there is a long waiting list for the NHS …"

"Her original experience with audio typing is with adult mental health services and therefore a switch to a paediatric structure and medical language will take some time".

"Adults with neurodiversity are well known to take significantly more time when it comes to transition to new environments then neurotypicals."

*"…**this role is technically suited for her with appropriate lengthening of the appraisal."***

" She needs to contact Access to Work in order to explore if there are any other ADHD relevant strategies that could assist her transition into this proposed role." Tribunal stress

434. Professor Kaul of OH set out a number of adjustments:

- *Noise cancelling headphones.*
- *Limiting distractions when she is focusing on her typing.*
- *She appears to have noise hypersensitivity.*
- *She recognised that english grammar and sentence structure is currently a challenge for her but is open to exploring IT technology solutions i.e., Grammerly or M365 editor functions in word documents.*
- *The employers will need to consider **if for the initial three months**, she is only allocated audio typing for a limited number of paediatricians whilst transitioning and gaining further experience with other introduced slowly…" Tribunal stress.*

435. The report also identified that there is a; "*possibility that there could be as yet some* undiagnosed *co-occurring conditions e.g., dyslexic traits."*

436. The claimant had been provided with headphones, but they were not noise cancelling.

437. In response to a question from the panel the claimant was asked to clarify whether her position is that the challenges she faced with grammar and sentence construction was due to ADHD or at that time, what was undiagnosed dyslexia. The claimant was non-committal: "*he [Professor Kaul] suspected it was dyslexia but to do with ADHD…"*

Adjustments

438. Ms Hamore then contacted Mandy Wright and Claire Taylor to discuss an extension to the trial as per OH advice. It was agreed to extend it by **another 4 weeks**.

439. The rationale for a further 4 weeks as explained by Claire Taylor was as follows: "…*a trial is ordinarily 4 weeks so seemed reasonable to start it at 4 weeks with adjustments…."*

440. However, the evidence of Ms Wright in cross examination is that HR decided on the length of the extension with no consultation with her,

441. When asked what Ms Hamore took into account when deciding on the extension, she explained that 4 weeks was considered "*reasonable*" taking into account the support the claimant needed and the impact on the service. There was nothing set out in writing in terms of any impact assessment however, the Tribunal accept her evidence that she discussed the *impact* with the managers and how far behind with work they were. The Tribunal find however that her assessment was limited. She was unable to confirm to the Tribunal actually how far behind they were at that time.

442. Ms Hamore also believes the impact on Mr Lockwood was a consideration however she had never spoken with him but told the Tribunal she had "*thought*" it was difficult for him to support the claimant and do his own work and that he was "*struggling*", and it had an impact on his mental health. However, this is not consistent with those who managed Mr Lockwood day to day. The evidence of Ms Bond is that he felt that he would like a short break but was otherwise happy to continue to support the claimant. Ms Wright understood that he was happy to continue to support the claimant. The Tribunal find that the evidence of the managers who managed Mr Lockwood day to day, are more reliable in terms of the impact on Mr Lockwood and Tribunal find that this is likely to have been the view that Mr Lockwood' expressed at the time and would have expressed, if asked.

443. If Ms Hamore believed that Mr Lockwood was struggling to support the claimant, there was inadequate grounds for that belief. However, the Tribunal did not find her evidence credible on this issue and do not accept that she was operating at the time on the understanding that there were any real concerns regarding the impact on Mr Lockwood in terms of his own health. The Tribunal do not find it plausible that Mr Lockwood would have said something so different to HR and that if he had, HR would not have made some record of that at the time.

444. Ms Hamore accepted under cross examination that she could have asked OH for more guidance on what extension the claimant would require to succeed in the role but did not do so.

445. Ms Hamore does not assert that the period of the extension was decided with reference to any specific needs or pressures of the team, but it appears to have been based purely on what the standard trial period is, allowing for the implementation of adjustments.

446. The claimant had a meeting on **8 December 2022** with Ms Wright, Ms White and Ms Bond (Ms Hamore was on annual leave) and it was agreed that a number of adjustments would be put into place. Ms Wright had no explanation for why the meeting took a further 2 weeks to arrange after receiving the OH report on 23 November 2022.

447. Ms Bond was never shown and did not ask to see the OH report, even though it was in part her responsibility to implement the adjustments. Ms Bond personally assumed responsibility only for reducing the claimant's workload. The adjustments which were put in place included that the claimant would not type for certain consultants whom she struggled to understand unless others were not available, Microsoft Editor 365 was to be set up on her computer to assist her with spelling and grammar, a blue screen was to be installed to help with the noise and distractions in the office, there was to be a discussion with the team to reduce the noise in the claimant's area, the claimant was to contact Access to Work immediately and Mr Lockwood was to continue to provide the claimant with 1 to 1 support.

448. The claimant was informed that the trail would be extended by **4 weeks** to **6 January 2023** by which time it was expected that the claimant would be receiving "*minimum feedback*" and would be at the 'spot checking' stage [1556]. This was therefore a trial of the initial 6 weeks plus the further 4 weeks, taking it to **10 weeks.** The claimant was then told on 13 December that trial period would be further extended to **20 January** to factor in the Christmas break [1610].

Extension - victimisation

449. Julie Hamore the Tribunal find, was aware of the grievance but it was never put to her that she made any decision or did anything because of the grievance. To victimise someone is a serious allegation and if being pursued it would be unjust to make a finding against an individual where this allegation has not been put and counsel for the claimant does not in submissions argue otherwise or attempt to argue that other evidence meant that putting this allegation was not required.

450. There are no documents or other witness evidence which would support a finding that Ms Hamore, Ms Wright, or Ms Bond did anything as alleged, because of the grievance the claimant had raised.

451. It was Ms Hamore and not Ms Bond or Ms Wright who decided on the length of the extension to the trial period and while she failed to consult with the managers or seek further OH advice or indeed ask the claimant how long she felt she needed, she was the Tribunal accept, operating on an understanding that she had to initially implement the recommendation following the grievance of 6 weeks. Thereafter, in light of OH advice she considered that allowing another 4 weeks still aligned with the respondent's policies. This was a rational decision consistent with the time periods provided for by the respondent's policies. The Tribunal do not find that there are any facts from which an inference can be drawn to support a finding that Ms Hamore carried out any act adverse to the claimant because she had raised a grievance.

Access to work

452. The claimant had contacted Access to Work to request further support in November 2022 and followed this up in December 2022 [1631]. On the 13 December she was told that there was a long wait time for those applying for support with a change of role because of the number of applications from people who needed support for a new job with a new employer. Ms Hamore was made aware of this on 16 December 2022.

453. At some point clarification was sought from Access to Work [1795] who confirmed that the anticipated wait time was 16 weeks which would have meant that it was not available until circa **April 2022.**

Blue Screen

454. The claimant complains that only a short blue screen was installed which meant she could see people's heads which was still distracting but a larger screen would have taken weeks to order. The Tribunal accept on balance the evidence of Ms Wright and Ms Bond under cross examination that the claimant never made them aware the screen supplied was not suitable. The claimant does not identify any contemporaneous documents where she raised a concern about the screen provided. The Tribunal find that the respondent reasonably believed that the adjustment provided was effective.

Headphones

455. The claimant had been provided with headphones on the 21 October 2022 [1324] but noise cancelling ones were ordered on the back of OH advice. An email on **8 November 2022** suggested they would take 2 weeks to arrive [1408]. The claimant did not get the noise cancelling headphones the Tribunal find, until about the beginning of **December,** which helped however, by December she was anxious about the deadline for the trial and the cold the Tribunal find, would not have helped with her mental health or ability to concentrate Someone without disabilities the Tribunal consider, would find it more difficult to concentrate when working in an unsuitable temperature.

456. The claimant was still struggling with the noise in the room. Ms Wright accepted in cross examination that it was an open plan office, and that there may have been another room they could have moved her to, but this was not offered to her as a permanent solution.

457. The Tribunal find that it is likely that had there been an OH report at the start of this Work Trial and a meaningful discussion with the claimant about what she needed to perform well in this role, at the outset she could have been accommodated in a more suitable quieter room.

Microsoft editor

458. The respondent it is accepted tried to instal Microsoft Editor 365, but it did not work on the claimant's computer. The claimant accepts that she refused the offer of a new computer which may have made this possible because by that stage there were only 2 weeks left to the end of the trial and it had taken time for her computer to build its grammar and spelling 'memory'. The claimant did not discuss with concern with IT because she had experience of how it works. Grammerly was the Tribunal find, explored as an alternative but the advice of IT was that it could not be used [1517]. The claimant did not challenge the claimant's witnesses on this point or adduce evidence that Grammerly could have been installed on to the computer she had been using or what if any other programmes may be installed.

459. The claimant's unchallenged evidence which the Tribunal accept, is that she had already asked for Microsoft 365 to be installed before the November OH report because she had thought it may help but had not been provided at that time.

Performance

460. It is not disputed, and the contemporaneous evidence shows, that the claimant continued to make serious errors throughout the extended trial period.

461. The claimant was still receiving daily documented feedback and was meeting with Ms Bond or Ms Wright weekly. On the **8/9 December 2022** the claimant accepts that she had had made errors including typing '*inattention deficit hyperactivity disorder'* rather than '*an attention deficit hyperactivity disorder'* and '*caring facial expressions'* rather than '*varying facial expressions*. [1629].

462. On the **22 December 2022** [1678] Ms Bond records that the claimant's grammar had improved but she needs to be mindful of accuracy and context and refers to other recent examples of errors including typing 80mg of medication instead of 18mg.

463. These examples of errors are, the Tribunal accept, serious.

464. On 4 January 2023 [1677] Ms Bond recorded that: "*We discussed that **you had made positive progress before Christmas** and to try and continue with no missed words/ incorrect words, minimum grammatical errors so that you can task the clinician directly with no pre- checks by Luke." Tribunal stress*

465. Despite the errors Ms Bond was therefore of the view that she was making progress and significant enough progress to regard it as 'positive'.

466. The claimant was working in an area which in December and January was at times, the Tribunal find, uncomfortable to work in due to the cold. She had been provided with a screen but not of the optimum type. Her computer had not been fitted with a programme which would have helped her with editing her work. Access to Work were not yet in a position to offer her more coaching and help her devise ways of working to assist her and yet she was improving during this period.

Checks

467. The claimant met weekly with one or other of her managers to discuss her performance and on balance the Tribunal accept the evidence of Ms Wright that they discussed the adjustments with her at these meetings, during which the claimant had for example mentioned wanting a heater and raised an about the noise.

468. Mr Lockwood had provided a feedback sheet dated from 29 November 2022 to 6 January 2023 [1719 – 1721] and while the claimant had not seen the sheet before these proceedings, she did not identify any entries which she believed to be incorrect. The Tribunal accept on balance that it is accurate. What it shows is the Tribunal consider an improvement in the risk errors the claimant was making after adjustments were implemented **from 8 December 2022:**

469. On 2 days in November 2022, it records that the claimant typed **9 letters,** there were 20 grammatical errors, and **18 risk errors** (on average **2 risk errors per letter**) .

470. In December 2022 there were 54 letters typed over 12 days with 57 risk errors, (about on average **1 risk error per letter**).

471. By January 2022, over 4 days, she typed 19 letters and made 12 risk errors (**0.6 errors on average** per **letter**).

472. The numbers of letter typed increased slightly from 4.5 to 4.75 per day over this period.

473. Ms Wright accepted the claimant's performance had improved but as she was still making serious errors, someone still needed to listen to the dictations and check her work and she was still not typing the expected number of letters.

474. The claimant in response to a question from the Tribunal, expressed the view that it would have taken about **6 months for her**, after all the adjustments were in place, to reach the required standard. The Tribunal notes that this is equivalent to the respondent's normal probationary period.

475. Initially the **6 week trial** had been extended by 4 weeks up to 10 weeks, based on guidance from HR and another 2 weeks to take into account the Christmas break (excluding the 4 week phased return).

476. The claimant was actually carrying out the work (excluding the phased return) for about **12 weeks**, because she took some leave over the Christmas break. The usual training period outside of the redeployment process, is 10 weeks but the respondent expects '*most individuals'* to be competent after 8 weeks [Ms Bond w/s para 9].

477. The claimant had therefore 2 weeks more than someone who joined outside the redeployment process to prove her competency. From 8 December, when some of the

adjustments OH recommended were put in place, she had (8 December to 20 January) **4 weeks** (taking into account the 2 weeks leave over the Christmas period), half the time the respondent would expect a new joiner to establish their competence.

The spelling and context errors.

478. The claimant does not present this case on the basis that she was disabled because of dyslexia at this time. The claimant confirmed to the Tribunal in response to its questions, that there has been no diagnosis of dyslexia because she had *"not explored*" that but that this may be the reason behind the challenges she faced with spelling and grammar however, she also gave evidence that her ADHD affected how she could construct sentences because she had difficulty *concentrating f*or long periods.

479. The claimant had not produced any medical evidence to show whether the issues with spelling and grammar were a result of ADHD or the dyslexia. Her evidence is that Professor Kaur, the closest the Tribunal have to any medical opinion, was of the view that it was because of the dyslexia.

480. The burden of proof is on the claimant to establish the disadvantage caused by her pleaded disabilities.

481. The claimant gave evidence under re-examination that she felt she could have learnt the ***terminology*** quicker but for the ADHD.

482. The Tribunal find on balance that the claimant has established on a balance of probabilities, that she did take longer to learn due to ADHD, that is supported by the **21 June** OH 2022 report [125]and that her learning, retaining information and organisation capacity are impaired, and while the report does not specifically say this is due to ADHD it does refer to her neurocognitive capacities. It is also consistent with the advice from Access to Work who were supporting her specifically with the effects of ADHD in the workplace and the adjustments they decided she needed [813], including time to focus on a task and see it through and to have time to process new things. The Tribunal is satisfied that the claimant on a balance of probabilities has established that these effects arise from ADHD.

483. On **18 January 2023** [1773] the claimant wrote to Ms Hamore and set out her thoughts on the trial [1775]: *"I have improved vastly since staring this position and would continue to make progress and improve as I gain more experience of the service. I feel I have the skills and experiences as Band 3 but willing to work in any role as Band 2…"*

484. The Tribunal take into account the claimant's evidence that had she had a typing test for this role she would not have considered it suitable. However, the Tribunal also take into account that it was a challenging role for her, required adjustments but that OH advised that it was appropriate (with lengthening of the appraisal), and she was improving, and she wanted to remain in the role.

485. Ms Hamore shared the letter with Ms Wright but did not look into whether the noise remained an issue or whether the temperature in the room was still a problem and she did not attend the meeting on 20 January and did not know if these matters were considered. There were no minutes of the 20 January 2023 meeting, only an outcome letter which makes no mention of the letter or the issue of the temperature [1792]. The Tribunal find there was no investigation into whether the temperature in the room remained a problem for the claimant and find on balance accept the claimant's evidence that remained cold in the offer where she worked until 18 January 2023 [w/s page 161 para c].

Dismissal : 20 January 2023

486. Under cross examination, the claimant gave evidence that she did not consider that the 'dismissal for Work Trial 3' had anything to do with her grievance.

487. There was a final review meeting on **20 January 2023** under the respondent's Policy, chaired by Lyndsey Wright supported by Mandy White of HR and what was discussed is set out in a letter of the 10 March 2023. Ms White says she showed the claimant's email of the 18 January 2023 to Lyndsey Wright and discussed it.

488. Ms White was aware that the noise cancelling headphones were not supplied to the claimant until December 2022 and in response to questions from the Tribunal, did not know why the claimant was not allowed to work from home, Ms Wright had merely told her that it was not appropriate and that seems to have been accepted: "*she did not go into detail but alluded to conversations having taken place*." Ms White confirmed to the Tribunal that during this meeting, she did not know if the temperature issue in the room had been resolved or not.

489. In terms of working from home, where the claimant could regulate the noise, temperature and distractions, the Tribunal find there was no meaningful consideration of how that may work. Ms Wright in her evidence in chief [w/s para 27] refers to the problem of putting the claimant in another room being the need for her to go back and forth to speak to Mr Lockwood and while she would, while training, need to speak with him, there was the Tribunal find, no evidence of any meaningful consideration by Ms Wright, Ms Bond or Ms White about whether the claimant could work from home and contact Mr Lockwood by MS Teams, at least for part of the week. This could have been trialled at least to see what impact this had on her productivity and concentration levels and thus accuracy.

Extension

490. Ms Wright gave evidence under cross examination, that she did not know if anyone had explored whether the trial could be extended but HR had not discussed this option with her. She and Ms Bond had not discussed together whether their team could support another extension. They had a 12 week backlog of typing but Ms Bond confirmed in cross examination that the backlog dated back to the Covid pandemic, and they could therefore have had this backlog for longer than 6 months, but it was it seems certainly before the claimant joined them. Ms Bond was unaware of any discussion about recruiting additional staff to deal with the backlog or about using overtime to clear it.

491. Ms Wright in answer to questions from the Tribunal, stated that what she would have accepted [1721] 'minimal errors' from the claimant at the end of the trial but they would not have wanted to see any risk errors. She believed that while the claimant was also completing between **9-12 letters per week**, this compared unfavourably to a full time typist who would normally be doing **50 to 70 letters per week**. Ms Bond however estimated that a full time typist would produce less than that, **8 to 10 letters per day** i.e., between **40 to 50 letters per week**. The Tribunal consider on balance, given Ms Bond had the day to day oversight, her estimate is likely to be more accurate. The Tribunal also heard evidence that the complexity and length of the letters vary and therefore what we have is an average number.

492. There were at the times about 6 full time and 6 part time typists all of whom are experienced. But a mix of new starters and long standing employees. They have a target as a department; a national target of 14 days to turn around letters and 7 days for urgent letters,

493. The Tribunal note that according to the respondent's spreadsheet, the claimant had produced in December 2022, about 4.5 letters on average each day which has been recorded. Therefore, she had reached on average, over those days, circa **50% of the expectation of a fully trained typist**. Ms Wright did not know how many letters on average are produced by someone with the claimant's experience in this role, she was taking the numbers of letters as an average taking into account those produced by very experienced members of the team. The claimant could therefore have been much closer to the number of letters produced by someone in their probationary period. Ms Wright did not have the data at the time or at this hearing.

494. In terms of errors, Ms Bond accepted in cross examination that the claimant by the end of the trial period was making significantly less errors and accepted that it looked as though after another month of training, she would have made even less, although she did not know if the errors would have reached zero. She gave no consideration at the time to whether there should be a further extension and believes that decision was mostly one made by HR. Ms Bond clearly had no involvement in the decision making process, she fed back that the claimant's performance was not suitable but under cross examination told the Tribunal that she did not know why the decision was made that work trial was not successful, she did not know if it was because of the number of letters produced. She was only told the reasons after the final meeting.

495. While in her evidence in chief Ms Bond expressed the opinion that the claimant would not have improved even with an extended trial, the Tribunal were not persuaded that her genuine view was this definitive. In cross examination she stated that she felt the claimant '*may struggle'* although accepted that she had appeared to improve during the trial period.

496. Ms Wright went on in evidence to say that they were not asking the claimant to produce the same numbers of letters as experienced full time typists by the end of the trial, but she was not able to say what was expected in terms of numbers. Although the number of letters the claimant produced were a factor for the claimant not passing the trial, Ms Wright was not able then or now it seems, to say how far short of what was expected the claimant's performance had been, whether it was 50%, 70% or greater.

497. The two main reasons Ms Wright confirmed for the decision that the claimant had not passed the trial were the number of letters produced and the risks errors she was making. Ms Wright accepted that it was not clear on the competency framework what the claimant needed to do to pass the trial [1364]. The framework does not state that zero clinical errors are required. Ms Bond however gave evidence under cross examination that she " *always*" told the claimant in their meetings that she must achieve no clinical errors to successfully complete the trial but could not point the Tribunal to any record of communicating that .

498. When asked by the Tribunal what would 'acceptable' have looked like for the claimant to have been assessed as having succeeded in the trial, candidly but surprisingly, Ms Wright said that she did not know. Ms Wright was not aware that the test of what would be accepted was zero clinical errors, even though on occasion she attended the supervision meetings along with Ms Bond. The Tribunal find on balance therefore, that this was not 'always' said in meetings with the claimant but it is likely that it was said on some occasions by Ms Bond.

499. It is not alleged by any of the respondent witnesses that the claimant was told that she had to produce x more letters per week to pass the trial. The Tribunal find therefore that the claimant would not have known know how much faster she may need to work.

500. However, if Ms Wright, the manager in charge of the department was not aware of actually what 'acceptable' looked like in terms of errors and number of letters produced, the Tribunal consider it unlikely that the claimant was clear.

Decision not to extend the trial and dismiss.

501. Ms White of HR explained the decision not to extend the trial period on the basis that the one to one support was not sustainable long term but made the comment in cross examination that ;"*if the claimant gave any mitigation …it would be considered".*

502. The Tribunal consider that this comment by Ms White clearly indicates that mitigation may provide grounds for an extension, which could then be accommodated. Ms White did not elaborate on what sort of mitigation may warrant an extension, from which the Tribunal infer that its scope is not defined in any policy or practice of the respondent. However, Ms White does not assert, and there is no other evidence that she did and thus the Tribunal find that she did not, make the claimant aware that she would consider a further extension if she were persuaded by the claimant that there were mitigating circumstances. Ms Wright gave evidence, (which was not challenged and which the Tribunal accept), that the possibility of an extension, was not discussed with her.

Luke Lockwood

503. Ms White spoke of the ongoing need for support and Ms Lockwood being a full time typist and that he was not able to do his role while supporting the claimant.

504. In terms of continuing that ongoing support, Ms White did not consider that cost was an issue which was taken into consideration.

505. It is clear the Tribunal find that there was no consideration into whether overtime could be used to address any backlog of work or investigation into the extent of the backlog and other ways to manage it (such as temporary overtime).

506. Ms Mandy White gave evidence that the decision not to extend the trial period was in part because of the need for sustained one to one support and alleges that management advised HR that it was causing Mr Lockwood "*significant anxiety"* . Despite his alleged state of mind, Ms White accepts that she did not speak with him. There was no consideration about whether anyone could share the checking process because the claimant wanted Mr Lockwood. However, the Tribunal do not accept that it is plausible that Ms Wright was told that providing this support was causing Mr Lockwood significant anxiety because Mr Wright in her evidence said that she knew him to be happy to continue to support the claimant and Ms Bond gave similar evidence, that he was happy to continue albeit he would like a short break. The Tribunal find that it is more likely than not, that the managers gave this information to Ms White about Mr Lockwood. If Mr Lockwood was experiencing 'significant anxiety' it would be reasonable to expect HR to have checked in on Mr Lockwood and his health

507. The outcome letter stated that the decision had been taken not to wait until April for Access to Work to provide support because it was deemed too long to wait, having previously received support from them in the past for other trials and while the claimant's grammar was noted to have improved; "*by the end of your trial, the errors being made were still missing off words or changing the context of the letters. Because of these errors, your line manager was never in a position to only ' spot- check' your work. Each letter required manual review to ensure this correctly recorded what was dictated by the consultant, taking up significant time of the team*." [1795]

508. The claimant's trial in the end had lasted 12 weeks, (plus time during phased return to begin to understand the role). She had worked for a reduced number of consultants for 7.5 of those weeks.

Escorted out of the building.

509. The claimant was dismissed. In her evidence in chief, she describes how the meeting was postponed to 20 January 2023 and how she felt the outcome was predetermined and comments on how she felt: *" I just wanted the meeting to go ahead as planned, the concerns that I had raised were not unknown to them. I was upset, deflated and pressure of the last few months had finally caught up with me … I attended with a heavy heart and was upset that after almost 26 years of service I was dismissed for something I believe the trust had failed me [page 166/167]"*

510. The claimant alleges that Ms Wright or Ms White behaved in a way which had the purpose of effect of causing the claimant's dignity to be violated or to create an environment which was intimidating, hostile, degrading, humiliating or offensive. it was not put to them either of these individuals that they conducted themselves in manner which had the *purpose* of causing any of those proscribed effects. The claimant was upset by the formality and what she perceived as coldness toward her however, the Tribunal find that while professional and perhaps formal, they were not unpleasant toward the claimant in the meeting. She describes the impact in her witness statement of the meeting itself as follows [page 167/168]:*" I tried extremely hard to not show them the tears that were welling up. I just wanted to get out of the room as soon as possible before I cried. I knew that if I did cry, I would lose control of my emotional that I had been holding back…"*

511. The claimant complains in her evidence in chief, about how she was then treated after the meeting and after she had been dismissed. The [claimant's w/s page 168 para c to e]. She complains that she was told to vacate the premises immediately and that she was shocked by this and surprised. She returned to her desk to pack her belonging and complains that Lyndsay Wright came and told her that she had to escort her out the building and stood and waited while she collected her possessions and then she had to walk through the office where everyone could see that she was being escorted. She describes feeling humiliated and treated like someone who; "*how had been dismissed or was a criminal"*. Ms White in her evidence in chief accepts that she asked Ms Wright to support the claimant in collecting her belongings and taking her out of the building [w/s para 34] . The allegation was not put to Ms Wright in cross examination about how she carried this out and nor was Ms White asked about her decision or instructions.

512. In her evidence in chief however Ms Wright denies 'marching' the claimant out of the building but accepts that she arranged for her ID badge and smart card to be handed over [w/s para 48].

513. Following the meeting, on the same day, 20 January at midday, the claimant sent a farewell email which was sent to a number of people including Ms Lyndsay Wright [1791]; "*Sad day today after 28 years of working in the NHS I am being let go. I wanted to just* ***thank you all you lovely people for making the last memory of working for the NHS a positive, happy and well loved one.*** *Thank you for all your support and I will miss those I got to know and share some office laughs…"*

514. The Tribunal find that the claimant was escorted out of the building however do not accept that she was 'marched' out. Taking into account that this allegation was not put to Ms Wright in cross examination, the Tribunal find that the evidence does not support a finding that Mr Wright did intend the manner in which this was done, to cause the proscribed effects.

Appeal

515. The claimant appealed the decision to terminate her employment on **27 March 2023** and set out her grounds in some detail [1797 – 1799].

516. Mark Roberts, Assistant director Families, Young Person's Learning Disabilities and Autism Directorate heard the appeal, the directorate where the claimant was working at the time of her dismissal. He had not met the claimant before and did not line manage Ms Wright or her direct line manager, Ms Kidd.

517. It was explained that the appeal would not re-hear the case [1801]. It was a review of the original decision.

518. The claimant wrote to Ms Taylor on 3 May 2023 [1803] asking for it to be confirmed what adjustments would be in place and for a copy of the digital recording of the hearing within 10 days of the appeal. Ms Taylor replied did not address those points [1800] and she could not recall responding. The Tribunal find that she did not.

519. The appeal addressed the points of appeal but upheld the decision. In terms of the decision not to extend the trial further, the outcome letter stated that [1833] the trial of **13 weeks** far exceeded the usual practice and referred to OH advice on 23 November not stipulating that the trial be extended for 3 months and: "…*performance was still significantly below the average member of staff in terms of quality and output and continuing the level of support* ***indefinitely*** *was unsustainable for the service."* Tribunal stress

520. Mr Roberts in evidence stated that it was evident from the management case that extending the trial was detrimental on the service and the capacity of the team. He took into account that was a relatively small team in a highly pressurised service and there is a risk for the organisation of letters being late getting back to GPs . He considered that the claimant's productivity was about 20% of the other members of the team and therefore about 80% of someone's capacity was being covered by others, plus there was the supervision time spent by Mr Lockwood, which equivalent to a full time employee. Mr Roberts had knowledge of the directorate. He did not consider the core issue to be the strain on Mr Lockwood supervising but the loss of capacity to the service and whether that could be sustained while her capability increased.

521. Mr Roberts considered the impact on the service was clear and that further OH was not needed to make the decision about what was reasonable. He considered that adjustments had been in place, including Microsoft 365 which had been offered but declined (he did not know at the appeal hearing, that IT had said Grammerly could not be used). Although the noise cancelling headphones had been provided until December, he did not consider this had led to any significant change in performance in January.

522. He confirmed that the appeal was primarily focussed on Work Trial 3, but it did not exclude them from reviewing whether there had been fundamental mistakes in how the policy was implemented.

523. Mr Roberts was of the view that the claimant in the 15 month process, was made aware of what the consequence of not finding a redeployment role would be and the claimant had the chance to ask questions for clarity from HR if unsure, however this issue about understanding the policy had been dealt with at the grievance and was outside their scope.

524. Mr Roberts did not ask further questions about how many letters members of the team with the claimant's experience would be producing, he relied on what he was told by the

management that she was not making satisfactory improvement but gave evidence that he understood she was delivering 20% of the capacity of other staff.

525. He was of the view that an error rate of zero however is what the management in his experience, would be 'aiming for', and then moving to increasing speed. There are peer audits carried out, but he did now know how often and had not seen the records which would highlight if any full time experienced members of the team had made same clinical errors. He considered that if the claimant made 1 error, he would consider that she had not passed the trial "*at that volume of throughput*", which the Tribunal find, implies that if she was producing more letters, an error may have been more acceptable.

526. Mr Roberts accepted the panel did not compare the throughput of work in the team before and after the claimant joined but he felt it was evident what the impact was in the information provided at the appeal, namely the number of letters the claimant completed compared to the average and the evidence about the quality concerns.

527. He was aware of the approximate size of the team and believed this to be somewhere in the region of 7 to 14, but he accepted he had not known the size of the team exactly at the appeal .

528. He did not carry out or ask for an analysis of the volume of work in and out of the team. He was aware and it is accepted, that locally they have patients waiting over 2 years for assessment, the consultants are extremely busy, and they need to keep on top of the typing.

529. There is no dispute between the parties about the importance of the work and the demand on the team. The work incudes children and people with special educational needs and is dependent on muti-agency team involvement in the cases.

530. Mr Roberts heard little about the impact on Mr Lockwood, he was more concerned about the impact on the capacity of the team.

531. Mr Roberts did not suggest, and the Tribunal find, that he gave no consideration to whether an extension could be supported by use of temporary staff or staff temporarily working overtime.

532. In response to questions from the Tribunal, Mr Robert's gave evidence that they could use overtime or temporary workers to help with the service during a further extension if they had the people with the appropriate skills and experience, although he expressed concern that temporary workers from the private sector may not have experience of the departments systems and medical language however, he went on to inform the Tribunal that people who have retired or work in the Bank (pool of typists) may be able to do the work if they were prepared to do it.

533. In terms of the existing team, he referred to significant restrictions on increasing expenditure but that it was not impossible. It would require the authorisation of the Executive Team and he accepted that someone working part time may have been prepared to increase their hours.

534. These options of addressing the impact on the service in terms of the work produced, were not considered but he gave evidence that there was in his view no reasonable prospect of the claimant's performance improving, thus he did not consider it necessary to obtain any further guidance from OH.

The something arising from the disabilities.

Anxiety and depression

535. It is alleged the following arise from the disability of **anxiety and depression**:

- *The claimant requires longer to understand and complete tasks.*
- *The claimant required additional face to face training and support and time to learn new tasks.*
- *The claimant has low self-esteem second guessed her own ability and readily accept negative criticism.*
- *The claimant finds it difficult to articulate her concerns, the claim struggles with lack of focus, and makes more mistakes when under pressure / scrutiny.*
- *The claimant struggles with distractions when hyper focused.*

536. As the respondent correctly points out in submissions [para 57] the burden is on the claimant to prove that the proposed 'somethings' arise from her disabilities which have not been conceded. In respect of anxiety and depression it is submitted by the respondent that there is no evidence to support a finding that any of the above arises from this disability. The claimant does not unfortunately address in the submissions the evidence which the claimant contents support each of the alleged 'somethings' arising from.

537. The only medical evidence regarding the effects of the claimant's anxiety and depression is set out in the OH report of **21 June 2022** [1124] where Professor Kaul expresses his opinion that stress and anxiety impact on her: ***concentration, worsening fatigue, short term memory recall, potential irritability and loss of confidence***. This explanation of the symptoms is supported by the claimant's own evidence and account of the effects.

538. The claimant, during her sick leave on 21 February until 6 March 2022, certified by her GP to be [927] a result of underlying mental health conditions, complained of **extreme insomnia** caused by work issues, stress and anxiety [879].

539. The Tribunal on balance accept that the claimant would at times suffer the effects as set out in the June 2022 OH report, from her disability of anxiety and depression, from April 2020.

540. The medical evidence does not support a finding that the other pleaded effects arose from anxiety and depression. The claimant had undiagnosed ADHD at this point and many of what she pleads are effects of ADHD she also pleads as arising from anxiety and depression. While there may be similar effects from both conditions, the Tribunal has to have regard the extent to which the existence of those effects is supported by the medical evidence, particular where the claimant accepts she had a separate, underlying condition which had the same or similar effect and which the parties have agreed did not give rise to a disability until a later date.

541. However, the Tribunal accept on balance, that the need for longer to understand and complete tasks would be consistent with the effect on her concentration and short term memory recall identified in the OH report. The issues around low self-esteem would be consistent with a loss of confidence. Struggling with distractions would be consistent with an impact on her concentration. However, the specific effect of having problems when hyper focused is also alleged to relate to the condition of ADHD and there is no medical evidence to suggest that being 'hyper focused' of itself made it more difficult for her to concentrate due to anxiety and depression. There is no evidence however that anxiety and depression required face to face training rather than any other type of effective training or that because of this condition she found it difficult to explain her concerns.

542. The Tribunal find that the claimant has established on a balance of probabilities that her anxiety and depression at times, affected her *concentration, fatigue, short term memory recall, caused potential irritability and loss of confidence.*

543. On balance the Tribunal do not accept that the evidence supports a finding, that it had the following effects :

- *Finding it difficult to articulate her concerns.*
- *The claimant required additional* ***face to face*** *training.*
- *The claimant struggles with distractions when hyper focused.*

Diabetes

544. In terms of **diabetes,** the respondent accepts that the claimant required meal breaks during the day. As described by the claimant, if she does not have meals, she may have a hypoglycaemic attack. It is common knowledge and the Tribunal take judicial notice, that not managing Type 1 diabetes effectively, may lead to hypoglycaemic attacks and if untreated can lead to seizures or unconsciousness.

545. Unfortunately, in submissions counsel for the claimant did not address what medical evidence supports that these effects arise from this disability. The claimant in her evidence in chief described the effects as including [page 15 para/16 para vi) ; *" I feel lightheaded,* disoriented*, lack concentration ,and feel unwell and sometimes I may need to lie down because have blurred vision and feel shaky".*

546. The respondent does not accept that the claimant because of diabetes struggled with longer periods of time at her desk or focusing on complicated tasks.

547. The Tribunal find that in circumstances where the claimant's blood sugar drops or she is having a hypoglycaemic attack, it is more likely than not that she would have the effects as described, including not being able to not being able to focus on complicated tasks and struggling to remain at her desk because she would feel shaky and light headed and lack concentration. The claimant did not set out in her evidence however, when these effects occurred or how often, in what circumstance i.e., if she had not had her insulin or food and she does not allege in her evidence in chief that any alleged acts of discrimination happened because she was suffering such an attack.

548. The OH advice on 26 January 2022 [1029] sets what that she needs to manage her condition at work i.e. to eat and drink regularly throughout the day and would benefit from frequent additional **breaks** during her working hours to help prevent her from developing symptoms relating to her underlying health condition. It does not say that while managing her symptoms and being allowed to have those adjustments, she will still find it difficult to concentrate or remain at her desk for longer periods.

549. The Tribunal find that difficulty concentrating on complicated tasks or remain at her desk was only something arising when she was suffering low blood sugar and was not a day to day when she was managing her condition as required.

Bronchiectasis

550. The claimant's case as set out in the list of issues, is that the effect of this condition is that she has difficulty breathing. The respondent admits that the claimant can have difficulty breathing at times.

Asthma

551. The claimant's case as set out in the agreed list of issues, is that the claimant has difficulty breathing. The respondent admits that the claimant can have difficulty breathing at times.

ADHD

552. The claimant's sets out in the list of issues the alleged 'somethings' arising from this disability. The respondent disputes all of them.

553. The Tribunal take into account the OH advice from Professor Kaul on 23 November 2022 [1433 - 1433] as which states that: *" Adults with neurodiversity are well known to take significantly more time when it comes to transition to new environments then* neurotypicals*."*

554. Professor Kaul also set out a number of adjustments: noise cancelling headphones, limiting distractions when she is focusing on her typing, and noted that she appears to have noise hypersensitivity.

555. OH, in its 18 August 2021 report also recommended that [419] as a result of the ADHD the claimant requires work with a structure and predictable work pattern.

556. However, the claimant has not proven that the challenges she faced with grammar and sentence construction was due to ADHD. That is not supported by the medical evidence and she herself in her oral evidence accepted that it would be due to undiagnosed dyslexia.

557. The Tribunal take into account the claimant's own evidence and the Health Passport which was prepared and sent to Ms Wright on 23 September 2022 [1299] which, with respect to ADHD, recorded [1294] that the claimant takes longer with tasks whilst learning.

558. The Tribunal also take into account the occasions when the claimant was reporting issues, including when she wrote on 15 November 2021 [577] raising an awareness of the impact of ADHD on the speed at which she felt she was retaining information.

559. After having some coaching from Access to Work the claimant had prepared notes with her ADHD coach to take to the review meeting on 2 February 2022 [825 - 832], which included comments about; needing time to focus on a task, losing track of what she was doing if she was interrupted during training and that once trained on an area if there was too much of a gap between her doing the task herself, she would make mistakes.

560. Ms Laws in cross examination stated that she was aware that ADHD may be making the claimant slower in performing her work.

561. While there is a paucity of medical evidence to assist the Tribunal, it finds that there is a consistency across the OH advice, the advice from Access to Work and what the claimant was reporting, in terms of the effects on the claimant and/or what the common effects of this condition are and that the claimant has established that ADHD had the following effects on the claimant:

- The claimant requires longer to understand and complete new tasks.
- The claimant requires additional training and support and time to learn new tasks.
- The claimant finds it difficult to articulate her concerns.
- The claimant struggles with lack of focus and makes more mistakes when under pressure/scrutiny.

- The claimant struggles with distractions when hyper-focused.

562. The claimant has not established that the training required has to be face to face, although depending on the type of training this may be easier for the claimant, or that she struggles to articulate her concerns because of ADHD.

Submissions

563. On 4 April 2024 both counsels submitted lengthy written submissions and expanded upon those orally. The submissions have been considered in full. Given the length of the submissions, they are addressed in the conclusions and findings but not repeated in this judgment, other than certain clarification points provided in oral submissions which are set out in brief below.

Claimant's submissions

564. The claimant's counsel prepared written submissions of 41 pages.

565. The claimant counsel by email of the 4 April 2024 confirmed the withdrawal of a number of further complaints and those are dismissed on withdrawal: direct discrimination in relation to the dismissal, victimisation in relation to being placed in an unsuitable role, and victimisation in relation to the extension period not being extended.

Direct discrimination

566. In terms of the allegation about lack of training and 'being thrown in at the deep end', counsel confirmed that this remained an allegation against Ms Kaur who while not a clinician, was the claimant's line manager and failed (between 18 August 2020 and 7 November 2021) to carry out any assessment to ensure she could carry out the roles. However, counsel in oral submission accepted that she may not have put it directly to Ms Kaur that she did not train the claimant properly ***because*** of her disabilities. She offered no explanation for not doing so and did not invite the Tribunal to consider it just to make a finding regardless of Ms Kaur not having had a chance to respond to it.

567. The allegation of micro-management counsel in oral submissions confirmed, was focused on the bed state spreadsheet.

568. In terms of knowledge about the lung condition, it is submitted that the claimant told Ms Kaur in an email on **27 July 2020** [319] that she had a diagnosis of bronchiectasis and counsel in oral submissions submits that Mr Kaur had actual or constructive knowledge from the date of that email. She submits that there is information within the email which shows the condition is likely to be long term, it is referred to as a 'condition' and not an illness and refers to her needing steroids going forward when she had an infection.

569. In terms of the allegation that Ms Kaur was 'apathetic', counsel in oral submissions confirmed that the only conduct complained of here, is the failure to amend the risk assessment [as per paras 58-60 of her written submissions].

570. In terms of the allegations that there was delay in the access to work assessment, counsel in oral submission explained that the claimants case is that the complaint is not about when the assessment took place but the application process and that it should have been done without delay and that the delay was because of the sickness absence of the claimant and that the sickness absence in turn was because of the anxiety and depression due to the ADHD. It was pointed out by the judge to counsel that how she was clarifying the case in submissions, sounded more like a section 15 then a section

13 EqA argument but counsel confirmed nonetheless that this was how the claimant was putting her case and made no application to amend.

571. In terms of the allegation around the Wellbeing Reviews counsel in oral submissions informed the tribunal that she believed that she had put it to Ms Kaur in cross examination that she was closed off *because* of the disabilities but she could not put a positive case that she had in fact put this allegation to her.

Discrimination arising from

572. In terms of the access to work assessment not being ordered until 14 October, and why this was less favourable treatment; counsel in oral submissions argues that the application itself should have been progressed without delay and the assessment was delayed until her return to work.

573. In terms of Ms Kaur asking the claimant to consider redeployment on 15 September 2021 and how that can arise from the ADHD, counsel conceded in oral submissions that it cannot as ADHD it is agreed did not qualify as a disability from May 2022 but that the claimant was absent with **anxiety and depression due** to ADHD.

Harassment

574. In terms of the complaint of dismissal as a complaint of harassment, counsel in oral submissions submitted that the list of issues should read that it was dismissal and being escorted off the premises, the claimant had set out her evidence in chief that she was complaining about the dismissal **and** the way this was carried out i.e., the humiliation of being escorted off the premises.

Indirect discrimination

Mask wearing

575. In oral submission in respect of the indirect discrimination claim about mask wearing counsel in oral submissions, submits that the correct comparator group is those working in the same office as the claimant namely Stewart House and that this is the correct group because not all employees across all the offices are subject to the same restrictions. There are variations to the policy, because some are open plan and at The Willows for example the claimant could remove her mask in the office when she was working alone. It is therefore limited to those working at Stewart House who cannot remove their masks.

576. In terms of the evidence of group disadvantage this was not addressed in written submission and in oral submission counsel conceded that there was no medical evidence or statistics to assist the Tribunal. While she accepted that medical evidence could have been produced by the claimant or statistical evidence, she made the point that counsel was not involved in preparing the bundle of evidence and would invite the Tribunal to consider whether it is likely to cause the disadvantage to people with the same lung condition.

577. No evidence was heard, or submission made about time limitation issues.

Respondent submissions

578. The respondent counsel presented written submissions of 39 pages attaching with it an extract from Phipson on Evidence 20th edition chapter 12, rules of evidence relating to

the course of a trial : examination of witnesses and copies of the Wellbeing Review notes. The relevant extract from Phipson included reference to the guidance on the cross examination of witnesses in **BPY v MXV [2023] EWHC 82 [Comm)at para [34].**

579. Counsel submits that discrimination claims are serious complaints and that where allegations were not put to the witnesses and thus, they have not had a chance to respond, it would be inappropriate to make submissions based on those complaints or to determine them.

580. It is submitted that complaints are out of time, and the claimant has presented no evidence why time should be extended and in oral submissions the respondent argued stated that the respondent had been prejudiced by loss of the limitation defence and no evidence was presented by the claimant.

581. In terms of knowledge, counsel refers to Gallop v Newport and in oral submission argued that Ms Kaur did not have knowledge of all the elements required for section 6, including the impact on day to day activities. In terms of the impairment of anxiety and depression it was reasonable for her to think that this was related to her mental health and anti-depressants were because of Covid and poor health generally or the emotional disorder as distinct from anxiety and depression.

Harassment

582. Counsel in oral submissions submits that there is no claim about the claimant being ' frogmarched' out of the office, this was not part of the claim and was never put any of the respondent witnesses.

Indirect

Mask wearing

583. In oral submissions, counsel submits that there is no evidence of group disadvantage, and it would be 'guess' work for the Tribunal to assume there was, just because the claimant experienced a particular disadvantage does not mean everyone with the same condition would and the burden rest on the claimant to prove it.

584. In oral submissions counsel accepted that the correct comparator group would be those required to wear a mask at work for the same amount of time as the claimant but that should be across the respondent workforce because there are no specific office or environmental factors and the Tribunal will be concerned with the with same disability as the claimant in the same circumstances, and there is no evidence someone with asthma and the same lung condition would have the same disadvantage.

Diabetes – breaks

585. In oral submissions, counsel argues that the relevant comparator pool would be those with diabetes who were permitted to have a 10 minute break away from their desk and it is guess work they would be put at the same alleged disadvantage. It is submitted the claimant cannot establish group disadvantage.

Requiring staff to exceed minimum standards.

586. Counsel submits that there is no state of affairs that could be said to be a PCP, at best it is a one off issue in respect of the PA role and having a zero clinical expectation was not an unrealistic standard.

Requiring minimal mistakes in work trail

587. It is submitted in oral submission that there was no evidence of a PCP that the respondent expected the claimant and staff in an audio typist role to have minimal mistakes in week 1.

Legal Principles

Harassment

588. The starting point is the statutory provision under section 26(1) EqA 2010.

589. In ***Bakkali v Greater Manchester Buses (South) Ltd*** **[2018] I.C.R. 1481** Slade J held that: "*Conduct can be "related to" a relevant characteristic even if it is not "*because *of" .*

590. The words 'related to' in S.26(1)(a) have a broad meaning and conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it : ***Hartley v Foreign and Commonwealth Office Services 2016 ICR D17, EAT*****.**

591. The EHRC Employment Code adopts a broad interpretation of the term 'related to' and the Tribunal have had regard to the examples in the Code.

592. The test has both subjective and objective elements to it: ***Thomas Sanderson Blinds Ltd v English EAT 0315/10*** **the EAT**

593. The Tribunal have had regard to the guidance in ***Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT***.

594. ***Weeks v Newham College of Further Education EAT 0630/11***. Mr Justice Langstaff, then **President** of the EAT "*21. ..An environment is a state of affairs.* It *may be created by an* incident*, but the effects are of longer duration.".*

Direct discrimination : section 13 EqA

595. Section 13 of the EqA provides that:*(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.* The burden of proof is contained in section 136 EqA .The Tribunal have had regard to the guidance in **Qureshi v Victoria University of Manchester [2001] EAT.** A Tribunal may be able to go straight tot the reason why question**: Shamoon v Chief Constable of the Ryal Ulster Constabulary [2003] IRLR 285**

596. Guidelines are set out in the Court of Appeal decision in **Igen Ltd v Wong [2005] EWCA Civ 142** *which* the Tribunal have had regard to and **Madarassy v Nomura International Plc [2007] IRLR 246**

597. In the judgment of Lord Justice Mummery in ***Madarassy v Nomura International plc 2007 ICR 867, CA*****,** he stated: 'The bare facts of a difference in status and a difference in *treatment* only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

598. In ***Denman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA*****,** Lord Justice Sedley accepted the approach in Madarassy that something more than a mere finding of less favourable treatment is required. Nevertheless, his Lordship made the important point that 'the "*more*" which is needed to create a claim

requiring an answer need not be a great deal. In some instances, it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire.

599. In ***Efobi v Royal Mail Group Ltd*** **2921 ICR 1263** Lord Leggatt observed that: '…no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation.'

Comparator

600. In terms of the comparator, section 23 (1) provides that on a comparison for the purpose of *establishing* direct discrimination there must be 'no material difference between the circumstances relating to each case'.

Something arising from: section 15 EqA

601. The *relevant* statutory provision is section 15 EqA.

602. In **Secretary of State for Justice and anor v Dunn EAT 0234/16** the EAT: identified the following four elements that must be made out in order for the claimant to succeed in a S.15 *claim*: 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** (i.e. caused by) the something that arises in consequence of the disability, and the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

603. The Equality and Human Rights Commission's Code of Practice on Employment states that the *disabled* person 'must have been put at a disadvantage'(para 5.7).

604. There is no need for a comparator in order to show unfavourable treatment under S.15.

605. For a claim under S.15(1) to succeed, the unfavourable treatment must be shown by the claimant to be '**because of** something arising in consequence of her disability'. The '*something'* must have a connection to the claimant's disability.

'The EHRC Employment Code: consequences of a disability 'include anything which is the **result, effect or outcome** of a disabled person's disability' — para 5.9.

606. In **Pnaiser v NHS England and anor 2016 IRLR 170, EAT**, Mrs Justice Simler *summarised* the proper approach to establishing.

607. *Knowledge* by employer of the casual link is **not** required only knowledge of the disability

608. The "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and so amount to an effective reason for or cause of it.'

Objective justification

609. The EHRC Employment Code: aim pursued should be legal, should not be *discriminatory* in itself and must represent a real, objective consideration.

610. **Stott v Ralli Ltd [2022] IRLR** 148:It is an objective test. The Tribunal should weigh the employer's *justification* angst the discriminatory impact and undertake a critical scrutiny of whether the means correspond to a real need and are appropriate with achieving the

legitimate aim and are necessary to that end. The employer need now show that it was the only course open to it.

611. In a section 15 case in particular see **: Homer v Chief Constable of west Yorkshire Police and West Yorkshire Police Authority [2012] IRLR 601:**Lade Hale: "*To be proportionate, a measure has to be both an appropriate means of achieving a legitimate aim and (reasonably) necessary in order to do so."*

612. Burden of *proof* is on the respondent to establish justification: **Starmer v British Airways [2005] IRLR 86**

613. The more serious the disparate adverse impact, the more cogent must be the justification for it**.** It is for the Tribunal to weigh the reasonable needs against the discriminatory effect. There is no range of reasonable responses test: **Hardys & Hansons plc v Lax [2005] IRLR 726.**

614. As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be *proportionate* if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

Failure to make reasonable adjustments.

615. EHRC Employment Code, which states: 'If an employer has failed to make a reasonable adjustment *which* would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified' — para 5.21.

616. The relevant statutory provisions are section 20, 21 and 22 EqA provides.

617. The 'substantial disadvantage' must bear some relation to the disability. The disability does not necessarily need to be the sole or even main reason for the "something" that arises in consequence of it. The disability needs only to have a significant or more than trivial influence on the "something".

618. **Environment Agency v Rowan [2008] ICR 2018:** a Tribunal must identify the PCP, the non-disabled comparators and the nature and extent of the substantial disadvantage.

619. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**, the Court of Appeal held that, under section 20 EqA 2010 where a PCP has put a disabled employee at a disadvantage, the duty begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage.

620. **Southampton City College v Randall [2006] IRLR 18,** the EAT upheld a tribunal's decision that it would have been reasonable for an employer to devise a new job which took into account the employee's disability.

621. **Secretary of State for Work and Pensions (Job Centre Plus) and others v Wilson UKEAT/**0289**/09**, The evidence showed that the work could not be done effectively from home.

622. In **McGuinness v Mersey Care NHS Foundation Trust ET/2409186/2021:** The tribunal concluded that the adjustment required was to ensure he did not perform those duties until he had received the necessary equipment and training.

623. **Cosgrove v Caesar and Howie [2001] IRLR 653,** the EAT held that it was principally for the employer to explore the possibility of reasonable adjustments, not for the employee to suggest them. However, if the adjustment to be suggested is wholly exceptional then it is for the employee to advance it

624. Section 212(1) EqA states that *'substantial'* means 'more than minor or trivial'. A tribunal must therefore test "whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others that do not have the disability (**Sheikholeslami v Edinburgh University [2018] IRLR 1090).**

625. **Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 663 :** consulting an employee or arranging for an OH or other assessment of the employee's needs is not normally a reasonable adjustment in itself because it does not remove any disadvantage.

Actual knowledge

626. Knowledge of the disability requires an actual or constructive knowledge of the facts of each element of section 6 EqA: **Gallop v Newport City Council [2014] IRLR 211.**

627. EAT in **Gallop** as Judge Hand QC stated at paragraph 59: "59. *… an employment tribunal when deciding whether or not there has been discrimination by a sole decision maker is not concerned with the motivation, intention and knowledge of others being imputed to* the *decision maker but with the actual motivation, intention and knowledge of that decision maker. …"*

628. The Tribunal have also considered the case of**: *Urso v Department for Work and Pensions 2017 IRLR 304, EAT***.

Constructive knowledge

629. EHRC Employment Code - employers must '**do all they can reasonably be expected to do'** to find out whether a claimant has a disability.

630. An employer will not be liable for a failure to make reasonable adjustments unless it had actual or constructive knowledge both that the employee was disabled, and that he or she was disadvantaged by the disability in the way set out in S.4A(1) (i.e. by a PCP or physical feature of the workplace).

631. It is sufficient for the tribunal to find that there would have been **a prospect** of the disadvantage being alleviated.

632. Court of Appeal in **Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA,** where Lord Justice Elias remarked: *'So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. **It may still be** reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.'*

Burden of Proof

633. **Efobi v Royal Mail Group Ltd [2021] IRLR:** the initial burden of proof on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent.

Indirect discrimination

634. The relevant statutory **provision** is section 19 EqA.

635. **Ishola v Transport for London [2020] ICR 1204:** Be it a provision, criterion or practice that it being relied on, all three words connote a state of affairs indicating how similar case are generally treated or how a similar case would be treated it if occurred again, 'practice' connotes **some** form of continuum in the sense that it is the way in which things generally are or will be done . That does not mean that it is necessary for the PCP to have been applied to anyone else, something may be a practice if it is carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. A one off decision or act can be a practice, it is not necessarily one.

636. For indirect discrimination the concept of a PCP is fairly wide, there does not need to be a formal policy **in** place. If the claimant is challenging a PCP applied throughout the employer's organisation, then the pool will usually be the whole workforce **(Faulkner v Chief Constable of Hampshire Constabulary UKEAT/0505/05).**

637. In **Lewisham LBC v Malcolm [2008] UKHL 43:** The comparison exercise can be done by **either** statistical evidence or other evidence which shows that the protected characteristic is obviously or inherently more likely to be associated with disadvantage because of the PCP (**Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15).**

638. Comparison: In relation to disability, this would not be disabled people as a whole but people with a particular disability – for example, with an equivalent level of visual impairment. (**Paragraph 4.16 of Employment Statutory Code of Practice).**

Unfair dismissal

639. The starting point is Section 98 of the Employment Rights Act ("ERA").

640. It is the respondent's burden to prove that it dismissed the claimant for a potentially fair reason. When applying s.98(4) ERA the burden is neutral.

641. When applying s.98(4) ERA a tribunal is to consider the dismissal and appeal stages of the disciplinary process: ***West Midland Co-Operative Society Limited v Tipton*** **[1986] IRLR 112.**

642. When applying s.98(4) the tribunal will determine whether the decision to dismiss was within the range of reasonable responses: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439,** as confirmed in ***Post Office v Foley; HSBC Bank Plc (formerly Midland Bank Plc) v Madden*** **[2000] IRLR 827.**

643. In ***Taylor v Alidair Ltd*** **[1978] IRLR 82** the Court of Appeal was concerned with the legal test that applied in a capability dismissal case. Lord Denning identified the test as being (para. 20): *Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove he is in fact incapable or incompetent.*

644. In ill health absences cases the legal framework starting point is often that said in ***Spencer v Paragon*** **Wallpapers *Ltd* [1976] IRLR 373,** namely:

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?* (para. 14).

645. As to the relevant circumstances, in *Spencer* the EAT identified them as including the nature of the illness, the likely length of the continuing absence and the need of the employers to have done the work which the employee was engaged to do (para. 13).

646. The aspect of fairness will usually be split into two parts. Firstly, did the employer follow a fair procedure and secondly, did the employer act reasonably in treating the reason as a sufficient reason for dismissal. In **Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL) ,** it was established that: where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" to establish that the dismissal is fair, which argues that the dismissal should be regarded as fair because it would have made no difference to the outcome.

647. The test as to whether the respondent acted reasonably in section 98(4) of the ERA 1996 is an objective one. It is for the Tribunal to decide whether the employer's decision fell within the reasonable responses that a reasonable employer would have made given the circumstances of the case.

Time limits – Discrimination

648. The relevant statutory provisions relating to time limits are set out under section 123 the EqA.

649. In ***Hendricks v Commissioner of Police for the Metropolis*** **[2003] ICR 530:***The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.*

650. It is a claimant's burden to persuade a tribunal that it is just and equitable to extend time: Robertson ***v Bexley Community Centre*** **[2003] IRLR 434.**

651. When considering its discretion whether to extend time, a tribunal may have regard to the checklist contained in s.33 Limitation Act 1980 (*British Coal Corporation v Keeble* [1997] IRLR 336). A tribunal is not required to go through every one of the *Keeble* factors: ***London Borough of Southwark v Afolabi*** **[2003] ICR 800 (para. 33);**

652. In Adedeji ***v University Hospitals Birmingham NHS Foundation Trust*** **[2021] EWCA Civ** 23, LJ Underhill set out the recommended approach (para. 37).

653. As to the reason for any delay, the absence of any evidence as to the reason for a delay does not mean that a tribunal is bound to refuse an extension of time: ***Abertawe Bro*** Morgannwg ***University Local Health Board v Morgan*** **[2018] IRLR 1050 (para. 25);** ***Concentrix CVG Intelligent Contract Limited v Obi*** **[2023] IRLR 35 (para. 50).**

654. In ***Edomobi v La Retraite RC Girls School*** **UKEAT/0180/16 Laing J observed:** *If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a Claimant from the consequences of any delay.* (para. 31).

655. The strength or otherwise of a claim may be a relevant factor to consider when determining whether to extend time: ***Lupetti v Wrens Old House*** **[1984] ICR 348.**

656. The prejudice to a respondent in losing a limitation defence is a relevant factor for a tribunal to take into account when deciding whether to extend time or not: ***Miller v Ministry of Justice*** **UKEAT/0003/15 (para.13).**

Conclusions and Analysis

Direct disability discrimination (S.13 EqA)

657. Did the Respondent do the following acts or omissions:

> **Between 18 August 2020 and 7 November 2021, Jinny Kaur did not provide the Claimant with any suitable training and in their first meeting the claimant was thrown in the deep end by being required to take minutes of complex medical matters about which the Claimant had no prior knowledge. The Claimant asserts that the relevant disability is anxiety and depression [LOI 5.1].**

Knowledge of anxiety and depression

658. The respondent accepts that Ms Kaur had actual knowledge of the impairment of anxiety and depression from on or around **18 May 2021** but not that it amounted to a disability.

659. The claimant submits that Ms Kaur had knowledge from **18 August 2020** because the claimant had informed her on her first day about all her conditions.

660. This Tribunal is required to conduct an enquiry as to what the reason for the treatment was, and this involves ascertaining the conscious or subconscious motivations for that treatment by Ms Kaur, namely that it was because of the claimant's disability.

661. Even if Ms Kaur did **not** know the precise condition suffered by the claimant (anxiety and depression), she will be taken to have actual knowledge of it if she was aware of both the **underlying problems** that amount to the condition and its **effects.**

662. For the reasons set out in the findings, the Tribunal conclude that the while the claimant disclosed other conditions, she did not mention problems with her mental health before August 2020.

663. The Covid risk assessment which the claimant had signed in **June 2020**, had made no reference to anxiety and depression. However, there was clearly something discussed at the **26 August 2020** meeting because Ms Kaur recorded concern about whether there was an underlying medical condition. While it is not important whether Ms Kaur knew what the cause of the mental health issue was, (whether it was EUPD or anxiety and depression), the Tribunal conclude on the evidence that Ms Kaur did not have sufficient information at this stage about the *effects* of the impairment to have knowledge that the mental health condition was a disability. The Tribunal conclude on the evidence, that the claimant did not explain the day to day effects on her activities or explain how long she had those effects, as set out in the findings of fact above.

664. In **October** the claimant mentioned that she would struggle with her mental health if she could not work from. Ms Kaur reasonably understand that she was referring to what the impact may be in those specific circumstances of not working, however it indicated that the claimant's mental health was vulnerable [337].

665. By **16 November 2020** Ms Kaur was making further enquiries about the claimant's mental health. At a meeting with Ms Kaur, the claimant had disclosed [345] that she was on anti-depressant medication, that there had been a deterioration in her mental health.

Ms Kaur thought that this was linked to anxiety over Covid. It is recorded in the notes of that meeting that Covid was *a factor*, but not the sole cause and Ms Kaur was already suspecting an underlying mental health condition.

666. The information Ms Kaur had by **16 November 2020** strongly suggested that she had mental health problems and in particular suffered with anxiety and depression (hence the anti-depressant medication) . Ms Kaur stated under cross examination that she knew the claimant had anxiety and depression before 31 October 2020, but what is relevant for the Tribunal to determine in the context of the section 13 claim, what she knew of the *effects* of that impairment, not merely whether she knew the claimant had or was likely to have some sort of mental health impairment.

667. Nowhere within the OH referral [348] does it set out what the effects of the relevant disability were which had been communicated to Ms Kaur. That is not to say Ms Kaur was not then under an obligation to make reasonable enquiries.

668. By **30 November 2020 [370]** the claimant was reporting that her psychiatrist had reported that she was **not** suffering from anxiety but stress and that she was not having a relapse.

669. By **May 2021** the claimant was then absent and was now unable to work because of the effects of EUPD and anxiety.

670. The Tribunal conclude that by May 2021, Ms Kaur had sufficient information about the mental health condition to know that she had the claimant had the disability. She knew the claimant had a mental health impairment, the claimant had mentioned anxiety and she knew the claimant was taking medication, which would have informed her that the effects of this condition on normal day to day activities were more than minor or trivial. The claimant was unable to work because of her mental health. It was also clear that the issues with her mental health condition were likely to last 12 months, because the claimant had first mentioned having issues with her mental health in August 2020 and by May 2021, she knew therefore that the effects of the issues with her menta health and lasted for at least 10 months.

671. The Tribunal conclude that Ms Kaur had the relevant actual knowledge from about **12 May 2021**. The allegation about being thrown in at the deep end cannot succeed however, because this happened when she first started in the PA role in August 2020.

Did not provide <u>any</u> suitable training.

672. Ms Kaur was ultimately responsible for the training, which was put in place, as the claimant's direct line manager at this time.

673. The Tribunal conclude that Ms Kaur, as set out in its findings, was supportive of the claimant's need to shield and did not rush her to return to work. The Tribunal accept that the training for this role was not very structured, it was mainly 'on the job' training . The claimant had however relevant experience, including working previously as a team secretary and had experience as a typist.

674. The Tribunal conclude that some suitable training was provided including some shadowing and guidance, along with regular meetings where issues with her performance were raised with her.

675. The claimant did not identify any specific training that she needed (other than IT training) and although she had some problems with the 'Bed State Spreadsheet', she had the

support of IT, however, did not refer back to IT for further support or suggestions when she was instructed to use the original Excel spreadsheet.

676. The Tribunal conclude that the claimant did not raise any concerns about the training which was in fact provided and on balance the Tribunal find that Ms Kaur was supportive. In terms of the issues with sending documents, Ms. Kaur put forward some solutions to this problem and while the claimant still had some difficulties, it cannot be said that the respondent did not provide **any** suitable training. The Tribunal find that the claimant has failed on a balance of probabilities, to establish that Ms Kaur did not provide **any** suitable training.

677. However, because of the effects of the claimant's underlying ADHD, this may well have made this type of 'on the job' training unsuitable for the claimant, however neither she nor the respondent at this stage knew that she had ADHD. The claimant herself considers that the ADHD would have had '*had a big impact'.*

Thrown in at the deep end.

678. In terms of the allegation that the claimant had been thrown in at the deep end at the meeting in August 2020 (when she was required to practice taking minutes/notes), the claimant accepted in cross examination that Ms Kaur knew nothing about this meeting at the time. Ms Kaur had not given instructions that the claimant take minutes/action plan at this meeting.

679. The complaint that Ms Kaur personally treated the claimant *less favourably* has no merit.

680. Further, the Tribunal find, that asking the claimant to practice taking minutes/notes, while someone else was taking the official minutes, was a perfectly reasonable and supportive step to help her train for the role. The claimant had taken minutes in previous roles and while she may have found this meeting challenging, she was only at this first meeting practising, she was not the official notetaker. The claimant also did not object to doing it.

681. The Tribunal find that being required to practice taking minutes/notes objectively would have been helpful in preparing the claimant for the role. The Tribunal do not consider objectively that this amounted to a disadvantage.

Comparator

682. The claimant does not identify an actual comparator in respect of either allegation.

683. A hypothetical comparator would be someone with the same abilities as the claimant but without her disability. That would mean someone with the claimant's experience and skills.

684. The Tribunal conclude that a hypothetical comparator with experience in typing and secretarial work, would have been treated in the same way as the claimant and asked to take notes in the meeting and would have received the same type of training.

Because of disability

685. Did disability have a 'significant influence' on the way the claimant was treated?

686. Even if the Tribunal had concluded that the claimant was not given suitable training and that she had been 'thrown' into the deep end' by Ms Kaur, it was not put to Ms Kaur in

cross examination that she had 'thrown' the claimant in at the deep end or not trained her properly ***because*** of her condition of **anxiety and depression.**

687. Further, the claimant (see above) alleges that the reason suitable training was not provided was because the claimant had a lot of appointments do to all her medical conditions. However, the Tribunal had no evidence about how many appointments she needed, and this allegation was not put to Ms Kaur.

688. Given the number of allegations and the breadth of the allegations and indeed the changing nature of the claim (with complaints withdrawn at various stages), it was important to give Ms Kaur an opportunity to respond to the very serious allegation that she had personally discriminated against the claimant *because* of her disability. (Philipson on Evidence 20th ED). This is a serious allegation and fairness dictates that this allegation about why Ms Kaur personally acted as she did, should have been put to her directly.

689. Counsel for the claimant in submissions does not seek to argue that it was fair not to put the allegation to her and that there are reasons why in this case it was not necessary to do so. Throughout the hearing the claimant with counsel, was reviewing the evidence and revising the list of issues, withdrawing claims where it was considered appropriate to do so and while that was a sensible approach which is encouraged, it does make it even more essential to clearly put the allegations being pursued to the witnesses, particularly where the allegation is such a serious allegation personal to the witness.

690. The Tribunal do not find that Ms Kaur in any event knew the claimant had the relevant disability at the alleged time of the discrimination.

691. In terms of training, the claimant had commenced a period of sick leave from 12 May 2021 and did not return until 7 October, and when she returned it was to amended duties pending the first Work Trial. In terms of being ' thrown in at the deep end' this was at the start of the PA role and before Ms Kaur had knowledge of the relevant disability

692. Ms Kaur did not throw the claimant into the deep end or fail to provide adequate training because of the disability of anxiety and depression, that was not a significant influence in the type of training provided and indeed, the Tribunal find it played no part whatsoever in that decision. In any event, it would be manifestly unjust to make such a finding where Ms Kaur has not had the chance to respond to it.

693. This claim is not well founded.

Jinny Kaur <u>often</u> micro-managed the Claimant's workload. The Claimant asserts that the relevant disability is anxiety and depression [LOI 5.2]

694. The allegation is that Ms Kaur 'often' micromanaged the claimant's workload, however, in oral submissions counsel confirmed that this allegation related to only one issue, the 'Best State' spreadsheet which the claimant had amended and the instruction for the claimant to revert to using the original spreadsheet. This on any objective basis, cannot be described as a frequent act and thus it cannot be said that Ms Kaur was micromanaging her work '<u>often'.</u>

695. The claimant had produced a spreadsheet which she accepts missed out important data. Ms Kaur instructed her to revert to using the previous version. Although there appears to have been an issue with the format in which this reached Sara Le-Butt, objectively the Tribunal do not consider it unreasonable for the claimant to be required to revert to the spreadsheet which included all the relevant data.

696. The claimant was left to try and resolve the issue, including with the assistance of IT if this was beyond her skillset, even though she had experience of using Excel. The claimant could have and was advised to arrange further Excel training. In any event, on the one hand the claimant complains of being too closely managed because she was told to use the original spreadsheet and then complains that she was left to resolve the issue. What the claimant appears to be really complaining about is the lack of support in resolving the problem of formatting, i.e., not providing enough management/support, rather than over managing.

Less Favourable treatment

697. The claimant does not identify any actual comparator. There are no findings of fact or inferences which would support a finding that Ms Kaur would have treated someone with the claimant's same skills and experience but without her disability of anxiety and depression, differently and allowed them to continue to use and adapt a new spreadsheet rather than revert to the original version.

Because of disability

698. It was also not put to Ms Kaur that she had given this instruction because of the claimant's disability and the same point is made about the injustice of a finding that she had discriminated personally where this was not put to Ms Kaur.

699. In any event, this instruction was given at the **29 April 2021** meeting as set out in the findings, before Ms Kaur had acquired the relevant knowledge of disability.

700. The Tribunal concludes that the claimant's disability played no part in the decision to require her to use the original spreadsheet containing all the necessary data.

701. The claim is not well founded.

When the Claimant approached Jinny Kaur to discuss her health, Jinny Kaur was apathetic and increased her scrutiny of the Claimant [LOI 5.3]

The Claimant asserts that the relevant disabilities are anxiety and depression, and bronchiectasis.

Knowledge of bronchiectasis

702. The respondent accepts that Ms Kaur had knowledge of the impairment of **bronchiectasis** on **25 June 2020** when the claimant wrote to the respondent [297] to explain that her lung condition was under investigation but does not concede that she had knowledge that it qualified as a disability.

703. The Tribunal conclude that the combination of the information contained in the 27 July 2020 email, about constant infections, the need for steroids when she has an infection and antibiotics (indicating that the effects could not be managed without medical intervention going forward, indefinitely) and need for therapy, was, on balance, sufficient to fix Ms Kaur with knowledge that the claimant had a condition which was likely to be long term and had a substantial effect on her day to day activities (i.e. breathing) from **27 July 2020** and the Tribunal conclude that the claimant had knowledge from this date.

704. The Tribunal conclude that Ms Kaur had knowledge of the relevant components of section 6 EqA to amount to actual knowledge that this was a disability by **27 July 2020.**

Conduct complained of

705. In terms of the allegation that Ms Kaur was 'apathetic', counsel in oral submissions clarified that the only conduct complained of here, is the failure to amend the risk assessment [as per paras 58-60 of her written submissions]. These paragraphs refer to the risk assessment carried out on 25 June 2020 and the confirmation on 17 September that it needed updating and the failure to do so promptly. It was not updated until 31 October 2020. [308]

706. It is submitted that the lack of adaptations to the risk assessment carried out on **25 June 2020** is in part a result of the claimant's new diagnosis of bronchiectasis . It is alleged that the risk assessment was carried out before the respondent accepts knowledge of the claimant's anxiety and depression and bronchiectasis and that this supports the claimant's case that the reason for failing to update the risk assessment is because of these disabilities. That was not an allegation put to any of the respondent's witnesses.

707. There is an obligation on line managers under the Reasonable Adjustment Policy [204] to involve HR where they are notified that a member of staff has a long term health condition [para 4.2]. That obligation was triggered on 27 July 2020 when the claimant confirmed the diagnosis [319] of bronchiectasis. However, as set out in the findings of fact, the claimant did not formally transfer into the PA role and under the line management of Ms Kaur until **18 August 2020** and prior to that the claimant remained under the line management of her previous manager, Francis Smitheringale. It was Ms Smitheringale who completed the Covid 19 Risk Assessment for the claimant on 11 June 2020 [p.296].

708. On **17 September 2020** [325] Ms Kaur met with the claimant, and it was discussed that the Covid 19 risk assessment completed in June 2020, needed updating asap. It had not been updated since the diagnosis of bronchiectasis on **27 July 2020.** In the event it was not updated until **31 October 2020** [337]. Ms Kaur could not recall when she updated the risk assessment however, it was never put to her that she did not update it because of the claimant's relevant disabilities.

709. In terms of not updating the Covid risk assessment, it is not clear and not identified in the pleading, what disadvantage this itself caused the claimant. The allegation is that it showed an apathetic attitude rather than a failure to implement something which was required at this time. However, the claimant was reporting in the September meeting that her health and wellbeing were good, there were no significant changes and no significant problems to report.

710. It is difficult to see what impact such 'apathy 'therefore had on the claimant. If it is that it upset the claimant, then as set out in the Tribunal findings, the claimant did not consider at this time that Ms Kaur was 'apathetic'. On balance the Tribunal find that at this time she felt that Ms Kaur was supportive of her, and she was not concerned that she was wanting to remove her because of her health conditions. As set out in the findings of fact, the claimant would have been happy to continue working for Ms Kaur in another role when she decided to resign from her PA role. At the grievance appeal [1196] she made the statement: "*You know you are not ever going to get a perfect situation but I was happy to stay with Jinny*. ."

711. It is alleged that Ms Kaur 'increased her scrutiny' of the claimant. It is not clear what is meant by 'increasing scrutiny' of the claimant and it was not put to Ms Kaur in cross examination in what way she increased her scrutiny because of the condition of bronchiectasis or anxiety and depression and nor did counsel clarify this in submissions. There is no evidence presented to support this allegation as it stands.

Less Favourable treatment

712. There are no findings of fact or inferences which would support a finding that Ms Kaur would have treated someone without the claimant's disability of anxiety and depression and/or bronchiectasis, differently in not materially different circumstances.

713. The claimant does not identify any actual comparator.

714. It was also not put to Ms Kaur that she had not updated the OH assessment quicker because of the relevant disabilities and the Tribunal consider that given how serious this allegation is and the lack of clarify in the issues over what this actual allegation is, it was necessary to give Ms Kaur a chance to respond to the allegation and it would be unjust to make any finding of discrimination by her in those circumstances.

715. The claim is not well founded. The claim was also presented outside the primary time limit.

During the summer of 2021 the Claimant requested support with the access to work assessment, <u>but this was not ordered until</u> 14 October 2021 [LOI 5.4]

The claimant asserts that the relevant disabilities are anxiety and depression.

716. Ms Kaur had actual knowledge that the claimant had anxiety and depression and that it was disability from 12 May 2021, therefore she had knowledge at the relevant time. As set out in the findings of fact, the claimant did not want to pursue the assessment with OH until she returned to work and while there were some delays in certain steps being taken before she returned to work, the Tribunal as found, accept Ms Kaur's explanation for those steps as plausible.

Less Favourable treatment

717. The claim is clearly put on the basis that the assessment was not ordered until 14 October however, in oral submissions counsel seemed to be attempting to put the case differently, on the basis that the complaint is not about when the assessment took place but the application process. That is not how the complaint is put. If after hearing the evidence, the claimant wanted to amend her claim, a formal application to amend should have been made.

718. However, even if the criticism is about the application process, it is not clear what disadvantage any delay in the application process had. The claimant wanted the assessment to take place on her return to work and it did. The Access to Work service emailed Ms Kaur on 14 October [524] for approval and she approved it the same day. There was no discernible disadvantage in any delay in the application process.

Because of disability

719. The support from access to work was for the condition of **ADHD**. However, the claimant was not disabled for the purposes of the EqA with this condition until May 2022.

720. It is alleged that the claimant was off work because of anxiety due to ADHD and in submissions it is alleged that Ms Kaur delayed the access to work assessment *because* the claimant was off sick *because* of her anxiety *because of* the ADHD diagnosis [para 64]: "*If* the *claimant did not have anxiety and depression, it is likely that she would not have needed to take the time off after the ADHD diagnosis*". As positioned, this is a

section 15 EqA claim, the complaint is that this delay happened *because of her* ***absence*** arising from her disability of anxiety and depression.

721. The Tribunal do not consider that if the reason for the delay is because of absence caused by a disability rather than the disability itself, it falls within the definition of a section 13 claim.

722. The claimant appears to be attempting to link acts related to ADHD with other conditions which qualified as disabilities at the relevant time for the purposes of section 6, to bring this allegation in scope of the EqA.

723. There are no findings of fact or inferences which would support a finding that Ms Kaur would have treated someone without the claimant's disabilities of anxiety and depression and/or bronchiectasis, differently.

724. The claim is not well founded.

In the three wellbeing discussions on 15 September, 24 September and 6 October 2021 the Claimant discussed issues surrounding face mask wearing, difficulties with trialling new medication, guidance from Access to Work and support from her GP. Jinny Kaur was 'closed off' to these issues [LOI 5.5]

The claimant asserts that the relevant disabilities are anxiety and depression, bronchiectasis, diabetes.

Knowledge of Diabetes

725. The respondent accepts that Ms Kaur was aware that the claimant had diabetes from 25 June 2020. A **Covid 19 Risk Assessment** was completed for the claimant on 11 June 2020 [p.296] which recorded that she has Type 1 diabetes controlled by injection, and this was provided to Ms Kaur on **25 June 2020.** The Tribunal conclude that Ms Kaur had the requisite knowledge of the disability from this date. Type 1 diabetes is a commonly known condition, and the Tribunal considers that knowing that she had diabetes and that it **required management by injection**, that Ms Kaur would have known that the effects of the condition were likely to be long term and the effects, without treatment, more than minor or trivial. The serious effects of Type 1 diabetes if left untreated are common knowledge.

less favourable treatment

726. The claimant does not identify an actual comparator. A hypothetical comparator would be someone without the claimant's disability and who had stated that she did not want to return to her role and had raised the same or similar issues.

Because of

727. The Tribunal understands from counsel's submissions, that the allegation is that Ms Kaur was not interested in further investigating or considering the matters raised by the claimant.

728. The Tribunal consider that, as counsel for the claimant submits [para 66] there was a failure to comply with the Policy, in that a wellbeing discussion did not take place before the absence reached 14 calendar days and it did not cover all the issues set out in para 4.3.1 of the policy [159]. The OH health report referral on 2 August 2021 was also outside the 28 day time frame set out in para 4.3.2 of the Policy. Counsel for the claimant

submits that the redeployment process was being explored before the claimant raised it with Ms Kaur and the claimant believes this is why Ms Kaur was 'closed off' however, if that were the reason, that is not *because* of her disabilities.

729. As set out in the findings of fact, the notes of the meetings record a discussion about these issues and it remains unclear what, if anything, it is alleged Ms Kaur failed to do which she should have done at this stage, other than, get an OH sooner and cover all the issues set out in the Policy.

730. By the time of the Well Being reviews, the claimant had made it clear that she did not want to return to her role as PA. It is accepted that the Wellbeing Wheel had not been completed but there was discussion with the claimant about various issues including trailing new medication and mask wearing, because those are recorded.

731. The Tribunal do not accept that the claimant was on balance subjected to a disadvantage by Ms Kaur being 'closed off' as alleged because of her pleaded disabilities. Although all the factors set out in para 4.3.1 were not discussed, the claimant had made it clear that she did not want to continue in the role.

732. The Tribunal consider that anyone else who was absent but not disabled and had indicated that they did not want to continue in the role but qualified for redeployment, would have been treated in the same way as the claimant. Indeed, counsel for the claimant in written submissions, states that her *absence* was the reason why the claimant was treated as she was [para 69], which would make it a section 15 EqA claim.

733. The Tribunal conclude that Ms Kaur managed the process has she did during those meetings because the claimant had indicated that she did not want to return to her role, thus many of the issues such as adjustments for the PA role and flexible working were not covered.

734. The Tribunal conclude that the reason for the treatment was not because of the pleaded relevant disabilities, but because of her expressed desire not to return to the same job.

735. As the respondent raises in its submissions, it was not put to Ms Kaur that she was 'closed off' because the claimant had the relevant pleaded disabilities and it would therefore in any event, be unjust to find that the disabilities were a significant influence without giving her the chance to respond.

27 The claim is not well founded. The claim was also presented outside the primary time limit.

Discrimination arising from disability (S.15 EqA)

736. Did the Respondent do the following acts or omissions:

Did Jinny Kaur <u>often</u> micro-managed the Claimant's workload [LOI 8.1]

unfavourable treatment

737. For the reasons set out above in the conclusions to the direct discrimination complaint, the Tribunal conclude that Ms Kaur did **not** 'often' micromanage the claimant's workload, that this conduct happened is not made out on the evidence.

'Because of something arising' from the claimant's disabilities.

738. The claimant asserts that the relevant something arising from her disability is in respect of her **anxiety and depression.**

739. The claimant was not clear in her own evidence however, that there was any link with the spreadsheet difficulties and this disability, as set out in the findings. In cross examination she gave evidence that her impairments did not cause the problems she had with the spreadsheet, but it was used as an excuse to get rid of her.

740. The claimant on the one hand seems to maintain in her evidence that she was able to have amended the spreadsheet and should have been permitted to do so and insisting she revert to the original version was 'micromanaging' her and on the other, that the issue with the spreadsheet was in some way linked to her disability of anxiety and depression and she needed more support.

741. Counsel for the claimant in oral submissions was asked by the judge what evidence she was pointing to that the something arising was due to anxiety and depression rather than ADHD, counsel informed the Tribunal that there was no evidence in the documents, it is 'just what the claimant believed at the time'. The ADHD was undisguised at that point and counsel accepted that it was 'difficult to pinpoint what it is arising from' and appreciated there were no documents to evidence a connection, only the claimant's own oral evidence.

742. The claimant has not proven on a balance of probabilities that the difficulties she had with the formatting of the spreadsheet had anything to do with her anxiety and depression and in any event, the Tribunal do not accept that she was 'micromanaged'.

Did the respondent know the claimant had the disabilities?

743. Section 15 EqA does not apply if the respondent does not know and could not reasonably be expected to know that the claimant had the disabilities.

744. The Tribunal conclude that Ms Kaur was put *on notice* on **26 August 2020** meeting that there may be an underlying medical condition; referring to **'formal anxiety and EUPD'** and that she had sufficient information at this stage to put the respondent under an obligation to make enquiries knowledge. It would have taken the respondent perhaps no more than a week to obtain further information form the claimant which is likely to have led the claimant to explain the symptoms in sufficient detail to make the respondent aware of the long standing nature of the condition and the daily impact of it i.e., by about **2 September 2020.**

745. Knowledge by the employer of the casual link is **not** required.

Legitimate aim.

746. While the Tribunal accept that the claimant was instructed to use the original spreadsheet, the Tribunal conclude that this was because of the errors with the spreadsheet the claimant had produced. She had removed important information. The Tribunal consider that it was reasonable to request that she revert to the previous format and address whatever issues there may have been with the sending of it out to Sara Le-Butt and there was discussion about the claimant arranging more Excel training, these were all sensible measures.

747. The Tribunal consider managing the claimant effectively is a legitimate aim and that instructing the client to use the previous spreadsheet was a proportionate means of doing that. The spreadsheet she had used was not fit for purpose. The claimant had

Excel experience and did not say to Ms Kaur that this task was beyond her skill set and abilities.

748. The claim is not well founded. The claimant was also brought outside the primary time limit.

During the summer of 2021 the Claimant requested support with the access to work assessment, but this was not ordered until 14 October 2021 [LOI 8.2]

The Claimant asserts that the relevant somethings arising from her disability is in respect of her anxiety and depression, bronchiectasis.

unfavourable treatment

749. The claimant as set out in the Tribunal's findings, elected not to have the Access to Work assessment until her return to work. This was her choice.

750. While there was some delay in Ms Kaur responding in September 2021, this had no impact on the date of the assessment, in that the initial assessment took place as the claimant had wished on her return to work on 7 October 2021 and thereafter Ms Kaur acted promptly in confirming support for the coaching sessions.

751. The Tribunal do not consider that any delay amounted to unfavourable treatment, as already addressed above.

Because of something arising from the claimant's disabilities

752. The support was specifically to assist with a grant for ADHD coaching, it was not for support connected with any other health condition. The claimant appears to be trying to attach certain complaints to conditions other than ADHD, when they properly relate to ADHD, because of the agreed position (recorded in the Tribunal previous judgment by consent) that she was not disabled by ADHD until May 2022.

753. The claimant has not established a connection between any other condition and the assessment which was due to be carried out by Access to Work.

754. While the something arising is also alleged to relate to the bronchiectasis, it is not explained how that relates to this allegation. In submission, counsel for the claimant does not mention this condition at all. The claimant has not proven that anything arising from this condition had a connection with this alleged treatment.

755. Counsel for the claimant in her submissions puts the claimant's case on the basis that [para 74 of claimant's submissions] she was signed off work on 27 May 2021 to understand the ADHD condition and the reason Ms Kaur gave for delaying the access to work was because the claimant asked for this to be done on her return and that [para 75]: "*It is the claimant's case that she would have struggled to concentrate on work and would have been distracted by the new ADHD diagnoses as she would have been hyper focused"*

756. The argument that the claimant was absent with anxiety and depression and that the delay was because she was absent, the Tribunal find is unsound The delay was because the claimant herself wanted to wait until she returned to work, and the provisional assessment was carried out then. If she wanted to have the provisional assessment before she returned, she could have arranged for that. The reason why the assessment took place when it did was not because of her absence, it was because of the claimant's

request and preference for when this was to take place. Her reasons for wanting the assessment on her return, may have been linked to her ill health at the time but the reason Ms Kaur acted as she did was because she was acting in accordance with the claimant's request. The Tribunal consider that even if there is therefore a connection between her anxiety and depression and her preference to delay the assessment, this does not amount to unfavourable treatment. The respondent could not force the claimant to participate sooner and if they had, and insisted on an earlier assessment, that would no doubt be argued as unfavourable treatment and would have merit.

757. In any event the Tribunal have concluded that problems with concentration specifically while 'hyper focussed' while an effect of ADHD, is not proven to be linked with her condition of anxiety and depression. There is insufficient evidence to prove that the reason she did not want the assessment until she returned to work was because of the effects of anxiety and depression rather than the pleaded effects of the ADHD condition (which include that the claimant struggles with distractions when hyper focused).

758. There is no direct evidence and the Tribunal consider no primary findings of fact , to support an inference that the delays in September was because of anything arising from either of these two conditions.

Did the respondent know the claimant had the disabilities?

759. For the purposes of a section 15 claim, what is required is whether the respondent knew or could reasonably be expected to know that the claimant had the disability.

760. As set out above, the respondent could *reasonably* have been expected to know that the claimant was disabled because of **anxiety and depression** from around **2 September 2020.**

761. In terms of when the respondent could reasonably have been expected to know that the claimant was disabled because of **bronchiectasis** (as opposed to actual knowledge) , the claimant it is agreed had this disability from April 2020.The respondent was aware that the claimant had constant chest infections by **11 June 2020** [295] and Ms Kaur was told her condition was under investigation. The Tribunal consider that had the respondent made reasonable enquiries at this stage, including potentially discussing the symptoms with the claimant and contacting her GP, it would have understood that this condition was likely to be long term and having a substantial effect on her day to day activities. The enquiries the Tribunal conclude, are likely to have taken no more than 7 days to make, i.e., by **18 June 2020.** Even if the doctor was not able to confirm the cause, he would have been able to confirm that she had a lung condition and explain the impact on her breathing and that it was likely to be a long term condition.

If so, has the respondent shown that any unfavourable treatment was a proportionate to a legitimate aim.

762. The respondent does not plead a legitimate aim in connection with this alleged unfavourable treatment.

763. The claim is not well founded and is dismissed. The claim was also presented outside the primary time limit.

In the three wellbeing discussions on 15 September 2021, 24 September and 6 October 2021 the Claimant discussed issues surrounding face mask wearing, difficulties with trialling new medication, guidance from Access to Work and support from her GP. Jinny Kaur was closed off to these issues [LOI 8.3]

The Claimant asserts that the relevant somethings arising from her disabilities are in respect of her anxiety and depression, bronchiectasis, diabetes.

Unfavourable treatment

764. Counsel submits in her submissions [para 76] that the failure to comply with the Policy at 4.3.1 at these meetings, affected the claimant's transition into coming back to work however, she does not clarify how.

765. In her submissions she states [para 76]:"*Jinny Kaur being closed off to issues in these meetings is* attributed *to the claimant requiring longer to understand and complete new tasks. Jinny Kaur had already raised the issue of performance with the claimant and the redeployment process had already been explored."*

766. The evidence has not been presented to support a finding that if some other adjustments or steps in line with the Policy been taken, the claimant would have been able to return sooner, she would have been prepared to continue with the PA role or that it affected her transition back into work and nor do the submissions address this.

767. However, despite the lack of clarity in the submissions, it is at least clear that it relates to facemask wearing. The need to wear a face mask is linked to the condition of bronchiectasis. The claimant's evidence is that she builds up more mucus when wearing a mask. Although there was some discussion, in the event the claimant was returned to a location where she needed to wear a mask. The Tribunal have considered whether this is evidence that Ms Kaur was not engaging or was 'closed off' about the issue the claimant raised about wearing a mask. However, at the Wellbeing Review meeting on 24 September [449] there was some discussion around this, and the claimant had agreed to wear a mask in line with the respondent's policy, although she felt she may find it difficult wearing a mask for prolonged periods. In her own notes [452] she states that she agreed to try wearing a mask although she wanted them to consider part time working.

768. The Tribunal do not accept that Ms Kaur was 'closed off' at these meetings because there were discussions about mask wearing, which culminated in the claimant agreeing to try wearing one on her return. When she did return and after trying to wear one, asked to be moved, she was. Ms Kaur was supported by HR in these meetings.

769. As for any other impact in terms of her transition, it is simply not clear from the claimant's evidence or submissions what it is being alleged Ms Kaur should have done which she did not do, and which amounts to her being 'closed off' in these meetings. She had by this stage put in a place an Action Plan, but the claimant did not want to return to her PA role. She had made that clear and OH supported that decision.

Because of something arising from the claimant's disabilities?

770. The evidence presented suggests that the main problem with the claimant's performance in this role, and thus the discussions which led on from that about redeployment, were connected with the effects of ADHD. The OH report of 18 August 2021 as set out in the findings, clearly advises that a different, more structured role would be more manageable "*in view of the ADHD".*

771. The fact that the main relevant disability was ADHD, is further supported by the support she is given by Access to Work to manage that condition in her roles going forward.

772. The Tribunal were not directed in submissions by counsel to the evidence to support that anxiety and depression was a reason for the issues with her ability to perform in the job of PA and hence the redeployment discussions and decision not to progress the Action Plan.

773. However, the Tribunal take into account that by November 2020 the claimant was reporting, as set out in the findings of fact, that in terms of her mental health, the referral reports that the clamant has said that her mood was not good, there had been a deterioration in her mental health and her anti-depressants had been increased and she was seeing a psychologist weekly.

774. The OH report of 18 August 2021 as set out it the findings of act, indicated that the main barrier to her doing this job was the effects of ADHD but it also referred to it not being "*compatible with **her mental health…"***

775. The Tribunal conclude on balance that the anxiety and depression was a contributing cause and had a significant influence on her ability to do the job at least from November 2020 .

776. The difficulties from mask wearing did arise, on balance, from the lung condition and the Tribunal accept that being required to wear one and having difficulties breathing or creating more mucus may have resulted in some increase in anxiety.

Did the respondent know the claimant had the disabilities?

777. The respondent could reasonably have been expected to know that the claimant had all 3 relevant pleaded disabilities by the date of these meetings (see above).

Legitimate aim

778. In terms of the requirement to wear a mask the respondent argues that it had a legitimate aim of reducing the risk of Covid 19 transition and complying with the face mask mandate in place at the time. The claimant does not seek to dispute that these are legitimate aims. The Tribunal accept that measures to protect the health and welfare of employees is a legitimate aim as is compliance with face mask mandates to ensure compliance with government guidance .

779. In terms of whether the aims were proportionate, the Tribunal has little difficulty in finding that they were not in these particular circumstances with respect to mask wearing. There was an alternative. There were other offices available. The claimant was moved to The Willows, which was easily and quickly accommodated when she raised her concerns.

780. The claimant has not established however, that Ms Kaur was 'closed off'.

781. The claim is not well founded. The claim was also presented outside the primary time limit.

Jinny Kaur did not provide the Claimant with <u>any</u> warning of performance issues nor provide time to improve. [LOI 8.4]

The Claimant asserts that the relevant somethings arising from her disability are in respect of her anxiety and depression.

Unfavourable treatment

782. While the claimant may dispute the feedback about her performance it is simply not accurate to maintain that she was not provided with 'any warning' about her performance issues or time to improve. The claimant was warned not only during one of one meeting but when the Action Plan was put together and she was told that she had 6 weeks to improve.

783. The claimant's counsel in submissions argues that this was unfavourable treatment because the claimant suffered the disadvantage of an Action Plan being discussed before the informal routes were explained and the Action Plan could have been implemented earlier. That is not however how the claim is pleaded, it is that there were no warnings or time to improve. The Action Plan was, however, part of the informal process and the claimant in evidence said she had been pleased at the time that there was going to be an Action Plan in place. This was before she received her ADHD diagnosis.

784. The allegation of not providing **any** warning of performance or time to improve, the Tribunal find is not made out.

Because of something arising from the claimant's disabilities?

785. As set out above, it has been established by the claimant that the issues with her work were caused during this period, by ADHD and to a lesser extent also by anxiety and depression.

Did the respondent know the claimant had the disabilities?

786. The respondent could reasonably have been expected to know that the claimant had all the disability of anxiety and depression by the date of these meetings (see above).

787. No legitimate aims are pleaded.

788. This claim is not however, well founded.

On 15 September 2021 Jinny Kaur asked the Claimant to consider redeployment: The Claimant asserts that the relevant somethings arising from her disability are in respect of her anxiety and depression and bronchiectasis [LOI 8.5]

Unfavourable treatment

789. The Tribunal do not accept that asking the claimant whether she wanted redeployment was a disadvantage. This was raised with OH in the referral on 2 August. It is submitted by counsel for the claimant that Ms Kaur had raised this before the formal management process had been complied with and while that is correct and this was raised before a discussion on the 3 August with the claimant, the claimant wanted redeployment. The claimant made an informed decision, and the evidence does not support a finding that she was not well enough to make this decision. It is difficult to see how this discussion, rather than attempt to put support in place which she did not want and put her through a formal performance (or capability) process (which may have ended in her dismissal), would have seemed a better option at that time and clearly it did not at the time.

790. In retrospective the claimant now considers that given how the work trials worked out, it would have been better not to opt for redeployment, however, this was her choice at the time, even if she would later regret it.

791. The claimant did not want to return to her role and OH were supportive of that decision.

792. As counsel for the respondent sets out in details in his submission [para 114 – 132] the claimant then had a series of meetings afterwards and had every opportunity to change her mind.

793. The Tribunal do not accept that asking the claimant about redeployment in the circumstances, was unfavourable treatment.

Because of something arising from the claimant's disabilities?

794. As set out above, it has been established by the claimant, at least from November 2020, on a balance of probabilities, that the issues with her work were in part caused by anxiety and depression.

795. The evidence does not support a finding that the difficulties the claimant faced which led her to not want to continue in the role, were due to bronchiectasis and this was not put to Ms Kaur.

Did the respondent know the claimant had the disabilities?

796. The respondent could reasonably have been expected to know that the claimant had the relevant pleaded disabilities by the date of these meetings (see above).

Legitimate aim and proportionate means

797. The respondent pleads a legitimate aim of looking after the welfare of the respondent's employees. The claimant in submissions does not argue against this being a legitimate aim and the Tribunal have little difficulty in finding that it is.

798. The claimant submits however that this aim was not met because Ms Kaur started the redeployment process before speaking with the claimant and while the claimant was off sick. However, the Tribunal do not accept that the process was started until the claimant agreed that this is what she wanted. Ms Kaur was making enquiries whether this was an option and suitable way forward, and the claimant was the Tribunal find, well enough to make the decision while off sick to take up that option. The alternative being to manage her performance through a performance management or capability process, which may have been more stressful for the claimant . It was a proportionate means of looking after the claimant's welfare.

799. The allegation is not that pressure was applied to the claimant.

800. The respondent also argues that it had a legitimate aim of following OH advice. The claimant does not argue in submissions that this aim is not legitimate but that it cannot be relied upon because OH was not obtained before Ms Kaur asked the claimant about redeployment and as the case is pleaded, that is correct. Ms Kaur was not following OH when she first raised this with the claimant.

801. This claim is not well founded and is dismissed.

Jinny Kaur removed the Claimant from her permanent role without any formal performance or absence management procedures being followed.

The Claimant asserts that the relevant somethings arising from her disability are in respect of her anxiety and depression and Bronchiectasis and ADHD [LOI 8.6]

Unfavourable treatment

802. The Tribunal do not accept that the claimant was removed from her role. The claimant said that she did not want to return to it. This not a case where the claimant was forced to accept redeployment. In any event, there was no formal performance management or absence management process followed because the claimant made it clear, and was supported by OH, that the job was not suitable for her.

803. With respect to whether the claimant understood that her employment would be terminated at the end of 12 weeks, if she had not secured another role, the Tribunal as set out in the findings, conclude that on balance the claimant was told this would be the outcome and she understood this.

804. The claimant is an intelligent lady. She had held responsible roles for a significant number of years. She was perfectly able to arrange support through the Access to Work scheme and raised a grievance in 2022 and yet she never raised a grievance or appealed the decision when she received the letter in November 2021 and the Tribunal conclude that this is because she had chosen redeployment knowing the potential consequences.

Because of something arising from the claimant's disabilities?

805. As set out above, it has been established by the claimant that the issues with her work were contributed to by anxiety and depression and mainly caused by ADHD but not the Tribunal has concluded, bronchiectasis.

Did the respondent know the claimant had the disabilities?

806. The respondent could reasonably have been expected to know that the claimant had the relevant pleaded disabilities by the date of these meetings (see above).

807. This claim is not well founded and is dismissed.

The Claimant was dismissed on 20 January 2023 [LOI 8.7]

The Claimant asserts that the somethings arising from her disabilities were in respect of her anxiety and depression, ADHD, diabetes, bronchiectasis and asthma.

Unfavourable treatment

808. The decision to dismiss the claimant was unfavourable treatment, it caused an obvious disadvantage. Both parties accept that.

Because of something arising from the claimant's disabilities?

The dismissal

809. The respondent's primary submission is that the claimant alleges that she was dismissed because of the different things that are said to have arisen from her 5 disabilities, as opposed a claim that something arising from her disabilities was her underperformance and thus inability to meet the standards required. The respondent submits that the list of issues sets out the effects of her conditions but does not include as an effect, her inability to meet the standards of this role. Counsel for the respondent also submits that the claimant does not say in her evidence in chief that she was unable or had difficulty in meeting the required standards in the audio typist role because her

performance was adversely affected and thus her witness statement misses the second causal link.

810. Further, the respondent submits that there is no evidence anything which arises from her disabilities was an effective cause of her dismissal and it is unlikely all fifteen things were an effective cause. Further, it is submitted it was not put to the witnesses that the claimant was dismissed for any of those 15 things.

811. If the Tribunal do not accept that primary position, it is submitted that the claimant has not led persuasive evidence to establish that her ability to meet the required standard for the role was diminished because of anything arising from her disabilities and she has not pursued any reasonable adjustment claims in respect of the third work trial but in any event the respondent made adjustments.

812. In terms of the primary argument, the Tribunal is not persuaded. It was clear from the claimant's evidence in chief that she considered she was struggling in the role because of the various alleged effects of her disabilities. She refers throughout her witness statement to the adjustments she felt she needed in this role [e.g., page 56 para i& ii,/page 154 para c etc]. The Tribunal refer below to only a couple of examples of where the Tribunal consider it was clear that the claimant was complaining that her disabilities impacted on her performance in this role:

"I could not understand her lack of support towards me trying reasonable adjustments that had now been identified by the OH assessment. At this point I felt exhausted from giving 100% to make this trial succeed ***and always felt that I would overcome any barriers caused by my disabilities****.." [claimant's evidence in chief page 154/155 par c]*

"On 21 November 2022, Julie responded that she would look into it…however, she offered to pause the WT3 to allow my managers to consider and put in placed [sic] reasonable adjustments I needed for the role. This was only fair and should have been the practice applied to this and all of my previous roles. In the absence of reasonable adjustments being put in place and being effective, ***it was not fair to assess my performance. Because I was disadvantaged because of disabilities that were affecting my performance****…" [claimant's evidence in chief page 151 para a.] Tribunal stress.*

813. Mr Roberts who heard the appeal against dismissal makes it quite clear in his evidence in chief that he considered that he reached a decision to dismiss because the claimant was not performing, and reasonable adjustments had been put in place to support her performance.

814. The claim form itself [26 para 65 and 65.14] makes the link clear; "*As a result of the Claimant's various* diagnosis*, the Claimant avers that she has suffered unreasonable treatment in that :… 65.14 she was dismissed. Her performance issues: increase of spelling mistakes and grammatical errors, taking longer to grasp new tasks arose from her mental impairments, particularly ADHD, anxiety and depression and therefore she was adversely effected."*

815. It was patently clear to the respondent that the allegation is that her performance was impaired by the effects of her disability, and she was dismissed for her performance. The witnesses were questioned about the effects and the adjustments and about her performance in the role and prospects of improvement with an extension of the trial period with the adjustments now in place. The primary submissions do no put forward a reasonable defence to this complaint.

816. The claimant was dismissed because of her performance in Work Trial 3.

817. The performance in the role, namely the ability to type sufficient letters but also more importantly to the respondent, to complete letters with no clinical errors, the Tribunal accept, was impaired by her disability, principally ADHD.

818. The OH report in **November 2022** [1433] advised that: *"Adults with neurodiversity are well* known *to take significantly more time when it comes to transition to new environments then neurotypicals."*

819. Counsel for the respondent refers to the above as generic advice, no specific to the claimant in how it is written. However, the Tribunal take into account that the adjustments recommended by OH for the claimant related to those same issues as identified, namely issues with concentration and distraction (noise cancelling headphones and limiting distractions) and learning new tasks (limiting the number of consultants she worked for).

820. While the OH report is written in general terms, the Tribunal accept on balance, that the claimant experienced those effects. The advice is consistent with the list of the adjustments the claimant asked for on 27 January 2022 [813] after discussing her condition and role with the Access to Work team and ways they could support her with managing ADHD. Those adjustments were linked with the additional time she needed to focus on tasks, which is a common theme in the advice from Access to Work and the claimant's own evidence and what she asked for and what was recorded in the Health Passport at the time [1299]. The Tribunal find that the claimant has shown on a balance of probabilities, that she took longer to learn new tasks and transition to new environment because, primarily of the ADHD.

821. Certain adjustments were put in place to address these effects, including a screen and noise cancelling headphones to limit distractions and noise and a reduction in her workload to allow her to focus on fewer consultants and there was then some improvement then in her performance.

822. The Tribunal also accept that on balance, the disability of anxiety and depression was also a factor in impairing her performance at times when she felt under pressure, in terms of concentration, which also made it more difficult for her to learn new tasks and complete tasks.

823. The claimant was required to work in a cold office however there is no medical evidence to suggest that this made her breathing more difficult. However, the Tribunal consider that it is common sense that working in a cold office is likely to be an added distraction for someone who already finds it difficult at times to concentrate and focus on a task.

824. The Tribunal have little difficulty in concluding, as set out in its findings, that the claimant struggled to reach the competencies in the Work Trial 3 because of the effects of her disabilities and in particular the impact of ADHD and that the decision to dismiss was unfavourable treatment arising from her disabilities, principally ADHD, and to a lesser extent anxiety and depression.

Did the respondent know the claimant had the disabilities?

825. The respondent accepts that the Lyndsey Wright knew about the claimant's disabilities of bronchiectasis, asthma, diabetes and ADHD from September 2022 but not anxiety and depression during the periods of alleged discrimination.

826. In terms of what the respondent knew or could reasonably be expected to know, as set out above it knew or **ought reasonably** to have known by the date of dismissal that the

claimant had the disabilities of ADHD and anxiety and depression, for the reasons as set out previously in the judgment.

Legitimate aims

827. In terms of the dismissal, the legitimate the aims relied upon are:

- Assessing the suitability of an employee in a trial role within a defined period, and/or;
- Ensuring that the Respondent maintains the necessary standards in the provision of its services.

Assessing the suitability of an employee in a trial role within a defined period,

828. The claimant's counsel does not deal with the legitimate aims in submissions [para 87] only with the proportionality of the means. The Tribunal must nonetheless determine if the defence is made out on the evidence because the burden is on the respondent.

829. The Tribunal find that to have a defined period to assess whether someone is suitable for a role may be a legitimate aim however, the respondent has not expanded upon this in submissions and explained why this aim was in place for the respondent and what purpose it served. The period of a work trial for redeployment was 4 weeks. For new starters in the Audio Typist role (WT3) the training was 10 weeks. It was not explained by the respondent witnesses or counsel in submissions, what the aim was behind a 4 week defined period as opposed to a 10 week period or any other period. It was also a defined period which could be extended.

830. To simply say there was an aim to assess employees in a defined period does not explain the legitimacy of the aim; what was the real, objective consideration of the aim is.

831. It is simply not clear what the aim and the objective of the defined period for the trial is and whether it is a true aim. Is it to ensure the employee and manager knows what the expectations are and can set in place a training structure for a defined period? Is it for the purposes of workforce planning so that if not successful, steps can be taken to otherwise fill the vacancy?

832. The redeployment policy provides for 4 weeks but the Tribunal did not hear evidence about what was the aim behind the 4 week period in the policy .

833. The Tribunal cannot find on the evidence that the aim was a true aim. Further, the Tribunal consider that having a defined period may be for a legitimate aim however in this case, the Tribunal also have not heard why it was legitimate in the particular circumstances, her redeployment period was 12 weeks in total and new starters recruited into this role are trained for 10 weeks.

Ensuring that the Respondent maintains the necessary standards in the provision of its services.

834. The Tribunal accepts that maintaining standards is a legitimate aim and appreciate the potential impact for the service and its patients of mistakes and delays in letters being sent out to their GPs.

835. As set out in the findings of fact, the work that was being carried out was important work and it was important to ensure that it was carried out without significant clinical errors,

to ensure the communication with others working with the patient had the correct medical information and advice.

836. The Tribunal find that this was a true and legitimate aim generally and in these particular circumstances.

Proportionate means

837. The real issue in this case is whether the respondent employed proportionate means to achieve the aims. The burden of proof is on the respondent.

Weighing up the reasonable needs against the discriminatory effect.

838. The respondent needed the Tribunal accept to be able to trust that letters were being sent out without clinical errors. It was also a relatively small department, and it was necessary to ensure that sufficient letters were being produced by the team to meet its target and the team were already operating with a backlog.

839. However, Ms White of HR indicated in her evidence that there could have been another extension, as set out in the findings of fact. Her evidence was not that if someone presented with mitigation it would make no difference because regardless a further extension could not be accommodated, her evidence was that if there were mitigating circumstances that may be possible.

840. The Tribunal do not accept that Mr Lockwood had any resistance to continuing to support the claimant, although he may have needed a short break, there is no evidence from the respondent that another member of the team could not have covered for him. It is not sufficient to argue that the claimant wanted Mr Lockwood to support her, the question of alternative support or dismissal, was not put to her and the Tribunal conclude that she would have chosen alternative support if asked (as evidenced by her appeal and her clear expression of wish to stay in the role).

841. As set out in its findings, the claimant had produced in December 2022, about 4.5 letters on average a day. Taken as an average, the Tribunal calculate (using the figures provided by the respondent)that the number of letters she produced, was circa 50% of the expectation of a fully trained typist.

842. The redeployment policy may have provided for a 4 week trial, but employers are not justified in slavish adherence to policies alone to justify discrimination or failure to make adjustments.

843. Someone outside the redeployment process would be allowed 10 weeks to complete the training, the claimant with ADHD and anxiety and depression, was working under the pressure of reaching the stage of being competent after 6 weeks and then ultimately 12 weeks.

844. The decision initially to set a 6 week trial was made by Mr Moonsinghe and was not based on OH advice or the policy. The extended period was not informed by discussions with the claimant about what she needed or advice from Access to Work. The period decided upon was based on his '*gut instinct'.* Mr Moonsinghe does not allege that there was any compelling business need or aim, which required him to limit the trial to 6 weeks. The claimant had been employed by the respondent for almost 26 years.

845. The respondent made adjustments however, they were made late in the day. The respondent allowed the claimant another 4 weeks from when the further adjustments as

set out in the findings of fact, were put in place, but once again this was not a decision taken with reference to the needs of the business and what the claimant required, taking into account what she was saying or what OH was advising, it was based on a broad view of what was reasonable, with reference primarily to the redeployment policy itself.

846. Had the OH report been obtained in good time to enable the managers to put in place the adjustments required at the start of the trial period (e.g. headphones and screens), the Tribunal consider that it is very likely that the claimant would have had a much better chance of learning more quickly and meeting the required standards.

847. The Tribunal consider that a reasonable adjustment would have been to start the trial when the OH report was received and all the adjustments were in place, this would have included Microsoft 365 (which would have alleviated some of the pressure and distraction of spelling and grammatical errors). Although the Tribunal find on balance these were not related to her disabilities but more likely dyslexia) it would nonetheless have helped reduce some of the pressure and/or had a prospect of helping her type letters more quickly.

848. By the time the adjustments were in place, from 8 December 2022, the claimant had been working for almost 6 weeks under the pressure of having to succeed in the trial in an environment which was not adapted for her needs.

849. It is likely that a more suitable room could also have been located where she could have worked from the outset with a workstation set up for her, in a warmer, quieter environment. There was no meaningful consideration given to this or even trialling this.

850. Working in a cold environment is distracting and challenging for someone without health conditions, and the respondent appears to have had in place no system to monitor the temperature. For staff to need heaters and to work in coats, is wholly unacceptable. The managers knew the heating system was problematic and were reactive when dealing with the working environment, providing heaters when asked for and more when the ones provided were not sufficient. There appears to have been no monitoring of the temperature and while the claimant was resistant to being moved, this was because her workstation had already been set up.

851. For reasons set out in the findings of fact, the Tribunal conclude that measures could have been taken to alleviate the work pressures on the rest of the team and clear the backlog, including offering temporary overtime to existing staff or recruiting from the Bank of typists.

852. While Mr Roberts gave evidence that there were significant restrictions on increasing expenditure, he did not expand on that and provide any details of what those restrictions were and accepted that it was possible to offer overtime with the authorisation of the Executive Team. He accepted that someone working part time may have been prepared to increase their hours. No effort was made to seek that approval and no evidence was put before the Tribunal by the respondent to suggest that the Executive Team would have refused it or if granted it, for how long.

853. The Tribunal conclude that the respondent took a view that they had been reasonable enough, the gave no serious consideration to whether they could accommodate a further another extension and if so for how long. They also thought it unlikely that the claimant would meet the competencies but did not consider in any meaningful way what the prospects were and whether these outweighed the inconvenience and cost to the respondent.

854. The Tribunal note that external new starters have a 10 week training period and 6 month probationary period.

855. The Tribunal have considered the guidance in **Griffiths v Secretary of State**.

856. The impact of the decision on the claimant was profound, it was to take away her employment with the NHS and all the attached benefits, after 26 years of employment. The impact on the claimant was extremely serious. The reasonable needs of the respondent, to limit the trial period and not allow an extension, do not the Tribunal find, justify that impact in the circumstances. The respondent had not looked at and even at the hearing, could not provide any information about the likely cost of putting in place some temporary overtime shifts to clear the backlog while the claimant continued to have some 1 to 1 support. Mr Roberts was not concerned about the impact on Mr Lockwood supporting the claimant and he was, in fact, happy to continue to support her. The ability to continue to support her therefore was not an issue.

857. It was not reasonably necessary to terminate the claimant's employment and the trial period at that point. Less discriminatory measures could and should have been taken to ensure that the aim of making sure that the work she did (a legitimate aim) was sent out without errors, was met. Namely continue the one to one support for a further period.

858. In terms of the aim of having a defined trial period, the Tribunal did not hear evidence about the reasons for that aim, or why it was reasonably necessary. In practice, the respondent extended this trial and thus clearly while the Tribunal can appreciate the benefits of having a clear end date, it was extended, and the new date communicated and training restructured. Whatever the purpose of this aim is, the Tribunal conclude that could have been met by a further **defined** extension period. The Tribunal consider that a period of a further 3 months would have been reasonable.

859. The claimant's case is put on the basis that a reasonable adjustment would have been between a further 3 to 6 months. A further 3 months would be slightly more time than is given to new starters during their 10 week training period to reach the competencies. The claimant would have this time working with adjustments in place and without the pressure of a short deadline to perform to. The Tribunal consider that if she was unable to reach the required standard within that further time frame, the prospects of her being able to, at any point, create the necessary letters without serious errors, would be so low as to render it unreasonable to extend the period further.

860. The Tribunal consider however, that there is a real prospect that a 3 month extension of the trial may have enabled the claimant to get to the stage of making no clinical errors, given that she had shown some improvement with adjustments. OH, had advised that they considered this was an appropriate role for her with a lengthening of the trial period and had recommended for 3 months that she type for fewer consultants and that she build from there.

The claim succeeds. There are no limitation issues.

Prospects

861. The Tribunal take into account the difficulties the claimant faced with concentration and that she was still making clinical errors at the end of the extended trial.

862. The Tribunal consider that it would have been reasonable to allow the claimant a further period of 3 months by way of a further extended trial period but that there is a chance that the claimant would have been dismissed fairly and for a non-discriminatory reason

even had the trial been extended for this length of time, because she would still not have met the required standards for the role.

863. The parties are invited to address the Tribunal at the remedy hearing on this issue in terms of what compensation it is just and equitable to award and what, if any, deduction for loss of chance should be applied.

The respondent failed to put in place informal or formal action plan to address performance issues and decided to redeploy the Claimant in respect of her bronchiectasis, anxiety and depression [LOI 8.8]

864. Jinny Kaur between July 2020 and 7 November 2021.

Unfavourable treatment

865. As set out above, the respondent had started the informal performance management process, Ms Kaur had raised issues of performance with the claimant at supervision meetings and begun to put in place an Action Plan. However, the Tribunal do not accept that asking the claimant whether she wanted redeployment was a disadvantage and when she made it clear that this is what she wanted (and to not remain in the role of PA), it was not to her disadvantage not to take her through a performance process.

866. The Tribunal do not accept that asking the claimant about redeployment in the circumstances, was unfavourable treatment.

Because of something arising from the claimant's disabilities?

867. As set out above, it has been established by the claimant that the issues with her work were caused by anxiety and depression and ADHD. The claimant was not disabled because of ADHD until May 2022.

Did the respondent know the claimant had the disabilities?

868. The respondent could reasonably have been expected to know that the claimant had the relevant pleaded disabilities by the date of these meetings (see above).

869. This claim however, is not well founded .

Harassment related to disability (S.26 EqA)

Did the Respondent do the following acts or omissions? The Claimant was dismissed on 20 January 2023The Claimant asserts that this allegation relates to her anxiety and depression, ADHD, diabetes, bronchiectasis and asthma [LOI 14.1]

Was that conduct unwanted?

870. The respondent concedes that the dismissal was unwanted conduct and patently it was.

871. In terms of the allegation of being escorted out of the building and how this was managed, as set out in the findings of fact, the allegation was not put to Ms Wright in cross examination about how she carried this out and nor was Ms White asked about her decision. The Tribunal find that the claimant was escorted out of the building, however it would be unjust to make findings about how she conducted this, what her attitude toward the claimant was and whether this was handled sensitively, without this

having been put to the respondent's witnesses. This specific allegation of how she was escorted out of the building, was not included in the list of issues as forming part of this complaint, if it was this should have been identified by counsel and this omission makes it even more important that the allegation of harassment was put to the respondent's witnesses.

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

872. The claimant does not have to show that her disability/disabilities are the main or sole cause of the **unfavourable** treatment, it is enough if the disability had a significant influence on or was an effective cause of the treatment: **Hall v Chief Constable of West Yorkshire Police [2015] UKEAT 0057/15 (para 42)**

873. The Tribunal find on balance that the reason for dismissal was related to her disabilities, on a balance of probabilities, for reasons set out in the findings of fact and above in the conclusions, the Tribunal find that the claimant has satisfied the burden of proof in showing that her disabilities of ADHD and to a lesser extent anxiety and depression, impaired her performance. The ADHD was the main barrier, however, the Tribunal also accept that the anxiety and depression contributed in terms of her levels of concentration, particularly when she was feeling under pressure.

874. The claimant also complains of suffering more chest infections and having difficulty breathing due to the temperature in the office. The medical evidence does not support a finding that any chest infections were linked to the temperature in the room, or that the low temperature caused the claimant greater problems breathing because of the asthma or bronchiectasis.

If so, did that unwanted conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, taking into account s.26(4) Equality Act 2010?

875. The respondent makes no concession in terms of whether the dismissal had the proscribed effects.

876. The Tribunal conclude that as described, the claimant felt extremely upset and emotional about the outcome of the 20 January 2023 meeting but had anticipated that this would be the outcome.

877. While the Tribunal do not mean to trivialise how upset the claimant was after 26 years of service, the proscribed effects for the purpose of section 26 require the conduct to have the purpose or effect of violating the claimant's; dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

878. Violating is a strong word, offending against dignity or hurting it is insufficient, it must ' be violated': **Richmond Pharmacology v Dhaliwal [2009] ICR 724.**

879. The claimant had come resigned to this meeting on 20 January to being dismissed, this did not come as a shock to her. The claimant was upset but the Tribunal do not find that she felt violated. It was not put to any of the respondent witnesses that they intended to violate her dignity or create the proscribed environment.

880. The claimant describes not feeling comforted in the meeting but not that it was handled in a manner that could objectively reasonably have the proscribed effects. It is not alleged that Ms White or Ms Wright intended to cause her any upset and certainly not to the degree that it would amount to harassment.

881. The Tribunal conclude that what made the claimant feel humiliated is the alleged way in which she was treated when she left the meeting. As described by the claimant, the Tribunal accept that it would be objectively reasonable for her to feel that way, having regard to all the relevant circumstances. However, the allegation is not made out. The Tribunal conclude that while she was required to hand over her security badge and ID, the rest of the allegation regarding how she was treated, is not made out on the facts. Further, it would be unjust to uphold the allegation in circumstances where it was not put directly to the witnesses.

882. The claim is not well founded.

Indirect disability discrimination (S.19 EqA)

Allegation 1: Face masks [LOI 18]

PCP

883. The Respondent accepts that it applied a PCP of requiring its employees to wear a face mask, which was to minimise the risk of transmission of Covid-19.

884. The claimant confirmed that the periods complained of are (1) 7 – 14 October 2021 and (2) Work Trial 2.

Did that PCP apply to persons who did not have bronchiectasis.

885. It is accepted that the PCP applied to all staff working in a shared office, including those who did not have this condition.

The comparator group is all persons working in the same office as the Claimant.

886. The claimant compares her treatment to other employees working at Stewart House on the basis that different practices applied to different offices of the respondent depending on whether the offices were open plan or not. The respondent witnesses were not questioned by the claimant on the various offices and the different practices across those offices, but the claimant elected to limit the group to one office and not all offices where the same practice applied.

887. The Tribunal do not accept that an appropriate comparator group is limited to those few staff working the same office as the claimant when this was an organisation wide PCP.

888. The Tribunal accept the respondent's submission on this point, that there are no environmental factors which would provide a reason for limiting the group to one office. To confine the group to only those people working in one office would not represent fairly the whole group affected by the PCP.

889. No information about the whole group was put before the Tribunal and therefore it cannot reach any conclusions based on a comparison with the rest of the comparator group.

Did, or would, that PCP put persons with bronchiectasis at the particular disadvantage of exacerbating that disability, compared with persons who did not have bronchiectasis?

890. The claimant has not submitted any evidence, statistics, medical evidence or evidence from **other** employees who have this condition, as to how the PCP affects people generally with this condition.

891. The claimant's written submissions [para 102] simply state that it is a lung condition and mask wearing would exacerbate this illness. The respondent submits that the claimant had led no evidence that persons with this condition would have experienced the same problem as the claimant (who also has asthma) and that is correct.

892. While the Tribunal accepts that it may appear attractive to consider that common sense dictates that it can be presumed that people with such a lung condition would have the same difficulties as the claimant, the Tribunal are not medical experts, and this is not a common or well-known illness in the same was as diabetes is. Further, the comparator group relied on by the claimant are those with bronchiectasis only, however the claimant has the additional complication of having difficulties breathing at times, due to asthma, which may also have been a contributing factor [445].

804. Judicial Notice is a rule in the law of evidence that allows a fact to be introduced into evidence if the truth of that fact is so notorious or well-known, or so authoritatively attested, that it cannot reasonably be doubted. The Tribunal do not consider that it can take Judicial notice that *wearing a mask* would necessarily put persons with bronchiectasis at the same disadvantage as the claimant. While a common symptom of bronchiectasis is producing phlegm, the claimant complains specifically that her condition was made worse by wearing a mask (rather than by her asthma or the interaction of her asthma exacerbated her bronchiectasis when wearing a mask). There was no evidence to support the claim that it is the common experience of those with this condition that wearing a mask *exacerbates* the condition. (It is not alleged that the disadvantage is the need to remove a mask to clear the mucus).

893. It would have been fairly straightforward for the claimant to adduce some medical evidence to support this complaint and there is no explanation for the failure to do so. In the circumstances the evidence does not support a finding of group disadvantage, no evidence having been advanced by the claimant.

If so, was the Claimant put at that disadvantage?

894. The Tribunal conclude on balance, that the claimant suffered the pleaded disadvantage, in that wearing a mask made her condition worse, it led to a build of mucus and constant coughing however, the asthma may have also been a factor.

If so, can the Respondent show that the PCP was a proportionate means of achieving the legitimate aims of:

- **reducing the risk of Covid-19 transmissions, and/or.**
- **complying with the face mask mandate that was in operation at the time.**

895. Had the Tribunal determined that there was a group disadvantage, the Tribunal would have determined that these aims were legitimate, and the claimant does not dispute in its submissions that they are not, only that the means of applying them were not proportionate in the claimant's case.

896. In terms of the first period, the claimant could have been offered the option to work at The Willows immediately on her return to working from sick leave however, this was not done. It was however only a short period of time (1 week) until she was moved to an office on her own where she does not complain of the need to wear a mask in the communal areas. However, the claimant had not given evidence about how she was affected during this short period. In terms of proportionate means, the claimant had however, agreed to try working with a mask on her return and in those circumstances,

where she had agreed to try it and was moved as soon as she asked to be, the Tribunal consider on balance that the means was proportionate.

897. In terms of Work Trial 2, the respondent submits that there was no lesser way for the respondent to achieve the aim because the claimant needed to be working on site and there was no office available for her to use. As set out in the findings of fact, there were no enquires made into whether the claimant could be allocated an office. The OH report dated 23 March 2022 recommended her own room so that she did not have to wear a face mask. The Tribunal conclude that the respondent failed to make enquiries about other offices and therefore do not accept the respondent's evidence that no offices were available.

898. Given the failure to establish group disadvantage however, the claim is not well founded.

Allegation 2: Removal of/threat to remove reasonable adjustments [LOI 23]

Did the Respondent apply a PCP of removing and/or threatening to remove reasonable adjustments?

The claimant alleges that Sarah Physick, challenged the existing reasonable adjustment of 15 minutes meal break away from desk and placed the claimant on notice that this reasonable adjustment would be removed.

899. This complaint relates to the discussions Ms Physick had with the claimant about the need to have a break for diabetes away from her desk. There is no evidence that Ms Dunkley was involved in this discussion.

900. The Tribunal accept Ms Physick asked the claimant about this and that she had told her that she needed a letter from OH if she was to continue to have the break away from her desk and therefore that this was in effect a threat to remove what was a reasonable adjustment and a recommendation made by OH . The respondent does not argue in its submission that this was not a reasonable adjustment which the claimant required. However, as set out in its findings, Ms Physick was not aware of the OH letter recommending breaks because this had, because of an oversight, not been sent to Ms Dunkley.

901. There is no evidence that there was a PCP of removing reasonable adjustments beyond this one incident. Ms Physick was not challenged on her evidence that others with diabetes were allowed the adjustment they required, which in their case was a break at their desk. Ms Physick was operating on the understanding it seems that what the claimant was asking for was not a reasonable adjustment and that rather than an intention to withdraw a reasonable adjustment she was questioning whether this was an adjustment which was required and thus reasonable.

902. The claimant alleges that there was a PCP in place of removing or threatening to remove reasonable adjustments and while the comparator group is pleaded as all persons requiring and/or having reasonable adjustments, no evidence was put forward by the claimant of any other persons whom it is alleged had their adjustments removed or threatened to be removed.

903. It is alleged that out of that group (of all persons requiting or having reasonable adjustments in place), those with diabetes would be put at a particular disadvantage. Firstly, it is alleged that the removal of an adjustment would cause them stress, anxiety and uncertainty. The claimant does not identify anyone within the comparator group who had their reasonable adjustment removed (and who did **not** have her particular

disability) who did not or would not, suffer the same disadvantage as the claimant. The Tribunal consider this position to be unsound, it is inherently unlikely that if someone needed an adjustment because of a disability, (or indeed required any adjustment at work even for a non-disability related reason) it would not cause them stress, anxiety and uncertainty to have it removed or threatened with removal.

904. The second particular disadvantage, is that of; "*undue pressure on the claimant to prove existing reasonable adjustments."* It is difficult to see how this can give rise to a group disadvantage for those with diabetes, given it is pleaded as specific to the claimant. The claimant does not identify anyone else with diabetes (or any other disability) who was subjected to this particular disadvantage and what is pleaded as a disadvantage because of a PCP, actually appears to be the actual PCP itself i.e., being required to prove an adjustment is required.

905. If there is a requirement to provide OH advice, the claimant had the advice, it is not that her condition made it difficult to obtain it. In her specific case, there was a failure by OH to send the advice to the correct email address.

906. The claim may have made more sense if it had been pleaded as a PCP of those with diabetes being required to take their breaks at their desks. However, the difficulty would still be the lack of evidence of group disadvantage.

907. The claimant in its submissions avers that Ms Physick approached the claimant because she had raised a grievance and that this threat to remove an adjustment was an act of victimisation. That of itself would undermine the argument that there was in place a PCP, rather than Ms Physick acting as she did solely to target the claimant.

908. The claimant presented no evidence that there were other occasions when threats to withdrew reasonable adjustments were made and this is not engaged with in the claimant's submission.

If so, did that PCP apply to persons who did not have diabetes? The comparator group is all persons requiring and/or have reasonable adjustments.

909. The claimant advanced no evidence that anyone else who required an adjustment threatened to have it removed. The only evidence before the tribunal is that of Ms Physick that she did not threaten to remove the adjustments of a break for others with diabetes who reported into her.

If so, did, or would, that PCP put persons with diabetes at the particular disadvantage of: Causing stress, anxiety and uncertainty to the Claimant. Undue pressure on the Claimant to prove existing reasonable adjustments - compared with persons who did not have diabetes?

910. The claimant submits [para 97] that persons suffering with diabetes would be conscious of their sugar levels and the need for food intake to regulate those levels. There is no evidence submitted by the claimant that threats to remove reasonable adjustments would cause more stress, anxiety and uncertainty than those with a different disability requiring adjustments (as above)

If so, was the Claimant put at that disadvantage?

911. The Tribunal accept the claimant's evidence that the threat to remove this adjustment caused the claimant's some anxiety.

912. No legitimate aim is pleaded.

913. This claim is not well founded.

Allegation 3: Removing the Claimant from a permanent role [LOI 28]

805. **Did the Respondent apply a PCP of removing the Claimant from a permanent substantive post to an unsecure temporary post in the absence of formal performance or absence management procedure?**

914. The claimant's counsel submits [para 107] that that it was made clear that the redeployment appendix relates to everyone going through the redeployment process and that this process would put persons suffering from anxiety and depression at the disadvantage of causing stress, anxiety and uncertainty due to the very nature of the condition.

915. However, this is not how the claim is pleaded, it is the PCP of removal in the absence of a formal performance or absence management procedure into an unsecure temporary post, not that the redeployment process itself is the PCP. No application to amend the claim was made.

916. As put the PCP is specific to the claimant. It is not submitted that the PCP applied only to the claimant and yet still qualifies as PCP.

917. The claimant had not led any evidence that there was such a PCP in place, of removing employees from a permanent substantive post to an 'unsecure temporary post' in the absence of formal performance or absence management procedures.

918. The Tribunal accept the respondent's submission that no such state of affairs has been established. No evidence was put forward or questions put the witnesses about the existence of such a PCP.

If so, did that PCP apply to persons who did not have anxiety and depression? The comparator group is all persons that have been redeployed.

919. The claimant had led no evidence of group disadvantage. There is a redeployment policy which applies to all staff in certain circumstances, and as set out in the findings of fact, the policy sets out what those circumstances are, namely that this option is available if re-adjustment of duties, in accordance with the Reasonable Adjustments Policy, have previously been tried and showed not to work or, it cannot be accommodated for operational reason or on the basis of Occupational Health advice.

920. The claimant led no evidence nor were witnesses asked, about those who had been redeployed under the policy, which had been removed from permanent posts into insecure ones or indeed the effect on them.

If so, did, or would, that PCP put persons with anxiety and depression at the particular disadvantages of loss of confidence in own ability and/or causing stress, anxiety and uncertainty to the claimant compared with persons who did not have anxiety and depression?

921. No evidence has been presented by the claimant about this comparator group and the impact of going through this process on those with and those without this disability.

922. The Tribunal cannot in the absence of any evidence, conclude that those with her particular disability within the comparator group would suffer the alleged disadvantages as compared to others without the claimant's disability. The Tribunal consider that for those who cannot perform their role, redeployment into a more suitable role may be a source of relief and reassurance, the alternative perhaps being dismissal.

If so, was the Claimant put at that disadvantage?

923. It is submitted that the claimant was at the disadvantage because she had no idea when signing up to the redeployment policy that it would lead to dismissal.

924. Firstly, the Tribunal conclude that she did know and secondly, if this was the source of her anxiety, then this is not a result of the application of the policy but the failure to follow the policy. The policy does not provide (and this is not alleged in evidence or submissions) for not telling those going through the policy that it may lead to dismissal.

925. The claimant did not allege that others had been treated the same way (i.e. were not told that they may be dismissed at the end of the redeployment process) or produced evidence to that effect, nor were the witnesses questioned about this.

If so, can the Respondent show that the PCP was a proportionate means of achieving the legitimate aim of:

926. The respondent argues that the application of the policy had a legitimate aim, to secure the claimant suitable alternative employment.

927. It is not disputed by the claimant in submission that this is a legitimate aim, but it submits that the means employed to achieve the aim was not proportionate because the claimant was not aware that it may end in dismissal. However, that is not the finding of the Tribunal. As set out in the findings of fact, the claimant did know.

928. The claim is not well founded.

Allegation 4:

Did the Respondent apply a PCP of not maintaining/removing reasonable adjustments at end of work trial period [LOI 33]

929. The claimant points to various adjustments in its written submissions which it alleges were not maintained or removed which include:

- That during **Work Trial 3,** Julie Hamore shared the OH advice [1433] Ms Wright on or around 23 November 2022 and this letter confirmed that the claimant was to have noise cancelling headphones and it is the claimant's case that these were not provided until December and is something she complained about previously throughout the trial.
- That Microsoft editor 365 was approved but refused by the claimant.
- No investigation to explore similar IT software to Microsoft 365 or Grammerly
- The one to one support of Luke was deemed unreasonable to continue with at the end of the work trial period.

PCP

930. In oral submissions, counsel for the claimant explained that the claimant was not being put on the basis that the respondent had a policy 'par se' of removing adjustments but it

is alleged that if there is no OH advice, the normal practice would be to remove the adjustment where there is no evidence to support the need for it. That however is not how the case was identified in the list of issues and nor was this put to the respondent witnesses.

931. Counsel for the claimant in oral submissions when asked by the Judge what evidence the claimant relies upon for the existence of such a practice, went on to refer to Sarah Physick informing the claimant that without OH advice, the adjustment of breaks would be removed but accepted there was no evidence supportive of a PCP.

932. It remains confusing following the claimant's submissions, how this claim is being advanced. It seems to be being argued that the adjustments should have continued after the end of the Work Trial 3. However, there is no evidence that the noise cancelling headphones which were provided (albeit late) would not be maintained or would be removed at the end of the Work Trial had the claimant continued in the role. The headphones were not provided until December, but the complaint is not that they were provided late but not 'maintained' or were 'removed'.

933. It is the case that once the Work Trial 3 had ended and the claimant met the competencies, had the claimant continued in the role the one to one support would not have continued. That the Tribunal accept was a PCP in place, but it is not explained how that would have been a disadvantage, because that would only happen at the stage where the claimant was competent.

934. The PCP is not concerned with the refusal to extend the Work Trial again. Counsel only mentions that in her submissions in the context of a response to any legitimate aim.

If so, did that PCP apply to persons who did not have anxiety, depression and ADHD? The comparator group is all persons requiring and/or have reasonable adjustments during redeployment.

935. The Tribunal conclude no such policy was in place. The claimant had led no evidence that such an alleged PCP applied to all persons requiring reasonable adjustments and during redeployment and this was never put to any of the respondent witnesses.

If so, did, or would, that PCP put persons with anxiety and depression and ADHD at the particular disadvantage of maintaining unrealistic high standards of work without support compared with persons who did not have anxiety, depression and ADHD?

936. The claimant led no evidence on the comparator group. The only evidence was from the respondent witnesses who gave evidence that they have employees with ADHD who have successfully passed the trial period and work without one to one supervision.

If so, was the Claimant put at that disadvantage?

937. The Tribunal accept that the claimant, because of ADHD and anxiety and depression, found it more difficult to reach the required standards within the Work Trial 3 period and is likely to have found it more difficult if the adjustments were removed. However, there is no evidence that had she remained in the role and a further extension granted, the adjustments would have been removed/ not maintained.

938. The claim is not well founded.

Allegation 5: Requiring staff to <u>exceed minimum standards</u> in a role profile [LOI 38]

Did the Respondent have a practice of requiring staff performance to exceed the minimum standards set out in a role profile before considering them as suitable for the role?

939. Counsel for the claimant in submissions, clarified that this allegation relates to Work Trial 3 only.

940. The role profile for the job (which Ms Wright confirmed was the role profile for an administration assistant [280] and typist [1279]) applies to all new starters . The written role profiles do not provide that a person only passes the competency checks where there are **no serious clinical errors** in their typing and nor does it provide information on what are acceptable levels of performance.

941. Ms Wright was not sure what the acceptable levels were, however, Ms Rose and Mr Moonsinghe were clear, that a person had to be able to carry out the work without one to one support and the need for their work to be checked (other than spot checking) before they were considered competent.

942. The Tribunal accept that this requirement qualified as an informal practice or condition and that these criteria were not set out in the job profile itself.

If so, did that PCP apply to persons who did not have anxiety and depression and ADHD? The comparator group is all persons who have undertaken the same role profile.

943. The Tribunal accepts the claimant's argument (and the respondent does not submit otherwise) that the correct comparator group is all those working as an Audio Typist in this department.

944. The Tribunal conclude that this requirement for 0 clinical errors was applied to all those who took up the role of Audio Typist in this department during their training.

If so, did, or would, that PCP put persons with anxiety and depression and ADHD at the particular disadvantage of being unable to meet these unrealistic standards and therefore being unlikely to succeed in that role, when compared with persons who did not have anxiety and depression and ADHD?

945. The claimant led no evidence on the group disadvantage specific to this allegation.

946. The Tribunal only heard evidence from the respondent's witnesses on the application of the relevant criteria and they gave evidence that they have had people with ADHD perform well in this role and successfully pass the trial period.

947. The Tribunal take into account the general advice from Professor Kaul on 23 November 2020 [1433] that adults with neurodiversity were "*well known*" to take significantly more time when it comes to transitioning to new environments from neurotypicals. However, the specific PCP complained about is requiring staff performance to exceed the minimum standards set out in the role profile. While those who are neurodivergent take longer to adapt to new environments generally, there is no evidence that in practice those with ADHD and anxiety and depression cannot meet the minimum standards required in this role within the time scales and with the training provided.

948. The PCP relied upon is not limited to those whose performance is being assessed under the redeployment policy, which is subject to a trial period of 4 weeks. There are different

trial periods, with new starters have a training period of 10 weeks. It is put forward as a PCP which applies to all those who took up the Audio Typist role.

949. The claimant did not identify anyone else who with the same disabilities, who did not pass the required competency standard. The claimant did not produce any statistics, witness evidence or other medical advice to assist the Tribunal. The Tribunal is being invited to speculate that others with the claimant's disabilities would not exceed the minimum standards at the end of whatever period they are being assessed over.

If so, was the Claimant put at that disadvantage?

950. The claimant the Tribunal conclude, did not meet the requirement to have 0 clinical errors after the trial or extended trial period, and the Tribunal conclude that this was because of her conditions of ADHD (mainly) and to an extent, anxiety and depression (and it is also likely that undiagnosed dyslexia may have been a factor).

If so, can the Respondent show that the PCP was a proportionate means of achieving the legitimate aim of ensuring that letters were written accurately.

951. The Tribunal accept that taking such a step to ensure letters are written accurately is a legitimate aim where the welfare of vulnerable patients is otherwise at risk. However, in terms of proportionate aim, the Tribunal (for reasons set out in connection with the section 15 dismissal claim which will not be replicated here), the Tribunal would conclude that in the case of the claimant and in those the particular circumstances, it was not proportionate to apply that PCP without giving her a further extended trial period.

952. However, as the claimant had led no evidence about group disadvantage and the Tribunal do not consider that it can take Judicial Notice of the general effects of ADHD (and to an extent, anxiety and depression), in this context, the claim cannot succeed.

953. The claim is not well founded.

Allegation 6: Requiring minimal mistakes in week one of a work trial : work trial 3 [LOI 43]

Did the Respondent have a practice of requiring staff in a work trial of meeting the <u>requirement of the role,</u> with minimal mistakes, after the first week of that trial?

954. The claimant in submissions clarified that the claim concerns Work Trial 3 only and it is that the training plan for the claimant [1371] includes the initial 4 week phased return and that by week 5, (3 days after the assessment period began) the claimant was required to complete one clinic with minimum corrections.

955. Ms Wright confirmed that the training plan and this requirement applied to all new starters, it was not tailored to the claimant. Ms Bond under cross examination confirmed as set out in the findings of fact, that minimal mistakes were required at this stage of training and Ms Bond in cross examination clarified that this meant no clerical risk errors, just minor grammatical errors.

956. The Tribunal conclude that this requirement was a practice and/or condition.

957. However, this was not a requirement **of the role as such** because that conduct was limited to no more than one clinic with no clerical risk errors. However, the Tribunal accept that this PCP was applied in the relevant department as a requirement of the

training programme, albeit that did not result in the employee not passing the competency test at the end of the trial but was a target set during it.

If so, did that PCP apply to persons who did not have anxiety, depression and ADHD? The comparator group is all persons who have undertaken the same role profile.

958. The Tribunal agree with the selected comparator group and the respondent does not seek to argue otherwise and conclude that this PCP would have been applied to everyone taking up this role.

If so, did or would, that PCP put persons with anxiety and depression and ADHD at the <u>particular disadvantage</u> of being <u>unable to meet those standards</u>, therefore it was <u>unlikely that those employees would succeed in the work trial</u>, when compared with persons who did not have Anxiety and Depression and ADHD?

959. The claimant has again failed to lead any evidence on group disadvantage although the Tribunal take into account the OH report of Professor Kaur on the general difficulties of these with these conditions.

960. The Tribunal do not consider that the evidence supports a conclusion that those with anxiety and depression and ADHD are more likely to be unable to succeed in the work trial at the end of it, even if they are more likely than not to be able to meet the interim target of minimal errors by week 1 of the trial.

961. The respondent witnesses were never questioned about those in the department who while training did not meet this target at week 1, how many of those have these health conditions and how many of those who do not meet this target at week 1, then fail to succeed at the end of the trial period. The respondent's evidence is that they have people with ADHD working as Audio Typists who have successfully completed the trial period and were not questioned further about those individuals and whether they had difficulty with this particular target.

962. The respondent witnesses were not questioned about the statistics of those who pass, those who fail and out of those how many have the same disabilities as the claimant.

963. The Tribunal is being invited to speculate when questions were not put to the respondent witnesses and the claimant does not in her evidence put a positive case that this reflects her understanding of the effect on those with her conditions and is unable to give any examples or provide any supporting evidence.

If so, was the Claimant put at that disadvantage?

964. The Tribunal conclude that the claimant was unable to meet the standards because of her disabilities of anxiety and depression and in particular, ADHD, and also perhaps to an extent, dyslexia.

If so, can the Respondent show that the PCP was a proportionate means of achieving the legitimate aim of assessing the suitability of an employee in a trial role within a defined period.

965. To avoid repetition the same points are made with the previous indirect discrimination complaint. This is a legitimate aim. In terms of the means to achieve this, however, in the claimant's case this would not have been proportionate.

966. The claim is not well founded.

Reasonable adjustments (S.21 EqA) [LOI 48]

Allegation 1

Did the Respondent apply a PCP of rigid and predetermined grievance appeal procedures?

967. For the reasons set out in the findings of fact, the Tribunal have not found that the evidence supports a finding that the outcome of the grievance appeal was predetermined.

968. There is also no evidence to support an allegation that there was a PCP of pre-determining grievance appeals. The respondent witnesses were not even questioned by the claimants' counsel about how many appeals they had conducted and how many were upheld or indeed how many the respondent as a whole had conducted in perhaps the previous 12 month period. To assert that there is such a PCP in place is groundless.

969. In terms of there being a PCP of a rigid grievance appeal process, the Tribunal accept that there is a PCP of generally not using an external investigator but to conduct grievance appeals internally. However, the claimant failed to explain the connection between having an external investigator and her disabilities or their effects. It is not unusual and nor is it unreasonable, for an employer not to use external bodies to conduct internal dispute resolution procedures.

If so, did that PCP put the Claimant at the substantial disadvantage of:

An external investigator was not appointed.

970. The basis of a claim relating to reasonable adjustments, is that the PCP itself gives rise to a substantial disadvantage and the claimant needs to identify what the substantial disadvantage is which affects them individually as compared to persons who are not disabled.

971. However, that is not how the claim is put. It is that the alleged PCP of having a rigid policy meant that an external investigator was not appointed, but then what ? That in itself cannot give rise to a disadvantage. Counsel did not explain in her submissions [para 120- 122] what disadvantage this caused the claimant. If it is alleged that this gives rise to unfairness in the way grievance appeals are conducted, then it is not submitted by counsel or dealt with in the claimant's evidence why it is said that puts the claimant at a substantial disadvantage by comparison.

972. The requirement of section 20 (3) EqA is not made out.

No critical assessment was carried out and the Claimant's evidence was not considered.

973. It is also alleged that the rigid and predetermined grievance, meant that there was no critical assessment and the claimant's evidence was not considered. If the respondent has a policy to predetermine the outcome of grievance appeal, counsel does not explain in her submissions and nor does the claimant address in her evidence, why it is alleged that non-disabled employees bringing a grievance would not suffer the exact same disadvantage in terms of the alleged lack of a critical assessment of their appeal. If this

PCP applied, it would not be fair for anyone, regardless of whether they were disabled or not.

974. The requirement of section 20 (3) EqA is not made out.

The impact of the actions on the claimant's ability to perform the work trials was not considered.

975. The alleged refusal to consider whether her disability affected her ability to do the job may potentially be unfavourable treatment, because of something arising from her disability i.e., the appeal was not upheld (the unfavourable treatment) because of her inability to perform the work trials, which was in turn because of the effects of her disability on her performance. However, that would be a section 15 claim .

976. The claimant has identified a number of adjustments, for example, the line manager to attend the access to work coaching sessions to understand her needs. What needs to be identified by the claimant is what her needs are and what disadvantage this adjustment has the prospect of removing or mitigating. If the PCP for example was pleaded to be the way her work or training was structured, or the required competencies for the role, then the disadvantage is the impact on her ability to perform the work, then the adjustment of more education for the manager may help alleviate or remove that problem/disadvantage, but that is not what is pleaded.

977. What the claimant has failed to do is address the consequences of each alleged specific PCP which she alleges caused her, as a disabled person, a substantial disadvantage over those who are not disabled.

978. Further, the impact on her ability to perform the work trials was considered. The appeal panel decided that an extension to the normal trial period would have been reasonable and therefore it was recommended that an alternative trial would be sought, and the claimant afforded an extended period of to 6 weeks. The claimant may not have agreed with that adjustment, but the complaint is not that the 6 week work trial was the PCP.

A fair and thorough investigation was not carried out.

979. If the respondent has a PCP of being rigid or predetermining the outcome of grievance appeals, counsel does not explain in her submissions and nor does the claimant address in her evidence, why it is alleged that non-disabled employees bringing a grievance would not suffer the exact same disadvantage.

980. The requirement of section 20 (3) EqA is not made out.

Did the Respondent have actual or constructive knowledge of this disadvantage?

981. As set out above, the respondent had by the grievance appeal stage at least constructive knowledge of the relevant disabilities.

If so, what steps could have been taken to avoid that disadvantage?

982. The Tribunal conclude there was no requirement to carry out any reasonable adjustments because the requirements of section 20 (3) EqA have not been met.

Knowledge of disadvantage ?

983. There is no evidence that Ms Moonsinghe was or should have known of any of the 5 pleaded substantial disadvantages.

984. The claim is not well founded.

Allegation 2

Did the Respondent apply a PCP of applying an initial trial period to work trial 3 of six weeks? [LOI 55]

985. The decision of Mr Moonsinghe was according to his own evidence, and he was not challenged on this, based on his 'gut instinct'. The claimant criticises the lack of a referral for guidance from OH. Mr Moonsinghe was not questioned by claimant's counsel about whether he had applied this length of extension to other cases and whether this was the respondent's usual practice. The only evidence before the Tribunal indicates that the approach to the claimant's case was down to the discretion of Mr Moonsinghe on the day and he applied his individual 'gut instinct'. There is no indication that he would or had applied the same length of extension in any other case where a disabled employee is seeking an extension to the trial period and nor was this put to him in cross examination.

986. There is no evidence of an indication that this length of extended trial would be applied again, this was not explored with Mr Moonsinghe in cross examination.

987. The respondent submits that there is no evidence of a state of affairs and that it is nothing more than a one off decision unique to the claimant's specific circumstances. Counsel for the claimant in submissions refers to this being a decision made by Mandy White however the Tribunal assumes this is an error.

988. The claimant's counsel, in submissions, does not engage with the issue of how this one off decision can amount to a PCP in law and neither does the claimant in her evidence.

989. The Tribunal conclude that the claimant has not established that there was a PCP in place of extensions to 6 weeks.

If so, did that PCP put the Claimant at the substantial disadvantage of placing the Claimant in a situation where she was unlikely to succeed in the Audio Typist work trial.

990. The Tribunal accept that setting a 6 week trial in her case, given her challenges, did mean that she unlikely, to meet the required competencies in this role in 6 weeks. Indeed, she did not meet them.

Did the Respondent have actual or constructive knowledge of this disadvantage?

991. The respondent did not seek OH advice before deciding on the extension period. It is likely the Tribunal find, that had it done so (and the claimant reassures that it was carrying out a meaningful review into whether there should be an extension and for how long), the recommendation would have been for a longer period, given the nature of the claimant's challenges, the delay in putting in place adjustments, the advice to allow her for 3 months to type for fewer consultants and then build up the number she typed for over a further period (she had only typed for fewer consultants for 7.5 weeks by the date her employment was terminated).

992. Counsel for the respondent argues that both the respondent and the claimant were positive in their expectations about her suitability at the outset and therefore at the outset the claimant was not put at a disadvantage. However, counsel also states that the claimant would not have considered the role suitable had she understood what it involved. The Tribunal conclude that had OH advice been obtained, and the claimant had a proper understanding of what the job involved, (and the Tribunal consider that this should have included a typing test, for a 'careful' selection to have taken place) it would have been known, or should have been known, that 6 weeks was likely to be insufficient, not least given external recruits have a 10 week training period.

If so, what steps could have been taken to avoid that disadvantage? The claimant advances the following step:

To have extended the initial trial period beyond three months to a period of three to six months

993. The Tribunal has addressed this extension period in the section 15 claim above and to avoid repetition refers back to those determinations. To have extended the trial period would have been a reasonable adjustment.

Was it reasonable for the Respondent to take those steps?

994. As set out above the Tribunal consider that would have been reasonable to have arranged a longer extension at the outset.

Did the Respondent fail to take those steps?

995. It is not in dispute that that an adjustment beyond the extension of 6 weeks was not made.

Did the Respondent have actual or constructive knowledge of this disadvantage?

996. The Tribunal consider that it is more likely than not, that had Mr Moonsinghe made reasonable enquiries of OH, he would have known that 6 weeks was not going to be sufficient. The Tribunal consider that 6 months is likely to have been the recommended adjustment, with an initial phasing in (typing for fewer consultants) for the first 3 months and then circa a further 3 months from that point (bearing in the mind the usual 10 week training periods for new starters).

997. The claimant has not established the necessary PCP however and therefore the claimant is not well founded.

Allegation 3 [LOI 62]

Did the Respondent apply a PCP of removing the Claimant from a permanent role?

998. In submissions, the claimant's counsel argues that if the voluntary process had not been started, there was mandatory process that they would have followed and that the Attendance Management and Wellbeing Policy is a policy used to remove a person from a permanent position. The PCP is the Policy.

999. There is no evidence that the Policy is used to remove a person from a permanent position. Someone may as a result be dismissed or redeployed but the Tribunal do not consider that it is a PCP used for that purpose, though that may be an outcome.

1000. The claimant is complaining that she was discriminated against because the Policy was not implemented and followed but would have been if she had not agreed to voluntary redeployment. The claimant was not removed from her role, she asked to be redeployed, she in effect resigned from her role as PA.

1001. The redeployment policy provides for suitable roles to be sourced, and as set out in the findings of fact, the policy provides that candidates for new roles still need to demonstrate suitability for the new position against essential criteria on the person specification. The post under the redeployment policy is suitable if: "*The employee meets the essential criteria for the job or would meet the minimal training within a reasonable period of time*" . Further, it provides that where the employee has a disability, reasonable adjustments need to be made to allow them to undertake the role. The redeployment process does not of itself, if followed, give rise to a *substantial disadvantage*.

1002. What the claimant it seems should be complaining about is a failure to follow the PCP, to ensure alternative employment was suitable and reasonable adjustments made.

806. **If so, did that PCP put the Claimant at the substantial disadvantage of:**

Loss of trust and confidence in employer

1.1 Loss of confidence in her own capabilities
1.2 Causing stress, anxiety and uncertainty to the Claimant
1.3 Being placed into a series of unsuitable alternative unstructured work trials for temporary roles
1.4 Dismissal

1003. The Tribunal do not accept that there is evidence that any alleged application of the PCP relied upon caused the claimant stress, anxiety and uncertainty. The claimant chose redeployment. If there was a failure to ensure there was selection of a suitable role, this was a breach of the Policy.

1004. The respondent's witnesses were not questioned about whether there had been a failure in other cases to fit employees into suitable vacancies so as to give rise to a practice of doing so. This line of questioning was not put to the witnesses, and this is not how the PCP is put.

1005. **If so, what steps could have been taken to avoid that disadvantage? The Claimant advances the following steps:**

1.5 Implementation of detailed Health Passport
1.6 Implementation of informal/formal performance action plan
1.7 Structured training for the Claimant
1.8 Clear actions and targets
1.9 Earlier referral to Access to work.

1006. The above steps would not remove the disadvantage caused by the pleaded PCP because the Policy provides for the employee to be offered suitable roles and reasonable adjustments to be made.

Was it reasonable for the Respondent to take those steps?

1007. It was not reasonable to make adjustments to the PCP because it has not been established that the PCP put the claimant at the pleaded disadvantage.

Did the Respondent fail to take those steps?

1008. Whether the steps were taken can only be considered in reaction to each Work Trail.

Did the Respondent have actual or constructive knowledge of this disadvantage?

1009. It is alleged that Ms Kaur knew that the PCP was placing the claimant at the pleaded substantial disadvantages because she received feedback about the trials. The feedback concerned how the individual trials were progressing. If there were issues, those problems or disadvantages were as a result of failings to comply with the Policy rather than the Policy itself.

1010. The claim is not well founded.

Allegation 4 [LOI 69]

Did the Respondent apply a PCP of not putting a health passport in place for the claimant until 16 September 2022?

1011. The respondent did not have Health Passports in place until November 2021.

1012. The claimant's counsel in submissions did not submit that this claim is concerned with the position before November 2021.

1013. Counsel deals briefly with this claim in submissions as follows [para 130]: "*it was reasonable for the Respondent to take the steps of implementing a health passport before 16 September 2022 and the policy was introduced in* ***November 2011*** *and Julie Hamore confirmed that all managers would have been signposted to the changes within the policy via emails and news bulletins."*

1014. The Tribunal understands from the submissions, that the complaint is about the period after November 2021 (the reference to 2011 is clearly an error) but before the Passport was in place for the claimant in September 2022.

1015. Unfortunately, the claimant in submissions does not specify what the disadvantages are which are relied upon with reference to this specific period but sets them out in broad terms, other than one alleged disadvantage which she clearly identifies which is Ms Physick asking the claimant about her diabetic breaks.

1016. The claimant does not address in her evidence, whether that is being relied upon is a practice, criterion or provision.

1017. Counsel for the respondent in submissions is equally unclear about how this complaint is put but argues that if this claim is about the period before November 2021, it is bound to fail factually because Passports were not in existence before then. If the claim relates to the period November 2021 to September 2022 , the respondent argues that there was no PCP of not putting Passports in place as is clear from the updated reasonable adjustments policy in November 2021.

1018. A problem with the claim as it is put is that what the claimant is complaining about is the policy not being applied **to her** personally, as the Tribunal understands the submissions, from November 2021. It appears to be agreed that the policy was introduced in November 2021.

1019. It was not put to any of the respondent's witnesses that this was a deliberate act and that there was any PCP in place which provided that the policy about Passports would not be applied to the claimant.

1020. In terms of whether there was a practice, claimant's counsel does not address how what is alleged, is said to be a 'practice'.

1021. The EAT has held that an alleged practice must have an element of repetition about it and be applicable to both the disabled person and the non-disabled comparator. The EAT in Nottingham **City Transport Ltd v Harvey EAT 0032/12** held that a one off flawed disciplinary process was not a practice.

1022. In ***Ishola v Transport for London 2020 ICR 1204, CA*****,** Lady Justice Simler emphasised that the words 'provision, criterion or practice' are not terms of art but ordinary English words which are broad and overlapping. In the view of Simler LJ the function of a PCP 'is to identify what it is about the *employer's management of the employee or its operation'* that causes the particular disadvantage. Therefore, to test whether the PCP is discriminatory or not, **it must be capable of being applied to others.**

1023. The claimant's counsel did not put it to the respondent's witnesses whether it was only the claimant who did not have a Passport or whether the failure to implement the Policy of putting in place a Passport for those who needed it, was a practice across the respondent and whether this practice applied to non-disabled employees. The awareness of the Passport was questioned but not whether there was a failure to apply it to those who needed it.

1024. While a Passport may be a method of removing a disadvantage, for example by informing a new manager of the need to implement an adjustment that is required, of itself its absence does not create the disadvantage i.e., the need for the adjustment.

1025. Section 20 EqA provides that the PCP puts a person at the disadvantage, the duty then is to take such steps as is reasonable to remove the disadvantage *caused* by the PCP, not to remove the PCP itself, but to remove the disadvantage it causes.

1026. What is being argued is that the PCP should be removed i.e., the practice of not having a Passport for the claimant. The discriminatory impact of a PCP itself, is covered by section 19 (indirect discrimination caused by the application of a PCP).

1027. The Tribunal is not persuaded, and indeed counsel for the claimant does not address this in submissions, that what is being alleged is a 'practice' which the respondent had in place.

If so, did that PCP put the Claimant at the substantial disadvantages set out in the list of issues.:

1.10 Inconsistent application of reasonable adjustments
1.11 Placement in unsuitable temporary roles
1.12 Delays in grievance and grievance appeal procedures
1.13 Failure to provide suitable heating provisions between <u>26 September</u> 2022 and first week of January 2023
1.14 Failure to provide structured training in work trials.

1028. Having an inconsistent application of reasonable adjustments, is not of itself necessarily a disadvantage. The only 'inconsistent' application the claimant identifies applies to this claim, is Ms Physick questioning the claimant on her need for a break.

1029. Counsel for the claimant in her submissions clarifies that the 'inconsistent application of reasonable adjustments' is referring to Ms Physick questioning the claimant on the need for a break away from her desk and whether she could eat at her desk. This happened on **the 6 April 2022.** The Tribunal accept as Mr Physick accepted in cross examination that she would not have raised this with the claimant had this adjustment been set out in a Passport. However, it was not the absence of the Passport par se, it was the failure to communicate this as between managers, from HR or to have received the OH report. The lack of Passport did not cause the disadvantage, it was the requirement to eat at her desk, that was the appropriate PCP which caused the disadvantage.

1030. Counsel for the claimant does not explain how a Passport could have prevented a delay in the grievance and grievance appeal procedures and what information this would have provided to Mr Singh and Mr Moonsinghe which they did not already have, or the claimant could not have given them. As set out in the findings of fact, the delays were caused by various factors and it is not clear to the Tribunal, and it is not addressed in submissions, how any of those reasons would have changed had there been a Passport in place.

1031. The heating issues postdates the implement of a Passport for the claimant in September 2022 [1294]. The Passport was in place and shared with Ms Wright in Work Trail 3 on **23 September 2022.** Therefore, any alleged disadvantage cannot be caused by the failure to have a Passport. If the Passport was not updated or did not contain the appropriate information about her conditions, that is a different allegation. The Passport made no mention of breathing difficulties in cold weather.

1032. It is also submitted that she was placed in unsuitable roles, but counsel does not identify which roles. However, the only roles which could apply are Work Trail 1 and Work Trail 2.

1033. In terms of unsuitable jobs and failure to provide structured training, the respondent had received the OH report in **August 2021** which provided that the claimant needed a role with a structured, stable and predictable work pattern, that tight deadlines are not compatible or juggling various tasks, with her ADHD.

1034. The claimant and HR were taking into account that OH report in determining what roles were appropriate and this was the extent of the information they had at this stage, given the recent diagnosis of ADHD.

1035. The claimant's case is that before Work Trail 1 she had told the managers and HR about her disabilities and that she takes longer than others to learn and pick up new work, that it helps her to observe the task to be carried out and have some sort of standard operational procedure checklist, which helps her to embed what she has learned and build memory [w/s para 71.a]. It is therefore not explained by the claimant how essentially those same requirements set out in a Passport, would have made any difference i.e., how that would have removed any disadvantage.

1036. The August 2021 OH report was provided to Ms Dunkley in January 2022 (Work Trial 2) and as set out in the findings of fact, the main issues the claimant had with completing this work were because of the effects of ADHD, and this did not qualify as a disability until **May 2022.** The claimant was absent on sick leave from **11 April 2022 to 18 September 2022.** It is not clear therefore how it is alleged the Passport would have removed any disadvantage during this work trial. There was no obligation to make any reasonable adjustments for ADHD during the period of this trial.

Did the Respondent have actual or constructive knowledge of this disadvantage?

1037. Counsel in submissions, deals with this briefly and asserts that the respondent had knowledge as it was raised through the claimant's work trial period and it was not explored further due to the claimant's sickness absence. Counsel does not identify what period of sickness she is referring to or the date she alleges this was raised after the Passport policy was introduced.

1038. Tribunal notes that the OH report mentioned implementing a Passport in its **March 2022** report [999]. The respondent was put on notice of the recommendation for a Passport at this point.

If so, what steps could have been taken to avoid that disadvantage? The Claimant advances the following step: To have the health passport in place before 16 September 2022.

1039. The Tribunal conclude that the failure to put in place the Passport for the claimant was not a PCP. The failure to have a Passport in place, of itself, did not give rise to the identified disadvantages and thus there was no obligation to make reasonable adjustments under section 20 EqA (i.e., to have in place a Passport).

1040. This claim is not well founded.

Allegation 5 [LOI 76]

Did the Respondent apply a PCP of <u>not</u> reviewing the success of reasonable adjustments with the Claimant?

1041. The claimant's counsel in submissions makes a general claim of a PCP of not reviewing adjustments. She refers specifically to not having Microsoft Editor 365 and Grammarly in Work Trail 3, that the claimant raised in her grievance that not all the adjustments had been put in place and therefore the trial period should be extended but this was declined.

1042. Counsel also refers to earlier unsuccessful reasonable adjustments but does not identify what those are or even which Work Trial she is referring to. It is a vague and broad allegation which is difficult to determine. It is also difficult for the respondent to respond to the claim, hence their submission that it does not understand the evidential basis for the claim and that the claimant has not shown that such a PCP was operated.

1043. It is not clear from the submissions of the claimant; on what basis it is alleged that there was PCP in place. It is not alleged that there was a provision or criteria in place and therefore the Tribunal assume that what is being alleged is that the various managers over various Work Trails informally had a general practice of not reviewing adjustments. However, while there may be some adjustments which the claimant felt should have been reviewed, it is clear that adjustments were reviewed and advice was sought, including from OH.

1044. In terms of the specific failings identified, Microsoft Editor could not be applied to the claimant's computer. She had experience of this programme and declined it. It could have been offered or installed at the outset, but that is not what is being complained about here, it is reviewing the success of adjustments made. The claimant could at any stage have asked or contacted IT to arrange for this to be installed had she changed her mind and wanted this to be added. As for Grammerly, this could not be installed, and this was not challenged by the claimant and nor did the claimant adduce any evidence of any alternative programmes that may have been available and which she would have been prepared to have installed.

1045. Adjustments were clearly reviewed at various stages as set out in the findings of fact. Counsel asserts a PCP of not doing so, without addressing in the evidence or in submissions on what basis it is alleged there was a PCP.

If so, did that PCP put the Claimant at the substantial disadvantage of:

1.15 Impacted performance.
1.16 Improvements in performance not recognised.
1.17 Dismissal

1046. As counsel for the respondent rightly submits the claimant has failed to identify which disability relates to which alleged disadvantage nor has the claimant shown that she would have been disadvantaged compared to non-disabled persons.

1047. The claimant has not identified in terms of any alleged PCP, which alleged adjustments which the respondent failed to review, caused which of the alleged disadvantages and what exactly those disadvantages are and which disability they relate to.

1048. Stating there are some unspecified adjustments which were not reviewed (perhaps not implemented) as part of a PCP which led to an unspecified impact on performance or unspecified improvements in performance not recognised, presents the claim in a way which is impossible for the Tribunal to work out what it is being asked to determine (or the respondent to respond to). It is not for the Tribunal to guess and work through every possible scenario.

1049. The claim simply has no merit as it is put and is not well founded.

Did the Respondent have actual or constructive knowledge of this disadvantage?

1050. The claimant does not in submissions identify when it submits the respondent had knowledge of what disadvantage.

If so, what steps could have been taken to avoid that disadvantage? The Claimant advances the following steps:

1.18 Unsuccessful reasonable adjustments could have been replaced earlier.

1.19 Identifying areas of improvement and areas requiring additional support

1051. The claimant does not identify which unsuccessful reasonable adjustments should have been replaced or what areas of improvement and areas required additional support for the purposes of this claim.

1052. The remaining issues about reasonableness and knowledge simply cannot be determined in the absence of any details of what the claimant is alleging.

1053. The claim is not well founded.

Allegation 7: Heating [LOI 83]

Was the Claimant put at a substantial disadvantage in respect of the temperature of her work area between 26 September 2022 and the first week in January 2023? The claimant's asthma and bronchiectasis worsen in cold conditions.

1054. As set out in the findings, the claimant has not established that the temperature in the room had the alleged disadvantage. The Tribunal conclude that the claimant was required to work in a cold office however, there is no medical evidence to support her evidence that this made her breathing more difficult or made her asthma and bronchiectasis worse. It would have been a simple matter for the claimant to have obtained some medical evidence on this issue.

1055. There is no report from her GP or other medical evidence to support her contention that it was made worse.

1056. The claimant was told she could work in another office and while it is understandable that she had reservations about moving her desk, had she been suffering with her breathing or chest infections because of the cold, the Tribunal consider it would be reasonable to expect her to have moved and to infer from her refusal, that the cold was not making these health conditions worse.

1057. The claimant did not report this alleged impact on her health to OH on 22 November 2022 [1433]. There is no mention of the impact of the cold in this report or of increased lung infections.

If so, what steps could have been taken to avoid that disadvantage? The Claimant advances the following step: to provide heating.

Was it reasonable for the Respondent to take those steps?

1058. It would have been reasonable for the respondent to have resolved the heating issue whether being more proactive about repairing the boiler or being more proactive about putting in place sufficient hearings.

Did the Respondent fail to take those steps?

1059. The respondent took some steps but as set out in the findings of fact, the respondent was not proactive and did not provide sufficient heaters.

Did the Respondent have actual or constructive knowledge of this disadvantage?

1060. The Tribunal conclude however, that the evidence does not support a finding that the lack of heating caused the alleged disadvantage**.**

Allegation 8: Dismissal [LOI 89]

Did the Respondent apply a PCP of not maintaining/removing reasonable adjustments at end of work trial period?

1061. Counsel for the claimant clarifies in submissions that this claim relates only to Work Trail 3 and relates to the failure to extend the Work Trial and keep in place the one to one support.

1062. Counsel for the respondent argues that the claim as put in the list of issues, is that adjustments which were put in place were **removed or not maintained** on 20 January 2023, rather than a complaint about a PCP of refusing to put in place a further adjustment, (namely a further extension to the trial period) and that the one to one support necessarily ended when the claimant was no longer employed. The claimant's employment ended when she did not satisfy the competencies at the end of Work Trail

3, and it naturally followed that the existing adjustments would not continue from that point.

1063. While the Tribunal appreciates the respondent's point about the way the claim is put in the list of issues and the claimant has been legally represented throughout, including in the preparation of the list of issues, it is clear the Tribunal consider what the complaint is. The claimant's counsel does clarify this in written submissions that it is the decision not to extend the trial period.

1064. The respondent must have anticipated as much because he addresses in his written submissions why it would not be appropriate to extend the claimant's work trial.

1065. The Tribunal do not consider that it would be appropriate to take such a pedantic approach to the way the claim is put in the issues when it is clear what is at the heart of this claim, which is understood by the respondent. To do otherwise would be an injustice to the claimant.

If so, did that PCP put the Claimant at the substantial disadvantage of dismissal in comparison with persons who are not disabled?

1066. The decision not to extend the Work Trail disadvantaged the claimant, because she could not meet the required standards within that further period.

1067. The claimant in submissions does not engage at all with the comparator point.

1068. The Tribunal do not accept the respondent's submission that the correct approach is to compare the claimant's situation to that of a non-disabled comparator who had in place a non-disability adjustment that was removed at the end of his work trial which that led to that employee's dismissal. The respondent counsel submits that this comparator would suffer the same disadvantage.

1069. In the Tribunal's judgment, the appropriate comparator group are other employees who are not disabled and who are able to carry out the essential tasks required of the job, whereas because of her disability the claimant could not do those tasks, and thus she was dismissed, whereas members of the comparator group were not liable to be dismissed.

Did the Respondent have actual or constructive knowledge of this disadvantage?

1070. It was of course known to the respondent that not extending the trial period may result in her dismissal and that she was finding it difficult to meet the performance standards because of her disabilities.

If so, what steps could have been taken to avoid that disadvantage? The Claimant advances the following steps:

1.20 Extension of work trial to 3 to 6 months

1.21 Continuation of successful reasonable adjustments

1.22 Recognition of improvements in performance

Was it reasonable for the Respondent to take those steps?

1071. For the reasons set out in relation to the section 15 claim and to avoid unnecessary repetition, for the same reasons, the Tribunal consider that the extension of the trial period by a further 3 months with the adjustment of one to one support kept in place, would have obviously avoided the dismissal on 20 January 2023 and would have been a reasonable step to take.

1072. The recognition of how the claimant had improved, would not of itself be an adjustment which would have prevented her dismissal. It would be a factor to be taken into consideration when deciding whether the adjustment was a reasonable one.

Did the Respondent fail to take those steps?

1073. The respondent did not take those steps after 20 January 2023.

1074. The claim is well founded.

Victimisation (S.27 EqA) [LOI 96]

Allegation 1: Grievance

The Claimant's grievance on 11 February 2022 amounted to a protected act.

1075. The respondent does not dispute that the grievance amounted to a protected act and the Tribunal clearly it does.

Did the Respondent do the following acts or omissions?

Sarah Physick and Caroline Dunkley bullied the Claimant and/or threatened her with the removal of reasonable adjustments. [LOI 97.1]

1076. There is no evidence that Ms Dunkley was involved in this conduct.

If so, did they amount to a detriment?

1077. The Tribunal accept that this amounted to a detriment because it caused the claimant some anxiety.

If so, was that detriment done because the Claimant did the protected act of raising a grievance?

1078. Ms Physick was aware that there was a grievance but denies knowing what it was about .In any event, the Tribunal conclude that, as set out in its findings, Ms Physick was not motivated by the grievance. Others with diabetes in her team chose to have their breaks while working at their desks and Ms Physick was genuinely unaware of the OH recommendation about breaks (because in oversight this was not copied to Ms Dunkley) The Tribunal as set out in its findings, accept that Ms Physick did not appreciate why the claimant could not take her break at her desk, which would leave her able to answer the phone if required.

1079. While the Tribunal appreciate the recommendation of OH, the Tribunal also consider that it may have reasonably appeared to Ms Physick that eating something to manage diabetes is something the claimant could do while sat at her desk and that it did not necessitate her having to eat in the kitchen.

1080. As set out in the findings of fact, the Tribunal also have regard to the fact that Ms Physick had first raised the issue of the claimant needing breaks, before the claimant had raised her grievance.

1081. The Tribunal conclude that the evidence does not support a finding that Ms Physick threatened to remove the claimant's adjustment to have a break to eat away from her desk, because of her grievance.

1082. This claim is not well founded.

When the Claimant started the Audio Typist role on 24 October 2022 Andrew Moonesinghe and Mandy White allowed a six week trial period <u>when the medical evidence suggested it should have been longer. [LOI 97.2]</u>

1083. Ms White and Mr Moonesinghe accept that they did not refer back to OH for guidance on the period of any extension to the Work Trial 3.

1084. As the respondent rightly points out, Mr Moonesinghe did not have the medical evidence suggesting a longer trial period when he made his decision that the next trial period should be 6 weeks, and therefore as the claim is put, it cannot succeed. The OH report of Professor Kaur had not been written by this stage when the relevant decision was taken [1433-1434].

1085. The Tribunal conclude that the claim cannot succeed as far as it relates to Ms white because there is no evidence that she was consulted about the length of the extended trial period.

If so, did they amount to a detriment?

1086. The Tribunal accept that the decision to extend the trial period to 6 weeks amounted to a detriment because it deprived the claimant of the chance to improve her performance, pass the trial and secure the role. However, the Tribunal conclude that Ms Moonesinghe who was a credible witness, believed that the period he had decided upon was a reasonable one.

If so, was that detriment done because the Claimant did the protected act of raising a grievance?

1087. After hearing the evidence of Mr Moonesinghe, the Tribunal conclude that he was credible when giving evidence about his reasons for not seeking further OH advice. The Tribunal conclude that he genuinely (though not reasonably) considered that he was in a position to assess what the period should be.

1088. It was also not put to Mr Moonesinghe that he did not obtain further advice from OH about the length of the extension, because of the grievance. This is a serious allegation, and it would be unjust to make a finding that Mr Moonesinghe had subjected the claimant to an act of victimisation when this was not put to him by claimant's counsel and nor does she seek to argue in her submissions anything to the contrary.

1089. This claim is not well founded.

Lyndsay Wright, Rosie Bond and Julie Hamore fail to follow the 23 November 2022 occupational health report which suggested an extension of the work trial period [LOI 97.3]

1090. The OH report from Professor Kaul [1433] on 23 November 2022*"…this role is technically suited for her with appropriate lengthening of the appraisal."* He did not indicate how long the appraisal should be lengthened for.

1091. The claimant in submissions [139] argues that it was accepted that OH [1433] was not followed up by Mandy White, and Lyndsay Wright or Julie Hamore in terms of whether OH considered that the trial period should be extended at the end. It is submitted that they failed to do the obvious thing and get another OH report and decide between them what a suitable timescale would be. However, this is what did happen, and they agreed to an extension of 4 weeks, communicated to the claimant on 8 December 2022.

If so, did they amount to a detriment?

1092. The Tribunal consider that it was a detriment to the claimant to not extend the trial period for longer because she was unable to meet the performance expectations within that period.

If so, was that detriment done because the Claimant did the protected act of raising a grievance?

1093. As set out in its findings, Ms Bond was not aware that the claimant had put in a grievance.

1094. In the Tribunal's judgment, there is no evidence to support a finding that the individuals failed to arrange a longer extension to the trial period because the claimant had raised a grievance or any primary findings of fact, from which an inference may reasonably be drawn.

1095. The grievance was presented in February 2022, 9 months before this decision was taken.

1096. In submissions the Tribunal note that counsel puts the reason behind the length of the trial period, which was agreed, as follows; "*This was based on their own opinions about what was reasonable and not based on any professional guidance*." While the Tribunal find that this is an accurate reflection of what happened, it is a far cry from alleging that these individuals decided to agree an extension period which they knew would not give the claimant sufficient time to improve her performance because of a protected act.

1097. Under cross examination, the claimant gave evidence that she did not consider that the 'dismissal for Work Trial 3' had anything to do with her grievance.

1098. The claim is not well founded.

The claimant was dismissed by Mandy White and Lyndsay Wright [LOI 97.4]

1099. The decision to dismiss the claimant was taken by Ms White after discussing with Ms Wright the claimant's performance after the extended trial period. Ms White had made the decision to dismiss. It is not disputed that the claimant was still making clinical errors and the number of letters she was producing was not satisfactory and she still required one to one support.

If so, did it amount to a detriment?

1100. The decision to dismiss was obviously a detriment.

If so, was that detriment done because the Claimant did the protected act of raising a grievance?

1101. The Tribunal conclude that there is no evidence which supports a finding that the reason for the dismissal had anything to do with the grievance which the claimant had brought.

1102. Under cross examination, the claimant gave evidence that she did not actually consider that the 'dismissal for Work Trial 3' had anything to do with her grievance.

1103. The claim is not well founded.

Unfair dismissal [LOI 1OO]

Was the Claimant dismissed for a potentially fair reason?

1104. The respondent's position is that reason for dismissal was incapability for failing to meet the competencies of the Audi Typist role at the end of Work Trial 3 or in the alternative she was dismissed for some other substantial reason, after her resignation from the PA role and after completing 3 Work Trial unsuccessfully.

If so, was that dismissal fair in accordance with s.98(4) of the Employment Rights Act 1996?

1105. Both those reasons are potentially fair reasons for dismissal.

Real reason for dismissal

1106. Ms White took into account the claimant's performance in terms of the number of letters produced and errors being made and considered that the one to one support was not sustainable. Mr Roberts took into account the impact on the team and the service but gave evidence that he carried out no further investigation into an extension because he believed there was no reasonable prospect of the claimant's performance improving.

1107. The Tribunal have considered whether the lack of confidence in the claimant's ability to do the job and concerns over the inability to maintain the one to one support, means the reason for dismissal is properly categorised as an SOSR. However, the lack of confidence in the claimant's ability to perform in the role and the need for support, is concerned with the claimant's capability and thus capability is the Tribunal find, the real reason for the dismissal.

Was a fair process followed?

1108. In terms of the process, the Tribunal find that the claimant made an informed decision to resign from her position as PA and enter into the redeployment process. She was aware that at the end of the 12 weeks' notice period, her employment would end if an alternative role was not secured for her.

1109. The claimant complains that she did not realise that it may be difficult to secure a suitable permanent role. However, she did not make enquiries during the discussions as part of the Wellbeing Reviews. She refers in her statement to there being other roles in Ms Kaur's department that she was not offered, however this allegation was never put to Ms Kaur in cross examination and remains unproven.

1110. However, had the respondent carried out any form of normal assessment for Work Trial 2 as would apply to a person going through an interview process to assess suitability, it

would have been apparent to the claimant that this work was going to be difficult for her and it is likely that she would not have selected this role. While the claimant also complains that she was not given the same opportunity to assess her suitability for Work Trial 3 and would not have accepted it had she known what was involved, OH advised that it was a role she could do with adjustments, she did improve in the role, and she remained committed to making it work.

1111. The Tribunal consider that given that the claimant had health conditions which the respondent knew about at this time, that it was unfair (and outside the band of reasonable responses) not to take some basic steps to assess her suitability beyond looking at her past experience. The respondent's own policies require managers to select applicants for jobs carefully but even after the problems in Work Trial 1 and 2, there was no greater care taken to assess whether the Audio Typist role was suitable for her. A simple typing test was all that was required to give the claimant a better understanding of how challenging she may find the work and what adjustments may be needed.

1112. In Work Trial 3, the respondent took some steps to make adjustments for the claimant, however it was rather a chaotic, uncoordinated approach with headphones provided late, not phasing her into the role by limiting her initially to the 'easier' dictations, programmes to assist with spelling considered part way through her training, an ill-informed decision about the extension period based on a 'gut instinct', failure to consider whether a quiet room could be made available for her, and the claimant having to push for an urgent OH referral for advice on adjustments. That was all in the context of the claimant working under pressure to perform and facing imminent dismissal after 26 years of employment. This disorganised approach to putting in place appropriate adjustments was not within the band of reasonable responses for an employer dealing with a long standing disabled employee in her last work trial.

1113. The claimant had to work in a cold office, which the Tribunal consider, is likely to have impacted on her performance and specifically her ability to concentrate. The Tribunal consider that for anyone, even without a disability, working in the cold is likely to impair their work performance. While the claimant was loath to move because she would have to set up her workstation and she was loath to waste valuable time doing that, this was an environment for which the respondent was responsible. An obvious step would have been to reassure her that her work trial would be extended to ensure that it took into account any disruption from a move. That reassurance was not provided. The Tribunal heard little about how effective the respondent were at resolving the heating issues, they did not even monitor the temperature but were reactive, addressing the problem with heaters only when asked for them and then not in sufficient number.

1114. The Microsoft Editor 365 programme may have assisted, and the Tribunal appreciate the claimant's concern when under pressure to perform in the remaining weeks of the trial not to risk removing the dictionary of words she had built up on her PC by adding a new programme. Had this adjustment been implemented at the outset, when it was clear that the claimant was making spelling errors, this would no doubt have relieved some of the pressure.

1115. The claimant was well supported by Mr Lockwood and given regular feedback. However, she was also under constant pressure, at the start to meet very high standards within only 6 weeks, when new starters normally have 10 weeks. This was extended by 4 weeks and then 2 weeks, but these incremental extensions would not have been as helpful as knowing at the outset that she had 12 weeks to reach the performance targets.

1116. The claimant was someone with ADHD and who was known to suffer with anxiety. She was under pressure to perform within relatively short windows. The initial 6 week period was based on a 'gut' instinct rather than any carefully considered balance between the needs of the business and the needs of the claimant.

1117. It was made clear to the respondent that it would take the claimant more time to adapt to this new working environment and proper consideration was not given to the above factors and how they may have impacted on her performance, whether disability related or not, and whether this should be treated as mitigation.

Reasonable belief

1118. The test set down in ***Alidair Ltd v Taylor 1978 ICR 445,*** **CA** is does the employer honestly believe the employee is incompetent or unsuitable for the job, and are the grounds for that belief reasonable?

1119. As Lord Denning MR put it in *Alidair Ltd v Taylor 1978 ICR 445, CA*: 'Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.'

1120. The burden of proof in respect of the reasonableness of the employer's belief, and whether the employer has conducted a reasonable investigation to verify its belief, is now however, neutral.

1121. What the tribunal has to decide is whether there was material in front of the respondent that satisfied the respondent of the claimant's inadequacy or unsuitability and on which it was reasonable to dismiss.

1122. The respondent considered that the claimant was not meeting the standards in the role and that is accepted. She was not meeting the standards, however in terms of what would be a reasonable period for improvement, that will differ greatly from case to case and will depend on the circumstances of each case.

1123. In *Evans v George Galloway and Co Ltd 1974 IRLR 167, ET*, a man with six years' service was thought to deserve six months, rather than five weeks.

1124. In *Clark v Johnson EAT 484/78* the EAT extended a long-serving butcher's improvement period from one to nine months.

1125. Ms White had accepted that if there was mitigation, the trial could be extended however, an extension of the trial was not discussed with Ms Wright, and it is not alleged that the issue of mitigation was raised with the claimant at the dismissal hearing and explained that this may provide grounds for a further extension. The Tribunal conclude that this is because no real thought was applied to the question of mitigation.

1126. The Tribunal consider that it was unreasonable not to make a reasonable adjustment of an extended trial period in light of her disabilities and background mitigating factors, and the prospect that she may, given more time, meet the requisite levels of performance). The Tribunal conclude that in the absence of advice from OH (or Access to Work), the decision that there was no reasonable prospect of the claimant improving her performance was not a reasonable one, it was not within the band of reasonable responses and it was not based on an investigation which was within the band of reasonable responses.

1127. The claimant's performance had improved with the adjustments in place, despite the rather chaotic implementation and ongoing challenges around noise and temperature.

1128. It was a decision taken without any real consideration of how much longer the claimant may require with adjustments to meet the performance targets, whether the support could be continued and for how much longer. It was a superficial view of the impact on the business with no consideration about how any impact could be mitigated for a period (e.g., with temporary overtime).

1129. The Tribunal consider that the process which was followed in dealing with this disabled employee who had been in the respondent's employment for 26 years, was not within the band of reasonable responses.

1130. A reasonable employer, acting reasonably, when faced with a disabled employee who had not met the targets in that 12 week period, would have carried out further investigation into what the prospects were of her meeting those targets within a further period and whether that further extension could be accommodated.

1131. The possibility of an extension was not even discussed at the dismissal hearing, with the managers of that department.

1132. The redeployment policy itself provides that work trials must be suitable and that reasonable adjustments must be made. There was a failure to implement those policies with sufficient diligence in the claimant's case.

1133. Ms White of HR believed this work trial could be extended further if there was mitigation, but failed the Tribunal consider, to apply her mind to whether there was mitigation in the claimant's case. That she had been put into a trial as a disabled person with no additional checking to ensure she was capable of doing the task (such as a simple typing test), she had worked at times in an unsuitable office and adjustments had been made part way through the trial while she had continued to work under the pressure to perform.

1134. There was no proper assessment at the appeal stage either of how any impact on the business of extending the trial further once all the adjustments were in place, could be mitigated.

1135. The Tribunal consider that a fair process was not followed. There was no inadequate investigation into whether the respondent could support the claimant further. The decision not to take further OH advice (and/or Access to Work advice) on the prospects of the claimant meeting the appropriate competencies and how long this may take, before dismissing the claimant, who had worked with them for 26 years, was outside the band of reasonable responses.

If the Claimant's dismissal was unfair, would the Claimant have been dismissed fairly in any event, applying Polkey? If the Claimant's dismissal was unfair, would the Claimant had been fairly dismissed later in time? If so, when?

1136. The Tribunal conclude that there is a prospect that the claimant, even with an extended trial period, would not have met the requirements of the role and may have been fairly dismissed on capability grounds.

1137. The parties will be invited at the remedy hearing to address the Tribunal on whether it is just and equitable to make any deductions pursuant to section 123 (1) ERA to reflect the prospects of a fair dismissal at a later stage.

Remedy

807. The case will be listed for a remedy hearing to determine the amount of compensation to award.

Employment Judge Broughton

Dated: 7 August 2024

Sent to Parties on:

…08 August 2204…….

For the Employment Tribunal:

……..

Recordings and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/"

Appendix : LIST OF ISSUES

Time limits (s.123 EqA)

2. Have the Claimant's discrimination claims been presented in time?

   2.1. If not, was there conduct extending over a period?

   2.2. If so, was the claim in time from end of that period?

2.3. If not, should time be extended on a just and equitable basis, pursuant to s.123 of the Equality Act 2010?

Disabilities (S.6 EqA)

3. As determined by Judge Butler in a judgment dated 30 March 2023, or as otherwise agreed between the parties, the Claimant was disabled, for the purposes of s.6 of the Equality Act 2010, by reason of:

3.1. Type 1 Diabetes, from December 1989;

3.2. Anxiety and depression, from April 2020;

3.3. Bronchiectasis, from April 2020;

3.4. Asthma, from January 2022;

3.5. ADHD, from May 2022.

4. It is the Respondent's position that the Respondent had actual knowledge of the Claimant's impairments as follows:

4.1. Type 1 Diabetes:

4.1.1. Jinny Kaur: 25 June 2020

4.1.2. Lisa Laws: 25 October 2021

4.1.3. Caroline Dunkley: On or about 17 January 2022

4.1.4. Sarah Physick: On or about 14 January 2022

4.1.5. Andrew Moonesinghe: On or about 25 May 2022

4.1.6. Mandy White: On or about 25 May 2022

4.1.7. Julie Hamore: On or about 15 August 2022

4.1.8. Lyndsay Wright: On or about 23 September 2022

4.1.9. Rosie Bond: On or about 23 September 2022

4.2. Anxiety and depression:

4.2.1. Jinny Kaur: On or around 18 May 2021

4.2.2. Lisa Laws: Did not have knowledge of anxiety/depression during the period of alleged acts of discrimination, below.

4.2.3. Caroline Dunkley: On or about 20 January 2022

4.2.4. Sarah Physick: On or about 20 January 2022

4.2.5. Amrik Singh: On or about 2 March 2022

4.2.6. Gail Phillipson: On or about 2 March 2022

4.2.7. Andrew Moonesinghe: On or about 25 May 2022

4.2.8. Mandy White: On or about 25 May 2022

4.2.9. Lyndsay Wright: Did not have knowledge of anxiety/depression during the period of alleged acts of discrimination below

4.2.10. Rosie Bond: Did not have knowledge of anxiety/depression during the period of alleged acts of discrimination below.

4.3. Bronchiectasis:

4.3.1. Jinny Kaur: 25 June 2020

4.3.2. Lisa Laws: Did not have knowledge of bronchiectasis during the period of alleged acts of discrimination, below.

4.3.3. Caroline Dunkley: On or about 17 January 2022

4.3.4. Sarah Physick: On or about 14 January 2022

4.3.5. Andrew Moonesinghe: On or about 25 May 2022

4.3.6. Mandy White: On or about 25 May 2022

4.3.7. Lyndsay Wright: On or about 23 September 2022

4.4. Asthma:

4.4.1. Jinny Kaur: 25 June 2020. As above, the Claimant was disabled by reason of asthma from January 2022.

4.4.2. Lisa Laws: Did not have knowledge of asthma during the period of alleged acts of discrimination, below.

4.4.3. Caroline Dunkley: On or about 17 January 2022

4.4.4. Sarah Physick: On or about 14 January 2022

4.4.5. Andrew Moonesinghe: On or about 25 May 2022

4.4.6. Mandy White: On or about 25 May 2022

4.4.7. Lyndsay Wright: Did not have knowledge of asthma during the period of alleged acts of discrimination below.

4.4.8. Rosie Bond: Did not have knowledge of asthma during the period of alleged acts of discrimination below

4.5. ADHD:

4.5.1. Jinny Kaur: 27 May 2021. As above, the Claimant was disabled by reason of ADHD from May 2022.

4.5.2. Lisa Laws: 25 October 2021. As above, the Claimant was disabled by reason of ADHD from May 2022.

4.5.3. Caroline Dunkley: 22 November 2021. As above, the Claimant was disabled by reason of ADHD from May 2022.

4.5.4. Sarah Physick: 22 November 2021. As above, the Claimant was disabled by reason of ADHD from May 2022.

4.5.5. Amrik Singh: On or about 2 March 2022. As above, the Claimant was disabled by reason of ADHD from May 2022.

4.5.6. Gail Phillipson: On or about 2 March 2022. As above, the Claimant was disabled by reason of ADHD from May 2022.

4.5.7. Andrew Moonesinghe: On or about 25 May 2022

4.5.8. Mandy White: On or about 25 May 2022

4.5.9. Julie Hamore: On or about 15 August 2022

4.5.10. Lyndsay Wright: On or about 23 September 2022

4.5.11. Rosie Bond: On or about 23 September 2022

Direct disability discrimination (S.13 EqA)

5. Did the Respondent do the following acts or omissions:

5.1. Between 18 August 2020 and 7 November 2021, Jinny Kaur did not provide the Claimant with any suitable training and in their first meeting the Claimant was thrown in the deep end by being required to take minutes of complex medical matters about which the Claimant had no prior knowledge;

5.1.1. The Claimant asserts that the relevant disability is anxiety and depression.

5.2. Jinny Kaur often micro-managed the Claimant's workload;

5.2.1. The Claimant asserts that the relevant disability is Anxiety and Depression

5.3. When the Claimant approached Jinny Kaur to discuss her health, Jinny Kaur was apathetic and increased her scrutiny of the Claimant;

5.3.1. The Claimant asserts that the relevant disabilities are Anxiety and Depression, Bronchiectasis.

5.4. During the summer of 2021 the Claimant requested support with the access to work assessment but this was not ordered until 14 October 2021;

5.4.1. The Claimant asserts that the relevant disabilities are Anxiety and Depression, Bronchiectasis

5.5. In the three wellbeing discussions on 15 September, 24 September and 6 October 2021 the Claimant discussed issues surrounding face mask wearing, difficulties with trialling new medication, guidance from Access to Work and support from her GP. Jinny Kaur was closed off to these issues;

5.5.1. The Claimant asserts that the relevant disabilities are Anxiety and Depression, Bronchiectasis, Diabetes

6. If so, did the Respondent treat the Claimant less favourably than it would have treated someone who did not have the Claimant's disability?

6.1. The Claimant relies on a hypothetical comparator only

7. If so, was the less favourable treatment because of the Claimant's disability/disabilities?

7.1. The relevant disabilities relied on for each allegation are set out above

Discrimination arising from disability (S.15 EqA)

8. Did the Respondent do the following acts or omissions:

8.1. Jinny Kaur often micro-managed the Claimant's workload;

8.1.1. The Claimant asserts that the relevant something arising from her disability is in respect of her anxiety and depression

8.2. During the summer of 2021 the Claimant requested support with the access to work assessment but this was not ordered until 14 October 2021;

8.2.1. The Claimant asserts that the relevant somethings arising from her disability is in respect of her Anxiety and Depression, Bronchiectasis

8.3. In the three wellbeing discussions on 15 September 2021, 24 September and 6 October 2021 the Claimant discussed issues surrounding face mask wearing, difficulties with trialling new medication, guidance from Access to Work and support from her GP. Jinny Kaur was closed off to these issues;

8.3.1. The Claimant asserts that the relevant somethings arising from her disabilities are in respect of her Anxiety and Depression, Bronchiectasis, Diabetes

8.4. Jinny Kaur did not provide the Claimant with any warning of performance issues nor provide time to improve

8.4.1. The Claimant asserts that the relevant somethings arising from her disability are in respect of her Anxiety and Depression.

8.5. On 15 September 2021 Jinny Kaur asked the Claimant to consider redeployment;

8.5.1. The Claimant asserts that the relevant somethings arising from her disability are in respect of her Anxiety, Depression and Bronchiectasis.

8.6. Jinny Kaur removed the Claimant from her permanent role without any formal performance or absence management procedures being followed;

8.6.1. The Claimant asserts that the relevant somethings arising from her disability are in respect of her Anxiety, Depression and Bronchiectasis and ADHD.

8.7. The Claimant was dismissed on 20 January 2023.

8.7.1. The Claimant asserts that the somethings arising from her disabilities were in respect of her Anxiety and Depression, ADHD, Diabetes, Bronchiectasis and asthma

8.8. The Respondent failed to put in place informal or formal action plan to address performance issues and decided to redeploy the Claimant in respect of her Bronchiectasis, anxiety and depression.

8.8.1. Jinny Kaur between July 2020 and 7 November 2021.

9. If so, was that unfavourable treatment?

10. Did the following things arise from the following disabilities?[1]

10.1. Diabetes:

10.1.1. The Claimant struggles with longer periods of time at her desk or focusing on complicated tasks

10.1.2. The Claimant requires regular meal breaks during the working day. The Respondent admits that the Claimant required meal breaks during the day.

10.2. Anxiety and depression:

10.2.1. The Claimant requires longer to understand and complete new tasks

10.2.2. The Claimant requires additional face-to-face training and support and time to learn new tasks

10.2.3. The Claimant has low self-esteem, second guesses her own ability and readily accepts negative criticism

10.2.4. The Claimant finds it difficult to articulate her concerns

10.2.5. The Claimant struggles with lack of focus and makes more mistakes when under pressure/scrutiny

10.2.6. The Claimant struggles with distractions when hyper-focused

10.3. Bronchiectasis:

10.3.1. The Claimant has difficulty breathing. The Respondent admits that the Claimant can have difficulty breathing at times.

10.4. Asthma:

10.4.1. The Claimant has difficulty breathing. The Respondent admits that the Claimant can have difficulty breathing at times.

10.5. ADHD:

10.5.1. The Claimant requires longer to understand and complete new tasks

10.5.2. The Claimant requires additional face-to-face training and support and time to learn new tasks

10.5.3. The Claimant finds it difficult to articulate her concerns

10.5.4. The Claimant struggles with lack of focus and makes more mistakes when under pressure/scrutiny

10.5.5. The Claimant struggles with distractions when hyper-focused

11. If so, was any unfavourable treatment done because of something arising from the Claimant's disabilities?

12. If so, did the Respondent know or could have reasonably been expect to know, of the Claimant's disability/disabilities?

[1] Unless expressly conceded, all 'somethings arising from' disabilities are in dispute

13. If so, has the Respondent shown that any unfavourable treatment was proportionate to a legitimate aim? The Respondent relies on the following legitimate aims:

13.1. Face masks

13.1.1. reducing the risk of Covid-19 transmissions; and/or

13.1.2. complying with the face mask mandate that was in operation at the time.

13.2. Micro-management of workload

13.2.1. The effective management of employees; and/or

13.2.2. Ensuring regular contact with employees who were shielding and/or working from home.

13.3. Asked to consider redeployment

13.3.1. Looking after the welfare of the Respondent's employees; and/or

13.3.2. Following occupational health advice.

13.4. Grievance

13.4.1. ensuring that grievances were fully investigated.

13.5. Grievance appeal

13.5.1. Ensuring that the grievance appeal was fully investigated;

13.5.2. That any requests for a delay from the Claimant were accommodated; and/or

13.5.3. That any requests for adjustments from the Claimant were accommodated.

13.6. Audio Typist trial

13.6.1. Determining an employee's suitability to a role within a defined period;

13.6.2. Providing support and constructive feedback;

13.6.3. Ensuring that letters were written accurately; and/or

13.6.4. Mitigating against clinical risk of errors.

13.7. Dismissal (para. **Error! Reference source not found.**)

13.7.1. Assessing the suitability of an employee in a trial role within a defined period, and/or;

13.7.2. Ensuring that the Respondent maintains the necessary standards in the provision of its services.

Harassment related to disability (S.26 EqA)

14. Did the Respondent do the following acts or omissions?

14.1. The Claimant was dismissed on 20 January 2023.

14.1.1. The Claimant asserts that this allegation relates to her Anxiety and Depression, ADHD, Diabetes, Bronchiectasis and asthma

15. If so, was that conduct unwanted?

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

17. If so, did that unwanted conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, taking into account s.26(4) Equality Act 2010?

Indirect disability discrimination (S.19 EqA)

Allegation 1: Face masks

18. The Respondent accepts that it applied a PCP of requiring its employees to wear a face mask, which was to minimise the risk of transmission of Covid-19.

19. That PCP applied to persons who did not have Bronchiectasis. The comparator group is all persons working in the same office as the Claimant.

20. Did, or would, that PCP put persons with Bronchiectasis at the particular disadvantage of:

20.1. exacerbating that disability, compared with persons who did not have Bronchiectasis?

21. If so, was the Claimant put at that disadvantage?

22. If so, can the Respondent show that the PCP was a proportionate means of achieving the legitimate aims of:

22.1. reducing the risk of Covid-19 transmissions, and/or;

22.2. complying with the face mask mandate that was in operation at the time.

Allegation 2: Removal of/threat to remove reasonable adjustments

23. Did the Respondent apply a PCP of removing and/or threatening to remove reasonable adjustments?

23.1. The Claimant alleges that Sarah Physick, challenged the existing reasonable adjustment of 15 minutes meal break away from desk and placed the Claimant on notice that this reasonable adjustment would be removed

24. If so, did that PCP apply to persons who did not have diabetes? The comparator group is all persons requiring and/or have reasonable adjustments.

25. If so, did, or would, that PCP put persons with diabetes at the particular disadvantage of:

25.1. Causing stress, anxiety and uncertainty to the Claimant.

25.2. Undue pressure on the Claimant to prove existing reasonable adjustments.

compared with persons who did not have diabetes?

26. If so, was the Claimant put at that disadvantage?

27. If so, can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim? .

Allegation 3: Removing the Claimant from a permanent role

28. Did the Respondent apply a PCP of removing the Claimant from a permanent substantive post to an unsecure temporary post in the absence of formal performance or absence management procedure?

29. If so, did that PCP apply to persons who did not have Anxiety and Depression? The comparator group is all persons that have been redeployed.

30. If so, did, or would, that PCP put persons with Anxiety and Depression at the particular disadvantages of

30.1. Loss of confidence in own ability

30.2. Causing stress, anxiety and uncertainty to the Claimant compared with persons who did not have Anxiety and Depression?

31. If so, was the Claimant put at that disadvantage?

32. If so, can the Respondent show that the PCP was a proportionate means of achieving the legitimate aim of:

32.1. Trying to find a suitable alternative role following the Claimant's request to cease working in her substantive role.

Allegation 4: Dismissal

33. Did the Respondent apply a PCP of not maintaining/removing reasonable adjustments at end of work trial period?

34. If so, did that PCP apply to persons who did not have Anxiety, depression and ADHD? The comparator group is all persons requiring and/or have reasonable adjustments during redeployment.

35. If so, did, or would, that PCP put persons with Anxiety and Depression and ADHD at the particular disadvantage of

35.1. maintaining unrealistic high standards of work without support compared with persons who did not have Anxiety, depression and ADHD?

36. If so, was the Claimant put at that disadvantage?

37. If so, can the Respondent show that the PCP was a proportionate means of achieving the legitimate aims of:

37.1. Assessing the suitability of an employee in a trial role within a defined period, and/or;

37.2. Ensuring that the Respondent maintains the necessary standards in the provision of its services.

Allegation 5: Requiring staff to exceed minimum standards in a role profile

38. Did the Respondent have a practice of requiring staff performance to exceed the minimum standards set out in a role profile before considering them as suitable for the role?

39. If so, did that PCP apply to persons who did not have Anxiety, depression and ADHD? The comparator group is all persons who have undertaken the same role profile.

40. If so, did, or would, that PCP put persons with Anxiety and Depression and ADHD at the particular disadvantage of:

40.1. being unable to meet these unrealistic standards and therefore being unlikely to succeed in that role, when compared with persons who did not have Anxiety and Depression and ADHD?

41. If so, was the Claimant put at that disadvantage?

42. If so, can the Respondent show that the PCP was a proportionate means of achieving the legitimate aim of:

42.1. Ensuring that letters were written accurately.

Allegation 6: Requiring minimal mistakes in week one of a work trial : work trial 3

43. Did the Respondent have a practice of requiring staff in a work trial to meeting the requirement of the role, with minimal mistakes, after the first week of that trial?

44. If so, did that PCP apply to persons who did not have Anxiety, depression and ADHD? The comparator group is all persons who have undertaken the same role profile.

45. If so, did, or would, that PCP put persons with Anxiety and Depression and ADHD at the particular disadvantage of:

45.1. Being unable to meet those standards, therefore it was unlikely that employee would succeed in the work trial, when compared with persons who did not have Anxiety and Depression and ADHD?

46. If so, was the Claimant put at that disadvantage?

47. If so, can the Respondent show that the PCP was a proportionate means of achieving the legitimate aim of:

47.1. Assessing the suitability of an employee in a trial role within a defined period.

Reasonable adjustments (S.21 EqA)[2]

Allegation 1

48. Did the Respondent apply a PCP of rigid and predetermined grievance appeal procedures?

49. If so, did that PCP put the Claimant at the substantial disadvantage of:

49.1. An external investigator was not appointed

49.2. No critical assessment was carried out

49.3. The Claimant's evidence was not considered

49.4. The impact of the actions on the Claimant's ability to perform the work trials was not considered

49.5. A fair and thorough investigation was not carried out.

50. Did the Respondent have actual or constructive knowledge of this disadvantage?

[2] Unless expressly conceded, all substantial disadvantages are in dispute

51. If so, what steps could have been taken to avoid that disadvantage? The Claimant advances the following steps:

51.1. Appointment of external investigator

51.2. Full re-hearing of grievance

51.3. Grievance Manager to request Claimant's evidence

51.4. Work trials to be extended for duration of grievance procedures

51.5. Early implementation of Claimant's requested reasonable adjustments

51.6. Appointment of welfare contact to support Claimant through formal procedures

51.7. Line Manager to attend access to work coaching session to understand Claimant's needs

52. Was it reasonable for the Respondent to take those steps?

53. Did the Respondent fail to take those steps?

54. Did the Respondent have actual or constructive knowledge of this disadvantage

Allegation 2

55. Did the Respondent apply a PCP of applying an initial trial period to work trial 3 of six weeks?

56. If so, did that PCP put the Claimant at the substantial disadvantage of:

56.1. Placing the Claimant in a situation where she was unlikely to succeed in the Audio Typist work trial

57. Did the Respondent have actual or constructive knowledge of this disadvantage?

58. If so, what steps could have been taken to avoid that disadvantage? The Claimant advances the following step:

58.1. To have extended the initial trial period beyond three months to a period of three to six months

59. Was it reasonable for the Respondent to take those steps?

60. Did the Respondent fail to take those steps?

61. Did the Respondent have actual or constructive knowledge of this disadvantage?

Allegation 3

62. Did the Respondent apply a PCP of removing the Claimant from a permanent role?

63. If so, did that PCP put the Claimant at the substantial disadvantage of:

63.1. Loss of trust and confidence in employer

63.2. Loss of confidence in her own capabilities

63.3. Causing stress, anxiety and uncertainty to the Claimant

63.4. Being placed into a series of unsuitable alternative unstructured work trials for temporary roles

63.5. Dismissal

64. Did the Respondent have actual or constructive knowledge of this disadvantage?

65. If so, what steps could have been taken to avoid that disadvantage? The Claimant advances the following steps:

65.1. Implementation of detailed Health Passport

65.2. Implementation of informal/formal performance action plan

65.3. Structured training for the Claimant

65.4. Clear actions and targets

65.5. Earlier referral to Access to work

66. Was it reasonable for the Respondent to take those steps?

67. Did the Respondent fail to take those steps?

68. Did the Respondent have actual or constructive knowledge of this disadvantage?

Allegation 4

69. Did the Respondent apply a PCP of not putting a health passport in place for the Claimant until 16 September 2022?

70. If so, did that PCP put the Claimant at the substantial disadvantage of:

70.1. Inconsistent application of reasonable adjustments

70.2. Placement in unsuitable temporary roles

70.3. Delays in grievance and grievance appeal procedures

70.4. Failure to provide suitable heating provisions between 26 September 2022 and first week of January 2023

70.5. Failure to provide structured training in work trials.

71. Did the Respondent have actual or constructive knowledge of this disadvantage?

72. If so, what steps could have been taken to avoid that disadvantage? The Claimant advances the following step:

72.1. To have put a health passport in place before 16 September 2022

73. Was it reasonable for the Respondent to take those steps?

74. Did the Respondent fail to take those steps?

75. Did the Respondent have actual or constructive knowledge of this disadvantage?

Allegation 5

76. Did the Respondent apply a PCP of not reviewing the success of reasonable adjustments with the Claimant?

77. If so, did that PCP put the Claimant at the substantial disadvantage of:

77.1. Impacted performance

77.2. Improvements in performance not recognised

77.3. Dismissal

78. Did the Respondent have actual or constructive knowledge of this disadvantage?

79. If so, what steps could have been taken to avoid that disadvantage? The Claimant advances the following steps:

79.1. Unsuccessful reasonable adjustments could have been replaced earlier

79.2. Identifying areas of improvement and areas requiring additional support

80. Was it reasonable for the Respondent to take those steps?

81. Did the Respondent fail to take those steps?

82. Did the Respondent have actual or constructive knowledge of this disadvantage?

Allegation 7: Heating

83. Was the Claimant put at a substantial disadvantage in respect of the temperature of her work area between 26 September 2022 and the first week in January 2023?

83.1. The Claimant's asthma and bronchiectasis worsen in cold conditions

84. Did the Respondent have actual or constructive knowledge of this disadvantage?

85. If so, what steps could have been taken to avoid that disadvantage? The Claimant advances the following step:

85.1. To provide heating.

86. Was it reasonable for the Respondent to take those steps?

87. Did the Respondent fail to take those steps?

88. Did the Respondent have actual or constructive knowledge of this disadvantage?

Allegation 8: Dismissal

89. Did the Respondent apply a PCP of not maintaining/removing reasonable adjustments at end of work trial period?

90. If so, did that PCP put the Claimant at the substantial disadvantage of:

90.1. Dismissal

91. Did the Respondent have actual or constructive knowledge of this disadvantage?

92. If so, what steps could have been taken to avoid that disadvantage? The Claimant advances the following steps:

92.1. Extension of work trial to 3 to 6 months

92.2. Continuation of successful reasonable adjustments

92.3. Recognition of improvements in performance

93. Was it reasonable for the Respondent to take those steps?

94. Did the Respondent fail to take those steps?

95. Did the Respondent have actual or constructive knowledge of this disadvantage?

Victimisation (S.27 EqA)

Allegation 1: Grievance

96. The Claimant's grievance on 11 February 2022 amounted to a protected act.

97. Did the Respondent do the following acts or omissions?

97.1. Sarah Physick and Caroline Dunkley bullied the Claimant and/or threatened her with the removal of reasonable adjustments;

97.2. When the Claimant started the Audio Typist role on 24 October 2022 Andrew Moonesinghe and Mandy White allowed a six week trial period when the medical evidence suggested it should have been longer;

97.3. Lyndsay Wright, Rosie Bond and Julie Hamore failed to follow the 23 November 2022 occupational health report which suggested an extension of the work trial period?

97.4. The claimant was dismissed by Mandy White and Lyndsay Wright

98. If so, did they amount to a detriment?

99. If so, was that detriment done because the Claimant did the protected act of raising a grievance?

Unfair dismissal

100. Was the Claimant dismissed for a potentially fair reason?

101. If so, was that dismissal fair in accordance with s.98(4) of the Employment Rights Act 1996?

102. If the Claimant's dismissal was unfair, would the Claimant have been dismissed fairly in any event, applying Polkey?

103. If the Claimant's dismissal was unfair, would the Claimant had been fairly dismissed later in time? If so, when?

Remedy

104. If the Claimant succeeds in some or all of her discrimination claims:

104.1. What recommendations does the Claimant seek?

104.2. Should the Tribunal make those recommendations?

104.3. What injury

104.4. How much interest is owed?

105. If the Claimant succeeds in her unfair dismissal claim:

105.1. What basic award is payable?

105.2. What award of the compensatory award is just and equitable?