THE INDUSTRIAL TRIBUNALS

CASE REF: 10262/18

CLAIMANT: **Bernard (Brian) Magee**

RESPONDENT: **Her Majesty's Revenue & Customs**

DECISION

The unanimous decision of the tribunal is that the claimant's claim is dismissed.

Constitution of Tribunal:

Employment Judge: **Employment Judge Bell**

Members: **Mr J Barbour**
Mr S Pyper

Appearances:

The claimant was self-represented.

The respondent was represented by Mr J Kennedy, Barrister- at- law instructed by the Crown Solicitor's Office.

1. The claimant in his claim complained of direct discrimination, failure to make reasonable adjustments and harassment under the Disability Discrimination Act 1995 as amended (DDA), together with detrimental treatment for trade union activity. The claimant contended that he was marked in his yearly performance management report (PMR) as Achieved rather than Exceeded (so as to qualify for a £250 performance bonus) by reason of focus upon aspects of his work negatively impacted by his disabilities, without sufficient account being taken thereof or reasonable adjustment to the level of output expected of him, or criteria used to rate his performance, nor account of a proportion of his time being taken up by Trade Union duties, but taking into account statistics not previously included in PMRs, to his emotional and financial detriment.

2. The respondent in its response denied and resisted the claimant's claims, in particular contending that marking was carried out on a fair basis assessing performance against agreed targets taking into account relevant factors including the claimant's particular circumstances and abilities and that all reasonable

adjustments had been made; also, contending that the claim was presented out of time the claimant having been informed of the marking of his performance assessment on or about 9 February 2018.

3. At a Case Management Discussion on 31 October 2018 the provision criteria or practice (PCP) alleged by the claimant to have put him at a substantial disadvantage due to his disability and which meant that the duty to make reasonable adjustments arose was identified as twofold:-

    i. That statistics were used to measure his productivity in a different way to the way his productivity had been measured previously; and

    ii. That he was measured on the logging task when the claimant could not do as much of that task because of pain in his hands and this was known to managers.

    The respondent agreed that the claimant was disabled for the purpose of the DDA and the identified time point would be dealt with as part of the substantive hearing.

4. At a Case Management Discussion on 13 December 2018 the claimant's claims of direct discrimination and harassment under the DDA were dismissed following their withdrawal.

5. The claimant's claim of detriment on grounds of Trade Union activities was dismissed on 31 December 2018 following its withdrawal.

6. At a Case Management Discussion on 26 March 2019 in light of an email from the claimant to the tribunal dated 15 February 2019 stating '*as I suffer from tiredness and can sometimes have difficulty articulating myself in gathering thoughts and words, the main thing I would like is your patient* [sic] *and understanding, if I appear confused etc.'*, the respondent confirmed it had no objection to such adjustments insofar as the tribunal considered appropriate and necessary in the circumstances.

The Substantive Hearing

7. At the outset it was agreed that rest breaks and additional time when required by the claimant would be accommodated, accordingly regular breaks and additional time were provided throughout the course of the hearing.

8. The respondent confirmed it still considered there to be a live point at the outset as to whether the claim presented on 30 July 2018 was in time. It became apparent in the course of evidence that the claim was prima facie presented in time (the achieved marking whilst indicated to the claimant on 9 February 2018 was still open to change before a final mark was confirmed to the claimant on 3 May 2018 following his end of year PMR meeting on 30 April 2018) and the time point was not pursued further by the respondent or addressed in closing submissions.

9. The respondent raised that the claimant had sought in his second witness statement to refer to another PCP not previously part of his claim, albeit considered by the respondent to be without merit, regarding the unavailability of notes of discussions between his line manager and Reasonable Adjustments Support Team (RAST) prior

to revision of his Reasonable Adjustment Passport (RAP) in Summer 2018, which, were an application by the claimant to amend his claim to include this allowed, might require further evidence to be brought for the respondent. It was agreed the respondent would proceed with inclusion of the PCP, with decision upon amendment to be reserved and if apparent in the course of the hearing that further evidence would be necessary the respondent could seek to call same, albeit no such application was ultimately made.

10. Following the substantive hearing a panel meeting took place on 14 May 2019 at which this decision was reached.

THE ISSUES

11. The issues for determination by the tribunal were:-

11.1 Does the tribunal have jurisdiction to determine the claim?

That is,

(a) Was it presented in time? If not,

(b) Is it just and equitable to extend time?

11.2 Does the claim require amendment to include an additional PCP *that the claimant was put to a substantial disadvantage by the unavailability of notes of discussions between his line manager and Reasonable Adjustments Support Team prior to revision of his Reasonable Adjustment Passport in Summer 2018*?

If so,

Should an application for amendment be allowed?

11.3 Did the respondent have a duty and fail to make reasonable adjustments in respect of any disability of the claimant?

That is,

(a) Did the duty to make reasonable adjustments arise?

Were any of the following a provision criteria or practice applied by the respondent to the claimant which put the claimant at a substantial disadvantage due to his medical conditions?

(1) Statistics being used to measure his productivity in a different way to the way his productivity had been measured previously.

(2) Being measured on the logging task when the claimant could not do as much of that task because of pain in his hands and this was known to managers.

(3) Being required to produce a high physical output of case/productivity in order to receive an exceeded marking.

(4) A practice of not recording notes of meetings between the manager and counter-signing officer.

(5) The PMR process HR71008 – rating performance by asking the manager 'does this person consistently':

i. Exceed their business objectives as set out in their PMR?

ii. Set exceptionally high personal standards and strive for high quality in every element of the job role?

iii. Exceed the expected quality, quantity and deadlines for the job role?

iv. Seek additional work?

v. Require minimal management support and intervention?

vi. Make a measurable impact on the team and its work?

vii. Influence those around them to improve and excel?

viii. Act as a role model for those around them?

ix. Demonstrate a commitment to excellence?

x. Demonstrate a strong commitment to improving their own performance and to continuous professional development?

(6) No record being kept of the discussion and advice provided between the claimant's manager and the Reasonable Adjustment Support Team in Summer 2018. [Subject to paragraph 11 (2) above].

(b) If the duty arose was it breached? / Did the respondent take such steps as were reasonable in all the circumstances of the case for it to have to take in order to prevent the arrangements made by the respondent from placing the claimant at a substantial disadvantage in comparison with those that are not disabled?

Were any of the following a reasonable adjustment to prevent the substantial disadvantage due to the claimant's disability caused by the PCP?

i. Discussion with the claimant at an early stage of an indicative marking to address perceived weakness; request an amendment to his objectives; discuss any reasonable adjustments which might help him.

ii. Discussion on the reason why, (only at the last PMR meeting), the actual numbers of customers dealt with would be a major factor.

iii. The claimant's manager to have contacted the respondent's Reasonable Adjustment Support Team (RAST) at an earlier stage than Summer 2018.

iv. For the respondent not to have placed an emphasis on an 'uplift' from the claimant's previous year's performance.

v. To have updated the claimant's Reasonable Adjustment Passport from November 2015 earlier than Summer 2018, in light of mounting evidence of his deteriorating physical and mental health during 2017/18.

vi. To have scored the claimant's performance on aspects of his work impacted by his disability in a way so as not to be discriminatory/unfavourable.

vii. To have reallocated some of the claimant's tasks to prevent him suffering pain and contribute to him increasing the number of cases cleared.

viii. The introduction of disability trigger points.

ix. An occupational health referral before the claimant's achieved marking, to ascertain what adjustments may have been put in place to prevent unfavourable treatment.

If so,

11.4 What is the claimant's injury to feeling and/or loss?

SOURCES OF EVIDENCE

12. The tribunal considered the claim, response, agreed hearing bundle of documentation, additional documentation presented at hearing, written statement and supplementary statement of the claimant and written witness statements of Mrs Dorothy Ramsey (former manager of the claimant) and Mr Maurice McGarry (Higher Officer (HO) and former immediate manager of Mrs Ramsey) for the respondent together with their sworn oral testimony.

FINDINGS OF FACT AND CONCLUSIONS

The tribunal found the following relevant facts proven on a balance of probabilities:

13. The claimant joined the NICS in 1992.

14. The claimant is a Trade Union (PCS) representative.

15. The claimant suffers from pernicious anaemia, vitamin B12 deficiency, low mood and anxiety, depression, upper limb disorder, borderline sleep apnea, vertigo and prepatella bursitis.

16. The claimant it is agreed was disabled at the relevant time for the purposes of the DDA 1995 arising from his ongoing medical conditions.

17. The claimant's conditions impact upon his memory, concentration, energy levels and cognitive skills. The claimant receives a B12 injection every 4 weeks and is on medication for stress/anxiety and low mood.

18. The claimant finds that his performance and ability to work fluctuates between peaks and troughs, peaking after his B12 injection and dipping when his next injection is due.

19. Following a takeover of the Child Benefit Office by Inland Revenue and subsequent merger with HM Customs & Excise to form HM Revenue & Customs, the claimant ultimately in 2015 joined Business Tax Operations. Mrs Ramsey became manager of a team of twelve Administrative Officers (AOs) including the claimant within Business Taxes Credits from November 2015 and the claimant accordingly provided her a copy of his existing Reasonable Adjustments Passport (RAP).

20. In November 2015 Mrs Ramsey reviewed with the claimant his RAP. At that time Mrs Ramsey asked the claimant if any adjustments to the targets were required, the claimant advised her that he had no difficulty meeting any target set, that he just got tired when his injections were due. On 24 November 2015 a RAP was completed in partnership between the claimant and his line manager (due to be reviewed on or before 31/12/16) recording reasonable adjustments agreed and implemented under the DDA by the respondent for the claimant following a process of discussion and assessment. It listed therein:

> '*All agreed adjustments.*
> *Special Chair/Mouse/fan and desk risers.*
>
> *Adjustments for current role.*
>
> *Desk risers to be sourced for new desk.*
>
> *As Brian gets tired in the 4 week run up to his quarterly injections manager has agreed to accept late leave requests if he is feeling particularly tired.*
> *Manager has agreed that Brian can offset leave against his flexi if he will be over the allowable limit at the end of the 4 week period and this has been down to him leaving early because of tiredness.*
>
> *Manager has agreed time off (up to 3 hours 42) for doctor's appointments for injections.*
>
> *Brian is currently attending Cognitive Behavioural Therapy sessions – DAL for these sessions has been approved as they are linked to his ongoing depression which having lasted for more than a year would qualify under DDA.'*

Also, under '*Emergency health and safety information'*

> '*Discussed Brian's ongoing medical condition; confirms he has pernicious anaemia and Vitamin B12 deficiency & vertigo. Still suffers from memory and multitasking difficulties although he feels they are improving; he must receive quarterly Vit.B12 shot to maintain iron & energy levels. He's still on medication for 'Stress, Anxiety and Low Mood'. Brian does suffer from wrist pain and ULD when he uses a key board for prolonged periods and knows he must take rest breaks.'*

21. Both Mrs Ramsey and Mr McGarry have completed over recent years online learning in Equality & Diversity; Health & Safety Risk Assessment; Health & Safety for Managers; Unconscious Bias; Bullying & Harassment in the workplace; Disability Adjustment Leave for Managers.

22. The respondent operates a performance management review (PMR) process. At the start of the reporting year PMR paperwork was agreed between the jobholder and manager to reflect objectives (work and developmental), thereafter progress monitored through regular discussions, an indicative marking given at mid-year, self-assessment by the jobholder mid and at the end of the year and ultimately an end of year (EOY) mark awarded.

23. Up to March 2017 the respondent sought to achieve a guided distribution rating of 20% for Exceeded, 70 % for Achieved and 10 % for Must Improve. A bonus payment in excess of the standard pay award was given for an Exceeded mark worth approximately £250.

24. In 2015 the claimant received a £200 recognition bonus award for his organisation of the first HMRC Black History Month in Northern Ireland.

25. In 2016 the claimant was among those shortlisted for a national Civil Service Diversity Award.

26. The claimant in his performance management review for the year from 1 April 2015 to 31 March 2016 received an Achieved mark.

27. Following his mid-year PMR meeting for 2016/17 the claimant in April 2017 wrote to Mrs Ramsey summarising in 14 bullet points evidence to support an Exceeded mark, he included therein:-

    - *Taking into account losses, I performed highest in team productivity at 16.77 which is above team target of 10*
    - *I cleared the second highest amount of cases within team*
    - *I consistently work for the good of the team and business and regularly provide cover at short notice to ensure business needs are met*

    …

- *Consistently provided cover while rest of team availed of 'team time'*

  ….

- *I have overcome a number of health issues to exceed targets*.'

28. In a management meeting chaired by Mr McGarry (Mrs Ramsey's immediate manager) on 12 April 2017 attended by Mrs Ramsey comments recorded in respect of the claimant were:-

> '*At mid-year Brian was considered as an achieved but Brian has self-assessed for the year as exceeded. He has impressed with his thorough & technical consideration of casework and has volunteered to act as phone cover during team time/ team meetings. He is described as polite and approachable. His outputs are high although his losses on time are more than others which is caused by his role as a PCS rep from which he has received glowing feedback from those he assisted and other colleagues who have encountered his PCS work. The validation group discussed at length his performance in the year and judged that in comparison with his peers that he deserved an exceed marking.'*

29. The claimant received an Exceeded mark for his 2016/17 performance management review for the year from 1 April 2016 to 31 March 2017.

30. The next performance year 2017/18 ran from 1 April 2017 to 31 March 2018. The respondent's guidance for Performance management prior to 31 March 2018 was *HR 71002 Performance Management : Policy,* which includes in its '*underpinning principles*' :

> '*Performance will be pro-actively managed with a focus on continuous improvement and individual development and managing poor performance in order to facilitate efficient business delivery in line with the Civil Service values.'*

Also, in its '*Policy Summary'*

> '*Performance management is key to driving up individual and organisational performance and providing greater value for money to deliver high quality public services. The Performance Management policy provides a framework for managing performance throughout the year, laying the foundations of expected standards of performance and facilitating employee engagement.*
>
> - *Performance is evaluated against both the 'What' (delivery of objectives) and the 'How' demonstrations of behaviours, competencies and Civil Service values) with equal weighting.*
>
> - *Objectives must be set at the beginning of the performance management year and jobholders should be reviewed against those standards at monthly performance discussions throughout the year.*

The purpose of the end-of-year process is to confirm jobholder's performance ratings. This may be done via the process of a moderation meeting.

Jobholders who are part of a moderation meeting will be assessed against the agreed performance expectations and their moderation group which will be agreed by the Department.'

31. The policy provided for steps within the Performance Management process to include at the:

Start of the year: Managers Expectation Setting Meeting, Set objectives.

Mid-Year: Managers consistency checking.

Mid-Year review: Employees given Indicative rating.

End of Year: End of year review meeting- Employee self-assessment/notification of suggested rating, Managers moderation, Employee notified of rating.

32. Additional guidance was set out in further policies for performance management applicable prior to March 2018 including:

- *HR71004 Performance management: Performance planning*

- *HR71006 Monthly performance discussions* which included therein:-

  '*It is recommended that discussions are held on a monthly basis. There should be an absolute minimum of three performance discussions a year, forming the objective settling, the mid-year review and end of year reviews.*

  Monthly performance discussions will help to ensure that performance ratings do not come as a surprise to the jobholder and will mean there is a less intensive process at mid and end–of-year for both managers and jobholders.

  The manager and jobholder are jointly responsible for having these monthly performance discussions ….
  ….

  There is no requirement to take or retain detailed notes of each discussion.

  A detailed note should only be kept where a jobholder is rated as Development Needed; or is on the Achieved/ Development Needed borderline on the performance wave….'

- *HR71008 Rating performance*, including therein:-

  '*Managers will assess performance on three final ratings – 'Exceeded', 'Achieved' and 'Development Needed'*.'

  Also,

'*The performance wave below aids managers when assessing the jobholders performance and awarding a rating. The manager should consider where, taking into account the descriptors of the ratings and the jobholders' performance throughout the year, a jobholder's performance would be plotted on the wave*.'

And,

'***Example descriptors of performance ratings***

Exceeded

- *Exceeded outcomes; exceeded behaviour standards.*

Achieved

- *Exceeded outcomes:*
- *Achieved behaviour standards.*
- *Achieved outcomes; exceeded behaviour standards.*
- *Achieved outcomes; achieved behaviour standards.*
- *Exceeded outcomes; behaviours just met.*
- *Outcomes just met; exceeded behaviour standards.*'

Also,

'*When assessing the jobholder for a performance rating, the manager should consider:*

- *The 'What' delivery of objectives and the 'How' impact of behaviour, competencies and values with equal weighting. Jobholders should be assessed against the agreed performance expectations using the performance wave model and descriptions of performance as a guide.*
- *Whether any work or personal difficulty beyond the jobholder's control affected their performance. How well the jobholder managed this difficulty, and the extent to which the manager was able to provide support, is also relevant when assessing performance.*
- *If the jobholder has any health conditions or disabilities that impact on their work and any reasonable adjustments that are in place.*
- *That performance ratings must be awarded based on fact not opinion with each decision supported by objectives examples of performance.*

Sick absence and performance

Sickness absence levels should not be taken into account when assessing performance. Performance ratings should be based solely on the jobholders performance when in work. If the manager has any concerns about a jobholders' sickness absence they should follow the attendance management policy.

In addition managers can ask themselves the following questions – these are only prompts and should not be used as a 'tick sheet'…

	Ask yourself does this person consistently	
Exceeded outcomes, exceeded behaviour standards	*Exceed their business objectives as set out in their PMR?* *set exceptionally high personal standards and strive for high quality in every element of the job role?* *Exceed the expected quality, quantity and deadlines for the job role?* *seek additional work?* *require minimal management support and intervention?* *make a measurable impact on the team and its work?* *influence those around them to improve and excel?* *act as a role model for those around them?* *demonstrate a commitment to excellence?* *demonstrate a strong commitment to improving their own performance and to continuous professional development?'*	*Exceeded*

- *HR71009 Mid-year review* :-

'*the mid-year discussion is essentially a continuation of the monthly discussion which will have been ongoing between the manager and jobholder since the start of the appraisal year; however, as this discussion takes place at the mid-point in the*

appraisal year, the jobholder should reflect on their overall performance since the start of the appraisal year to this point…

…

Note: the manager should ask the jobholder if any individual needs or circumstances exist that affects their ability to meet their objectives. Managers should consider any individual needs or circumstances raised and make reasonable adjustments to the objectives where appropriate.
The manager should make it clear that this is only an indicative rating and does not guarantee the final performance rating at the end of the year.'

- *HR71010 End-of-year review.*
- *HR71011 Performance management: Confirming final performance rating.*
- *HR71012 Disagreements and appeals.*
- *HR71027 Performance Management: How to: Assess the 'How' Element of Performance.*
- *HR83021 Workplace Adjustment Passport- background.*
- *HR83014 Disability: Reasonable adjustments (Northern Ireland only)*.

33. Performance management processes were altered after 31 March 2018 and guidance for the new *Performance and Development Conversations* provided in *HR71100*. Reporting moved to a rolling process of continuous assessment with no middle or end from July 2018 and a transitional process operated for the 2017/18 year, which included the removal of the need for guided distribution; a simplified process for paperwork and record keeping; and optional end of year moderation meetings.

34. In April 2018 Mr McGarry set out written guidance to all of his managers as follows*:*

> *'2017/2018 is a transitional year for PMR process but markings are still based on the Performance Wave and subsequently 50% Behaviours and 50% Performance.*
>
> *As there is no moderation exercise this year I have documented some pointers to consider when assessing a jobholders performance.*
>
> *<u>Development Needed</u>*
>
> *This marking would be appropriate where job holder has displayed poor behaviours throughout the year and/ or has been under-performing in terms of productivity output.*

Exceed

This marking would be appropriate where jobholder has consistently performed at a higher level throughout the year and has demonstrated excellent behaviours. They may be the "go to" person on the team, have delivered productivity whilst consistently assisting others or have delivered significant impact through job roles held. They should be proactive within the team/office and can be relied upon to always have all work tasks completed on time and accurate. This is not a prescriptive list, but is a good indicator.

Achieve

This marking is appropriate where the job holder has delivered a good performance both in terms of productivity and behaviours.'

35. Mrs Ramsey following the above changes to the PMR process continued to record on a spreadsheet as she had done in previous years since taking over her team in November 2015, hours on tasks and clearances to allow for the calculation of individual productivity with and without 'losses' from which she compiled a table to use as a guide for PMR 1-2-1 discussions throughout the year.

36. The claimant recorded in a word document kept by him (amongst others) the following entries:

24/05/17 pain in neck/shoulder… took frequent breaks.

07/07/17 …some pain in right wrist while logging ...

08/02/18 I.T issued plus pain in fingers after logging today. Left early due to both.

09/02/18 still pains in fingers.

19/02/18… (some pain in right shoulder area).

20/02/18… (pain in right shoulder).

21/02/18... (pain in right shoulder very strong).

22/02/18 (still [p]ain in right shoulder, despite taking frequent breaks, still painful and slight pain in fingers now).

23/02/18 Woke up with pain in shoulder and back.

03/05/18: logging-pains in fingers, stopped 4.20 and volunteered to do phones till 5.

37. There was an informal arrangement that the claimant could swap tasks when he was feeling the effects of his upper limb disorder and accordingly he would regularly undertake trade union work to avoid using the computer. Trade Union time was not taken into account when assessing productivity.

38. The claimant had in total three performance meetings prior to his end of year review for the 2017/18 reporting year, which took place on 12 June 2017, 11 September 2017 and 19 February 2018. Mrs Ramsey recorded notes on completion of each meeting on a 'Performance & Development 1-2-1 Discussion Template', included therein was the following:

1. **Personal Contribution**: Self- Appraisal to include: Performance against PMR Objectives. Progress against targets. Accountability and decision making.	12/6 At Fri 2/6 personal stats show an average of 9.17 (16.93 without losses) against a target of 10 (14 without losses). Time off task 103.62 of a total of 226.01 (54.15% time on task) this includes 20.65 TU time. Reference to TU role to be included in his PMR. 11/9 discussion in general terms around performance as there have been issues raised with HO that need to be addressed separately. 20/10 Personal stats show an average of 8.22 (16.89 without losses) (12.10 Ex PCS losses). No In year meeting held as Brian not available when KITs held end of Oct/beginning of Nov. 19/12/18 @ Personal stats show an average of 8.20 (16.46 without losses) (12.88 Ex PCS losses) against a target of 10 (14 without losses).
2. **Personal development:** Performance against Developmental Objectives	12/6 PMR discussed and personal objectives will make reference to the completion of ODP Level 2 and continued TU learning. 11/9 ODP still not started but ongoing personal demands on his time. 19/2 Discussed the position of ODP as Brian has still not started the assessments and time is running out per email dated 12/2/18.
3. **Team contribution & development**: Behaviours. Feedback for line manager. Continuous improvement activity. Quality & Team KPIs. Peers Support.	12/6 Continues to play a positive role within the team and is helpful and supportive of colleagues. 11/9 again I confirmed to Brian that the issues he has identified will be addressed separately and that I have no issues with his contribution to the team. 19/2 I advised Brian that I view his performance as an overall achieved but that I was conscious that I had limited info on his PCS duties so I asked for evidence to be included in his overall self-assessment for his EOY. He has recently sent me his Jan 18 Facilities time report but the

	last one sent to me was for May 17.
4. **Domestics**: Attendance to include: Sickness absences Annual leave plans Flexi & time sheet T& S claims Any issues that may be impacting on work life or home life	12/6 No issues – TU monthly report is due. NB meeting was brief as he was feeling unwell and had had difficulty focusing on simple tasks today. 11/9 Brian's mother has recently been diagnosed with cancer. His daughter was caught up in the Barcelona terrorist attack and both of these have had an unavoidable impact on his overall health and wellbeing – he is a bit distracted. He is also suffering at times from the symptoms of Vitamin B12 deficiency. 19/2 Brian was off sick for 4 weeks following the death of his mother and returned 11 Dec on a 3 week phased return. Normal hours resumed Jan 18.

39. In the course of 2017/ 18 the claimant experienced a number of difficult domestic issues including his wife and mother being ill and daughter being caught up in a terrorist attack (Barcelona).

40. Around May/June 2017 Mrs Ramsey first considered that the claimant was not working to his previous standard.

41. The claimant did not provide Mr Ramsey with his Facilities Time month reports for June 2017 through to December 2017.

42. On 15 June 2017 at his return to work discussion following a day's sickness absence by reason of blood pressure Mrs Ramsey suggested that the claimant consider a full check up with his doctor as she considered the symptoms he was describing were those of his B12 deficiency outside the 4 week run up to his injection.

43. Over the Summer months in 2017, on collating her team's daily stats sheets onto the Excel spreadsheet kept by her, which she did retrospectively often on a 2 weekly basis, Mrs Ramsey noted discrepancies in the claimant's daily records which she queried with him by email. Mrs Ramsey also observed that the claimant regularly showed more time off task than his colleagues.

44. On 17 July 2017 Mrs Ramsey sought from the claimant a copy of his 2017/18 PMR and PDP (performance development plan) paperwork, his being the only one outstanding. On receipt Mrs Ramsey drew to the claimant's attention that he had forgotten to include reference to his PCS duties when setting his PMR objectives.

45. In August 2017 the claimant's mother was diagnosed with cancer.

46. On 29 August 2017 following notification from the claimant by email of a number of upcoming PCS personal cases including at 12 pm and 13.30 that day and at 12 and 2 pm on the following day Friday 1 September 2017, Mrs Ramsey replied *'I am*

going to have to ask you to reschedule your Fri meetings this week as I cannot afford for any more hours off task this week. 80 % of our hours this week equated to 239.65 and we have only planned in total 190.5 (52.5 of which will be indirect)

I am happy to discuss if you have a case to persuade me otherwise but as we are at day 10 on our SLA I need all the hours available on task this week.'

47. The claimant felt Mrs Ramsey was adding pressure while he was going through a stressful period by micro-managing him and in response raised an allegation of bullying and harassment against Mrs Ramsey and completed an *Accident, near miss or work related ill health Report* (HR ACC1) on 8 September 2017 setting out in respect of the email of 29 August 2017 '*This email was the final straw for me, as I feel I have been the recipient of a number of unwarranted email and actions. I have previously raised concerns with my FML about the way I feel she has treated me, including negative body language. I have further explained that if I have Friday meetings, then it can be accepted that they are unavoidable, or that I have tried to re-arrange. I have also explained that I have re-arranged Friday meetings but did not feel the need to appraise her of every time I did so. On other occasion I have been asked to confirm the nature of union meetings which I feel is unwarranted and intrusive. We had previously discussed that I do not work well under micro-management, although it was accepted that I do my work well and respect the role of manager. While individual incidents may not appear detrimental, taken together, they have contributed to work related stress levels and are having a negative impact on my health and mental wellbeing.*'

48. By email on 12 September 2017 Mrs Ramsey outlined to Mr McGarry that following a KIT discussion with the claimant the day before he had confirmed his mother was still in hospital and her condition was terminal, his wife was awaiting a gallbladder operation, his daughter was recently hospitalised following an asthma attack and was now awaiting a referral for further tests and in addition his daughter was caught up in the terrorist attack in Barcelona. Mrs Ramsey commented '*it would be fair to say that there is the potential for outside influences to have been impacting on his mental state within the last few weeks'* and went on to confirm that the claimant was happy for Mr McGarry to mediate '*but has told me he just wants to be left alone to get on with the work and I don't know what exactly he means by that as I have a responsibility to management [sic] him as I do his peers*.'

49. A stress reduction plan was put in place dated 13 September 2017 to next be reviewed on 6 December 2017 outlining the main issues identified and the jobholder's and manager actions to be taken and claimant's personal domestic issues at home noted but that he was managing these and they were not interfering with his work.

50. On receipt of the ACC1 and stress reduction plan when it was later released to her, Mrs Ramsey commented by email to Mr McGarry on 3 October 2017 that she had been trying to get the claimant to avoid arranging meetings for Fridays for some time, she had refused time for Friday 1 August 2017 as a result of having repeatedly asked for Non KPI time to be kept to a minimum over August because they were so short staffed, and due to the amount of annual leave allowed that week and planned hours on task the Service Level Agreement (SLA) was in danger of being exceeded, and which indeed happened and was the 'first slip' they saw. Mrs Ramsey was

annoyed that the claimant had opted 'yet again' to arrange meetings around Friday lunchtime which she thought put pressure on the rest of the team who were either planning 6 hour days themselves or had to provide lunchtime cover. Mrs Ramsey commented that the claimant was relatively good at notifying her of his absences but that they seemed to have increased of late and he did not give her any details, that she was guilty of forgetting his services were required elsewhere but that she should at least be told where he was going from a health and safety perspective. In respect of emails exchanged with him Mrs Ramsey commented that the claimant might perceive this as micro-management but that she viewed it as keeping accurate records setting out ' *especially as I use this data to make my performance comparisons. I know Brian does a lot of PCA work outside of his recorded time but to be honest that is his choice. I just want him to do the job he is paid for and to maintain accurate records.'*

51. Ultimately the allegation by the claimant against Mrs Ramsey was resolved through mediation.

52. Whilst a reduced number of PMR reviews were required under changes to the PMR process Mrs Ramsey scheduled to meet the claimant on 1 November 2017 but this was unable to take place due to the claimant's absence from work.

53. Prior to his mother's death on 6 November 2017 the claimant took 7 days special leave absence. He thereafter took 4 weeks sickness absence (13 November to 8 December 2017) and Mrs Ramsey thereafter granted him a 3 week phased return to work, with the claimant returning to full time hours in January 2018.

54. The claimant's Stress Reduction Plan was due to be reviewed with Mr McGarry on 6 December 2017 but the meeting unfortunately had to be cancelled and was postponed a number of times thereafter.

55. Whilst reluctant to speak with the claimant about his performance before Mr McGarry's meeting took place to review his Stress Reduction Plan, in light of his recent bereavement and her having been a stressor for him, to avoid further delay Mrs Ramsey arranged and held the PMR 1-2-1 meeting with the claimant on 9 February 2018.

56. At the meeting the claimant self assessed himself on the performance wave as an Exceeded. Mrs Ramsey discussed with the claimant statistics compiled by her which we accept on balance that she continued to interpret and compare in the same way as she had done in previous years. Mrs Ramsey indicated that she rated the claimant's performance as an Achieved. Mrs Ramsey asked the claimant to provide evidence to support all aspects of his work in his EOY self-assessment for her consideration. Mrs Ramsey noted that she had received the claimant's January 2018 Facilities Time month report but had not received prior to that any since May 2017. Mrs Ramsey mentioned to the claimant that by regularly working 6 hour days he was putting pressure on himself to keep within the terms of the flexi agreement at the end of each 4 week period when perhaps he may not feel like working long hours and suggested he may benefit from leave rather than using it to offset against his flexi deficit, the RAP agreed only referring to concessions being required in the 4 week period to the claimant's B12 injection being due. No adjustment further to his RAP was requested by the claimant or considered

necessary by Mrs Ramsey at that time. Mrs Ramsey did not consider that the claimant's widely variable performance required a performance improvement plan but accepted it in light of his disability and personal circumstances.

57. In February 2018 arising from an MP's request for assistance to help a customer register his imported vehicle where the importer had in the first instance failed to make the appropriate import notification, the claimant assisted the customer by completion of a Notification of Vehicle Arrivals (NOVA). Following a query and then request from the Personal Transport Unit (PTU) to Mrs Ramsey that in similar cases where a VAT registered company that imports a vehicle refuses to make notification that her team liaise with PTU to try and make the company more compliant in future, Mrs Ramsey asked the claimant if he had a similar case in future to refer it to the PTU team. The claimant indicated in response to Mrs Ramsey that he would probably do the same thing again.

58. By email dated 21 February 2018 Mrs Ramsey sent the claimant a table showing requested statistics compiled under headings: Total Time; Time off Task; Nova Letter; NFA; Query; Total Cleared; Prod Rate; Prod Ex Losses; % time on task.

59. On 22 February 2018 the claimant completed an *Accident, near miss or work related ill health Report* (HR ACC1) reporting ongoing pain in his right shoulder arising and continuing from 19 February 2018 after he attached his specialist (Display Screen Equipment (DSE)) keyboard/mouse to the PC he was 'hot desking' on and the PC initially turning off repeatedly. The claimant referred therein to his fingers/wrist becoming sore on 22 February 2018 possibly due to the influence of the pain in his right shoulder and furthermore set out '*Today I am 'logging' which entails completing a spreadsheet with references and information. ** When I last undertook this task on Thursday 08/02/18 I had to stop work that day as I was beginning to feel pain in my fingers. This pain remained the following day.'*

60. Mrs Ramsey sought on 7 March 2018 from the claimant an outstanding completed DSE user checklist to allow for a DSE risk assessment to be arranged following submission of his ACC1 to prevent any reoccurrences. On investigation Mrs Ramsey established that the incident had been caused by a loose connection at the computer being used at the time. As the claimant already had a specialist keyboard mouse and chair the DSE assessor advised there was little more they could offer.

61. In April 2018 the claimant applied for promotion.

62. On 3 April 2018 Mrs Ramsey raised with three staff members including the claimant that Q4 certificates were outstanding, required by her to make a declaration of conformity.

63. By email on 18 April 2018 the claimant sought clarification of whether Mrs Ramsey wanted a written self appraisal or him to provide examples in order for him to achieve an exceeded marking for PMR purposes. The claimant referred therein to his involvement with the HMRC Disability and Race networks, attached a newsletter with an article to which he had contributed; feedback emails on his PCS (Trade union roles) as a personal Caseworker and union learning representative to show

his style of working and performance; and referred to verbal praise received from a customer the day before.

64. In response on 19 April 2018 Mrs Ramsey set out:

> *'The feedback that I require to support any exceed marking must cover all aspects of your work so in your case not just PCS. I need to know why, in comparison to your peers, you think your performance from April 17- March 18 was above theirs.*
>
> *I have to say that I do not rate your performance as an exceed but am willing to consider all of the evidence. I would say that there may have been days where your output would have warranted an exceed but there is no consistency in your performance. Over the summer months in particular there were dips which directly impacted on the team's ability to maintain the SLA.*
>
> *To give you an opportunity to persuade me I will arrange for our meeting to take place next week.*'

65. The claimant replied on 19 April 2018:

> *'That will be fine.*
>
> *Can you forward my stats so I can compare them against the team.*
>
> *When we last spoke you indicated that I was in top 3 performance wise re CAR stats. This was without PCS activity etc, hence your request for me to bring evidence re this aspect of my contribution etc.*
> *I cannot recall being responsible personally for the team's ability to maintain the SLA during the Summer, so would appreciate a recap of how this occurred.'*

66. Mrs Ramsey forwarded by email on 25 April 2018 to the claimant his personal summary and the team comparison 'stats' summary requested by him with two entries thereon for the claimant, one showing PCS time included in the losses and one with PCS time excluded from the time on task and the losses and continued therein:

> '*As I have previously mentioned your productivity rate for the year was good and you were in the top 3 based on the productivity excluding PCS time from both the total time available and time off task but 9th when this was included.*
>
> *However in terms of time on task you have the highest losses declared on the team even when the PCS losses are excluded. This would indicate that you have either overstated your general daily losses or your colleagues have understated theirs but either way a direct comparison is difficult.*
>
> *In terms of actual numbers ie customers helped your total of 1208 puts you next to last when the listed [sic] is sorted by total cleared ie how effective you*

have been. I know that multi cases cloud this direct comparison but everyone gets them it is simply the luck of the draw.

…. Firstly let me say I was [not] *suggesting that you were solely responsible for the team not meeting the SLA but you did have a couple of family instances which impacted on your ability to fully focus, not least your mother's terminal illness.*

The team only slipped out on the SLA on 2 of the weeks W/C 28/8 (Day 12) and 4/9 (Day 11) and I did indicate to you in my emails of 29 August that PCS time could put SLA in danger. You may remember the incident as it prompted you to complete an ACC1 and speak to Maurice and your Stress Reduction Plan was put in place as a result.

You have had a difficult year on a personal level and the results you have achieved are good but I do not feel that they warrant an exceed. I am seeking input from Maurice as he will be the countersigning officer and we can discuss your marking when we have your EOY meeting.'

67. The table of statistics compiled and used by Mrs Ramsey was as follows:

Productivity	Total Time	Time on Task	Time off Task	Nova Letter	NFA	Query	Total Cleared	Productivity	Productivity Excluding Losses	% time on task
A	1552.45	980.38	572.07	1592	390	550	2532	11.42	18.08	63.15
B	1344.34	914.13	430.21	1183	403	521	2107	10.97	16.13	68
C	1135.99	791.4	344.59	1114	110	284	1508	9.29	13.34	69.67
Brian Ex PCS	922.49	515.44	407.05	617	217	374	1208	9.17	16.41	55.87
E	1530.15	1041.13	489.02	1513	162	293	1968	9.00	13.23	68.04
Team Totals	13022.5	8143.01	4881.02	10533	2358	3748	16639	8.94	14.30	62.53
F	1557.24	1075.08	482.16	1091	334	492	1917	8.62	12.48	69.04
G	1478.7	876.86	603.34	1104	191	417	1712	8.10	13.67	59.30
H	873.46	493.87	379.59	480	154	345	979	7.85	13.88	56.54
I	1184.36	722.24	462.12	1029	113	171	1313	7.76	12.73	60.98
Brian	1091.45	515.44	576.01	617	217	374	1208	7.75	16.41	47.23
K	1274.39	732.48	541.91	810	284	301	1395	7.66	13.33	57.48

68. Throughout and at the end of the reporting year Mr McGarry met with his four managers to discuss and review the performance of their forty one Assistant Officers giving his managers guidance on how to decide upon appropriate markings and ensure that there was a consistent approach to rating performance and fair treatment. In relation to Mrs Ramsey's team, Mr McGarry reviewed the self-assessment paper work and discussed the performance of five individuals, three of whom (including the claimant) who had considered themselves to be an Exceeded, and two others who considered themselves an Achieved but Mrs Ramsey was considering if they might be an Exceeded due to productivity/clearance rates.

69. On reviewing the five officers and discussing the cases with Mrs Ramsey, Mr McGarry agreed that just two officers merited the Exceeded award:

70. Officer A had the highest productivity rate (11.42 or 18.08 excluding losses, 2532 cases cleared) yet did not receive an Exceeded marking because there had not been uplift in the previous year's performance and on the behaviours side they had just achieved and not exceeded expectations.

71. Mr McGarry agreed that officer B merited an Exceeded mark as despite personal issues they had given exceptional performance, had the second highest productivity (10.97 or 16.93 excluding losses & cleared 2107 cases), assisted other teams and rearranged their working times to suit the business throughout the year.

72. Officer C was one of the officers who had not self assessed as an Exceeded. On reviewing their performance Mr McGarry agreed with Mrs Ramsey that an Exceeded marking was not appropriate as although their productivity was the third highest (9.29 or 13.34 excluding losses, clearing 1508 cases) they had been working on more straightforward case.

73. The claimant was the fourth person to be table based on productivity once the time on task for union duties had been taken into account achieving 9.17 or 16.41 excluding losses & clearing 1208 cases. In the claimant's self-assessment for 2016/17 the claimant received an Exceeded mark, as pointed out by him having the second highest clearance rate and the second highest productivity rate. As with officer A, Mrs Ramsey looked to see if that performance had been maintained or if there had been any uplift. Mrs Ramsey judged that the performance had not been maintained and the claimant had appeared distracted at times. Mrs Ramsey took into account and made allowances for the difficult personal circumstances that had unfolded for the claimant in his home life relating to his wife, mother and daughters and which she considered were linked to fluctuations in the claimant's performance more than his disability. Mr McGarry agreed with Mrs Ramsey that the claimant's overall performance for the year was a good performance but not consistent throughout to merit the Exceeded marking and had been no uplift from the previous year when he had received an Exceeded. Mr McGarry was aware in his conversation with Mrs Ramsey that a RAP was in place but considered that Mrs Ramsey was concerned more about the claimant's hours as he had to work shorter days due to domestic issues at home than his health and union issues.

74. Officer E was the fifth person on the list to have exceeded the team average clearing 1968 cases with productivity of 9 or 13.23 excluding losses and was considered to merit an Exceeded mark having acted on feedback given at the end of the previous year on receipt of an Achieved mark, their contribution to their team and office through supporting team members as they consolidated their knowledge and undertaking to review guidance and training material. Mr McGarry agreed that Officer E merited an Exceeded marking as their productivity was higher than the team average and their contribution to their team and office through assisting and training others was excellent and consistent during the year.

75. By email the clamant replied to Mrs Ramsey on 25 April 2018 indicating that whilst he had not had the chance to look at the information in great detail some of her comments perplexed him, reciting these he then set out his comments including:

'My productivity rate is good and rated within top 3; I am unsure what you are referring to when you place me on 9th?

… Was telephone cover considered as a loss? I am unsure also how to interpret your remark about 'overstating' my losses but can assure you that if I have put down a 'loss', then that is what I considered it to be- how others record their losses is outside my control.

… I disagree with your premise that total clearances equates to how effective I have been and feel this is an unfair comparison to make, considering I have TU losses/health issues which impacts upon the volume I can deliver. I also disagree that multi cases are 'simply the luck of the draw'. On many occasions I have volunteered to take on large multi cases in order to help out colleagues, in the knowledge that I can claim one stat.

… but you did have a couple of family instances … TBH, I'm unsure how to respond to this comment?

… I do remember the 'incident' but again would disagree with your analysis that this somehow should cause me detriment? You appear to be taking a very short-sighted and insular approach to my performance …

… results you have achieved are good but I do not feel they warrant an exceed. Again I feel you are taking a very insular view of my performance.'

76. The claimant's end of year PMR meeting took place on 30 April 2018 with Mrs Ramsey confirming to the claimant that she considered him an Achieved although he considered himself an 'Exceed' marking.

77. The claimant felt aggrieved and hurt interpreting the Achieved mark as implying that he was ineffective.

78. On 3 May 2018 Mrs Ramsey emailed the respondent confirming that she had already forwarded Mr McGarry the claimant's original email [25 April 2018] and hers to the claimant with the 'stats' summary so he was aware of the basis of their discussion on 30 April 2018 and her view of the claimant's performance which as countersigning officer Mr McGarry agreed. She confirmed that she was providing the claimant with her narrative together with the only form she could locate, commenting that the simplified PMR for where there was agreement and a write up not required was hardly appropriate in the circumstances. The claimant's performance management objectives for 2017/18 and narrative from Mrs Ramsey were provided in respect of the meeting held by her with the claimant on 30 April 2018, as follows:

"I have considered the evidence provided in Brian's self-assessment but cannot agree his claim to having exceeded in this years' performance. I accept that it is difficult for me to assess his role of PCS rep and that the email evidence provided is glowing but I have had verbal feedback from managers on the floor to say that he can appear to be distracted and flustered in personal case meetings. I am also aware that the monthly Facilities Time reports have been few and when they have been received I

have has [sic] *to query the times against those declared on the stat sheets. I would expect timely submissions of accurate reports from an exceed.*

I am aware that Brian has had a difficult year on a personal level and that he has ongoing health issues but on balance I feel that the achieved marking is more appropriate. He himself has said that he has good days and bad days and I explained that for a performance marking of exceed I would expect to see a consistently high performance which he has not delivered according to his stats. We debated at length my interpretation of his stat summary including looking at numbers of customers dealt with and the % of time on task even excluding PCS losses but Brian felt that this did not reflect his full contribution to HMRC in the year.

I agreed that stats was only part of the picture global picture [sic] *and that in making comparisons between the team members I took a wider view including promptness in responding to requests for information, accuracy in maintaining records including stats and flexi. I sighted having to point out the same error on his flexi records in Dec and Feb as an example of why his performance was an achieved rather than exceeded. I have had to chase for SMs checklists to be completed whereas an exceed may return them promptly. I am still waiting on his completed DSE checklist from March.*

He has successfully completed 2 ODP assessments but needs to complete the full course before time expires.

I assured Brian that I was happy with the work he had undertaken and with his contribution to the team but recognised that he was disappointed with the marking."

79. The claimant by email on 16 May 2018 referring to the narrative which had been included by Mrs Ramsey queried:

> '*During our chat you mentioned that some managers had remarked that I appeared distracted and flustered during meetings. I had asked that I would like to know who they were and in what context the comments were made. Are you in a position to answer?*
>
> *You also omitted your comments about my taking leave and working 6 hours some days - I pointed out I was entitled to do this*'.

The claimant also sought agreement that 3 May 2018 was the start of his appeal period.

80. In reply Mrs Ramsey sent the claimant an email on 16 May 2018 confirming the names of managers from whom she had received feedback about the claimant's performance and set out:

> *'although both confirmed that they were impressed with your competency on the telephones they found during a formal meeting that you had been distracted and appeared to have difficulty focusing. The comments were made in response to my general comment during a management meeting*

that I would have difficulty assessing your performance as a PCS representative as I was having to reply to the feedback you provided only…

I note your comments about leave and flexi but as far as I am aware there is a word restriction on the PMR paperwork - if I had made comments it would have been about you having to offset leave as you had exceeded the flexi limits or were in danger of doing so at the end of a 4 week period.'

Mrs Ramsey agreed that 3 May 2018 was the start of the appeal period being from when the claimant received the PMR paperwork.

81. The respondent has a Reasonable Adjustment Support Team (RAST) to support and advise managers at any stage of considering or implementing a reasonable adjustment.

82. In an email to Mrs Ramsey on 18 June 2018 about the logging rota the claimant commented, '*you are also aware that I find logging a full day causes difficulties so unfortunately I cannot guarantee to provide a full day logging*.'

83. In response Mrs Ramsey by email on 19 June 2018 confirmed to the claimant that she would be happy to discuss his personal situation regarding the logging rota and put to him that '*it will give us an opportunity to review your Reasonable Adjustment Passport'*.

84. On 10 July 2018 Mrs Ramsey referred the claimant to Occupational Health for advice and support regarding what tolerance should be built into his trigger points relating to his conditions of prepatellar bursitis in his left knee, pernicious anaemia, bereavement of his mother, tiredness and pain in his hands and wrists, asking in particular whether his bereavement/depression and his anaemia were covered by the DDA.

85. On 11 July 2018 based upon HR guidance that it was possible his marking could be overturned the claimant raised a grievance in respect of the PMR Achieved rather than Exceeded mark given to him by his manager in April 2018, confirmed on 3 May 2018, and because he thought that the thought process and subsequent comments were discriminatory as a result of something arising from his disability and his trade union activities and that he considered had been a failure to make a reasonable adjustment. By letter dated 3 December Graeme Dunn confirmed that the appeal was not upheld.

86. On 16 July 2018 Occupational Health reported upon the claimant, outlining that his conditions (the nature of which was that there may be times of remission and times of flare up/relapse) in totality cause symptoms such as brain fog, difficulty with concentration and multi-tasking, lack of motivation, fatigue, long and short-term memory impairment, knee pain and depression/ low mood at various times and were in their opinion were likely to meet the criteria of the Equality Act [GB legislation]. It was recommended that regarding the claimant's ULD that they/he assess the risk (match the symptoms to tasks to avoid pains thresholds) in order to ensure that his work is mixed/arranged in such a way as to avoid repetitive keyboarding/mouse tasks for extended periods of time which are likely to aggravate pain/ symptoms. Also, that they undertake a stress reduction plan, revisiting it every 6 weeks to

ensure it remains pertinent for the next 6 months. OH advised that the claimant '*is best placed to know what kind of adjustments may be needed in view of his current, or indeed future, symptoms, and this can be a two-way conversation..'*

87. In July 2018 Mrs Ramsey contacted the RAST team to query if she should '*consider any other reasonable adjustments given that Brian has only ever advised that his performance is effected in the run up to his quarterly B12 injection*?'

88. Mrs Ramsey sought confirmation from RAST whether as a PCS representative the RAP needed to be extended to cover the time aspect on union duties out of concern that the scope of the RAP needed to extend to all aspects of the claimant's role, the RAST team advised Mrs Ramsey that the adjustments in place for the claimant were generous and a request to reduce a target that was being met had not been come across before by the advisor.

89. No notes were kept of Mrs Ramsey's discussions with RAST.

90. Following a review on 21 August 2018 a revised RAP was agreed between the claimant and Mrs Ramsey and signed off on or about the 11 September 2018. No adjustments had been sought in the interim by the claimant to his RAP but on review he sought a reduction of targets by 50 %, this was referred for consideration by Mr McGarry but ultimately refused. Agreed adjustments/ individual requirements were recorded as follows:

'***Physical***

- *Ergonomic keyboard, specialist mouse, document holder and desk fan.*

- *Brian requires access to desk fan while working and prefers to be close to a window. He has also asked to avoid being located at desk number 7 as he finds these uncomfortable to sit at*

….

Details of job related adjustments/ individual requirements:

…

Flexible working

- *Brian advised that his tiredness is no longer confined to the 4 weeks run up to his injection and occurs afterwards as well. Manager has agreed to accept late leave requests if he is feeling particularly tired.*

- *Manager has agreed that Brian can offset leave against his flexi if he will be over the limit at the end of the 4 week period and this has been down to him leaving early because of tiredness. Consideration to be given if he is also slightly over.*

- *Manager has agreed time off (up to 3 hours 42) for doctor's appointments for injections.*

- *Brian at times can suffer from vertigo, and consideration to be given as above.*

Wellbeing –

- *Personal Evacuation Plan put into place.*
- *Stress Reduction Plan - SRP to be reviewed/updated with HO Maurice McGarry.*
- *Personal Disability Trigger point has been set as 12 days.*

Work Objectives –

- *Brian has been removed from the Logging Rota and will alternate case working with PCS duties as required to avoid aggravating ULD.*
- *Brian had difficulty multitasking at times and has difficulty with short and long term memory. Consideration to be given for what may be deemed silly mistakes. Brian has requested email confirmation of notes of team meetings so he has something to refer back to.*
- *Adjusted target- Brian requested reduction of 50 %. This is to be discussed with HO. Performance to be regularly reviewed.'*

91. In an attachment to her email of 13 September 2018 Mrs Ramsey set out for the claimant and Mr McGarry details of the claimant's hourly productivity rate for 2017/18 and 2018/19 year to date together with team averages for comparison, included therein were the following:

Brian	Year 17/18		18/19	Apr-18	May-18	Jun-18	Jul-18	Aug-18	Sep-18
	Car Post Cleared	1208		102	166	182	153	250	92
	Total hours recorded	1091.45		47.5	60.55	69.05	57.2	91.4	32.24
	Time on Task	515.44							
	Productivity	1.11							
	TOT Productivity	2.34		2.15	2.74	2.64	2.74	2.85	

Team	Year 17/18		18/19	Apr-18	May-18	Jun-18	Jul-18	Aug-18	Sep-18
	Cars Post Cleared	17977		1543	1883	2272	1689	1993	938
	Total hours recorded	14190.71		782.04	858.25	954.19	647.14	770.24	363.14
	Time on task	8889.82							
	Productivity	1.27		1.97	2.19	2.38	2.61	2.59	2.58
	Total Productivity	2.02							

92. The claimant's claim was presented to the office of the tribunals on 30 July 2018.

93. On 8 November 2018 Mrs Ramsey recommended the claimant for a Recognition Award/ High Performance Award for his significant contribution to clearing a backlog when they fell outside their 10 day SLA over the Summer; for being the second highest productivity rate on the team for the period from April 18 to September 2018; volunteering to work the oldest cases and rearranging PCS meetings to allow for his time to be spent on direct tasks. The Award was approved on 13 November 2018 and a bonus paid to the claimant.

94. A grievance meeting took place on 27 November 2018 and by letter dated 3 December 2018 the claimant was advised of the decision taken by Mr Graeme Dunn not to uphold his grievance. In the Decision Manager's deliberation document he set out under the Reasoning behind Grievance Decision that although the claimant had provided him with additional evidence covering both performance and behavioural elements there was nothing to suggest that the manager had not taken these into account when reaching her decision; nothing to confirm or suggest that he had exceeded his objectives more often than not throughout the year; nothing to suggest the manager had not followed the correct procedures and assessed the claimant fairly; clear from evidence that the manager had recognised a job well done.

95. Following on from the claimant's grievance Mrs Ramsey's comments about the claimant appearing 'flustered' was flagged for removal but the claimant wished for it to remain.

96. The claimant appealed the outcome of his grievance and an appeal meeting took place on 1 February 2019. In a letter to the claimant dated 15 February 2019 Mr Robert Milne summarised the claimant's points of appeal as;

> ' • *You did not feel that your disability and any other activities have been taken into account when arriving at 2017/18 End of Year marking. You were awarded an achieved marking but felt you deserved an exceed marking.*
>
> • *You were upset and disappointed of the wording used as part of your end of year report. In particular the feedback about you being flustered. You felt this was unfair and didn't think it should be taken into account when arriving at your end of year marking as your condition can cause you to get flustered.*
>
> • *You highlighted that a different method of collating and displaying stats was introduced at the end of the year. You felt that you were being measured differently from the rest of your team.'*

Mr Milne advised the claimant that his appeal was not upheld finding the Decision making process to have been reasonable and fair in its outcome and recommendations and no reason to change what was in the decision makers report based upon the claimant's oral and written submissions.

In his **Reasoning behind Appeal Decision** Mr Milne set out:

> *'3. Grievance was not raised solely because realised was not going to receive an exceed marking. Grievance was raised because during the conversations Brian had had with his manager at End Of Year, and on the stats produced, Brian felt he was being treated unfairly.'*

97. Following his successful application for promotion in April 2018 the claimant joined Individual Small Business Compliance in December 2018 as a Band O Compliance Officer.

98. The claimant set out at paragraph 51 of his witness statement:

> '*On hindsight, I can see now that I was in a bad place and unable to see how much my stress etc. was affecting me.'*

THE LAW

Disability Discrimination

99. Under Schedule 3(3) of the Disability Discrimination Act 1995 as amended (DDA) a tribunal shall not consider a complaint on the ground of disability unless it is brought within a period of three months beginning with the day on which the act complained of was done. A tribunal may nevertheless consider any complaint which is out of time if, in all of the circumstances of the case, it considers it just and equitable to do so.

100. Section 4A of the DDA imposes a duty to make reasonable adjustments:-

> *"(1) Where –*
>
> *(a) a provision, criterion or practice applied by or on behalf of an employer;*
>
> *… places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled,*
>
> *it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to take in order to prevent the provision, criterion or practice, or feature, having that effect."*

101. The premise of the duty to make reasonable adjustments is that the disabled employee may be disadvantaged by the application of common rules. The duty may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability, involving a degree of positive action in order to achieve substantive equality. The comparative exercise to be carried out differs from that in direct discrimination. It is not necessary for the claimant to satisfy the tribunal non-disabled people doing the same job would have been treated differently. In many cases the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the PCP in play (***Archibald v Fife Council [2004] IRLR 65***). Reasonable adjustments are

primarily concerned with enabling the disabled person to remain in or return to work (***Salford NHS Primary Care Trust v Smith (Disability Discrimination) [2011] UKEAT 0507/10/2608***).

102. The mere fact that a particular rule affects more disabled people means that it may be indirectly discriminatory but does not mean necessarily that the duty to make reasonable adjustments arises. Furthermore the substantial disadvantage of the disabled person in comparison with persons who are not disabled has to be because of the disability (***Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley [2012] EqLR EAT***). Assessment cannot be made of what is or is not a reasonable adjustment without showing what it is about a disability that gives rise to the substantial disadvantage and therefore what it is that requires to be remedied (***Chief Constable of West Midlands Police v Gardner [2012] EqLR20 EAT***).

103. PCP's include arrangements on which any benefit is offered or afforded. Only substantial disadvantages give rise to the duty, that is, those that are not minor or trivial. The question is not whether the PCP is capable of causing a substantial disadvantage to the disabled person in question but whether it actually has this effect on him (or where applicable would have if he had been doing the job at the time). Whether a disadvantage exists is a question of fact (**Disability Code of Practice Employment and Occupation**).

104. In ***Environment Agency v Rowan [2008] IRLR 20*** the EAT set out that a tribunal considering a claim that an employer has failed to make a reasonable adjustments must identify:-

> *"(a) the provision, criterion or practice applied by or on behalf of an employer; or*
>
> *(b) the physical feature of premises occupied by the employer; or*
>
> *(c) the identity of non-disabled comparators (where appropriate); and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of the employer and the physical feature of premises', so it would be necessary to look at the overall picture."*

105. If the duty arises then the tribunal goes on to consider if any proposed adjustment is reasonable to prevent the PCP placing the disabled person at the substantial disadvantage.

106. The factors to be taken into account in determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make a reasonable adjustment and a non-exhaustive list of examples of reasonable adjustments are set out at Section 18B of the DDA (these include *the extent to which taking the step would prevent the effect in relation to which the duty is imposed;* also, *the extent to which it is practicable to take the step*). It is for the

tribunal to decide whether something is a reasonable adjustment, objectively, on the facts of the particular case.

107. The duty to make reasonable adjustments in S.4A is, of course, expressed not in terms of a duty to alleviate disadvantage arising in consequence of a disability or a reason relating to disability or… arising from disability (***Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley [2012] UKEAT 0417/11/2303*).**

108. The burden of proof in relation to the duty to make reasonable adjustments was specifically considered in ***Project Management Institute v Latif [2007] IRLR 579***. The position as summarised in *Harvey on Industrial Relations and Employment Law, is*:-

> *"… a claimant must prove both that the duty has arisen, and also that it has been breached, before the burden will shift, and require the respondent to prove that it complied with the duty. There is no requirement for claimants to suggest any specific reasonable adjustments at the time of the alleged failure to comply with the duty; in fact it is permissible … for claimants to propose reasonable adjustments on which they wished to rely at any time up to and including the … hearing itself."*

109. Possible remedies a tribunal may grant on finding a complaint under the DDA well founded, where it considers it just and equitable, are set out at Article 17 (2), these include compensation, which where ordered shall be calculated applying the principles applicable to the calculation of damages in claims in tort (Article 17 (3)), that is, to put the employee insofar as is possible in the position he would have been in had the unlawful act not occurred. Compensation may include an award for injury to feeling (Article 17 (4)). Awards should be just to both parties (***HM Prison Service v Johnson [1997] IRLR 162 EAT***). In ***Vento v The Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871*** the Court of Appeal identified three broad bands of compensation for injury to feelings.

110. Under the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996 where a tribunal makes an award under the DDA it is obliged to consider the inclusion of interest thereon.

SUBMISSIONS AND APPLYING THE LAW TO FACTS FOUND

Time Issue

111. Whilst an achieved mark was indicated to the claimant on 9 February 2018 it is clear that the claimant was given the opportunity thereafter to support his view that he instead warranted an Exceeded mark and his manager was open to consideration thereof and that his final mark was not certain for time to have begun to run from then. The claimant did not know his definite final mark until his end of year PMR meeting which took place on 30 April 2018, following which written confirmation of his mark was provided by the respondent to him on 3 May 2018. The tribunal is satisfied accordingly that the claimant's claim which was presented within the primary 3 month limitation period.

Reasonable adjustment

112. Were any of the following a provision criteria or practice applied by the respondent to the claimant which put the claimant at a substantial disadvantage due to his disability?

113. ***Statistics being used to measure his productivity in a different way to the way his productivity had been measured previously.***

We accept the evidence of Mrs Ramsey that she adopted the same approach and gave the same consideration to performance in 2017/18 as she had in the 2016/17 year, using the same statistics for each member of the team. We accept that this assertion is factually incorrect and this is not a PCP that was applied to the claimant.

114. ***Being measured on the logging task when the claimant could not do as much of that task because of pain in his hands and this was known to managers.***

We accept that the logging task was not included in the 'Time on Task' used to assess productivity and that all members of the team undertook this task on a rotational basis and this alleged PCP is factually incorrect. As such we find that this was not a PCP applied to the claimant, or, which put him at a substantial disadvantage due to his disability.

115. ***Being required to produce a high physical output of case/productivity in order to receive an Exceeded marking.***

Production of a high physical output of case/productivity was clearly not singularly determinative of receiving an Exceeded marking as supported by Officer E with a lower productivity average who received an Exceeded and Officer A with the highest productivity rate but given an Achieved. We accept that performance was assessed as a whole taking into account other matters, including the claimant's above average 'high physical output', glowing feedback, other feedback and issues with record keeping when arriving at the PMR outcome. We accept the respondent's contention that this alleged PCP is misconceived.

116. ***A practice of not recording notes of meetings between the manager and counter-signing officer.***

We are not persuaded this practice put the claimant to a substantial disadvantage the claimant having been provided with the rationale for his marking of Achieved on 9 February2018, in emails in April 2018 and at the meeting on 30 April 2018.

117. ***The PMR process HR71008 – rating performance by asking the manager 'does this person consistently':***

i. ***Exceed their business objectives as set out in their PMR?***

ii. ***Set exceptionally high personal standards and strive for high quality in every element of the job role?***

iii. Exceed the expected quality, quantity and deadlines for the job role?

iv. Seek additional work?

v. Require minimal management support and intervention?

vi. Make a measurable impact on the team and its work?

vii. Influence those around them to improve and excel?

viii. Act as a role model for those around them?

ix. Demonstrate a commitment to excellence?

x. Demonstrate a strong commitment to improving their own performance and to continuous professional development?

118. The claimant submitted the relevant PCP was *the requirement that in order to receive an Exceeded mark he was marked against a range of criteria which he as a disabled person found it more difficult to comply with* and therefore [was] more disadvantaged. At the core of this were the requirement for *consistency* and *uplift*.

119. Although the above policy guidance is preceded by '*In addition managers can ask themselves the following questions – these are only prompts and should not be used as a 'tick sheet'…'* it is apparent from the evidence of Mr McGarry that there was a practice of looking for consistency and uplift in assessing whether a jobholder warranted an Exceeded under the PMR process and upon which a pay bonus was decided.

120. The claimant's comparators are those persons who were subject to the PMR process but were not disabled.

121. By reason of the claimant's various disabilities his symptoms could flare up and at other times be settled, causing his performance to vary, usually in peaks and troughs in the run up to and after his quarterly B12 injections thus it was more difficult to be consistent on a day to day basis and uplift when his symptoms flared up and to be awarded an Exceeded mark and bonus.

122. The tribunal is satisfied therefore that the duty to make reasonable adjustments is engaged and that the respondent was under the duty to take such steps as were reasonable to prevent the PCP causing a substantial disadvantage to the claimant.

123. The respondent made a number of adjustments to enable the claimant to perform the duties of his employment, including as agreed in his RAP a special chair, mouse, fan and desk risers, the acceptance of late leave requests if he was feeling particularly tired and that he could offset leave against his flexi if he would be over the allowable limit at the end of the 4 week period and this had been down to him leaving early because of tiredness, time off (up to 3 hours 42) for doctor's appointments for injections. The RAP also recorded that the claimant suffered from wrist pain and ULD when he uses a keyboard for prolonged periods and knew he

must take rest breaks. As a result the respondent had an arrangement whereby the claimant was allowed to manage his own time and change to other duties when required by him to manage his symptoms, including carrying out trade union work, which he often did and which did not feed into time on task statistics and productivity assessed thereon.

124. We accept that Mrs Ramsey rather than looking at the claimant's performance on a day to day basis for consistency and uplift took into account the effects of the claimant's disability and did not look for consistency and uplift on a day to day basis but assessed his performance as a whole over the course of the year for the PMR process.

125. With these adjustments in place the claimant obtained an Exceeded mark in the 2016/17 PMR process.

126. In September 2017, whilst implemented in the context of addressing and improving stress experienced by the claimant in his interactions with Mrs Ramsey, the respondent put in place a stress reduction plan for the claimant.

127. Relevant factors in assessment of what is a reasonable adjustment as set out under Section 18B(1) DDA include in particular *the extent to which taking the step would prevent the effect in relation to which the duty is imposed;* also, *the extent to which it is practicable to take the steps.*

128. The claimant contended that adjustments made by the respondent were not however sufficient to prevent the substantial disadvantage caused to him by the PCP as a result of his disability, such that he obtained an Achieved rather than Exceeded mark in the 2017/18 PMR process and that further adjustments would have been reasonable as set out below, and that the respondent had accordingly failed in its duty to make reasonable adjustments under the DDA.

129. The respondent contended none of the claimant's further proposed adjustments would have had a prospect of leading to an Exceeded rather than Achieve mark and been a reasonable adjustment in the circumstances.

130. The claimant submitted the following were reasonable adjustments:

i. <u>Discussion with the claimant at an early stage of an indicative marking to address perceived weakness; request an amendment to his objectives; discuss any reasonable adjustments which might help him.</u>

The claimant contended that he was not given the time to improve between the indication of his Achieved mark and end of year marking because a mid-year meeting had not taken place. We accept that Mrs Ramsey did not consider there to be weakness but that the claimant was achieving his targets. We furthermore note Mrs Ramsey had planned to meet with the claimant at mid-year but unfortunately this PMR 1-2-1 meeting could not take places arising from the claimant's absence and bereavement, circumstances outside of her control, and Mrs Ramsey thereafter considered it preferable given she had been identified as a stressor and the claimant's recent bereavement that the claimant's postponed SRS review meeting with

Mr McGarry would take place first, but that when this was postponed she met with the claimant on 9 February 2018 to avoid any further delay. We consider in the circumstances it was not practicable for earlier discussion to have taken place and are not of the view in the circumstances that this was a reasonable adjustment which the respondent failed to make.

ii. Discussion on the reason why [only at the last PMR meeting] the actual numbers of customers dealt with would be a major factor.

We accept that at the end of year, statistics were compared across the team and the number of clearances was not a big factor. Mrs Ramsey had indicated throughout the year to the claimant that his overall indirect time was the highest on the team. We accept that utilisation time was considered as much a factor as customers dealt and the claimant's overall mark was arrived at on account of both performance and behaviours. We do not consider this proposed adjustment would have to any extent improved the claimant's prospect of obtaining an exceeded mark and do not consider it a reasonable adjustment that the respondent has failed to make.

iii. The claimant's manager to have contacted the respondent's Reasonable Adjustment Support Team (RAST) at an earlier stage than Summer 2018.

When Mrs Ramsey contacted the RAST team in July 2018 to confirm if as a PCS representative the RAP needed to be extended to cover the time aspect on union duties out of concern that the scope of the RAP needed to extend to all aspects of the claimant's role, the RAST team advised Mrs Ramsey that the adjustments in place for the claimant were generous and a request to reduce a target that was being met had not been come across before by the advisor. Ultimately no reduction in the claimant's targets was considered appropriate. As such earlier contact with the RAST team we consider would not have made any difference to the PMR assessment and marking and do not consider that this is a reasonable adjustment which the respondent failed to make.

iv. For the respondent not to have placed an emphasis on an 'uplift' from the claimant's previous year's performance.

We note that the underpinning principles behind the PMR process are to encourage jobholders to strive to continuously improve and develop so as to perform to facilitate efficient business delivery in line with Civil Service Values. In deliberating Mrs Ramsey looked to the claimant's previous year to consider whether his performance had been *maintained* or uplifted. Mrs Ramsey in doing so took into account and made allowance for the claimant's disability (in circumstances where otherwise she would have implemented a performance improvement procedure (PIP) due to his variable performance) and genuinely attributed fluctuations in the claimant's performance as linked to the difficult personal circumstances that had unfolded in his home life relating to his wife, mother and daughters more than his disability. We consider that Mrs Ramsey in her approach had made such adjustments as were reasonable so as not to place an emphasis on an 'uplift' and accordingly alleviate any disadvantage to the claimant attributable to his

disability given the purpose of the PMR process to encourage improvement and we consider it objectively reasonable to have attributed fluctuations in the claimant's performance that year to his difficult personal circumstances. We do not consider in the circumstances that is a reasonable adjustment which the respondent failed to make.

v. To have updated the claimant's Reasonable Adjustment Passport from November 2015 earlier than Summer 2018, in light of mounting evidence of his deteriorating physical and mental health during 2017/18.

When the RAP was updated the claimant was as a result removed from logging duties and a stress reduction plan recommended. The claimant already had in place an informal arrangement whereby if suffering ULD pain he could choose to carry out non computer based trade union work, and which was not included in time on task and did not feed into productivity statistics. A stress reduction plan had been implemented in September 2017. We do not consider that this action would have made which the respondent failed to make.

vi. To have scored the claimant's performance on aspects of his work impacted by his disability in a way so as not to be discriminatory/ unfavourable.

We accept in light of the formal and informal adjustments made as set out above that the assessment by Mrs Ramsey as moderated by Mr McGarry had all reasonable adjustments built in to prevent any substantial disadvantage caused by the claimant's disability.

vii. To have reallocated some of the claimant's tasks to prevent him suffering pain and contribute to him increasing the number of cases cleared.

We note that the respondent already had by way of an informal adjustment given the claimant the flexibility to undertake other duties to manage his pain, he could and often did carry out trade union work instead which did not count as time on task and did not feed into productivity statistics. The claimant was achieving his targets. The number of cases cleared was not singularly determinative of obtaining an Exceeded mark as evidenced by the scoring of other officers, but other factors, including behaviours were significant. As such we do not consider this action would ultimately to any extent have improved the claimant's prospect of an Exceeded mark. We do not consider that it is a reasonable adjustment which the respondent failed to make in the circumstances.

viii. The introduction of disability trigger points.

During the 2017/18 reporting year the claimant's attendance was not considered an issue. Management action was not considered following the claimant's absence due to bereavement. The introduction of disability trigger points would not have made any difference to the claimant's mark and we do not consider it a reasonable adjustment which the respondent failed to make.

ix. An occupational health referral before the claimant's achieved marking, to ascertain what adjustments may have been put in place to prevent unfavourable treatment.

The Occupational Health report in July 2018 recommended regarding the claimant's ULD that the respondent/claimant assess the risk (match the symptoms to tasks to avoid pains thresholds) in order to ensure that the claimant's work was mixed/arranged in such a way as to avoid repetitive keyboarding/mouse tasks for extended periods of time which are likely to aggravate pain/symptoms. Also, that they undertake a stress reduction plan. They furthermore advised that the claimant '*is best placed to know what kind of adjustments may be needed in view of his current, or indeed future, symptoms, and this can be a two-way conversation.'* Given both the informal arrangement already in place for the claimant to change duties to manage his ULD and stress reduction plan implemented in September 2017 we do not consider this adjustment would have made a difference to the claimant's marking and do not consider this is a reasonable adjustment which the respondent failed to make.

131. ***No record being kept of the discussion and advice provided between the claimant's manager and the Reasonable Adjustment Support Team in Summer 2018. [Subject to paragraph 11 (2) above].***

We are not persuaded that this PCP gives rise to a substantial disadvantage on grounds of the claimant's disability, such a discussion only arising in the context of a disabled jobholder, and furthermore the rationale given in the revised RAP in Summer 2018 in relation to revisions sought and permitted. It is accordingly unnecessary to determine whether an amendment of the claimant's claim is necessary and if so whether it should be allowed to include same.

CONCLUSION

132. The tribunal is not persuaded the respondent has failed in the duty to make reasonable adjustments, pursuant to the Disability Discrimination Act 1995, as amended; accordingly the claimant's claim is dismissed.

Employment Judge:

Date and place of hearing: 8, 9 & 10 April 2019, Belfast.

Date decision recorded in register and issued to parties: