THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Ms Saijun Jane Ning	**AND**	**North East Worldwide Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **1-3 March 2017**

Before: **Employment Judge A M Buchanan** **Members:** **Mrs C Hunter**
Mr D Morgan

Appearances

For the Claimant: Mr Max Winthrop - Solicitor
For the Respondent: Mr Jamie Anderson of Counsel

JUDGMENT

It is the unanimous Judgment of the Tribunal that:

1. The claim of discrimination arising from disability advanced pursuant to section 15 of the Equality Act 2010 ("the 2010 Act") is well founded and the claimant is entitled to a remedy.

2. The claim of discrimination by reason of a failure to make reasonable adjustments advanced pursuant to sections 20 and 21 and Schedule 8 of the 2010 Act is well founded and the claimant is entitled to a remedy.

3. The respondent is ordered to pay to the claimant £11292.82p compensation for unlawful discrimination.

4. The respondent is ordered to pay to the claimant £1200 in respect of fees paid in order to advance these proceedings.

5. The total sum payable by the respondent to the claimant is £12492.82p and is payable forthwith.

REASONS

Preliminary matters

1.1 By a claim form filed on 16 November 2016 the claimant brought claims to the Tribunal of disability discrimination advanced pursuant first to section 15 of the 2010 Act being a claim of discrimination arising from disability and pursuant secondly to sections 20 and 21 and Schedule 8 of the 2010 Act being a claim of discrimination by failure to make reasonable adjustments. The claimant relied on two early conciliation certificates on which Day A was shown as 28 September 2016 and Day B was shown as 28 October 2016. The claims were advanced against the above named respondent and also against the claimant's line manager Helen Alderson ("the second respondent").

1.2 A response to the claim was filed on 15 December 2016 in which the disability of the claimant for the purposes of section 6 of Equality Act 2010 ("the 2010 Act") was not accepted. The respondents denied all liability to the claimant. The respondent indicated that it would not seek to rely on the defence contained in section 109 of the 2010 Act in respect of the actions of the second respondent and sought the dismissal of the second respondent from the proceedings.

1.3 By a letter dated 3 January 2017 the solicitors for the claimant confirmed that, in light of the concession in respect of section 109 of the 2010 Act, there was no objection to the release of the second respondent from the proceedings. On 4 January 2017 the second respondent was removed from the proceedings on the order of Employment Judge Hunter pursuant to Rule 34 of Schedule I of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules").

1.4 A private preliminary hearing ("PH") came before Regional Employment Judge Reed on 12 January 2017 when the issues in the claims were broadly identified and case management orders were made and the matter was set down for trial. The issues identified are repeated at section 5 of this Judgment.

1.5 By letter dated 19 January 2017 and pursuant to an Order made at the PH, the solicitors for the respondent wrote to the claimant and to the Tribunal accepting that "*At all material times the Claimant will have been a disabled person for the purposes of the Equality Act 2010. As such, the question of the Claimant's disability no longer remains in dispute".*

1.6 The Tribunal announced its judgment on liability orally. The Tribunal indicated that it would deal with remedy and the parties were allowed some time to seek to agree the matter as far as possible. The Tribunal heard further submissions on the point and then announced its Judgment on remedy. The respondent made a request for written reasons as to both liability and remedy at the conclusion of the hearing and thus this Judgment is issued with full written reasons pursuant to Rule 62(3) of the 2013 Rules. The Tribunal has added into these written reasons full details of submissions received and a fuller statement of the law which the Tribunal referred to and a slightly fuller rationale for the conclusions reached than was announced orally at the hearing for reasons of time pressure: as it was the Tribunal sat into the early evening in order to

conclude this matter. If there is any conflict between the oral reasons and these written reasons, these written reasons prevail.

Witnesses

2. During the hearing the Tribunal heard from the claimant who was cross examined. For the respondent the Tribunal heard from:
2.1 Philip Blacklock who was a former colleague of the claimant and who began work on the same day as the claimant in the same role as the claimant namely International Trade Executive.
2.2 Helen Alderson who at all material times was the line manager of the claimant.
2.3 Martin Potts who was and is the HR manager of the respondent.

Documents

3. The Tribunal had before it a bundle of documents running to in excess of 139 pages and has made reference in the course of its deliberations to such of those documents as it was referred to in the course of the hearing. Any reference to a page number in this Judgment is a reference to the corresponding page in the agreed bundle.

Factual Issues

4. There were few factual issues to be determined by the Tribunal but such as there were are resolved in the findings of fact which follow.

5. **Legal Issues to be determined**

Disability

5.1 It was accepted that the claimant was a disabled person once various evidence had been exchanged and the impairment relied on was thyrotoxicosis and the respondent accepted that it had full knowledge of that condition with effect from 27 June 2016 when the first fit note was produced by the claimant subsequent to the beginning of her illness.

Disability Discrimination

Discrimination arising from disability claim - section 15 of the Act

5.2 Was there a dismissal?
5.3 If so, in dismissing the Claimant did the Respondent subject her to unfavourable treatment?
5.4 If so, was the unfavourable treatment because of something arising in consequence of the Claimant's disability?
5.5 If so, was the said treatment a proportionate means of achieving a legitimate aim?

Reasonable Adjustments claim - sections 20 and 21 of the Act

5.6 Has the Respondent applied a PCP that put the Claimant at a substantial disadvantage (when compared to a non-disabled person)?

5.7 What was the substantial disadvantage?
5.8 Would any or all of the alleged adjustments have alleviated the said disadvantage?
5.9 Were the alleged adjustments reasonable ones that the Respondent should have made in the circumstances?

Findings of fact

We have considered the evidence given to us orally and in writing and we have considered the documents to which we were referred. Having done so, we make the following findings of fact on the balance of probabilities:

6.1 The claimant was born on 30 September 1981. She has a BSc degree in Marketing and an MSc degree in Human Resources Management. Before joining the respondent, the claimant had worked for some two and a half years for the China and Britain Business Council and she had had no performance issues raised with her work at any time prior to her employment with the respondent.

6.2 The claimant began work for the respondent on 9 November 2015 and worked 37 hours per week until that working week was reduced to a four day working week of 30 hours per week with effect from May 2016.

6.3 The respondent is a limited company and is a subsidiary of the North East Chamber of Commerce. It holds various contracts particularly with various public bodies as a result of which it is responsible for providing advice and assistance to businesses in the North East on international trade and export. Given that the contracts are publicly funded, there is a large degree of reporting and accountability in respect of targets. At the material time the respondent had 33 employees and of those there were 13 International Trade Advisors ("the Advisors") and two International Trade Executives ("the Executives") of whom the claimant was one.

6.4 The claimant began work on 9 November 2015 on the same day as her colleague Philip Blacklock and at adjoining desks. Her role was effectively to make calls to potential new clients of the respondent in order to generate leads for the Advisors and so to enable them to provide export advice to those companies or individuals. The Executives' role also involved providing support to the Advisors by researching certain aspects of the business of the new client and producing reports for the Advisors to use in their dealings with their clients. It was not the role of the Executives to visit clients but the claimant tried to engineer opportunities to do so from time to time. When advertised, the role of the Executive was one which required GCSE certificates to a high standard and on the face of it the claimant was over qualified for the role which she was carrying out. We infer the claimant tried to make more of the role than it actually entailed and we also infer that the claimant was not stretched by the role and as a result her heart was not in it.

6.5 We heard evidence from Philip Blacklock in respect of the behavioural and performance matters which he perceived to arise in relation to the claimant almost from the start of her employment. We accepted his evidence which was to the effect that there were instances of some inappropriate questions being asked of him and other colleagues by the claimant, evidence about a negative attitude to work on the part of the claimant, evidence of the claimant not working effectively and spending some time on

personal calls and on the internet and particularly not meeting telephone targets in respect of contact with potential new clients. It was the major part of the role of the Executives to telephone potential new clients with a view to bringing them on board. Effectively it was a cold calling role and that major aspect of the role was not one which the claimant particularly enjoyed. The issues with the claimant's performance were not just noticed by Philip Blacklock but also by other colleagues and that is evidenced to us at pages 42, 43 and 58.

6.6 In accordance with the respondent's practice the claimant was subject to a three monthly probationary review in February 2016 the result of which is found at pages 60-62. That review was carried out by Helen Alderson. Only one of the many competencies marked was expressed as "*improvement required*": all the other competencies were marked either as "*satisfactory*" or "*good*". Helen Alderson did raise some issues with the claimant and the conclusion reached read: "*Jane has worked hard on engaging with external organisations. More emphasis to be placed on new lead generation. Overall has taken well to the role".*

6.7 After that review various performance issues arose and a health issue arose in March 2016 which was dealt with. On 15 March 2016, an issue arose in respect of the claimant's dealings with Joe Dale who was an Advisor. The claimant produced a report for Joe Dale in March 2016 which had to go through three iterations before being found acceptable by Joe Dale: the problem was attributed by the respondent to the claimant's failure to address with Joe Dale at the outset the content and format of the report he required. The tendency of the claimant to prepare what she thought was required rather than seeking instruction from the Advisor who had requested the report was another common cause of dissatisfaction throughout the brief time of the claimant's employment.

6.8 On 16 March 2016 the claimant was chased by her Line Manager in relation to data in respect of the Enterprise Project which was outstanding from her and on 18 March 2016 (page 83) there was a note made by the claimant's Line Manager in respect of an application for flexible working made by the claimant at around that time in which she states in an aide memoire: *"I have not had her request to work flexibly returned*. *Jane has the weekend to consider whether this is a job she wishes to continue with*".

6.9 The next matter of significance was the claimant's six monthly probationary review which took place on 9 May 2016 (pages 98-101). That review was successfully passed by the claimant. All the competencies were marked as achieved. There was the opportunity to award a fail or to extend probation but Helen Alderson took neither of those courses and marked the claimant as having passed the review. In so doing various matters were drawn to the attention of the claimant, in particular under the heading "*Business Development*". A comment was made as follows:-

"*When focusing on business development Jane is able to generate leads and engage with new clients, however this is a definite area of weakness, something which we will closely monitor over the coming weeks. Volume of calls should be increased to aid telemarketing therefore lead generation….*".

That report was subsequently followed by a letter to the claimant of 18 May 2016 from Martin Potts which advised the claimant of her successful completion of the

probationary period of her employment and concluding, "…*I would like to take this opportunity to thank you for the service you have given and trust that your employment will continue to be a long and happy one*" (page 108). The claimant's terms and conditions of employment were reissued to her consequent on the successful probationary period (pages 103-106).

6.10 The claimant still continued to engender some ill feeling from amongst her colleagues as is reflected in text messages sent to her Line Manager (pages 110-114). The tenor of the complaints was that the claimant was not working hard enough. The claimant did not know anything about these messages and the matters of complaint were not raised with her.

6.11 At the end of May 2016 continued dissatisfaction in relation to completion of data and the meeting of appointment targets is evidenced and an e-mail from Helen Alderson to the claimant of 31 May 2016 records that there had been some appointments which had to be removed from the claimant's list of achieved visits and a note that her performance would be reviewed in two weeks' time (page 115).

6.12 On 16 June 2016 an incident occurred in the workplace when the claimant spoke to a colleague, Joe Dale, and told him that there had been a complaint made against him by a client and that he was in big trouble. The claimant had been asked particularly not to raise that matter and her conduct was contrary to a specific instruction given to her that she should not refer to that matter and her actions did not commend her to anyone within the respondent organisation. Her conduct was generally perceived to be insensitive. On the next day 17 June 2016 Helen Alderson met with the claimant (page 116) and advised her that her conduct was "*bordering on harassment and gross misconduct*". On that same day there was a meeting between Helen Alderson and Martin Potts to discuss the claimant's performance and at that meeting a brief note was made by Martin Potts (page 116A) in which some brief reference is made to the performance issues with the claimant which Martin Potts and Helen Alderson expanded upon in evidence to us and the note reads, "*Sick of hearing Jane's name, never hear Phil Blacklock's..behaviour/attitude – fit not right negative attitude*", and there is reference in that note to the possibility of dismissal "*under two years*", that being the position of Martin Potts namely that an employee with less than two years' service can be safely dismissed. A decision was made at that meeting that from that point on Helen Alderson would meet with the claimant on a weekly basis to effectively micromanage her business development activity and see if that made any difference to the claimant's performance.

6.13 On 27 June 2016 the claimant became ill and went away from work and did not return again prior to her dismissal. We find that the claimant had been suffering symptoms of her illness for some time in the workplace although she had not made that known to the respondent. The diagnosis on the first fit note (page 117) which was continued through on all fit notes until the end of the claimant's employment was "*Thyrotoxicosis - under investigation and treatment by endocrinology*". That is a potentially serious condition which requires ongoing treatment rather akin to Type 2 Diabetes. That diagnosis did not cause any alarm bells or any action to be taken by anyone within the HR Department of the respondent company. The claimant was then away ill and she remained ill and absent until her subsequent dismissal. The respondent accepts that the claimant was a disabled person by reason of that condition for the

purposes of section 6 of the 2010 Act and that it had knowledge of that condition from 27 June 2016.

6.14 There was contact between the claimant and her Line Manager in July 2016 when she was advised by Helen Alderson that the respondent company was pushing for European Regional Direct Funding (ERDF) which was a further fund for which the respondent had made application to enable it to make export grants to its clients. The application by the respondent for ERDF was successful in August 2016 and that meant that the respondent had to comply with a further set of reporting deadlines and targets and needed to carry out more intensive work in obtaining new leads for export work and the like. All that caused further consideration to be given to the claimant's performance which had been deemed to be unsatisfactory at the time that she had fallen ill – although the claimant did not know it.

6.15 There was further contact between the claimant and Helen Alderson in July 2016 when the claimant asked about redundancies which were taking place within the respondent at that time in relation to the medium sized business Advisors and the claimant was reassured by her Line Manager that that redundancy programme was not going to affect her own particular team. On 11 July 2016 (page 119B) Helen Alderson wrote to the claimant: "*Just wanted to drop you a line to see how you are doing and let you know everyone is asking after you. Hope you are getting the care you need from the hospital?".* On 27 July 2016 (page 120) Helen Alderson wrote to the claimant: "*How are you feeling? Any better at all? Yes there have been some changes – how did you find out? It would have been better for us to chat about it first to relay (sic) any fears you might have now. Unfortunately the L&C and MSB Budgets have been cut by UKTI. These are outside of our normal contract and at the moment, all team structures remain the same. Please feel free to have a chat if you need to. Take care and do let us know how you are getting on with your treatment".*

6.16 At around this time, the claimant noted that the respondent had advertised on its website the position of International Trade Advisor and she made an application for that post. It was not the first time she had made such an application to the respondent: she had done so before she obtained the Executive post in November 2015 and it was a post for which she felt herself well qualified. However she was not successful in her application and that was explained to her at a meeting on 15 August 2016. That was a meeting attended by the claimant and Martin Potts and Julie Underwood in the absence of Helen Alderson on annual leave. This meeting was a welfare meeting organised by reason of the claimant's then absence from work for some six weeks and it was a meeting conducted pursuant to the respondent's usual practice of making home visits after four weeks of absence. The meeting took place, at the claimant's request, in a Costa coffee shop in Sunderland rather than at her home. At the meeting there was nothing but the briefest mention of the claimant's illness and again no appreciation of the fact that the claimant may be a disabled person for the purposes of the 2010 Act. It was explained to the claimant that she was not successful in her application for the Executive role because a colleague who was facing redundancy, Jonathan Gamblin, had been appointed to it instead. There was a conflict as to whether or not Martin Potts had said to the claimant at that meeting that she had not been interviewed for the Executive role because she was ill. We find ourselves unable to make a finding on that point. Given the complete failure by the respondent to appreciate that there was any disability question raised by the claimant's illness in this case we have our suspicions

that something to that effect could well have been said given that it would have accurately reflected the attitude which clearly prevails in the HR Department of the respondent. However, we found ourselves unable to determine what had been said and given that nothing turns on it, we move on. On 17 August 2016 the claimant wrote (page 125) to Martin Potts: *"Thanks for coming out together with Julie to see me. As discussed I am currently still receiving treatment from the hospital and yet waiting for some test results. I plan to return to work once I get advice from consultant. Please find attached sick note from my doctor....."*. The claimant attached a further fit note dated 12 August 2016 with the same diagnosis as before (page 127) for a further four weeks.

6.17 On 23 August 2016 a meeting took place between Helen Alderson and Martin Potts - the catalyst for that meeting was Helen Alderson's return from annual leave and also comments made by an Advisor, Simon Cragg, to Martin Potts in relation to the claimant's performance generally and the fact that the claimant's performance was generally perceived as poor. We accept that at that meeting a decision was reached that the claimant's contract of employment was to be terminated. The note (pages 128A-128B) produced at that meeting by Martin Potts makes reference again to the claimant having less than two years' service: the salient part of the handwritten and virtually illegible note reads: *"Spending far too much time talking about under-performing employee…..can't carry on under 2 years*". It was agreed that the matter should be first discussed with Julie Underwood who was the line manager of Helen Alderson. The claimant was not immediately made aware of the decision taken about her.

6.18 Subsequently on 26 August 2016 Helen Alderson sent a written note (pages 128D-128F) to Martin Potts of her concerns in respect of the performance of the claimant since her employment began. There matters lay pending authority from the International Trade Manager Julie Underwood to terminate the claimant's contract. Martin Potts met with Julie Underwood in the week commencing 29 August 2016 and received authority to terminate the claimant' s contract. A note (again virtually illegible) of that meeting appears at pages 128G-128I.

6.19 The respondent was overtaken by events and forced to act sooner than it had intended because on 5 September 2016 (page 130) the claimant sent a further fit note to the respondent which advised them that she was proposing to return to work on a phased return on 12 September 2016. The diagnosis on the fit note (page 133) read "*Thyrotoxicosis under specialist investigation and treatment*" and there were various suggestions for adjustments which could be made which read: "*Ongoing symptoms of fatigue and palpitations related to thyroid state and treatment. Would benefit from a formal occupational health review with a view to arranging suitable phased return to usual duties over a four week period".*

6.20 The receipt of the claimant's fit note and email provoked discussion and it was agreed that the respondent would organise a meeting with the claimant in short order and it did so for 7 September 2016. The claimant was invited to attend but was not told the purpose of the meeting. She went alone thinking the meeting was to discuss her return to work. At the meeting the claimant was dismissed. It was a short meeting. The respondent did not keep any meaningful note of the meeting but the claimant did (pages 134-135) and the note was broadly agreed by the respondent. The meeting was attended by the claimant and Martin Potts and Helen Alderson. The note records that

Helen Alderson advised the claimant that a decision had been made that the claimant was not to return to work, because she needed *"someone who could pick up the phone and make phone calls doing business development and that is not where your strength lie*s.....*I know you are very good in front of clients that is not what we need for this role. The role is still available. With all the new targets I need someone who can make phone calls. Unfortunately you are not coming back.....We will terminate your employment from today*". A little later the note accurately records (page 135) Martin Potts as saying in relation to the meeting on 15 August 2016: "....*last time we met in the coffee shop we were just checking your health. I probably wouldn't feel comfortable doing it in a coffee shop or in public. I would rather do it in a private meeting like this...".*

6.21 That is what that note records and we find that it is broadly accurate. And so the claimant was dismissed and a letter was sent to her on 7 September 2016 confirming that dismissal in which Mr Potts referred her to:-
"....*a number of performance and behavioural issues raised with yourself throughout your employment with us.....You acknowledged that your skill set didn't match many of the crucial elements of those required to be an International Trade Executive, we have provided you the support and guidance to bring you up to the required level but unfortunately this has not happened*". The claimant's employment ended with effect from that day 7 September 2016. No right of appeal was offered.

6.22 The claimant raised questions about the performance issues (page 138) and Martin Potts responded on 16 September 2016 by e-mail (page 139) referring to matters in February and March 2016 and indeed at the time of the six monthly review and the letter ends:-

"*I accept that there was no formal performance process because you were still within the first year of your employment. However on each occasion concerns were clearly outlined with you and you were afforded an opportunity to address these*. *Unfortunately, you did not make the necessary strides and this led to the NEECC reaching a decision to terminate your employment*..... *The reasons for the decision were around performance and behaviours....*".

6.23 We have considered the documentation at page 118 of the bundle which is advanced by the respondent as evidence of misconduct by the claimant which should reflect in remedy if appropriate. We are not satisfied that page 118 evidences any such thing. We heard evidence only from Helen Alderson on the contents of that document. We were shown no other evidence to back up the absence of appointments recorded on page 118 in diaries and the like. It is clear from the face of it that the document at page 118 evinces the claimant making duplicate appointments. We accept that that may be evidence of poor performance on the part of the claimant but it is not sufficient evidence to persuade us that the claimant was guilty of misconduct, let alone gross misconduct as was asserted.

Submissions

Claimant

7. For the claimant, Mr Winthrop filed written submissions (22 paragraphs – 9 pages) which are held on the Tribunal file which he supplemented orally. The submissions are briefly summarised:

7.1 It was submitted that the act of dismissal on 7 September 2016 was an act of discrimination contrary to section 15 and/or sections 20/21 of the 2010 Act.

7.2 in respect of the section 15 claim it was submitted that the correct approach to any such claim was set out in the recent decision of Simler J in the EAT in **Pnaiser –v- NHS England 2016 IRLR 170** which in turn expands on the decision of Langstaff J in **Basildon & Thurrock Foundation Trust –v- Weerasinghe 2016 ICR 305.**

7.3 It was submitted that it was necessary to start by focussing on the period between the claimant passing her 6 month probationary review in May 2016 until her dismissal. It was noted that under cross examination Helen Alderson had confirmed that her intention to micromanage the claimant from June 2016 onwards was genuine and that had she done so she believed the claimant would have reached the required standard to lead to her being retained in post.

7.4 It was submitted that under cross examination Martin Potts was candid in his wilful disregard of the claimant's condition in his thought process and that he seemed to have put much effort into studiously ignoring any inquiry into the claimant's condition. His candid evidence was that as the claimant did not have two years' service sufficient to advance a claim for unfair dismissal, there was no issue to trouble the swift despatch of the claimant from her employment.

7.5 It was submitted that had the claimant not commenced her disability related sickness absence she would not have been dismissed. She would have been micromanaged and both that and her employment would have continued. The catalyst for the dismissal was the claimant's production of a fit note heralding her return to work. None of these circumstances would have occurred but for the claimant's condition and thus the unfavourable treatment namely the dismissal was something which clearly arose from the claimant's disability.

7.6 An alternative approach is to consider section 136 of the 2010 Act. The decision to dismiss where previously the respondent had taken a decision to micromanage was a fact from which an inference could be drawn that the respondent had contravened section 15 of the 2010 Act by dismissing.

7.7 The respondent had concluded that the process of micromanagement was a worthwhile exercise. The opportunity to attempt a phased return was dismissed out of hand. The undue haste to rely on the new ERDF process was little more than an excuse. The claimant had not had the opportunity to achieve that which the respondent sought through the process of micromanagement which the respondent had concluded was worthwhile to attempt. The decision to dismiss was not proportionate.

7.8 in respect of the claim advanced pursuant to sections 20/21 of the 2010 Act, it was submitted that the decision to dismiss was a PCP which clearly put the claimant at a disadvantage in comparison to a non-disabled employee. The adjustment of trying a phased return and following the micromanagement process which Helen Alderson had already decided on would have been reasonable adjustments and would have removed the disadvantage and retained the claimant in employment.

7.9 In oral submissions, it was stated that the sickness absence of the claimant was clearly related to her disability and her absence materially influenced the decision to dismiss her for had she not been absent she would have been micromanaged and thus would have had a chance to retain her employment. The officers of the respondent knew of the claimant's illness and knew or should reasonably have known that she was a disabled person when they decided on her dismissal. Reference was made to the authority of **Buchanan –v- Commissioner of Police of the Metropolis 2016 IRLR 918.** It was submitted that in considering section 15(2) of the 2010 Act the focus of the Tribunal must be on the treatment itself and to ask whether the treatment was proportionate and in this case it was not.

Respondent

8. For the respondent Mr Anderson filed written submissions which are held on the Tribunal file and made supplemental oral submissions. The submissions are briefly summarised as follows:

8.1 It was submitted that the claimant's responses in evidence lacked credibility. The claimant could not say when it was asked of her that her dismissal was connected to her disability. If the claimant cannot say that then nor should the Tribunal be able to do so. In these proceedings the Tribunal is concerned with the subjective view of the respondent not an objective view of reasonableness. The Tribunal should consider the reason for dismissal with no question of reasonableness arising. The Tribunal was referred to **Abernethy –v- Mott Hay and Anderson 1974 IRLR 213**.

8.2 The case is not about whether the claimant had symptoms at work before she went absent from work in June 2016. The reasonable adjustment claim is solely about dismissal and should not be allowed to be widened. The case is not about whether the respondent followed a fair procedure in dismissing the claimant.

8.3 The Tribunal was requested to revisit the witness statements in order to remind itself of the problems in the claimant's work performance evinced by those statements. The respondent was aware of and entitled to take into account those many problems when taking the decision to dismiss. In addition to that the changing position within the respondent in August 2016 in respect of the ERDF funding was a factor which the respondent was also entitled to consider.

8.4 In respect of the claim pursuant to section 15 of the 2010 Act, it was submitted that the dismissal did not arise for a reason related to the claimant's disability. The Tribunal was referred to the decision of the Court of appeal in **Bahl –v- The Law Society and Others 2004 IRLR 799** and it was submitted that it was not open to the Tribunal to infer discrimination from unreasonable treatment. It would be wrong for the Tribunal to conflate matters of procedure, policy and unreasonableness with discrimination.

8.5 The Tribunal was asked to note the evidence of witnesses for the respondent which clearly referred to the possibility of the claimant's dismissal before her sickness absence began. It was submitted that there was evidence to show that the claimant's performance was poor particularly when compared to her contemporary Philip Blacklock.

8.6 It was submitted that even if the respondent had a complete volte face in August 2016 in respect of the claimant's dismissal that was not unlawful absent the aid of section 98(4) of the 1996 Act which was not relevant to the matters the Tribunal had to consider. The question of the ERDF funding was crucial for that placed additional pressures and time constraints on Helen Alderson and would have rendered the micro management of the claimant not viable. That was a non-discriminatory game changing factor. That was not the only factor arising after the six month review as the frustration of Simon Crosby with the claimant's performance expressed to Martin Potts evinced.

8.7 It was submitted that the letter sent by the claimant after her dismissal did not foreshadow any claim of disability discrimination and the Tribunal was entitled to take that into account in considering this matter.

8.8 In respect of the defence available to the respondent pursuant to section 15(2) of the 2010 Act, it was submitted that the tribunal must have found that the claimant's absence from work was the cause of her dismissal before this question needs to be considered. It was submitted it was proportionate to dismiss an employee who was clearly having performance issues when off sick taking account of the need for the business to operate efficiently. It was suggested that the legitimate aim being pursued by the respondent was the need to run an efficient business and to take account of the changing needs of the business particularly after the ERDF funding was made available and the additional targets which came with it.

8.9 In respect of the reasonable adjustment claim, the Tribunal was referred to the correspondence between the parties at pages 34-37 in which it was confirmed that the PCP in relation to this claim was the decision taken to dismiss the claimant and not the decision to micromanage the claimant. In any event it was submitted that there was no evidence before the Tribunal of substantial disadvantage to the claimant in comparison to persons who were not disabled. In any event it was not a reasonable adjustment to expect the respondent to wait longer before dismissing the claimant. The ERDF position changed matters significantly and it was not reasonable to expect the respondent to wait longer. There is no duty on the respondent to consider making adjustments – the duty is to make adjustments required by the wording of the 2010 Act and not further.

8.10 It was submitted that the decision in **Pnaiser** set out a complex set of questions which overcomplicated the matter in this case. The decision to dismiss an employee who does not have two years' service is a non-discriminatory explanation; the Tribunal should be careful to avoid the bear trap which exists to be drawn into consideration of matters which would only be relevant to a claim involving section 98(4) of the 1996 Act (which this case does not) and so fall into the trap identified in **Bahl**. It is the intention of Parliament that an employer need not follow a fair procedure or indeed act reasonably in all the circumstances when ending the employment of an employee without the necessary service.

The Law

9. The Tribunal reminded itself of the law in respect of the various claims advanced by the claimant and matters arising from such claims:

Discrimination arising from disability – section 15 of the 2010 Act.

9.1 The Tribunal has reminded itself of the provisions of **section 15 of the 2010 Act** which read:

"(1) A person (A) discriminates against a disabled person (B) if –

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

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

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

9.2 We remind ourselves that in considering a claim pursuant to section 15 of the 2010 Act, we need to consider what breach of section 39 of the 2010 Act is established, whether there was unfavourable treatment of the claimant, whether there is something arising in consequence of the disability and finally whether the unfavourable treatment was because of the something arising from the disability. In respect of the meaning of unfavourable in section 15 we noted **Trustees of Swansea University Pension & Assurance Scheme –v- Williams 2015 UKEAT/0415/14** and we have noted in particular the guidance:

"I accept Mr O'Dair's submission that it is for a Tribunal to recognise when an individual has been treated unfavourably. It is impossible to be prescriptive of every circumstance in which that might occur. But it is, I think, not only possible but necessary to identify sufficiently those features which will be relevant in the assessment which this recognition necessarily involves. In my judgment, treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be".

9.3 A useful explanation of the difference between claims under section 15 and those under sections 20/21 of the 2010 Act was provided by Judge Richardson in **General Dynamics –v- Karanza UKEAT/0107/**14 in the following terms.

"The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability – S.15 of the Act. The second is the duty to make adjustments, S.20-21 of the Act. The focus of these provisions is different. Section 15 is focused upon making allowances for disability. Unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20-21 focus upon affirmative action – if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage. In many cases the two forms of prohibited conduct are closely related – an

employer who is in breach of the duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct. But not every case involves a breach of the duty to make reasonable adjustments, and dismissal for poor attendance can be quite difficult to analyse in that way. Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play, or whether the case is best considered and analysed under the new robust S.15".

9.4 Further guidance on the relationship of these provisions was provided by Elias LJ in **Griffiths –v- Secretary of State for Pensions 2015 EWCA Civ** 1265 in these terms:

*"I would draw attention to three matters with respect to these provisions. First the definition of discrimination arising out of disability does not involve any comparison with an undisabled person – it refers to unfavourable treatment, not less favourable treatment. The formulation of the duty prior to the Equality Act, in the Disability Discrimination Act 1995, did envisage such a comparison. In **Lewisham London Borough Council v Malcolm**, the House of Lords construed the relevant provision then in force so as effectively to make this form of discrimination a dead letter, in practice adding nothing to the concept of direct discrimination. The reformulation of the duty in S.15 of the Equality Act was designed to restore the law as it had been understood prior to **Malcolm** and thereby give the concept the protection it affords real substance. Second, it is perfectly possible for a single act of the employer, not amounting to direct discrimination, to constitute a breach of the other three forms. An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment – say allowing him to work part time – will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in reemployment has not been made, the dismissal will not be justified. Finally, if the PCP, breach of which gave rise to the dismissal, also adversely impacts on a class of disabled people including the claimant, the conditions for establishing indirect discrimination will also be met. Third, it is in practice hard to envisage circumstances where an employer who was held to have committed indirect disability discrimination will not also be committing discrimination arising out of disability, at least where the employer has, or ought to have, knowledge that the employee is disabled. Both require essentially the same proportionality analysis. Strictly, in the case of indirect discrimination, it is the PCP which needs to be justified, whereas in the case of discrimination arising out of disability, it is the treatment. In practice the treatment will flow from the application of the PCP. Accordingly, once the relevant disparate impact is established, both forms of discrimination are likely to stand or fall together. However, the converse is not true. If it is not possible to establish that the relevant PCP created a disparate impact, the case will not fall within the concept of indirect discrimination but it may nonetheless constitute discrimination arising out of disability. The S.20 duty is normally relevant when looking into the future; it is designed to help prevent treatment which might give rise to a S.15 claim from arising".*

9.5 We have reminded ourselves of the decision of the Court of Appeal in **Bahl –v- The Law Society 2004 IRLR 799**. We note that reference was made in that decision to the speech of Lord Browne-Wilkinson in **Glasgow City Council –v- Zafar 1998 IRLR 36** where it was stated: "*The fact that, for the purposes of the law of unfair dismissal, an employer has acted unreasonably casts no light whatsoever on the question whether he has treated the employee "less favourably" for the purposes of the Act of 1976*". We note that in dealing with the claim under section 15 of the 2010 Act we are concerned with unfavourable and not less favourable treatment but the point remains good. We have reminded ourselves again of the words of Peter Gibson LJ at paragraph 99 where it was confirmed that an applicant only has to prove that the proscribed ground had a "significant influence on the outcome". The guidance continues by referring to the Judgment of Elias J:

"The inference may also be rebutted - and indeed this will, we suspect, be far more common - by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason."
We entirely agree with that impressive analysis.

9.6 We have reminded ourselves of the guidance of Simler J in **Pnaiser –v- NHS England 2016 IRLR 170** in respect of the proper approach to adopt in cases involving section 15 of the 2010 Act:

From these authorities, the proper approach can be summarised as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. 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.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

9.7 We have reminded ourselves of the decision of Judge Richardson in **Buchanan-v-Commissioner of the Police of the Metropolis 2016 IRLR 918** in respect of the defence of so called justification:

The starting-point must be the words of section 15(2)(b) of the Equality Act 2010. This requires the putative discriminator A to show that "the treatment" of B is a proportionate means of achieving a legitimate aim. The focus is therefore upon "the treatment"; and the starting point therefore must be that the ET should apply section 15(2)(b) by identifying the act or omission which constitutes unfavourable treatment and asking whether that act or omission is a proportionate means of achieving a legitimate aim.

Reasonable Adjustment Claim

9.8 The Tribunal has reminded itself of the relevant provisions of section 20 and 21 and Schedule 8 of the 2010 Act which read:

Section 20:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to take to avoid the disadvantage.

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

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

Section 21

(1) A failure to comply with the first second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue of subsection(2): a failure to comply is , accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8

The Tribunal has had regard to the relevant provisions of Schedule 8 of the 2010 Act and in particular paragraph 20 which reads:
" (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know...
(b)....that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

9.9 The Tribunal reminded itself of the authority of **The Environment Agency v Rowan [2008] IRLR20** and the words of Judge Serota QC, namely:

"*An Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the 1995 Act by failure to comply with section 4A duty must identify –*

(a) the provision, criterion or practice applied by or on behalf of an employer;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate);

(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 and on behalf of an employer" and the 'physical feature of the premises', so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment

Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice or feature placing the disabled person concerned at a substantial disadvantage".

The Tribunal notes this guidance was delivered in the context of the 1995 Act but considers it equally applicable to the provisions of the 2010 Act.

9.10 The Tribunal has reminded itself of the guidance in respect of the burden of proof in claims relating to an alleged breach of the duty to make reasonable adjustments in the decision in **Project Management Institute -v- Latif 2007 IRLR 579** where Elias P states:

"It seems to us that by the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative……that is why the burden is reversed once a potentially reasonable adjustment has been identified…..the key point…is that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made……we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

9.11 In relation to the question of the knowledge of the respondent, the Tribunal has reminded itself of the decision in **Secretary of State for Work and Pensions –v- Alam 2010 ICR 665** and in particular the following guidance:

"Separately however, it seems to us clear, as a matter of statutory interpretation and giving the language of those provisions their ordinary meaning, that to ascertain whether the exemption from the obligation to make reasonable adjustments provided for by section 4A(3) and 4A(3)(b) applies, two questions arise. They are:
1. Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: "no" then there is a second question, namely,
2. Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)?
If the answer to that second question is: "no", then the section does not impose any duty to make reasonable adjustments. Thus, the employer will qualify for the exemption from any duty to make reasonable adjustments if both those questions are answered in the negative. That interpretation takes proper account not only of the use, twice, of the word "and" but also of the comma after "know" in the second line of section 4A(3).

9.12 The Tribunal has had regard to the EHRC Code of Practice on Employment 2011 ("the Code") and in particular paragraph 6.28 and the factors which might be taken into account when deciding what was a reasonable step for an employer to have to take namely:-

"(1) Whether taking any particular step would be effective in preventing the substantial disadvantage.

(2) The practicability of the step.

(3) The financial and other costs of making the adjustment and the extent of any disruption caused.

(4) The extent of the employer's financial or other resources.

(5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice from Access to Work).

(6) The type and size of the employer. "

Burden of Proof and section 39 of the 2010 Act.

9.13 The Tribunal has reminded itself of the relevant provisions of **section 136 of the 2010** Act which read:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An employment tribunal……."

9.14 The Tribunal has reminded itself of the relevant provisions of **section 39 of the 2010 Act** and in particular:

(2) An employer (A) must not discriminate against an employee of A's (B)-
…
(c) by dismissing B
(d) by subjecting B to any other detriment……
(5) A duty to make reasonable adjustments applies to an employer…
(7) In subsections (2)(c)… the reference to dismissing B includes a reference to the termination of B's employment-…
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

Conclusions

10.1 The principal claim advanced by the claimant was that pursuant to section 15 of the 2010 Act and it was that claim on which the Tribunal focussed. The claim pursuant to sections 20/21 of the 2010 Act was the secondary claim and described in the ET1 (page 24) as being an additional and/or alternative claim.

The claim of Discrimination arising from Disability.

10.2 We reminded ourselves of the relevant statutory provisions and authorities set out above.

10.3 We first considered whether the respondent had treated the claimant unfavourably. Clearly the act of dismissal was unfavourable treatment and that element of the claim was simply established. No comparator was required.

10.4 We noted that the claimant's disability was accepted by the respondent and next considered what the "something" was which arose from the disability. We concluded that the absence of the claimant from work from 27 June 2016 until her dismissal on 8 June 2016 was the "something" which arose from the disability. There was no dispute between the parties on that.

10.5 We turned to the central question in this matter namely whether the dismissal of the claimant was because of the absence from work or whether it was for performance reasons and so entirely unrelated to disability as the respondent asserted. We reminded ourselves that there was no suggestion of the claimant asserting that her performance was worsened in any way by her disability. We also reminded ourselves again that this claim does not involve considerations of the reasonableness of the actions of the respondent in moving to dismiss the claimant in the way it did in terms of the procedure adopted. Those matters were not relevant to the question which lay at the heart of this claim namely what was the reason for the dismissal of the claimant.

10.6 We found ourselves in agreement with the submissions made by Mr Winthrop on behalf of the claimant in respect of this matter.

10.7 We concluded that the claimant had established primary facts from which we could infer that the absence of the claimant did have at least a significant influence (which means a more than trivial influence) on the decision to dismiss. We noted that the claimant had passed her three monthly review (paragraph 6.6 above) in February 2016 and her six monthly probationary review in May 2016 (paragraph 6.9 above) and that Martin Potts had written to the claimant at that time, only some 6 weeks prior to the beginning of her sickness absence, wishing the claimant and long and happy relationship with the respondent. We noted that Helen Alderson had decided to micro manage the claimant from around 17 June 2016 (paragraph 6.12) and we accepted her evidence in cross examination that her intentions were genuine and she was hopeful of a successful outcome from that process in terms of a better success rate in achieving potential new leads. The process of micro-management never got underway because the claimant fell ill and did not return to work before being dismissed some 10 weeks later. The claimant was seen at a welfare meeting on 15 August 2016 (paragraph 6.16) and no performance issues were so much as hinted at on that occasion. The respondent was spurred into action (paragraph 6.19) in September 2016 only when it received a further fit note from the claimant advising of her intention to return to work effective from 12 September 2016.

10.8 Accordingly we looked to the respondent for its explanation of the decision to dismiss. That explanation was that the issues with the claimant's performance were such that in light of the new targets and requirements on the respondent by reason of

the receipt of ERDF funding and other matters which had come to light both prior to the claimant's absence and during her absence, a decision was taken to dismiss her and that that was not influenced by her absence. We rejected that explanation. It was clear that had the claimant not been absent from work then she would have been subject to micro-management with a view to improving her performance. Something must have caused the respondent to change its position on micro-management and we infer that that something was the claimant's absence.

10.9 We accept that there were issues with the claimant's performance from the start and questions had been raised as to whether or not the claimant was likely to be a long term employee. We accept that during her absence the respondent acquired ERDF funding which placed a higher emphasis on that aspect of the claimant's role which she least enjoyed and at which she did not excel. We accept that those were matters in the contemplation of the respondent when it moved to dismiss the claimant. However, the respondent has not persuaded us by its explanation that the absence of the claimant (arising as it did from her disability) was not at least a material influence on the decision to dismiss.

10.10 The section 15 provision in the 2010 Act has been rightly described as a robust provision. It requires unfavourable treatment to be proved and for causative links to be shown between that unfavourable treatment and the matter which arises from the disability namely the absence from work in this case. Once that is done the emphasis shifts to questions of what used to be called justification. We comment that it sits very ill with a respondent to say we had an employee for 8 months whom we moved to dismiss without giving any consideration at all to the question of whether or not she was a disabled person: having now done so, we accept we should have known of her disability on 27 June 2016 but that had no influence on our thought processes. The fact that it sits ill with a respondent is not directly relevant to the questions we had to consider: but it did cause us to wonder why the respondent acted in that way. It had an HR Department manned by a professional HR Advisor who (adopting the words of Mr Winthrop) "put much effort into studiously ignoring any inquiry into the claimant's condition". We were bound to wonder why. We had to assess the questions posed by section 15 and if we had accepted the explanation from the respondent then there would have been no discrimination established in this matter. However, having carefully considered all relevant matters and explanations advanced, we do not accept that the respondent has discharged the burden which lay on it.

10.11 Accordingly we conclude that the claimant was treated unfavourably when dismissed by the respondent because of her absence from work which arose from her disability. The claim is proved and we move on to consider the questions posed by section 15(1) (b) of the 2010 Act.

10.12 We moved on to consider whether the defence set out in section 15(1) (b) of the 2010 Act is made out. The respondent asserted two aims namely first the efficient running of its business and making every effort to maximise productivity and secondly the taking into account of the changing needs of the business - in this case the increased pressures caused by the ERDF funding. We accept that those aims are legitimate aims for the respondent to seek to achieve. We have therefore moved onto consider whether the measures taken by the respondent to achieve those aims were proportionate.

10.13 We must balance the discriminatory effect of the decision to dismiss on the claimant against the two legitimate aims on which the respondent relies. We concluded that the dismissal had a severe effect on the claimant. It meant that she lost her livelihood and at a time when she was recovering from a serious illness. Would the retention of the claimant in employment have had any effect on the efficient running of the respondent's business and its productivity? We noted that the claimant had had a successful six monthly review not six weeks prior to falling ill. It had been agreed that she would be closely monitored and managed and her line manager was hopeful that that process would be successful. The claimant was a highly qualified individual and one who clearly had the capability to carry out the role. If the claimant had not succeeded after a period of micro-management, it was still open to the respondent to manage those performance concerns in whatever way it chose so long as, in so doing, it avoided acts of discrimination. The cost of employing the claimant for a reasonable period of micro-management was not great. Given those consideration, we concluded that the effect on the claimant of the discriminatory conduct was so much greater than the effect on the first aim relied on by not dismissing the claimant, that the dismissal was not a proportionate step to take to achieve the first aim.

10.14. We considered and balanced the relevant matters in respect of the second aim. Here the respondent relies on what Mr Anderson described as a game changing factor namely the receipt of the EDRF funding. We took account of the fact that the new funding regime did require greater effort and success from the respondent in acquiring new potential export customer leads and a higher workload. We took account of the fact that the claimant clearly did not excel in this aspect of her role – although her lack of success was not deemed sufficient to secure a fail or an extension to the period of probation in May 2016. The respondent is an organisation which relies on successful contract bids and its performance in such matters is clearly very important. We balanced those factors against the effects of the dismissal on the claimant. Having done so, we again conclude that the effect on the claimant was much greater than the effect on the second aim on which the respondent relies. The claimant would have returned to a period of micro management and in the event she did not succeed the respondent could have managed her performance in the way we refer to at paragraph 10.13 above. On balance the act of dismissal was not a proportionate step in respect of the second legitimate aim.

10.15 Accordingly the claim advanced pursuant to section 15 of the 2010 Act is well founded and the claimant is entitled to a remedy.

The claim of failure to make reasonable adjustments – sections 20/21 of the 2010 Act

10.16 This claim was advanced very much as a secondary matter and it did not add anything to the claim under section 15 of the 2010 Act in terms of loss to the claimant.

10.17 It was a claim expressed to be additional and/or alternative to the section 15 claim. It did not engage the advocates very long during the hearing.

10.18 In the ET1 the claim was put (page 12) on the basis that the decision to dismiss the claimant due to her sickness absence was a PCP putting the claimant at a

substantial disadvantage in comparison to those without her disability. The adjustments contended for were those set out on and suggested by the fit note dated 5 September 2016. In email correspondence between solicitors (Pages 34-36) matters were raised in respect of how the claim was advanced without any conspicuous clarity being achieved. At the outset of the hearing the Tribunal asked for details of the PCP relied on and it was said to be the decision to dismiss and the decision taken not to micromanage the claimant. In final submissions this claim was expressed to be "in reality an alternative way of putting the claimant's case". It was said that the dismissal of a person in the claimant's position was a PCP which put the claimant at a substantial disadvantage in comparison to non-disabled employees. The adjustments contended for were the process of micro-management decided on and a phased return to work and an occupational health referral.

10.19 The Tribunal spent only little time looking at this matter. We concluded that the PCP engaged was the policy which led the respondent to dismiss the claimant for performance reasons. We considered that that PCP put the claimant at substantial disadvantage compared to non-disabled employees (a very different comparison exercise than that required by section 13 of the 2010 Act) because, as a disabled employee, the claimant was absent from work and not able to evince any improvement in performance through the process of micromanagement which had been decided upon prior to her absence and through which the summary dismissal for stated performance reasons could have been avoided. We considered that the adjustment contended for namely allowing the claimant to return to work to be micro managed was a reasonable adjustment. In reaching that conclusion the Tribunal effectively took account of the same matters it had taken into account in deciding the decision to dismiss was not a proportionate means of achieving a legitimate aim as set out above.

10.20 According the claim succeeded but it added nothing to the claimant's ability to recover her losses. Effectively this case was properly advanced as a claim under section 15 of the 2010 Act.

Findings of fact in respect of Remedy

11.1 The Tribunal has considered the information in respect of pay contained in the terms and conditions of employment issued to the claimant in May 2016 (page 103) on which the gross annual salary is recorded as £20270.27. The net salary of the claimant after a deduction of £243 per month in respect of child care vouchers is recorded on page 117A as £1233.98 per month.

11.2 The Tribunal was not made aware of any other benefits in kind paid to the claimant.

11.3 The claimant found the dismissal process traumatic and it made her feel worthless particularly because it occurred out of the blue and at a time when she was looking forward to returning to work. The claimant was made to feel vulnerable by the dismissal and her confidence was badly affected by the experience. The dismissal occurred at a time when she was recovering from what was a difficult diagnosis and an illness which had first manifested itself in March 2016 from which date the claimant had suffered from extreme fatigue and, from time to time, shaking coupled with a feeling that her brain was

not functioning as it should. In May 2016 the claimant was admitted as an emergency case to hospital and after extensive blood tests received the diagnosis of Thyrotoxicosis and Grave's disease. The effects of the discriminatory dismissal were still being felt by the claimant at the date of the hearing before the Tribunal some six months later. The dismissal affected the claimant's pride in herself.

11.4 Since her dismissal the claimant has applied for 45 posts since September 2016 – 13 direct applications to potential employers and 32 through an agency. The claimant has attended 8 events nationwide from Newcastle to Manchester to seek to develop her skills and maximise her employment opportunities. The claimant has not been successful in obtaining alternative employment. The claimant did not produce any written evidence to support her assertion of job applications made. We assessed that evidence from the claimant as credible and truthful and we accepted what she said. We include a note in respect of the absence of written evidence of mitigation of loss at the specific request of Mr Anderson.

Submissions in respect of Remedy

12. In respect of remedy Mr Winthrop submitted:

12.1 The calculation of loss should be straight forward. A payslip is to be found at page 117A. The authorised deduction in respect of childcare should be added back to reach the true loss.

12.2 It was submitted that an award for injury to feelings fell in a range from the top end of the bottom Vento band up to the middle of the middle band.

12.3 It was submitted that the authority of **O'Donoghue –v- Redcar and Cleveland Borough Council 2001 IRLR 615** allowed the Tribunal if it felt it appropriate to consider if the claimant would have faced a non-discriminatory dismissal and when. An alternative approach, and the one it was submitted should be followed, was to calculate full loss and then reduce by a percentage to reflect the chance of a fair dismissal.

12.4 The process followed to dismiss the claimant was in breach of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 and the Tribunal should increase any award of compensation to reflect in particular that no appeal against dismissal was offered to the claimant.

12.5 The burden to prove that the claimant has failed to mitigate her loss lies on the respondent and the respondent has not discharged that burden.

13. In respect of remedy Mr Anderson submitted:

13.1 It was submitted that the claimant had been guilty of misconduct in respect of the creation of appointments in the diary system of the respondent as explained in paragraph 68 of the witness statement of Helen Alderson. The claimant was not able to explain the discrepancy.

13.2 The relationship between the parties was self-evidently deteriorating and **O'Donoghue** is authority for the proposition that it was possible as a matter of law to

cut off compensation after a period of time to reflect that position even where there had been a discriminatory dismissal. It was submitted that the evidence supported the conclusion that the employment of the claimant would have ended in any event in a short period after her dismissal. The dismissal would have occurred before the claimant acquired sufficient service to advance a claim of unfair actual or constructive dismissal and there is no need to consider whether such a dismissal would have been reasonable or in response to a fundamental breach of contract by the respondent.

13.3 It was submitted that it would be appropriate to express the likelihood of dismissal as a cut-off date in the region of three months after actual dismissal rather than to adopt a percentage approach to reflect the degree of likelihood of dismissal.

13.4 The Tribunal should adopt the claimant's rate of pay less the allowance for child care vouchers for to do otherwise would mean the claimant was being compensated at her gross rate of pay. It was accepted that the respondent bore the technical burden of proof in respect of mitigation of loss but it was clear that the claimant was overqualified for the role she undertook with the respondent and her qualifications meant that she was in a unique position in the job market and should have found alternative employment within a very short period after her dismissal and the Tribunal should cut off the claimant's entitlement to compensation accordingly.

13.5 In respect of injury to feelings it was submitted that the appropriate award was in the lower Vento band. The dismissal was a single act of discrimination and in cross examination the claimant was unable to say why she thought the discrimination had occurred and thus her feelings were not injured to any extent. To place injury to feelings in the middle Vento band would be wrong particularly when the employment period had not been a long one and it was clear the relationship would have ended in any event.

13.6 It was submitted that there was no obligation on the respondent to have allowed an appeal against dismissal as that obligation arises from considerations under section 98(4) of the 1996 Act which are not relevant to this claim. The claimant had not produced a schedule of loss and the respondent has had to deal with these matters quickly and without recourse to a schedule.

The Law in respect of Remedy

14.1 We have reminded ourselves of the relevant provisions of section 124 of the 2010 Act which read:

(2) The tribunal may....(b) order the respondent to pay compensation to the claimant.
(6) The amount of compensation which may be awarded under subsection (2) (b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.

14.2 We have reminded ourselves of the guidance to tribunals in the well-known authority of **Vento –v- Chief Constable of West Yorkshire Police (No 2) 2003 ICR 318** as updated by the decision in **Da'Bell –v- NSPCC 2010 IRLR 19.**

14.3 We have reminded ourselves of the decision in **Simmons –v- Castle 2012 EWCA Civ 1288** and the conflicting authorities of the EAT in respect of whether or not the 10%

uplift to damages dealt with in **Simmons** applies to awards for Injury to Feelings in the Employment Tribunal. We have noted in particular the decision of Langstaff J in **Beckford –v- London Borough of Southwark 2016 ICR D1**.

14.4 We have reminded ourselves of the provisions of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the 1996 Regulations") and in particular Regulation 4 in respect of the calculation of interest. We note that the relevant rate of interest pursuant to Regulation 3 of the 1996 Regulations for the purposes of this matter is 8% per annum.

14.5 We have reminded ourselves of the provisions of section 207A of the 1992 Act and of the provisions of Schedule A2 of the 1992 Act and the inclusion in that schedule of reference to claims pursuant to sections 120 of the 2010 Act as this matter is.

14.6 We have reminded ourselves of the decision of the Court of Appeal in **O'Donaghue –v- Redcar and Cleveland Borough Council 2001 IRLR 615 ("O'Donaghue**") and in particular the words of Potter LJ at paragraphs 49, 50 and 51:

"Whether it is appropriate to assess the particular chance in percentage terms will depend on the circumstances. Thus, in the Allied Maple Group case (see paragraph 45 above) Stuart-Smith LJ did not say that the assessment of the chance must be expressed in percentage terms, but only that the assessment is often expressed in percentage terms. The difficulty of expressing all chances in percentage terms can be seen from the kind of problem which existed in this case. In the kind of case Browne-Wilkinson J had in mind, there is no difficulty. Thus, where it can be seen that, but for some procedural discrimination, there was, say, a 20 per cent chance of an employee being dismissed in any event at the same time, the percentage approach is appropriate.

On the other hand, in a case like the present, where the question is, or may be, whether there was a chance of the employee being fairly dismissed in the future, the percentage chance is likely to vary according to the timescale under consideration. Thus, there may be a 20 per cent chance of dismissal in six months but a 30 per cent chance in a year. It is not easy to resolve those conclusions into some overall percentage by which "the normal amount of compensation" (per Browne-Wilkinson LJ) should be reduced. Indeed, in such circumstances, it may not be possible to identify an overall percentage risk. All will depend on the facts of the particular case. The crucial factor is that what is being assessed is a chance.

It seems to us to follow that it cannot be said that to refuse to assess on a percentage risk is necessarily wrong in principle, especially in a case of this kind where the Industrial Tribunal was considering whether the appellant would or might be fairly dismissed within or after a given period. The eventual approach of the tribunal, as we read their reasons, was to consider the chance of the appellant being fairly dismissed by six months from the date of her unfair dismissal. If (as it appears) they concluded that there was a 100 per cent chance of her being dismissed within six months, we can see nothing wrong in principle with the exercise which they performed".

Conclusions in respect of Remedy

15.1 In our deliberations in respect of liability we considered the question raised by the decision in **O'Donaghue** and further clarified by the decision in **Abbey National plc v Chagger 2010 ICR 397.** The question is if the claimant had returned to the workplace would the relationship with the respondent have continued and if so, until when? We have given this matter considerable thought. Having done so, we have concluded that there is a 100% chance that the employment relationship between the claimant and the respondent would have come to an end by the end of 2016. We reach that decision for various reasons. First this working relationship between the claimant and the respondent had been troubled from the start and was not destined to be a long term relationship. Secondly, the claimant was over qualified for the role and she did not enjoy the most important aspect of her role which was telephoning prospective new customers - effectively cold calling. Thirdly, the claimant had from the start of her employment been applying for different positions both with the respondent and elsewhere and that clearly evidenced the position that she was not happy in the role. Fourthly, when returned to the workplace the claimant was going to be micro-managed by her line manager and that was bound to be a difficult process and one which would cause tension between the parties. Finally, we accept the submission of Mr Anderson that we should consider only if the claimant would face dismissal by the respondent not fair dismissal as the claimant would not acquire protection from ordinary unfair dismissal until November 2017. All that points in our judgment to a firm conclusion that if this claimant had returned to the workplace the relationship would have been very short lived indeed. We conclude that by 30 December 2016 the relationship would have come to an end and that it is just and equitable for us to award the claimant compensation until that date but no further. The claimant was dismissed with four weeks' notice and paid until 7 October 2016. The period from 7 October 2016 until 30 December 2016 is 12 weeks and the claimant will therefore be awarded 12 weeks net pay.

15.2 We have considered whether in that 12 week period the claimant mitigated her loss. We note the submission from Mr Anderson that the claimant had failed to produce any written evidence of mitigation of her loss. That was certainly so but we accepted the claimant's oral evidence as to the steps she had taken up to the date of the hearing to secure alternative employment and we noted those steps had been unsuccessful. We are only considering the position until the end of 2016 in light of our conclusion in paragraph 15.1 above. We are satisfied that the claimant had mitigated her loss at least until the end of 2016. We have tested that conclusion. The claimant was only due to return to work in September 2016 on a four week phased return basis after a very serious period of illness. The claimant would have had to make applications and attend interviews and, given her state of health and the time such matters would ordinarily take, we conclude that the claimant could not have been expected to find alternative work by the end of 2016 even if there was a failure by her to take reasonable steps to do so – which we find there was not. Accordingly we will not reduce the award we make by reason of any failure to mitigate loss by the claimant.

15.3 We have considered the appropriate rate of net weekly pay at which to compensate the claimant. We have decided that the claimant is entitled to an award for loss of earnings from 7 October 2016 until 30 December 2016 – a period of 12 weeks only. In relation to the appropriate net weekly pay, we have approached the matter in

this way. We consider that the childcare vouchers should be taken account of in assessing the rate of the net weekly pay by adding back the amount of the deduction but that the tax attributable to those vouchers should then be taken into account. The Tribunal has therefore used the figure of £243 for childcare vouchers and has reduced that by 20% namely £48, in respect of tax to produce a figure of £195. To that has been added the net pay of the claimant of £1,233.98 as it appears on the pay statement at page 117A which gives a total of £1,428.98 per month. If that figure is multiplied by 12 and divided by 52 it produces a net weekly loss of £329.76. 12 weeks x £329.76 totals £3,957.12.

15.4 We have next considered whether we should make an award for injury to feelings and, if so, in what amount. We refer to our findings of fact at paragraph 11.3 above. We note that the claimant was considerably affected by her dismissal. It was only the act of dismissal with which we were dealing in this regard: the claimant had no knowledge that a decision had been taken that she be micro managed and the claim under section 20/21 of the 2010 Act added nothing to this head of loss. The consequences of the dismissal were still being felt by her at the time of the hearing before the Tribunal. We accept that her confidence and self-esteem had been affected by the discriminatory dismissal and that those effects were still ongoing at the time of the hearing before us some 6 months later. We take account of the fact that the discriminatory act of dismissal was a single act and there was no question of there being a series of acts or a discriminatory course of conduct. However, the act of dismissal is serious and had serious ongoing consequences on the claimant in terms of injury to her pride and loss of self-confidence.

15.5 We conclude that the appropriate band of compensation is the lower Vento band which after **Da'Bell** is £500 to £6000. We note the decision in **Simmonds** and **Beckford** and conclude that to the adjusted **Vento** bands we should add 10% and that in assessing an award for injury to feelings we may either set an amount and then add 10% or assess an amount inclusive of the 10% adjustment. We note also that the **Da'Bell** case was decided in 2009 and that we should take account of inflation since that date. Taking all those relevant factors into account we conclude that the appropriate award for injury to feelings in this case particularly bearing in mind the evidence from the claimant as to the effect of the act of dismissal on her (which we accept) is £6000 inclusive of all adjustments except those referred to in the next paragraph.

15.6 We have considered the provisions of section 207A and Schedule A2 of the 1992 Act and we conclude that the provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ("the Code") are engaged in this matter. The Code clearly covers matters relating to poor performance issues as the respondent was dealing with on its own case in this matter and we conclude that it is appropriate to consider an uplift of the award if we are satisfied that section 207A(2) is breached. Therefore we have considered the questions posed by section 207A. First we conclude that the Code applies. Secondly we consider that the respondent has failed to comply with the Code and that that failure was a comprehensive failure. There was a failure to write to the claimant in advance of the meeting on 7 September 2016 to tell her what the meeting was about. She went to the meeting thinking it was a return to work meeting and found herself summarily dismissed. That is in breach of the Code. The claimant was not told of her right to be accompanied to that meeting and that is a breach of the

Code. There was no right advised to the claimant of an appeal against the decision but the claimant did appeal and the appeal was dealt with in writing and therefore we do not attach too much significance to that factor. There was a meeting with the claimant by the respondent and therefore that is not a breach of the Code. Thirdly, we consider that the breach of the Code by the respondent was unreasonable: the respondent had HR advice and the basic steps required by the Code could easily and should have been taken and had they been taken the claimant's sense of injury would doubtless have been lessened. We consider that it is just and equitable to increase the award due to the claimant and we conclude that the appropriate increase given the identified breaches of the Code is 10%.

15.7 Accordingly we increase the award of injury to feelings by 10% (£600) to £6600 and the award for loss of earnings by 10% (£395.71) to £4352.83p.

15.8 We have considered the 1996 Regulations. We award interest on the injury to feelings award from 8 September 2016 until 3 March 2017 which we calculate at 177 days. 8% x £6600 is £528 which divided by 365 and multiplied by 177 gives an award of £256.04p. We award interest on the loss of earnings award by 88 days. 8% x £4352.83 is £348.22 which divided by 365 and multiplied by 86 is £83.95.

15.9 The claimant has succeeded in her claim to the Tribunal and the Tribunal considers it appropriate to make an award to the claimant in respect of fees paid by her to the Tribunal to file this claim and for the hearing. Those fees total £1200. This award is made pursuant to Rule 76(4) and Rule 78(1) (c) of Schedule I to the 2013 Rules.

Compensation Table

16. We set out details of our award of compensation in tabular form:

Loss of Earnings

7 October 2016 – 30 December 2016. 12 weeks x £329.76 per week =	£3957.12
Add: 10% uplift (section 207A)	£ 395.71
Add: interest	£ 83.95

Injury to Feelings

Award	£6000.00
Add: 10% uplift (section 207A)	£ 600.00
Add: Interest	£ 256.04
Total award:	**£11292.82**
Fee Award:	**£ 1200.00**

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EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 16 MAY2017

JUDGMENT SENT TO THE PARTIES ON

18 May 2017

AND ENTERED IN THE REGISTER ON

G Palmer

FOR THE TRIBUNAL