Case Number: 3303228/2015

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr S Badhan	**AND**	Glaxosmithkline Services Unlimited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham

ON 5th - 8th September, 1-11th November 2016

EMPLOYMENT JUDGE Woffenden
MEMBERS: Mr RS Virdee
Mr TC Liburd

Representation
For the Claimant: Ms L Badham of Counsel (5th -8th September 2016)
Mr A Johnston of Counsel
For the Respondent: Ms G Crew of Counsel

RESERVED JUDGMENT

1. The claimant's claim of discrimination arising from disability fails and is dismissed.

2. The claimant's claim of a failure to make reasonable adjustments fails and is dismissed.

REASONS

1 The claimant is employed by the respondent as a therapy representative. His employment commenced on 2 February 2004.

2 By a claim presented to the tribunal on 6 November 2015 the claimant brought claims of discrimination arising from disability contrary to section 15 of the Equality Act 2010 ('EqA') and a failure to make reasonable adjustments contrary to sections 20 and 21 of the EqA. Those claims were subsequently

amended by consent after the final hearing which had been listed for 5 to 9 September 2016 had to be adjourned on 8 September 2016 and relisted.

3 The respondent denies the claims made against it although it is conceded that the claimant was a disabled person (by reason of anxiety and depression) within the meaning of section 6 EqA from February 2014 onwards and that the respondent had knowledge of the same from 13 July 2015. The claims arise out of the claimant being subject to a period of performance management in his role in particular in relation to a verbal warning given on 8 April 2015, and a formal written warning given on 2 July 2015 and the respondent's failure to uphold the claimant's appeals in relation to the same, and a final written warning issued on 24 June 2016.

4 The tribunal heard from the claimant who gave evidence on his own account by way of a witness statement (385 paragraphs) and a supplementary witness statement (48 paragraphs).At the commencement of the hearing there was a discussion about any reasonable adjustments the claimant required and it was agreed there would be breaks at pre-ordained times and the times of any such breaks were adjusted as required by the claimant.

5 On behalf of the respondent the tribunal heard from :

5.1 Alexandra Grzegorczyk (Respiratory sales manager and the claimant's line manager from January 2015 onwards);and

5.2 Gary Denman (Manager Support Analyst who heard the claimant's appeal against the impositions of a verbal warning);

5.3 Rowan Woodhams (Learning technology Manager who investigated and heard the claimant's grievance);

5.4 Renae McBride (Communications manager who heard the claimant's appeal against the imposition of a written warning);and

5.5 Andrew Sellick (Director of Business Partnering who heard the claimant's appeal against the imposition of a final written warning).

They all gave their evidence by way of witness statements.

6 There was an agreed bundle of documents of 1285 pages .We read and have had regard only to those documents to which the parties referred us in their witness statements or under cross-examination.

7 The agreed list of issues to be determined by the tribunal were as follows:

<u>Disability</u>

7.1 Did the respondent have actual or constructive knowledge that the claimant was a disabled person within the meaning of section 6 of EqA

from March 2014 (as alleged by the claimant) or 13 July 2015 (as contended by the respondent)?

Discrimination Arising From Disability

7.2 Whether the respondent treated the claimant unfavourably as alleged by the claimant as set out in the Scott Schedule, namely:

(i) On 8 October 2014, Ms Parkes and Ms Jones questioning the claimant's performance and capability approximately seven weeks on return from six months' sick leave:

(ii) On 12 December 2014 Ms Parkes issuing the claimant with a Personal Improvement Plan;

(iii) On 9/10 March 2015 Alexandra Grzegorczyk ('AG') instigating a formal assessment of the claimant's performance despite medical evidence that the claimant was suffering from stress and anxiety, and in particular, telling the claimant there was no room for error, placing him under increased pressure;

(iv) On 15 April 2015 AG subjecting the claimant to a performance hearing;

(v) On 27 April 2015 AG issuing the claimant with a formal verbal warning

(vi) On 1 May 2015 AG issuing the claimant with a Personal Improvement Plan and only allowing him a period of 4 weeks within which to improve;

(vii) On 17 June 2015 Gary Denman ignoring/discounting the claimant's medical evidence in respect of his appeal against the formal verbal warning and subsequently rejecting the appeal;

(viii) On 22 June 2015 AG instigating a further performance hearing;

(ix) On 9 July 2015 AG issuing the claimant with a first written warning;

(x) On 14 September 2015 Renae McBride rejecting the claimant's appeal against the first written warning;

(xi) On various dates, the respondent not taking into account the claimant's disability and sickness -related absence and/or failing to give sufficient weight to the same when assessing the claimant's

ability to meet the objectives set out in his Performance Improvement Plans;

(xii) On 23 February 2016 AG requesting the claimant to attend a meeting to discuss his performance;

(xiii) On 24 February 2016 AG issuing the claimant with a Performance Improvement Plan from 24 February to 6 April 2016 not allowing the claimant a "cooling off" period;

(xiv) On 8 March 2016 AG assessing the claimant's 2015 performance as a 5;

(xv) On 15 March 2016 AG deciding that the Performance Improvement Plan would be measured from 24 February 2016;

(xvi) On 9 and 17 June 2016 AG subjecting the claimant to performance hearings;

(xvii) On 24 June 2016 AG issuing the claimant with a final written warning;

(xviii) On 26 July 2016 AG issuing the claimant with a Performance Improvement Plan to be measured from 26 July 2016.

7.3 If the tribunal finds that the claimant was treated unfavourably as alleged or at all by the respondent, whether the unfavourable treatment was because of something arising in consequence of the claimant's disability (the claimant relies upon his sickness absence and standard of work as the "something" arising in consequence of his disability).

7.4 If the tribunal finds the claimant was treated unfavourably as alleged or at all by the respondent because of something arising in consequence of the claimant's disability, whether the respondent has shown that the treatment was a proportionate means of achieving a legitimate aim. The respondent says that the legitimate aim was performance management, namely, to improve performance so that the respondent can deliver excellent customer service.

7.5 Whether the respondent did not know or could not reasonably have been expected to know that the claimant had a disability prior to 13 July 2015.

Failure to make reasonable adjustments

7.6 Whether the respondent applied the provision criterion or practices (the PCPs') as set out in the Scott Schedule, namely:

(i) Applying the performance management policy and by issuing the claimant with a Performance Improvement Plan on 24 November 2014, 12 December 2014, 1 May 2015, and 24 February 2016;

(ii) On 10 March 2015 and 1 May 2015 requiring the claimant to improve his performance within a period of four weeks;

(iii) On 8 April 2015 and 2 July 2015 requiring the claimant to improve his performance without providing necessary support;

(iv) On 27 January 2015,6 February 2015,3 March 2015, 5 March 2015, 19 March 2015, 1 May 2015,12 May 2015,11 June 2015,24 March 2016, 14 April 2016, 22 April 2016 requiring the claimant to attend performance hearings and to achieve level 3 or higher for all 5 elements of the call quality assessment without providing supporting materials;

(v) On 12 December 2014, 1 May 2015, 24 February 2016, 26 July 2016 requiring the claimant to perform to a high level/the same level as a non-disabled person and/or on a consistent basis;

(vi) On 8 April 2015 and 2 July 2015 the practice of not taking into account and/or placing sufficient weight the nature of an individual's disability and/or disability related sickness absence and/or relevant medical evidence issuing performance actions;

(vii) On 28 November 2014 the requirement for the claimant to continue to work with Ms Parkes;

(viii) On 23 June 2016 and 12 July 2016 the provision of informal coaching at a time when the claimant was under pressure.

7.7 Whether the claimant was put at a substantial disadvantage by the PCPs in comparison to a person who is not disabled. The Claimant submits he was put at a substantial disadvantage as set out in the Scott schedule, namely:

(i) The claimant was not given the opportunity to re-familiarise himself with the workplace and/or his performance objectives and build up confidence, which he says led to an exacerbation of his health and issuing of the first written warning;

(ii) The claimant was not given sufficient opportunity to improve his performance, placing him under further stress, exacerbating his

condition and resulting in him being issued with a verbal and first written warning;

(iii) The claimant was not given sufficient support in order to achieve the performance level required and as a result was issued with a verbal and first written warning;

(iv) By failing to consider the claimant's medical evidence, the claimant was issued with performance actions;

(v) Due to the nature of the claimant's conditions, he struggled to process information given to him during his performance assessment and this exacerbated his condition;

(vi) Due to the nature of the claimant's disability, he may on occasions, be unable to perform at the same level and/or maintain that performance on a consistent basis as a non-disabled employee and has as a result been subject to performance sanctions;

(vii) By continuing to work with Ms Parkes, the claimant's condition and the effects of his condition exacerbated;

(viii) By providing informal coaching at a time when the claimant was under pressure meant that the claimant was not able to take advantage/benefit from the informal coaching.

7.8 If the claimant was put at a substantial disadvantage by the PCPs, did the respondent take such steps as were reasonable to avoid the disadvantage? The respondent states that it did make reasonable adjustments. The claimant relies upon the following reasonable adjustments which it alleges that the respondent should have made:

(i) Allow the claimant a phased return to work and a longer period to reintegrate and familiarise himself with the workplace/performance objectives before applying the performance management policy/Performance Improvement Plan;

(ii) In relation to the Performance Improvement Plan on 24 February 2016 the respondent should have allowed a "cooling off" period before issuing the Performance Improvement Plan;

(iii) Allow the claimant a longer period, more than four weeks, to improve his performance before instigating the next stage of the policy;

(iv) Provide the claimant with additional support from colleagues, such as coaching and shadowing;

(v) Allow the claimant time to focus on specific areas by requiring him to achieve less objectives;

(vi) Provide the claimant with a customer checklist to enable the claimant to ensure that he covers the relevant points and/or performing scoring from customers to enable the claimant to get a realistic opinion of his performance and/or call quality reports from colleagues and/or the opportunity to go on un- assessed field visits prior to assessment so that the claimant knew what he was required to do prior to undertaking the assessment;

(vii) Lower/adjust the performance criteria and allow the claimant a longer period within which to improve his performance and/or allow the some inconsistency in his performance and/or not issue him with performance sanctions;

(viii) Take into account the claimant's medical evidence and medical conditions;

(ix) Place the claimant under the supervision of another manager;

(x) Review/Reduce the claimant's other work commitments during informal coaching phase and/or delay the informal coaching phase.

7.9 Did the respondent not know or could the respondent not reasonably be expected to know that the claimant had a disability or was likely to be placed at the disadvantages set out above? The respondent denies that, if the claimant were at a substantial disadvantage, it was or should reasonably have been expected to be aware of this.

Time limits/jurisdiction

7.10 The claim was accepted on 6 November 2015.

7.11 Whether the tribunal has jurisdiction to consider any act relied upon which pre—dates 22 May 2015 pursuant to section 123 (1) EqA. The claimant contends there was conduct extending over a period within the meaning of section 1 23 (3) (a) EqA. If not, the claimant concedes that conduct or acts falling prior to 22 May 2015 are out of time and outside the tribunal's jurisdiction (it was conceded by the claimant that he does not argue that it is just and equitable in all the circumstances for the tribunal to consider the complaint (s) out of time).

7.12 In relation to the failure to make reasonable adjustments claim, whether the tribunal has jurisdiction to consider any omission relied upon

which predates 22 May 2015, in that a discretionary omission is to be treated as occurring when the person in question decided on it pursuant to section 123 (3) (b) and section 123 (4) EqA (it was conceded by the claimant that he does not argue that it is just and equitable in all the circumstances for the tribunal to consider the complaint (s) out of time).

8 From the evidence we saw and heard we make the following findings of fact;

8.1 On 2 February 2004 the claimant commenced employment with the respondent. He is employed as a therapy representative. He has been assigned a territory 'Arden' in which there are three clinical care commissioning groups ("CCGs") namely North Warwickshire CCG Coventry and Rugby CCG and South Warwickshire CCG. His priority is to promote the respondent's drugs: Relvar for chronic obstructive pulmonary disease ("COPD") and either Incruse for Triple Therapy for COPD or Relvar for asthma. His customer base typically comprises GPs nurses pharmacists and practice managers. He is not office based but works out in the field. He would ordinarily conduct between 6 to 12 field visits ('FVs') to customers throughout the year of which 4 would be assessed by his line manager. The history to the complaints is lengthy and it has been necessary to set it out in some detail.

8.2 The claimant started in his current role in September 2012 and Anna Parkes became his line manager. There were no significant issues with his performance prior to this date. In 2013 the way in which the respondent assessed its representatives' performance changed. The respondent put in place a Customer Engagement Framework ("CEF"). Hitherto therapy representatives had been assessed on sales but there was a move to assessment on a number of different objectives such as call rates i.e. how many customers were met each day. The bar was raised as far as the respondent's expectations of therapy representatives were concerned in particular on the quality of calls made. Training was provided about the new assessment method.

8.3 On his own evidence the claimant's relationship with Ms Parkes was 'up and down'. She had observed in his Performance Development Plan for 2013 (in which he was marked as having met expectations) that his adherence to minimum standards had not always been apparent.

8.4 The claimant began to suffer from symptoms of stress anxiety and depression from March 2013. Although his lengthy witness statement made fleeting reference from time to time to his suffering from the effects of his disability and the exacerbation of those effects he gave no details .His evidence was its effects could be difficult to describe and that he relied on the contents of his disability impact statement for a full description of his condition and its impact on him. It had been prepared in March 2016 in readiness for a preliminary hearing on 3 May 2016 to determine the issue of disability which

was in the event conceded by the respondent as set out in paragraph 3 above. Summarising those sections of that (unchallenged) evidence which make any specific reference to the effects of anxiety and depression on his ability to carry out work activities he said the Cognitive Behavioural Therapy ('CBT') techniques he was given in 2014 helped him to deal with his symptoms of anxiety in receiving and responding to texts emails phone calls for colleagues preparing and attending fact to face meetings with managers and conducting field visits preparing and attending grievance appeals and facing work and completing tasks under extreme pressure. He did not identify any relevant time period during which he was able to carry out these tasks. Further (at an unspecified time) he described the techniques as having enabled him to have the energy to undertake tasks such as calling customers and booking appointments. In January 2015 he said he suffered from indigestion at night which affected his sleep so that he was mentally tired during assessed FVs unable to communicate with customers and meet performance targets (call quality) and unable to concentrate. As at his return to work in December 2015 he said he experienced a lack of motivation in the job. No expert medical evidence in the form of a report was provided to the tribunal.

8.5 The respondent had prepared a line managers' guide for 'Managing Stress and common mental health Problems'. It states:

> *"the most common forms of clinically diagnosed mental health problems are depression and anxiety. Stress at work can both cause mental ill-health or worsen existing mental ill-health so it is important to address pressure and stress issues and anyone with mental health problems.*
>
> *Many of the symptoms are similar to those people experience when they are under considerable pressure e.g. sleepless night, loss of or increased appetite, increase use of alcohol et cetera; the key differences are in the severity and duration of the symptoms and the impact they have on someone's everyday life. Usually a general practitioner (GP) will be involved in the diagnosis and treatment of mental ill-health in the form of medication or talking therapies or a combination of the two. Under the heading "Early recognition of mental health problems"* it is said that some of the key things to look out for are *"fall off in performance: reduced creativity and efficiency (working longer hours without an increase in output), poor memory, decision-making and concentration".*

Managers are advised to 'Be realistic about workloads –be aware that some people will wish to prove themselves and may offer to take on too much. Instead set achievable goals that make them feel they are making progress' and to' Take the time to have frequent informal chats so there is an

opportunity to discuss/progress problems without a formal (and possibly intimidating) session.'

8.6 At the beginning of 2014 issues were raised about the claimant's performance as far as call rate and call quality were concerned. A discussion about these issues took place between the claimant and Ms Parkes at an FV on 18 February 2014.

8.7 On 24 February 2014 the claimant was signed off work due to anxiety and depression and did not return until 18 August 2014. While he was absent he had 8 counselling sessions arranged through the respondent's Employee Assistance Programme and received CBT.

8.8 The claimant was referred to the respondent's occupational health department ('OH') and OH reports were prepared on the claimant dated 3 18 21 March and 4 25 April and 12 27 May and 18 June 2014. In the latter the claimant's symptoms were described as having settled, a phased return was anticipated subject to reassessment by his GP. Under the section headed "adjustments/modifications/restrictions" OH said "discussions regarding his workload expectations, time management and communications have been highlighted by Sutish as being of great benefit to him as he returns to work." That was reiterated in later OH reports dated 25 June and 21 August 2014.

8.9 On 23 June 2014 OH had sought a medical report on the claimant from his GP. The GP was asked among other matters whether his health condition would be considered to be "covered under the "disability provision" of the "Equality Act" 2010. The GP replied on 7 July 2014, confirming his diagnosis as anxiety with depression 'which had been going on since February of this year' and that his overall prognosis was good. It referred to the claimant's CBT sessions and medication (citalopram). It was also said that "it is likely that his present condition would be considered to be covered under the disability provision of the Equality Act of 2010." No reasons were given nor was there any reference to the statutory definition of disability and whether and if so how the claimant satisfied that definition. OH sought no further information or clarification from the GP.

8.10 Unbeknown to the respondent on 27 June 2014 the claimant's GP referred him for private treatment because of anxiety and depression and on 8 July 2014 the claimant attended an appointment with Dr M Hutt (a consultant clinical psychologist).

8.11 On 18 August 2014 the claimant returned to work on a phased return building up to normal working hours by 22 September 2014.There was no formal return to work meeting as required by the respondent's Sickness Absence and Return to Work Manager's Guide. In a section headed 'Questions and Answers' the guide says in reply to the question 'Is a return to

work interview really necessary in all cases?' that ' It is important that a return to work interview be conducted on every occasion ,without exception' and that it is part of the respondent's Attendance Management process. Managers are also reminded that under EqA employers are under a positive duty to make reasonable adjustments to support an employee which meant that the line manager 'must take the initiative and consider what adjustments would be possible and practicable.' The OH report dated 20 August 2014 which provided advice to Ms Parkes as referring manager said that his health condition had improved; however he would continue to have some "background symptoms as he returns to work." The GP's report was referred to as having been received but no mention was made of the opinion asked for or provided about disability. An OH report dated 15 September 2014 said that the claimant's return to work was going well and that he had been managing his background symptoms well. He was to continue to attend fortnightly CBT sessions finishing in October. No modifications were identified other than conclusion of the phased return to work and since it was said no further OH intervention was required the case was closed.

8.12 On 6 October 2014 Ms Jones (a health economy account manager) conducted a 1 to 1 meeting with the claimant .She was concerned about his performance in September 2014 in particular proactivity and prioritisation of tasks and that he had been late to meetings. She told him she would arrange a meeting between the claimant, Ms Parkes and herself on 8 October 2014. At that meeting (which took place approximately 7 weeks after the claimant's return to work and just over two weeks after his return to normal working hours) Ms Jones' concerns were discussed. He was asked about the work he had done in week commencing 15 September his time-keeping disruption at a lecture he attended on 25 September 2014 and lack of communication with Ms Jones. Ms Parkes told the claimant that his phased return was now over and what Ms Jones was asking for was the fundamentals of the job .They would arrange to meet again and some objectives would be put in place. The meeting lasted 3 hours and the claimant found it very difficult. He did not attribute any performance issues raised to his ill-health during that meeting. Indeed throughout the entire lengthy process that followed the claimant never stated that the performance issues arose from his mental health condition. His evidence under cross-examination was repeatedly to assert that he had done so (though he provided no details of what he had said) both at meetings (which were minuted) and to OH (which prepared written reports) but his comments had not been recorded. However at the time the documents were generated the claimant was assiduous in identifying amendments to the respondent and, for some if not all of them, he was accompanied by a trade union representative who could have assisted him in identifying and rectifying and significant omissions. We found his explanation (which was that he was not a lawyer) for not having identified these omissions wholly unpersuasive.

We find that the notes of the meetings and the OH reports (though not verbatim) accurately record what was discussed and to the extent there is a conflict between the claimant's version of events at these meetings and in relation to discussions with OH we have preferred the contents of the contemporaneous documentation.

8.13 On 9 October 2014 the claimant was again signed off work due to anxiety and depression and was absent from work until 24 November 2014.

8.14 On 1 November 2014 the claimant raised a grievance against Ms Parkes and Ms Jones in which he alleged bullying and harassment by them which affected his health and well-being and negatively affected his performance for the respondent. He said having been absent for six months he had recovered well enough to work and had come back with an open mind and was hungry determined and really looking forward to working with his colleagues and giving his best. However he said he now realised he could no longer work with Ms Parkes and Ms Jones who only made his condition worse.

8.15 On 11 November 2014 the claimant requested an interim line manager during the grievance process.

8.16 The claimant returned to work on 24 November 2014.On 26 November 2014 the claimant asked that AG (who was providing coaching to him) become his line manager. On 28 November 2014 the claimant complained about Ms Parkes continuing as his line manager and asked that this role be carried out by AG. He also asked to be referred to OH. By 28 November 2014 the claimant was informed that Ms Parkes would remain the claimant's line manager but with limited contact and coaching to support the development of the claimant's call quality would be provided by AG.

8.17 An OH report dated 9 December 2014 said that the claimant had managed his return to work well given the "current challenges that exist". He was said to be still on medication and receiving CBT sessions. He was described as fit for work. No adjustments were required. OH did not anticipate that the claimant would require any further absence. He was said to have "all the strategies and tools to support him through this difficult situation". No further reviews were required and his case was closed. It does not identify the claimant's medical condition.

8.18 On 12 December 2014 the claimant attended a meeting with Ms Parkes by which time he had been back at work full time for three weeks. Following that meeting on 15 December 2014 she sent to the claimant a document she described as a "performance improvement plan" which she had populated under various headings('the Parkes' PIP') together with a copy of the respondent's performance policy and procedure ("the Performance

Policy"). The claimant was informed that at this stage the process was informal and that the support the claimant required in order that his call quality and activity was in line with expectations had been discussed. He was warned that if the required progress was not made the process might have to become formal which could be done at any time during quarter one if the shortfall was significant. At the time the claimant accepted the imposition of the Parkes' PIP.

8.19 Under the Performance Policy employees are made aware informally of shortcomings in their performance at a performance shortfall discussion and if improvement is required an employee should understand what needs to be done, how it will be reviewed and over what period. There is also provision for performance assessment. Employees have to be made aware that their performance is being assessed and provided with a copy of the Performance Policy and no formal performance hearing can take place until an employee's performance has been assessed and discussed with HR and the assessment completed. Performance is assessed taking into account feedback from relevant stakeholders and customers where appropriate.' 'Stakeholders' are managers who observe calls made to customers by therapist representatives and assess them.

8.20 Following performance assessment there are several potential outcomes: performance is found to be satisfactory or although action is needed the shortfall in performance is not serious enough to utilise the Performance Policy or a formal performance hearing is required.

8.21 There are a number of sanctions which can be imposed as a result of the application of the Performance Policy: first verbal warning; first written warning; final written warning; dismissal. If a warning is given a line manager will set performance objectives using a Performance Improvement Plan ("PIP") and discuss with the employee how these will be measured and over what period and whether additional training or support would assist in improving performance. The duration of a performance review would normally be between one and four months. At the end of the review period an employee will be required to attend a further performance hearing to discuss performance and a decision will then be taken as to whether to progress to the next stage of the procedure and confirm the sanction being applied.

8.22 Paragraph 3 b) of the Performance Policy states:

> *"If, at any stage of the procedure, or prior to the procedure being implemented, your line manager suspects that ill health or disability factors may be contributing to your performance problem, then advice will be sought from Occupational Health, part of Environment, Health and Safety-Services to decide the best approach to assessing and resolving such contributing factors.*

Depending on the circumstances of the case, this may include formal referral to Occupational Health. This would involve an Occupational Health Adviser assessing the nature of the health disability problem and providing advice to the line manager and HR about the degree of relationship with your performance problem, and whether it is possible to make reasonable adjustments to the workplace, or to your working arrangements, in order to overcome the effect of the illness on your performance."

8.23 We conclude that Ms Parkes' discussion with the claimant on 12 December 2014 was a performance shortfall discussion referred to in the Performance Policy and that she utilised a PIP form for the purpose of identifying clearly to the claimant what needed to be done how it would be reviewed and over what period. There is no reference in the Performance Policy to a Performance Focus Plan which is the description given to the Parkes PIP by AG in evidence.

8.24 The claimant's last working day before Christmas was 16 December 2014.He returned to work after the Christmas holidays on or around 7/8 January 2015.

8.25 On 7 January 2015 the claimant's GP wrote to the respondent at his request. He confirmed that the claimant was being treated for stress and anxiety due to problems at home and problems at work. The GP said he understood from the claimant that he was still having difficulties with stress at work. He also confirmed that the claimant continued to take medication.

8.26 On 16 January 2015 the claimant was informed that he would report to AG while his bullying and harassment grievance was being investigated. She knew he had been unwell for a number of months previously and that he had spent a significant part of 2014 absent from work due to sickness. She was provided with the OH report dated 9 December 2014.The claimant told her that he had had CBT though she was not aware he was on medication. She did not seek more information from him because she did not want to pressurise him into revealing confidential information if he did not want to.

8.27 On 21 January 2015 the claimant emailed HR expressing reservations about the Parkes' PIP. He wanted to know why it was in place over what period had his performance been reviewed what extenuating circumstances had been taken into account and why was it put in place at that time. He was told it had been put in place to help support him improve his performance to the required standard under the Performance Policy, it related to shortfalls in call quality and activity (although the time frame was not identified) his sickness absence had been taken into account so the discussion did not take place until he was back and fit to be at work and it was

put in place at what was considered to be the most reasonable time factoring in the Christmas shutdown and that the first quarter of 2015 would be 'more steady ' to support the Parkes' PIP. He accepted under cross examination that at this time there was no confusion in his mind about why the Parkes PIP had been imposed or the areas in which he had to improve.

8.28 Ms Parkes provided a copy of the Parkes' PIP to AG as part of the handover process. She formed the view during the informal coaching sessions she had held with the claimant in January 2015 that he was not performing to a reasonable standard. She therefore reviewed and decided that she would use the Parkes' PIP (which resulted in a document she again described in her evidence and correspondence with the claimant as a Performance Focus Plan) for the purpose of identifying what improvement was required how it would be reviewed and over what period.

8.29 On 27 January 2015 AG met the claimant and used the Parkes' PIP (with some minor amendments agreed with the claimant) giving the claimant a 12 week period within which to improve incrementally in the areas identified. If the Christmas holidays are omitted by this time the claimant had been back at work for some six weeks in total.

8.30 AG conducted FVs with the claimant on 27 January 2015 6 February 2015 and 3 March 2015.She also conducted 2 weekly PIP reviews with the claimant. Stakeholder FVs took place on 5 March 2015 (Michelle Kitchen) and 19 March 2015 (Steve Grant). Ms Kitchen found the claimant did not focus on customer needs his questions were random and out of sequence and difficult to follow as a result of which addressing customer need was made more difficult. Mr Grant described the standard of calls he observed as being well below what he would expect from a representative with 11 years' experience. The claimant's witness statement attributed this to harsh marking rather than any shortfall in his performance.

8.31 Between 28 January and 8 March 2015 an investigation was carried out into the claimant's grievance and an investigatory report was prepared.

8.32 On 9 March 2015 AG wrote to the claimant to tell him that a formal assessment had been instigated under the Performance Policy. After assessment she would decide if a performance hearing was necessary. Only six weeks of the 12 week period within which he was to improve had elapsed. She also rang the claimant that day to tell him he had achieved a grade 5 rating for 2014 which was the lowest rating .He did not appeal against this.

8.33 AG met the claimant on 10 March 2015 and emailed him after that meeting to tell him that as part of the 'Performance Focus Plan' he had continued to make incremental improvements against agreed objectives but

she considered that he was not making the necessary improvements as part of that plan as far as call quality was concerned as a result of which it was necessary for her to instigate stage 2 of the Performance Policy. He was told that stakeholder feedback would be completed by 13 March 2015 and she would then decide on one of the options set out at paragraph 8.20 above. The claimant accepted under cross-examination that he had not met the objectives set for him by the above plan. The claimant's witness statement did not mention the claimant's allegation that AG told the claimant there was no room for error, placing him under increased pressure. We conclude no such comment was made as alleged. The claimant's witness statement does not mention that that the claimant was required by AG on 10 March 2015 to improve his performance within a period of four weeks. We conclude no such requirement was imposed on him on that date as alleged.

8.34 Following a phone call from the claimant in mid-March 2015 in which he said he was not feeling great AG referred the claimant to OH .In an OH report of 20 March 2015 he was described as fit for work, was receiving appropriate treatment and support for his underlying health issue. Although he was said to have stress from the above plan the claimant was described as feeling he had good management support and coaching to help him. The claimant accepted under cross-examination that he was content with the support he was receiving from the respondent at this time. Under "current capacity employment" it was noted that the claimant was vulnerable to the impact of stress so might need additional management support and it would be important that he proactively communicated any difficulties to his manager at an early stage so they could be addressed. The only adjustment noted was ongoing management support; he appeared to have recovered and was coping; had the necessary support in place and the referral was closed.AG assumed the underlying health issue referred to was a condition related to stress as the claimant told her he was receiving treatment for anxiety but she did not think it was necessary to refer the claimant back to OH at this time because the OH report said that the claimant felt he had good management support to help him which she took as an indication to continue with what she had been doing so far and the HR advice she had received was also positive about the support which she had been providing to the claimant.

8.35 On 20 March 2015 the claimant was informed that his grievance against Ms Parkes was partially upheld in that it was found demeaning and insulting comments had been made about him in front of colleagues. This related to general feedback (including her coaching style) and feedback following a meeting on 5 November 2013 given to the claimant by Ms Parkes. The rest of his complaints were not upheld.

8.36 On 8 April 2015 AG wrote to the claimant to invite him to attend a performance hearing on 15 April 2015.The purpose was to discuss his call

quality performance. He was warned that a performance sanction might be imposed. AG was in regular contact with the claimant whom she had known for some eleven years and from her conversations with him there was nothing to alert her or concern her about the claimant's health .She did not therefore consider it necessary to refer the claimant to OH again before taking this step.

8.37 On 15 April 2015 the claimant attended a performance hearing with AG. He was asked if he was happy to proceed without a representative and he said he was. AG's areas of concern related to the claimant's call quality. He was given the stakeholder feedback to read. When asked the claimant stated his preferred outcome was that no formal action be taken or further support provided and that he focus on 2/3 parts of the CEF with coaching in place. He said he had been off sick for most of the previous year during which he had had no coaching and that he had raised a grievance against Ms Parkes which had been upheld. However he accepted that he had to improve.AG took into account the claimant's extenuating circumstances his grievance and time off sick and also that OH had assessed him as fit to work and that the informal phase of performance management had lasted over three months and he had had a high level of support including coaching and 9 FVs within the three months and the claimant's rate of progress was slow despite his being an experienced representative. He was not delivering on the basics of the role as far as call quality was concerned. She decided to impose a formal verbal warning for 6 months and impose a PIP which would focus on 2/3 parts of the CEF and provide opportunities for practice.

8.38 On 20 April 2015 Dr Hutt wrote a letter to the claimant's GP in which said the claimant had had 20 CBT sessions and was making good progress. The PIP had increased his stress levels and the claimant was said (to his credit by Dr Hutt) to have coped remarkably well remaining at work and not becoming unduly depressed or anxious. The claimant was however becoming worried about the cumulative effects of pressure and the PIP and the action to be taken against him. Had things gone more smoothly at work Dr Hutt anticipated he would have finished treatment some time ago. There were 8 further CBT sessions which Dr Hutt hoped would 'see us through his problems at work.'

8.39 The issue of the formal written warning was confirmed to the claimant in a letter of 27 April 2015 in which he was also informed that a further PIP would be issued.

8.40 On 1 May 2015 the claimant met AG for an FV and was marked by AG as having achieved a total average score of 2.2 in relation to call quality. It was agreed that the call quality objectives for this PIP would be the same as those identified in the Parkes' PIP (in the form amended by AG on 27 January 2015) because they had not been met .We accept AG's evidence that they

agreed the duration of the PIP as 4 weeks (the standard review period under the Performance Policy). AG considered this was reasonable in the light of the fact that the targets under the PIP were the same as under the amended Parkes' PIP which had already been in place for 12 weeks. They discussed what support the claimant would like in place .The number and frequency of FVs was agreed there was to be fortnightly FVs with AG and weekly coaching and the claimant was to attend a 2 day training course. AG emailed the claimant that day with a PIP to take effect immediately over a four week period. There was therefore a period of 7 weeks from 9 March 2015 until 1 May 2015 while the claimant was at work but not subject to a PIP.

8.41 On 7 May 2015 the claimant appealed against the imposition of the formal verbal warning. The grounds were that the Performance Policy had not been followed the stakeholder feedback was not a true reflection of his performance a PIP should never have been imposed by Ms Parkes in the first place it was focussed on too many aspects of his role and it was unrealistic to achieve over January to mid-February 2015 it was based on a different sales model to that now in place and the scoring was different while the PIP was in place from January to March he had had to perform under challenging conditions because of the grievance and extenuating circumstances had not been taken into account (identified as his illness in 2014 as a result of which he had had no coaching so he needed more time to improve and Ms Parkes had been found guilty of bullying him).

8.42 On 12 May 2015 the claimant had another FV with AG and was marked by AG as having achieved a total average score of 2.5 in relation to call quality. On 22 May 2015 he emailed AG to ask for the PIP to be suspended until his appeal had been heard. He did not ask her to do so because of any health issues and AG declined because she felt it would help and support him in improving his performance. The claimant agreed to continue to work to the PIP.

8.43 On 5 June 2015 the claimant was invited to an appeal hearing on 10 June 2015.

8.44 On 10 June 2015 the claimant's appeal hearing took place before Gary Denman. The claimant was accompanied by his trade union representative Mr Bryan Kennedy .Mr Kennedy told Mr Denman that the claimant had had medical condition for over a year which could be 'classed as a disability' and there were no adjustments made to support him with his condition. He referred to the claimant's CBT sessions and the medication and said it may not have been an appropriate time to start a PIP when an employee had been off sick had a 'recognised illness' and an overbearing manager. The claimant confirmed that it had been better working with AG who had managed feedback in a pleasant way with very detailed scoring. Mr

Denman inquired why he thought that AG had come to the same conclusion as Ms Parkes about his performance. The claimant explained that there were extenuating circumstances because he had not received the correct coaching from Ms Parkes so he was behind the others and he had had time off. Mr Denman expressed the view that without the PIP the claimant might lose motivation in improving his performance. He was given copies of the claimant's GP's letter of 7 January 2015 and Dr Hutt's letter to the GP of 20 April 2015. Mr Denman concluded that these letters showed the claimant's health was improving (Dr Hutt having said the claimant was not unduly depressed or anxious) and that the support provided under the PIP had been helping him to 'fight back'. He accepted under cross –examination that Mr Kennedy had questioned the impact of the performance management process on the claimant's health but he saw no causality. He felt the formal structure it imposed helped the claimant and that removing him from the support it provided would result in the claimant being isolated. We accept his evidence that he rejected the claimant's appeal because he considered the correct procedure had been followed and the verbal warning was appropriate in the light of the claimant's performance having fallen below the required standard.

8.45 On 11 June 2015 the claimant attended an FV with Millie Pari. He was marked that he had failed to reach expectations. In his witness statement he did not attribute his poor performance to the effects of his disability but to mental fatigue following his appeal hearing the previous day and having insufficient time to prepare for it.

8.46 On 17 June 2015 the claimant was informed in writing his appeal had been dismissed and that the sanction of a formal verbal warning would stand.

8.47 On 22 June 2015 the claimant was invited to a performance hearing with AG on 26 June 2015 which in the event took place on 2 July 2015. Again the claimant was accompanied by Mr Kennedy. AG reviewed the PIP which had been in place from 1 to 31 May 2015 and informed the claimant that in her view it had not been successful. The claimant asserted his performance was on a par if not better than his colleagues. He disputed the effectiveness of the performance management process which had had a negative impact on his call quality and the timing of the PIP. He asked how somebody could be expected to perform under the pressure of a verbal and now a written warning. He complained about the speed of the performance management process and that HR ought to consider if it was appropriate for the performance management process to have started. When he was asked what would be supportive he said he wanted the verbal warning taken off his record. AG described the claimant as being at 'the bottom of the pack' and the reason for the performance management process was underperformance. The claimant said there was a link between being harassed and bullied and

having a PIP put in place straightaway and then to progress to a verbal warning and the PIP was not helping him.AG said his performance was not where it needed to be and it was linked to his performance. The claimant gave her the letters from his GP which he said he had provided to HR but which AG said had not been shared with her before. Mr Kennedy said that the claimant required a fresh start and there should be what he described as “a cooling off period” (although he did not specify its length) even if there was a PIP. AG said there had been some improvement but in relation to call activity 4 out of the 6 objectives set had not been met .She decided to impose a first written warning (to remain on his file for 12 months) and a PIP. There would be a further meeting on 6 July 2015 to discuss what he felt would support him. His progress against the PIP (which would have the same objectives as the last PIP) would be reviewed on 4 August 2015.The claimant immediately objected to such a short timeframe within which to improve if as AG said he had already had six months but had failed to do so. Mr Kennedy asked for a cooling off period of two weeks before the PIP began which request AG said would be referred to OH.

8.48 On 9 July 2015 the claimant was sent a letter confirming the outcome of the hearing on 2 July and the imposition of a first written warning which would remain in effect for 12 months once his performance was satisfactory and the performance policy was discontinued. He was warned that failure to improve and meet the agreed objectives might lead to his dismissal. On that day the claimant was signed off work due to stress at work initially for two weeks and did not return until 17 December 2015.AG had considered whether to wait for the outcome of the OH referral but decided that any adjustments could be made as needed.

8.49 In the OH report dated 13 July 2015 (which followed a telephone assessment on 9 July 2015) it was said that ‘Due to the duration of his symptoms it is likely that his medical condition would now be covered by the disability provisions of the Equality Act 2010 and therefore there is a need to consider reasonable adjustments to ensure he has the appropriate support at work.” It was said that it would be important to ensure that reasonable adjustments were considered to support him in the performance management process. The adjustments suggested were a longer timescale for assessment, consideration of additional ways to improve performance such as additional coaching, shadowing of colleagues and perhaps referring to a checklist during assessments. We observe that such a report is of little or no assistance in informing any judgment of the respondent on whether the claimant was or was not a disabled person since it does not identify the elements of the legal test of disability as defined under section 1 EqA or provide any supporting reasoning.

8.50 On 20 July 2015 the claimant appealed against the First Written Warning. He referred to the condition of depression and anxiety and said:

"1 No adjustments were made to my working condition since my return to work. Instead I was put on a PIP which has put me under undue stress and
2 I am being treated differently to my colleagues.

3 I raised a H&B grievance, which was upheld, and as a result I have been placed onto PIP

and therefore being victimised and managed out of GSK.'

8.51 On 7 August 2015 the claimant was invited to an appeal hearing on 13 August 2015 which in the event took place on 20 August 2015. It was before Renae McBride. The claimant was again accompanied by Mr Kennedy. Ms McBride did not have the OH report of 13 July 2015 before her though she knew the claimant was absent from work on long term sickness due to stress and anxiety symptoms and the claimant told her he was classified as disabled. The claimant was asked about what adjustments would have assisted him and said there should have been no PIP, the PIP should have been longer (3 months not 4 weeks) and he should have been given fewer or lower parameters to attain. Again he asserted that his performance was on a par if not better than his colleagues.

8.52 In an OH report dated 25 August 2015 the claimant was found to be unfit for work. It was said that he was able to participate in normal daily activities outside of work. The main barrier to his return was the pressure involved in the performance management process; he did not feel able to return whilst it was ongoing. It was reiterated that the claimant's medical condition would be "covered by the disability provisions of the Equality Act 2010" and therefore there was "a need to consider reasonable adjustments to ensure he has appropriate support at work. Reference was made to the suggestions of such adjustments in the OH report dated 13 July 2015. As far as "Outlook" was concerned it was said he did not feel able to cope with the pressure of the performance management process and it was unlikely that he would return to work whilst this was ongoing.

8.53 On 28 August 2015 the claimant raised a grievance alleging discriminatory treatment.

8.54 On 7 September 2015 the claimant was signed off work for four weeks with effect from 3 September 2015 because of stress at work.

8.55 On 14 September 2015 Renae Mc Bride wrote to the claimant to tell him that the First Written Warning would stand. She attached her notes of the meeting. She said that had the OH report of 13 July 2015 been available at

the time of the original hearing on 3 July 2015 this would have enabled him to agree an appropriate time to start the PIP with AG. Because the changes which the claimant had requested had been made to the PIP which had been imposed on 1 May 2015 and she had decided the timeframe of 4 weeks was appropriate bearing in mind the targets were the same as under the earlier PIP which had already given him 12 weeks over which to improve ,she felt that reasonable adjustments had been made. Now that the OH report was available and taking into account the claimant's illness when the claimant felt well enough to return to work she decided it would be appropriate to apply a "cooling off" period to provide time to settle back into the role before commencing the next PIP thus providing the fresh start the claimant was requesting and that period of the PIP be extended from 4 to 6 weeks. She found there was no evidence of the claimant being treated differently from his peers save for the imposition of the PIP or that he had been placed on a PIP because he had complained of bullying and harassment; the reason for the PIP was because of his failure to perform to the required standard.

8.56 On 29 September 2015 the claimant was invited to a grievance investigation hearing initially arranged for 6 October but which was rearranged for and took place on 19 October 2015.

8.57 In an OH report dated 8 October 2015 the claimant was found to be unfit for work. The position remained as set out in the OH report of 25 August 2015 save that now the claimant told OH that even with adjustments in place he did not feel he would be able to cope with the performance improvement process.

8.58 On 9 October 2015 the claimant was invited to a telephone attendance management meeting on 13 October 2015 which was rearranged and took place on 23 October 2015.

8.59 On 19 October 2015 the claimant attended a grievance hearing about his grievance of 28 August 2015. The hearing was before Rowan Woodhams and the claimant was accompanied by Mr Kennedy.

8.60 At the telephone attendance management meeting on 23 October 2015 the claimant was asked whether further medical advice should be obtained and what additional support could be provided during his sickness absence. The claimant said that the only thing that was stopping him returning to work was the PIP and that the process had progressed rapidly when he was issued with the written warning which sanction made him feel worse. In order for him to return to work he said the following needed to be considered;

- PIP cooling off period
-removal of the current sanction from his record
-No PIP

-full reinstatement of sick pay.
He asked AG to consider the suggested adjustments. It was agreed a follow up meeting would take place on 5 November 2015.

8.61 On 2 November 2015 the claimant was provided with a copy of the minutes of that meeting.

8.62 On 5 November 2015 the claimant attended another attendance meeting (via Skype) with AG. He was again accompanied by Mr Kennedy. The claimant said it was difficult to say when he would be able to return to work because the current live sanction due to his performance was "stressing him out"; this was stopping him from returning to work and he feared that once he returned the sanction would progress further. AG responded to the adjustments the claimant had suggested at the meeting on 23 October 2015. As far as removal of his current sanction and its removal from his record were concerned she confirmed that these would remain in place. As far as the suspension of the PIP was concerned she said it was the support mechanism which was applied to improve the claimant's performance and would remain in place. No adjustment would be made to the claimant's sick pay. She was however willing to apply a cooling off period. She said the length of the cooling off period would be discussed when he returned to work. The claimant said he was looking for a minimum four week period and it was agreed that there would be an OH referral about this. The claimant reminded AG that he was 'covered under the Equality Act 'and the respondent must provide reasonable adjustments.

8.63 On 6 November 2015 the claimant presented his claim to the tribunal.

8.64 On 26 November 2015 the claimant attended a grievance outcome hearing with Rowan Woodhams regarding his grievance of 28 August 2015. He was accompanied by Mr Kennedy. On the same day he received the written outcome of the grievance investigation hearing. His grievance was not upheld. However Ms Woodhams referred in her letter to the finding made by Renae McBride that there should be a cooling off period to enable the claimant to have time to settle back into the role and the PIP should be extended from 4 to 6 weeks. Ms Woodhams stated that she 'strongly' upheld Ms McBride's recommendation that his line manager (and HR) consider a reasonable adjustment to his PIP .She (quite reasonably) anticipated that her recommendation would be passed on but it appears this did not happen.

8.65 On 14 December 2015 the claimant's GP wrote to OH. He described how in July 2015 the claimant had attended the surgery. He had had a verbal and written warning about his performance. He felt he had not been supported by his manager and also coaching to improve his

performance. The GP had given him “some time out from work and reassessed” the situation. He had contacted the GP on 10 December 2015 asking for a fit note to return to work on 17 December 2015 to which the GP had agreed. He had been reviewed and advised to undertake a phased return to work over 6 to 8 weeks. The GP was not proposing any further treatment in addition to citalopram and said he suspected that as soon as the problems at work were resolved his recovery would follow.

8.66 On 15 December 2015 in an OH report it was said that the claimant appeared to be fit to commence a phased return to work. It was said he remained vulnerable to stress but appeared to be coping well with normal daily activities outside work. The claimant had informed OH that he was returning to work for financial reasons because his sick pay had expired and although he appeared to be able to commence a phased return from 17 December confirmation was sought from his GP that he was fit to do so. A phased return to work plan was set out which provided that initially the claimant was based at home catching up on admin product updates and e-learning that by the week commencing 4 January he work for 4 half days (4 hours) 2 days home-based and 2 days shadowing colleagues. He had been referred to ‘Return to Work coaching’ as additional support. It was said to be important that he had an appropriate level of management support on his return to work. It would take a few weeks to rebuild his confidence but the above adjustments should ensure he had the necessary support.

8.67 On 17 December 2015 the claimant returned to work on a phased return. His GP had provided a fit note providing for him to return that day on a phased basis over 6 to 8 weeks.

8.68 In an OH report dated 8 January 2016 which set out a phased return to work working full time hours by week commencing 8 February 2016 the claimant was said to be coping well although he continued to experience anxiety symptoms. He was said to feel well supported and was aware what was required of him and on track to achieve the work activities set. An additional return to work coaching appointment had been arranged. It was said the adjustments referred to (phased return an appropriate level of management support and coaching appointment) should ensure he had the necessary support.

8.69 On 15 January 2016 the claimant appealed against the respondent’s decision not to uphold his grievance discussed at the grievance investigation hearing on 26 November 2015.

8.70 In an OH report dated 2 February 2016 (following a telephone assessment that day) it was said he was coping well had had the return to work coaching which he had found helpful confirmed an anticipated return to

full time work week commencing 8 February 2016 and that the necessary support was in place.

8.71 There is no evidence to support the claimant's allegation that on 23 February 2016 AG requested him to attend a meeting to discuss his performance. His evidence refers to an email he received on 22 February 2016 but there is no such document in the agreed bundle. Be that as it may it is common ground that having returned to work full time on 8 February 2016, on 24 February 2016 (2 ½ weeks later) the claimant met with AG who issued him with a PIP to be in place from 24 February 2016 for six weeks. During the meeting the contents of the PIP were discussed. The claimant raised the issue of a cooling off period which he said had already been agreed.AG asked him to provide confirmation of this. She had not been made aware of the outcome of the grievance hearing before Ms Woodhams. In the meantime however AG made certain adjustments to the proposed PIP and made other allowances to provide support for the claimant during it. He was given the option to work either south or north Warwickshire. The length of the PIP was extended by 2 weeks. His activity rates were reduced from those required in 2015.There was to be a deferment of the claimant's personal development plan and business plan assessment for 2015 so the claimant could focus on the PIP. Assessed FVs were reduced and coaching FV sessions were increased. Stakeholder FVs were reduced. He was given 3 hours to book appointments and 2 hours to work on call quality. These matters were summarised in an email from AG to the claimant on 25 February 2016.Under the PIP the claimant had to attain call quality scores of 3 or less within four elements of the sales call model. The respondent had changed its scoring method in that scoring was reversed (a 1 now = exceptional 2 = outstanding 3 = strong and a 5 was the lowest score when previously a 5 = exceptional 3 =outstanding 2 = strong and a 1 was the lowest score) therefore lower scores indicated better quality calls. We accept AG's evidence that the scores he had to attain had been reduced and that was he not expected to achieve at a similar level to those set out in the preceding PIPs nor were his targets in line with those imposed on his peers (who had to attain 2.5).

8.72 On 23 February 2016 the claimant attended a meeting to appeal the decision not to uphold the grievance on 26 November 2015.

8.73 On 29 February 2016 the claimant was informed that the respondent's original decision not to uphold his grievance heard at the hearing on 26 November 2015 would stand.

8.74 In an OH report dated 1 March 2016 the claimant was assessed as being fit for work. It was noted the claimant had been a little taken aback by the non-implementation of the cooling off period he had anticipated (would take place) prior to commencing the PIP. The adjustment made to allow a six-

week assessment period rather than the usual four week was described as helpful. This was reiterated in the Recommendations section of the OH report. The claimant had told OH that this had been one of the recommendations made following his recent grievance appeal. OH advised him to discuss it further with AG. OH said it would have been helpful for the claimant to have had a period of four weeks consolidation in customer facing duties before commencing his PIP. OH described his request for "on-the-job coaching" during 2 to 3 FVs with feedback provided prior to assessment commencing as "reasonable." OH referred to a previous OH suggestion that the claimant might find it useful to refer to a checklist during customer visits to ensure he met the required standard if this would be appropriate. OH acknowledged that due to the claimant's underlying health issue he had a tendency to increased anxiety symptoms when in stressful situations. Although OH acknowledged the respondent's processes had to be followed, the report said "it will be important to ensure that he feels supported and that reasonable adjustments are considered. OH had encouraged the claimant to focus "positively on improving his performance in the required areas and your consideration of the recommendations above may help him to do so".

8.75 On 8 March 2016 AG notified the claimant that he had received a grade 5 (the lowest grade) for his performance the previous year.

8.76 The claimant requested just one stakeholder FV and with a second set of FVs provided by AG who attended three FVs at which she also provided coaching .The claimant was able to choose which FVs were included in the PIP. On 11 March 2016 the claimant had a discussion with AG and raised the cooling off period. He asked for a number of adjustments including a cooling off period to be followed by a PIP of 6 weeks focussing on call quantity to be followed by a PIP of 6 weeks focussing on call quality. She told him she was not aware of the OH suggestion that there be a four week consolidation in customer facing duties before commencing his PIP because the report was not received until 3 March 2016.

8.77 There is no evidence to support the claimant's allegation that on 15 March 2016 AG decided that the performance Improvement Plan would be measured from 24 February 2016. On that day however AG and the claimant did have a scheduled coaching event and she agreed that there would be 3 unassessed FVs before the PIP assessment took place as referred to in the OH report of 1 March 2016.

8.78 On 23 March 2016 AG conducted a PIP review with the claimant. She told him she had been trying very hard to accommodate the recommendations made in the OH report. The PIP period had been increased from 6 weeks to 7.5 weeks (it had originally been extended to 8.5 weeks but this did not take into account that for one of the weeks of the PIP the claimant

was on annual leave).The increase of 1.5 weeks in the duration of the PIP in AG's view took into account that fact that the claimant had only had 2.5 weeks of the 4 weeks consolidation in customer facing duties before the PIP commenced which had been suggested by OH. She was also of the opinion that the 2.5 weeks before the commencement of the PIP and the further extension of the PIP period satisfied the OH recommendation of a cooling off period.

8.79 On 24 March 2016 the claimant attended a FV with AG. It was his first such visit since 11 June 2015 and he did not reach the scores required on call quality. In his witness statement he said he did not agree with the scores he had been given on this occasion but did not explain why or attribute any shortfall in his performance to the effects of his disability.

8.80 On 4 April 2016 it was said in an OH report that the claimant remained fit for work and that no further OH intervention was required and the file would be closed.

8.81 On 14 April 2016 the claimant attended a FV with AG .She found the call lacked focus (apart from the opening) and was concerned the claimant lacked knowledge of the data in the campaign for Relvar. His witness statement attributed his low score to harsh marking not poor performance by him.

8.82 The PIP concluded on 22 April 2016 and on that date the claimant attended a stakeholder FV with Anie Kafie. She assessed the call as scoring 3 (pre-engagement planning) 3 (opening) 4 (uncovering customer needs and align opportunities) 4 (addressing customer needs aligned opportunities) 4 (gaining commitment) and 2 (post engagement analysis). The claimant would not accept under cross-examination that the feedback provided by her or AG was correct as far as the assessment of his call quality was concerned; it was his evidence that they were in a conspiracy to dismiss him. His witness statement attributed his poor performance not to the effects of his disability but to his AMEX card having been cancelled so he had to use his personal mobile phone which distracted him from his FV made him lose focus and affected his calls.

8.83 On 28 April 2016 AG wrote to the claimant to ask him to attend a performance hearing on 6 May 2016 .Following the February PIP she found his performance had not improved. His average call quality scores were 3.5 and although he had achieved his activity rate he had not achieved the targeted coverage rate (53% and 61%) achieving 52% and 38%. She had also received some feedback about negative behaviour such as missing deadlines non completion of training modules and arriving late for meetings.

8.84 On 5 May 2016 the claimant raised a grievance as a result of the difficulties he said he had faced since returning to work.

8.85 On 9 May 2016 the scheduled performance management hearing was postponed due to the claimant's grievance.

8.86 On 18 May 2016 the claimant received an award for his role in supporting the Arden team in successfully including Relvar on the local respiratory guidelines.

8.87 On 9 June 2016 the claimant attended a performance management hearing with AG. He was accompanied by Mr Kennedy. He disputed that there was a problem with his call quality and complained that Ani Kafie's feedback from the FV (which FV he had selected to be assessed) was biased. Under cross-examination it was pointed out to him that this conflicted with his earlier oral evidence under cross examination that there were problems with his performance and those problems arose from his disability. His response was that by this time his performance had improved considerably and AG and Ani Kafie 's assessments were both wrong. The claimant stated at the performance hearing that no reasonable adjustments had been made but when he was asked for clarification of the reasonable adjustments which should have but had not been made he was unable to do so and it was agreed this would be provided by 14 June 2016.

8.88 On 13 June 2016 the claimant was invited to a reconvened performance management hearing on 17 June 2016.He had provided no information about any suggested reasonable adjustments. Under cross-examination he accepted that there were no new reasonable adjustments that had not already been considered.

8.89 On 15 June 2016 the claimant submitted a written grievance about the performance management hearing on 9 June and in the light of this asked for a postponement of the reconvened hearing .AG declined his request.

8.90 On 17 June 2016 the claimant attended the reconvened performance management hearing with AG. He was accompanied by Mr Kennedy. He was issued with a final written warning to remain in effect for 12 months because he had failed to meet the objectives of the PIP.

8.91 On 23 June 2016 AG rang the claimant and advised him that there would be a three-week informal coaching phase (to be provided by Helen Minton) aimed at supporting elements of his call quality from 24 June 2016 until 15 July 2016 prior to the commencement of another PIP. He was to liaise with Ms Minton if he decided to use this support. At his request AG also made a referral to OH . The main concerns identified by AG on the referral form were ill health caused by work; fitness for work/role; Equality Act likely to

apply; attendance and likelihood of recurrence and performance related health issues.

8.92 On 24 June 2016 the claimant was sent the Final Written Warning. Ms Minton contacted him on 28 June 2016 and offered a number of dates when she was available in July. The claimant did not respond.

8.93 On 30 June 2016 the claimant sent an email to AG in which he described the support as welcome but it was not supportive to do it so soon. He requested that the three-week coaching phase did not begin until 11 July 2016. The reasons he gave were he had had 4 days off territory that week, 3 days of which on training on new systems with which he needed time to familiarise himself and having been off territory he needed time to focus on the business. He was anticipating an announcement about new local COPD guidelines which would require a focus on day to day business activities and he reminded her he was on a second written warning which was affecting his health and that he was protected under the disability provisions of the Equality Act 2010.The request was denied on 4 July 2016. AG pointed out that the coaching was provided as further support for him to run in conjunction with his normal daily duties for three weeks before the PIP commenced on 18 July 2016 and that the claimant could access the additional support whenever within the three weeks was most suitable for him.

8.94 On 8 July 2016 the claimant appealed against the imposition of the Final Written Warning complaining it was disability discrimination. He said feedback had been obtained from more than a year ago which was outside the PIP and this was an act of disability discrimination, negating the benefits of the reasonable adjustments put in place in recognition that he was a disabled employee.

8.95 In an OH report of 8 July 2016 it was confirmed that he was fit for work and able to undertake all normal daily activities. He had told OH that he was due to commence another PIP and allowed 3 weeks coaching support prior to its commencement but been unable to start it due to the demands of work .The suggested adjustments were:

- the need to be supported to attend his coaching sessions and review of his workload to enable him to put this in place
- previous recommendations about adjustment to the performance management process were still relevant-these included assessment over longer time scale, shadowing colleagues, the use of a checklist if appropriate.

As far as ‘Outlook’ was concerned it was said that he remained vulnerable to stress which would on occasion cause increased symptoms. The reasonable adjustments should be considered to ensure he had sufficient support at

work. No further review was considered necessary and the referral was closed.

8.96 Having received the OH report on 12 July 2016 AG agreed to extend the informal coaching period until 25 July 2016 (to reflect the time he had spent on training and annual leave which the claimant had booked for 18 19 and 20 July 2016) with the commencement of the PIP on 26 July 2016. She wanted to make sure that he could have the coaching with Ms Minton when he was not subject to a PIP because it was something he had said would be helpful.

8.97 On 26 July 2016 a six week PIP commenced after a discussion between AG and the claimant on that day. The claimant's evidence in chief identifies the only area that the claimant did not agree should be included was the call quantity (target and total call rate) because this was an area where he had met what had been required of him in the previous PIP. She had explained it had to be included because it was part of his role. This lack of agreement was duly noted on the PIP but that was the only complaint raised by the claimant at the time about the targets set for him.

8.98 Ms Minton contacted the claimant again with a number of dates in August and September when she was available. The claimant selected 3 of them .Ms Minton was able to meet him on two of those days but told him she was now only available for part of the remaining day and suggested they speak by telephone so he could tell her what he wanted from the coaching. There could also be coaching catch up in between visits. A coaching session between Ms Minton and the claimant took place on 12 August 2016.

8.99 A general checklist for call quality criteria is available to all representatives within the respondent .Therapy representatives are required as part of Step I of the Patient Focussed Scientific Selling framework to develop a unique pre-call plan ahead of each customer call. On 4 August 2016 the claimant agreed in an email to AG about the then current PIP that in addition to taking notes before or during calls as she mentioned he thought it would be useful to complete a checklist at the end of the call to ensure all the customers' needs had been met 'as recommended in the previous OH reports. Under cross-examination the claimant said he did not believe that it was for him to prepare a checklist and AG had told him the general checklist was not suitable to use for customers and not to use it. This latter point was new evidence not contained in his witness statement and we reject it. We accept AG's evidence that the claimant and she had talked about the use of a checklist during FVs and he had agreed to use one when she was not there but he had not actioned this .We conclude that on the balance of probabilities there was a misunderstanding between AG and the claimant about whose responsibility it was to prepare a checklist for him to use.

8.100 On 24 August 2016 the claimant attended an appeal hearing in respect of his appeal against the Final Written Warning before Andrew Sellick. The claimant was accompanied by Mr Kennedy. On 25 August 2016 Mr Sellick confirmed in writing to the claimant that his Final Written Warning would stand. His evidence (unchallenged in cross-examination) was that he found the process had been followed correctly that the matters raised by the claimant had been investigated and considered at the hearing ,the final written warning had been issued not as a result of any discrimination against him but because he had not achieved the performance targets set for him as part of the PIP and OH advice had been obtained in relation to the claimant's disability and any adjustments required had been made to the PIP.

8.101 On 25 August 2016 the claimant had the first of two assessed FVs with AG as part of the PIP.AG told him his call quality had improved.

9 Under Section 15 EqA:

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

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

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

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

10 The meaning of the word ' unfavourable' cannot be equated with the concept of 'detriment' used elsewhere in EqA. It has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability. It is for a tribunal to recognise when an individual has been treated unfavourably (Langstaff P in **Trustees of Swansea University Pension & Asurance Scheme v Williams [2015] IRLR 889).** He went on to say at paragraph 29 that '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'. He went on to give the example that 'A person who is asked, on pain of discipline, to work at a rate which he cannot achieve because of his disability would be treated unfavourably if he were then to be subjected to that discipline, or threatened with it: this would not be directly because of his disability, but because of that which arose from it –his inability to perform work at the same speed or with the same efficiency.'

11 In the case of **Basildon and Thurrock NHS Foundation Trust v Weersinghe [2016] ICR 305,** Mr Justice Langstaff held that there were two separate causal steps to establishing a claim under section 15. Once a tribunal had identified the treatment complained of, it had to focus on the words "because of something" and identify the "something" and then decide whether that "something" arose in consequence of the claimant's disability.

12 In the case of **Hall v Chief Constable of West Yorkshire Police [2015] IRLR** the EAT held that the tribunal had erred in concluding that it was necessary for the claimant's disability to be the cause of the respondent's action and that it was sufficient for the claimant's disability to have been a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but was nonetheless an effective cause of the unfavourable treatment.

13 In the case of **Pnaisner v NHS England [2016] IRLR 170** the EAT stated that (a) the tribunal had to identify whether there was unfavourable treatment and by whom; (b) it had to determine what caused the treatment. The focus was on the reason in the mind of the alleged discriminator, and an examination of the conscious or unconscious thought processes of that person might be required; (c) the motive of the alleged discriminator acting as he did was irrelevant; (d) the tribunal had to determine whether the reason was " something arising in consequence of [the claimant's]disability", which could describe a range of causal links; (e) that stage of the causation test involved an objective question and did not depend on the thought processes of the alleged discriminator; (f) the knowledge required was of the disability; it did not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

14 If the claimant was treated unfavourably treatment it was held in **Hardy v Hansons plc v Lax [2005] EWCA Civ 846** that the test for justification requires the employer to show (in relation to a PCP) that it is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business, but it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. That test was applied in **Hensman v Ministry of Defence UKEAT /0067/14/DM** in relation to a claim under section 15 EqA. The focus is on the treatment concerned and the starting point therefore must be that the ET should apply section 15(2) (b) EqA 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 (**Buchanan v The Commissioner of Police of the Metropolis UKEAT/0112/16/RN**).

15 As far as knowledge of disability is concerned the position was most recently summarised by the Court of Appeal in the case of **Gallop v Newport County Council EWCA Civ 1583** (a case which preceded the EqA) namely that

(i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the *facts* constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined .However it is essential for a reasonable employer to consider whether an employee is disabled and form their own judgment. That case also reminded employers of the need, when seeking outside advice from clinicians, not simply to ask in general terms whether the employee is a disabled person within the meaning of the legislation but to pose specific *practical* questions directed to the particular circumstances of the putative disability, the answers to which will then provide real assistance to the employer in forming his judgment as to whether the criteria for disability are satisfied.

16 The burden is on the employer to show that it was unreasonable for it to have the required knowledge.

17 Section 39(5) EqA imposes a duty to make reasonable adjustments upon an employer. Where such a duty is imposed sections 20, 21 and 22 and Schedule 8 apply. Section 20(2) states that duty comprises three requirements. Insofar as is relevant for us, the first of those requirements is that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, that the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

18 Section 21(1) EqA states that the failure to comply with one of the three requirements is a failure to comply with a duty to make reasonable adjustments. Section 21(2) EqA provides that a failure to comply with a duty to make reasonable adjustments in relation to the disabled person constitutes discrimination by the employer.

19 In **Environment Agency v Rowan [2008] IRLR 20** a case concerning the provisions of the DDA the Employment Appeal Tribunal, His Honour Judge Serota QC, presiding stated as follows:-

> *'27 …..In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:*

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

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

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

(d) the nature and extent of the substantial disadvantage suffered by the Claimant.

It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.' "

It was held that an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters at a) to d) 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 at a substantial disadvantage.

20 The Equality and Human Rights Commission has prepared a Code of Practice on Employment (2011) ('the Code').Tribunals and courts must take into account any part of the Code (to which neither Counsel referred us) that appears relevant to any questions arising in proceedings. Paragraph 6.10 of the Code suggests that *'provision, criterion or practice'* should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications and in line with authorities pre dating the EqA this includes one-off decisions and actions.

21 The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's.

22 The EqA states that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis.

23 Once the duty is engaged employers are required to take such adjustments as it is reasonable to have to take, in all the circumstances of the

case. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

24 Paragraph 6.28 of the Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

whether taking any particular steps would be effective in preventing the substantial disadvantage;
the practicability of the step;
the financial and other costs of making the adjustment and the extent of any disruption caused;
the extent of the employer's financial or other resources;
the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
the type and size of the employer.

25 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable. Paragraph 19.9 of the Code states that 'Where an employer is considering the dismissal of a disabled worker for a reason relating to that worker's capability or their conduct, they must consider whether any reasonable adjustments need to be made to the performance management or dismissal process which would help improve the performance of the worker, or whether they could transfer the worker to a suitable alternative role.'

26 As far as knowledge for the purpose of the claimant's claim of a failure to comply with the duty to make reasonable adjustments is concerned in **Secretary of State for the Department of Work and Pensions v Alam [2010]IRLR 283** (EAT) (again a case that preceded EqA) it was held that two questions needed to be determined:
Did the employer know both that the employee was disabled and that his/her disability was liable to affect him/her in the manner set out in section 4A (1) DDA?
Only if that answer to that question is no then ought the employer to have known both that the employee was disabled and that his /her disability was liable to affect him/her in the manner set out in section 4 A(1)?
If the answer to both questions was also negative, then there was no duty to make reasonable adjustments (see also the comments of Underhill P at [37] in **Wilcox v Birmingham CAB Services Ltd [2011]EQLR 810 EAT).**

27 Schedule 8, para 20(1) EqA states that a respondent is not under a duty to make reasonable adjustments if he or she does not know ,and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to .It would seem therefore that

the analysis in **Alam** remains good law. The test for knowledge for reasonable adjustments is therefore a different test to that for section 15 claims.

28 However in either claim the employer must do all they can reasonably to find out whether this is the case and what is reasonable will depend on the circumstances.
The Code states at paragraph 5.15:

> *" The employer must ,however ,do all they can reasonably be expected to do to find out [whether this is the case].What is reasonable will depend on the circumstances .This is an objective assessment .When making enquiries about disability ,employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."*

29 The Code cites the example of a worker who has depression:

> *" …has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given the opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened .The sudden deterioration in the worker's time keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability."*

30 At paragraph 6.19 it gives the following example:

> *"A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer queries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."*

31 Section 123 EqA provides that:

> *"(1) Subject to sections…140B, proceedings on a complaint within section 120 (which relates to a contravention of Part 5 (Work) of EqA)may not be brought after the end of –*
> *(a) The period of three months starting with the date of the act to which the complaint relates ,or*
> *(b) such other period as the employment tribunal thinks just and equitable . …..*
> *(3) For the purposes of this section –*

(a) conduct extending over a period is to be treated as done at the end of the period:
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

32 In **Matuszowic v Kingston –upon Hull City Council [2009] EWCA Civ 22** the Court of Appeal found that a failure to make a reasonable adjustment is an 'omission' rather than a 'continuing act' so that the time limit for presentation of a claim starts from the expiry of the period within which the employer might reasonably have been expected to make the adjustment. In the case of **Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil and others UKEAT /0097/13BA** the then President of the EAT Langstaff P held that where an employer refused to make a particular adjustment but agreed to keep it under review rather than making a 'once and for all' refusal ,the failure to make that reasonable adjustment was capable of amounting to a continuing act ,although the refusal to make the reasonable adjustment had occurred more than three months prior to the presentation of the claim. In **Viridor Waste v Edge UKEAT 0393/14/DM** the EAT distinguished **Jamil** and held each case was to be decided on its facts. In that instance it was a refusal and that it might be reconsidered was irrelevant .It was not a case of a policy to review as in **Jamil**.

33 It was held in **Hendricks v Commissioner of Police for the Metropolis [2003]IRLR 96 CA** that in determining whether there was an act extending over a period ,as distinct from a succession of unconnected or isolated specific acts ,for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme of regime in the authorities were given as examples of when an act extends over a period .They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period.'

34 Further 'the burden is on the claimant to prove, either by direct evidence or by inference from primary facts ,that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period.''

35 We are grateful to the parties' representatives for their oral and written submissions.

Conclusions

Knowledge of Disability

36 Although the list of issues had identified the relevant date relied upon by the claimant as March 2014 Mr Johnson has submitted in his written and oral submissions that the respondent ought properly to be fixed with knowledge of the claimant's disability from 8 October 2014 onwards or alternatively from 12 December 2014 or alternatively at the very latest upon receipt of the OH report on 20 March 2015.

37 The task for the tribunal is to ascertain whether, as at each date of those dates, the respondent had actual or constructive knowledge of the facts constituting the claimant's disability.

October 2014

38 By 8 October 2014 Ms Parkes knew the claimant had anxiety and depression and its effect was such that he had been unable to work at all for six months. He had however returned to work on 18 August 2014 on a phased return to work and she knew that as at 15 September 2014 his return to work was going well and he had reached normal working hours by 22 September 2014 and as far as OH was concerned his case was closed. There is no evidence that she knew OH had sought an opinion from the claimant's GP as set out in paragraph 8.9 above nor that she knew what the GP's opinion was .Neither the request nor the response was mentioned in any OH report; all that was said was a GP's report had been received. We conclude that although she knew that the claimant had a mental impairment in October 2014 she did not know as at that date that its adverse effect (without medication or treatment) on his ability to carry out normal day-to-day activities was long-term (in that the effect had lasted or was likely to last twelve months or more or recur).

39 Could Ms Parkes reasonably be expected to have had knowledge of the claimant's disability? Had the respondent done all it could reasonably be expected to do to find out? As the claimant's line manager Ms Parkes knew (or ought to have known) that she should have carried out a return to work meeting with the claimant in August 2014. As his line manager she knew that immediately before he began his sickness absence in February 2014 she had had a discussion with him about his poor performance. She knew (or ought to have known) from perusal of the line managers' guide (paragraph 8.5 above) that managers should look out for a fall off in performance as a key indicator of mental ill –health. She knew he had anxiety and depression. Had she conducted a return to work meeting she could have explored with the claimant whether the performance issues had had anything to do with a disability, and whether further advice was needed from OH. A large employer with a dedicated OH resource available to it has not done what it reasonably could to find out if an employee has a disability if an OH request to the claimant's GP seeking an opinion on that

issue does not identify the relevant legal test let alone pose specific questions directed to the particular circumstances of the putative disability and on receipt of a wholly unreasoned response it subsequently closes the case without seeking any further information or clarification. We conclude that by October 2014 the respondent could reasonably have been expected to know that the claimant had a disability, the claimant's line manager and the respondent's OH department having not made enquiries they reasonably could have made to find out whether that was the case.

12 December 2014

40 If however we are wrong on that point by 12 December 2014 the claimant had been absent from work with anxiety and depression for a further period of 7 weeks from 9 October to 24 November 2014. He was described by OH as being fit for work with no adjustments required and that no further absence was anticipated. Although he was still on medication and receiving CBT he had been back at work full time for three weeks and had evidently acquired the coping mechanisms ('strategies and tools') to enable him to do so .The claimant did not tell Ms Parkes when they met that his performance was affected negatively by his mental health condition or that because of his condition he could not meet the standard of performance expected of him under the Parkes' PIP. Although Ms Parkes now knew that the claimant's periods of absence for anxiety and depression had followed the discussion of performance issues on two occasions, and its effect was such that he had been unable to work for nearly eight months in total during 2014 nonetheless we conclude that although she knew that the claimant had a mental impairment she did not know as 12 December 2014 that its substantial adverse effect (without medication or treatment) on his ability to carry out normal day-to-day activities was long-term (in that the effect had lasted or was likely to last twelve months or more or recur).

41 By this later stage (if not before) could Ms Parkes reasonably be expected to have had knowledge of the claimant's disability? Had the respondent done all it could reasonably be expected to do to find out? There is no evidence that Ms Parkes (or anyone else) carried out a return to work meeting on this occasion even though there had been a second period of absence with the same condition of anxiety and depression. Further Ms Parkes was now was in the throes of applying the informal stage of the respondent's Performance Policy. She knew (or ought to have known) of paragraph 3 b of that policy. As we have found above she also knew that the claimant's two periods of absence due to anxiety and depression had followed the discussion of performance issues with him. In our judgment even though the claimant did not tell her that his performance was affected negatively by his mental health condition or that because of his condition he could not meet the standard of performance expected of him under the Parkes' PIP and OH said he was fit for work by this time her suspicions should have been aroused such that she should reasonably have sought the specific advice of OH or OH should have been prompted to make further specific

enquiries with the claimant's GP of its own volition as evidently it had felt able to do unilaterally in June 2014. We conclude that by 12 December 2014 the respondent could reasonably have been expected to know that the claimant had a disability, the claimant's line manager and the respondent's OH department having not made enquiries they reasonably could have made to find out whether that was the case.

March 2015

42 If we are wrong on that point and the respondent did not have constructive knowledge of the claimant's disability in December 2014 by March 2015 the claimant had been back at work since 7/8 January 2015.The OH report of 20 March 2015 described him as fit for work albeit with appropriate treatment and support and closed the referral .Reference is made in that report to an underlying health issue (which we accept as submitted by Mr Johnson can only be a reference to the claimant's impairment of anxiety and depression) .Mr Johnson submits that the anniversary of the claimant commencing his first period of long term sickness and the reference to the underlying health issue and his receipt of medication in the OH report of 20 March 2015 is sufficient to fix the respondent with actual /constructive knowledge. We conclude that although AG knew that the claimant had an underlying health issue she did not know what it was or what its effects (without medication or treatment) on his ability to carry out normal day-to-day activities were or whether they were long-term (in that the effect had lasted or was likely to last twelve months or more or recur).

43 By this stage could AG reasonably be expected to have had knowledge of the claimant's disability? Had the respondent done all it could reasonably be expected to do to find out? Although he had returned to work she knew the claimant had been unwell for several months for a number of months with a significant period of 2014 on sickness absence. She knew the claimant had a condition related to stress for which he had been receiving treatment. She knew (or ought to have known) from perusal of the line managers' guide (paragraph 8.5 above) that managers should look out for a fall off in performance as a key indicator of mental ill –health. Having formed her own view that the claimant was not performing to a reasonable standard she was in the throes of applying the formal stage of the Performance Policy and therefore knew (or ought to have known) of paragraph 3 b of that policy .She closed her mind to any further enquiries of OH because OH indicated in its report that the claimant was satisfied with the management support provided by her and HR advice was also positive about that support. In our judgment before progressing to the formal stage of the Performance Policy she reasonably could be expected to make further specific enquiries of OH about the claimant's underlying health issue. We conclude that in March 2015 the respondent could reasonably have been expected to know that the claimant had a disability, the claimant's line manager having not made enquiries she reasonably could have made to find out whether that was the case.

Discrimination Arising From Disability

44 Turning now to the allegations of unfavourable treatment set out at paragraphs 7.2 (i) to xviii) above we conclude that the respondent did not treat the claimant unfavourably when on 8 October 2014 Ms Parkes and Ms Jones questioned the claimant's performance and capability approximately seven weeks after his return from six months sick leave. They wished to discuss with him the concerns Ms Jones had about his time keeping conduct and performance in the preceding month of September having returned to work on 18 August 2014 on a phased return and having achieved normal working hours by 22 September 2014. In our judgment it is not unfavourable treatment for a disabled employee who has returned to work, who has been told of the nature of the concerns and that there would be such a meeting to discuss them to be questioned about those concerns at that meeting by those who manage him. His subsequent allegations that he had been bullied and harassed by Ms Jones and Ms Parkes at that meeting were not upheld; he may have found it a very difficult meeting but that does not mean that in and of itself the treatment was unfavourable as alleged.

45 We have found that Ms Parkes did not issue the claimant with a "Personal Improvement Plan" as alleged on 12 December 2014.There is no such thing under the respondent's Performance Policy. There are PIPs but a PIP is deployed only after an employee's performance has been assessed a performance hearing has taken place and a warning given. It falls within the formal part of the respondent's Performance Policy. Ms Parkes had made it clear to the claimant that as at 12 December 2014 the process was at the informal stage only. There was no unfavourable treatment as alleged by the claimant.

46 We have found that on 9/10 March 2015 AG did instigate a formal assessment of the claimant's performance despite medical evidence that he was suffering from stress and anxiety but not that as alleged in particular the claimant was told there was no room for error ,placing him under increased pressure. We conclude that if as part of a performance management process the performance of a disabled person is subject to formal scrutiny and evaluation which if found to be unsatisfactory could result in a performance hearing at which a disciplinary sanction could be imposed that is capable of amounting to unfavourable treatment because it creates a particular difficulty for such a person if because of his or her disability he or she could not achieve the standard of performance required.

47 We have found that on 15 April 2015 AG subjected the claimant to a performance hearing and that on 27 April 2015 she issued him with a formal verbal warning and conclude that subjecting a disabled person to such a disciplinary sanction following such a performance hearing is capable of amounting to unfavourable treatment because these acts create a particular

difficulty for such a person if because of his or her disability he or she could not achieve the standard of performance required.

48 We have not found that on 1 May 2015 AG issued the claimant with a Personal Improvement Plan; she did however issue him with a PIP. She did not as alleged only allow him a period of four weeks within which to improve; the claimant agreed this period with AG. Had it been imposed (rather than agreed) we would have concluded that to do so would have been capable of amounting to unfavourable treatment because an imposed time frame would create a particular difficulty for a disabled person if because of his or her disability he or she was unable to achieve the requisite standard expected of him or her within the allotted time. However that was not what happened here; the claimant had agreed to the duration of the PIP.

49 Although on 17 June 2015 Mr Denman did reject the claimant's appeal against the formal verbal warning he had received from AG on 27 April 2015 we have concluded that Mr Denman did not ignore or discount the claimant's medical evidence as alleged. He took it into account in reaching his decision to reject the appeal; he formed the view that it showed that at the time the claimant was subject to the formal application of the Performance Policy (which had resulted in the formal verbal warning of which he complained in his appeal) his health was improving. However as far as the subsequent rejection of the claimant's appeal is concerned we conclude that to do so is capable of amounting to unfavourable treatment because that would create a particular difficulty for a disabled person if the rejection was because of the disabled person's poor performance and because of his or her disability he or she was unable to achieve the standard of performance required.

50 We have not found that on 15 March 2016 AG decided that the Performance Improvement Plan would be measured from 24 February 2016.

51 As far as the remaining allegations of unfavourable treatment are concerned we conclude that each of them are capable of amounting to unfavourable treatment because each would create a particular difficulty for a disabled person if because of his or her disability he or she was unable to achieve the standard of performance required or meet the objectives set .

52 Mr Johnston submits that the reason for the unfavourable treatment was "manifestly" the claimant's alleged poor performance and that the claimant's prolonged period (s) of sickness more than trivially influenced, in particular, Ms Parkes' treatment of the claimant. Further he submitted that the fact that the claimant's sickness absence arose in consequence of his disability is "plainly incontrovertible." He submitted that the tribunal ought properly to find that the claimant's poor performance was caused or contributed to by his disability. Although he recognised that **Pnaiser** said that "it will be a question of fact assessed robustly in each case whether something can properly be said to arise

in consequence of disability" and further that "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" he submitted the tribunal ought properly to find a causative link between the claimant's disability and his difficulties in achieving the performance standards expected of him. He maintained a person who is disabled by reason of depression and anxiety is inherently more vulnerable to the stress that the performance management process creates, because of their condition they are more likely to suffer from higher levels of stress and anxiety by reason of the process than a non-disabled person would, and any exacerbation of their condition is likely to adversely affect their ability to perform to the standard expected of them. In his oral submission he said that the claimant was off work for substantial amounts of time in 2014 and 2015 and that new products had been introduced by the respondent in 2014 and as a consequence of his absence the claimant did not experience the same degree of exposure and develop the same degree of familiarity with them as his colleagues which was significant when contrasted directly with his peers.

53 Ms Crew submits that the reason for the claimant being subjected to the Performance Policy between January 2015 and August 2016 was the claimant's performance, in particular but not limited to, concerns about his call quality and his performance was not something that arose out of his disability of depression and anxiety. She points to the lack of any medical evidence to support this and submits the claimant has failed to establish the required causal link as set out in the case law (**Psnaiser, Weerasinghe and Hall**).The OH evidence was that he was fit for his work and did not state that his performance was linked to his condition and although it was accepted that being subject to a performance management procedure was likely to be stressful for an employee there was no evidence to support his contention that his standard of work was something arising out of his disability. She pointed to his failure to say in his defence at the performance hearings with AG that his poor performance was something arising out of his condition; rather he contended it was a result of having raised a grievance against Ms Parkes or that the feedback was biased and his performance was actually not as bad as the respondent alleged.

54 In our judgment generalised assertions about the likely effects on those who are disabled by reason of anxiety and depression of being subjected to a performance management process are no substitute for evidence. We are concerned with this claimant and his disability and our task is to determine as a question of fact (assessed robustly) on the evidence before us whether there is the requisite causal link (or links) between the something that causes the unfavourable treatment and the claimant's disability.

55 Although we have no difficulty in concluding that the claimant's sickness absence was in consequence of his disability we were not persuaded that it had any influence in the claimant's treatment by the respondent.

56 We conclude that the respondent (in the persons AG and Gary Denman and Renae McBride) subjected the claimant to the treatment complained of because of his (poor) standard of work particularly in relation to call quality. However ,the causes of poor performance are legion; for example an employee may be disinclined to perform to the standard expected by an employer although he has the capacity to do so or become unable for non-disability related reasons to attain the standard expected of him if those standards are raised .In this case the burden is on the claimant to prove that his (poor) standard of work arose in consequence of his disability of anxiety and depression. We did not find the claimant a credible witness on this point. It is only in retrospect that he has attributed performance shortcomings to his disability and he has produced no medical evidence whatsoever to show what the causal link or links were between the two. During the performance management process the claimant accepted his performance was poor and contended that any performance issues were as a result of bullying and harassment by Ms Parkes but also denied that his performance was poor and blamed his poor marking on bias by the assessors. Similar contradictions were found in his witness statement and his evidence under cross examination which were not consistent with each other. Although the claimant now alleges that he was unable to attain the standards of performance required of him during the undoubtedly stressful experience of performance management throughout it he demonstrated the ability to concentrate and communicate effectively both in writing and in person at numerous grievance performances and appeal meetings over a lengthy period. His impact statement was limited in time to the period prior to March 2016 and in relation to his work tended to indicate that there were times when with the benefit of treatment he was able to carry out the duties expected of him.Since we heard no evidence about the period of time the claimant's (unidentified) peers had to be exposed to and develop familiarity with the respondent's new products compared to the claimant we are unable to reach any conclusions about whether the claimant's disability related absence was the cause of any alleged lack of exposure and familiarity to new products or whether the latter was a cause of his poor performance. The claimant has failed to discharge the evidential burden on him; we are not satisfied he was treated unfavourably as alleged because of something arising in consequence of his disability.

57 As far as time limits are concerned Mr Johnson submitted in his oral submission that the respondent's performance management process was tainted from the outset and that because there was such a tainted ongoing process the acts complained of under that process are part of a continuing course of conduct. In his written submission he said there was an intrinsic link between the events that occurred at each stage of the process. This was continuing up to the presentation of the claimant's claim such that all his claims in relation to that unfavourable treatment are properly regarded as having been presented in time. We reject that submission. We conclude that each of the stages of the Performance Policy were distinct and required specific decisions to be taken by a

decision maker; that the majority of the decisions were taken by the same person (AG) is insufficient to persuade us that there is an intrinsic link as alleged by the claimant. Even if our conclusion at paragraph 56 above was wrong any claims of unfavourable treatment before 22 May 2015 are therefore out of time in any event.

58 Mr Johnston acknowledged in his submission that the improvement of the performance of its employees in order to improve the respondent's service delivery is capable of amounting to a legitimate aim. However he submitted that this did not equate to the application of its Performance Policy being a proportionate means of achieving that legitimate aim and the respondent must show not that the policy was a proportionate means of achieving that aim but that the treatment of the claimant was and the tribunal ought to find that the respondent was unable to show its treatment of the claimant was a proportionate means of achieving the wider legitimate aim. Ms Crew submits that it was a legitimate aim to get the claimant to improve his performance so that the respondent can provide excellent customer service .She points to the OH advice which was sought throughout and the intensive support to which the claimant was subject such as coaching training and adjustments.

59 If we were wrong to reach the conclusions set out at paragraphs 56 and 57 above we accept that performance management to improve performance so that the respondent can deliver excellent customer service is a legitimate aim. However turning to whether the treatment to which the claimant was subjected was a proportionate means of achieving that end the respondent has put in place the Performance Policy .It has provided managers who are responsible for assessing and managing employees' performance and applying the Performance Policy with access to OH and HR advice .Despite Paragraph 3 (b) of the Performance Policy there is no evidence that any of the managers who treated the claimant in the way complained of (or OH or HR which advised those managers) ever turned their minds to the contents of Paragraph 3 (b) and the question of whether ill health or disability factors might be might be contributing to the claimant's underperformance. At no stage did there seem to the tribunal to have been any real attempt by the managers concerned to ensure they were properly informed by OH in a timely way about 'the best approach' as envisaged by paragraph 3 (b) before deciding what to do next. Had such advice been obtained it may have revealed other less discriminatory means of achieving the legitimate aim such as (but not limited to) for example retraining changing the claimant's working arrangements in some way or transferring the claimant (temporarily or permanently) to another suitable alternative role. The managers concerned gave no evidence about the issue of proportionality. We are not satisfied that the respondent has shown the treatment of the claimant was proportionate and therefore justified objectively.

<u>Failure to make reasonable adjustments</u>

60 We have first considered whether the tribunal has jurisdiction to consider any omission relied on which predates 22 May 2015 (paragraph 7.12 above). Mr Johnston submitted that although it was accepted that certain of the claimant's reasonable adjustments claims (having regard to the nature of the adjustment suggested) must properly be regarded as one off or final refusal/ failures. However he submitted that the cyclical nature of the structure performance management process was such that where it was suggested that a similar adjustment ought to have been made at each stage of the process, an analogy could properly be drawn with the scenario considered in **Jamil**. A refusal to /failure to make a particular reasonable adjustment in relation to one stage of the process could not be equated to a once and for all failure/refusal since the structure of that process meant that the making of the adjustment ought properly to be reviewed at each successive stage. Thus the tribunal ought to consider that the claimant's claims in so far as they related to repeated failures to make the same reasonable adjustments are properly to be regarded as being in time even in respect of adjustments which the respondent ought reasonably to have been expected to make before 22 May 2015.Ms Crew simply submitted that many of the reasonable adjustments relied on were out of time as of the date that the decision was made and it would not be just and equitable to extend time.

61 We were not persuaded by Mr Johnston's submissions. A performance management process does not impliedly create a policy to review an earlier failure/refusal to make a reasonable adjustment at each successive stage. There was no evidence before us of any express agreement to keep the position under review or of the existence of any policy to do so. Any alleged failures by the respondent to comply with the duty to make reasonable adjustments are discrete. In the case of any alleged failure to make reasonable adjustments as set out in paragraphs 7.8 (i) (ii) (iii) (iv) (v) (vi) (vii) (viii) in the absence of any evidence to the contrary they are to be taken as decided on when the respondent did an act inconsistent with doing it or on the expiry of the period in which it might reasonably have been expected to do it. We conclude that in either event the latest date each such failure was decided upon was (at the latest) the dates on which the alleged PCPs were applied as set out in paragraph 7.6 (i) to (viii). As far as the alleged failure set out in paragraph 7.8 (ix) is concerned the decision not to place the claimant under the supervision of another manager was taken on or before 28 November 2014. Those alleged failures which were decided upon prior to 22 May 2015 are out of time and the claimant has not sought to put forward any grounds on which it would be just and equitable for time to be extended.

62 If however we are wrong in that conclusion we remind ourselves that it is for the claimant to establish both that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred that the duty has been breached.

63 The claimant has alleged that PCPs were applied to him as set out at paragraphs 7.6 (i) to viii) above. However we have not found that the claimant was required to improve his performance within a period of four weeks on 10 March 2015.Further although the PIP which began on 1 May 2015 was to last for a period of four weeks its duration was agreed by the claimant and in our judgment an agreement between an employer and employee about the period over which improvements are to be made does not constitute a provision criterion of practice for the purposes of section 20 (3) EqA.

64 We have found that on 8 April 2015 the claimant was invited to attend a performance hearing .No requirement was applied to him on that day to improve his performance as alleged ;his performance had already been found to be wanting hence the invitation. His evidence in chief fails to provide any evidence about what support was said to be necessary but was not provided. As far as 2 July 2015 is concerned that was the date on which a first written warning was imposed and although the terms of that warning do require the claimant to improve his performance his evidence in chief again fails to provide any evidence about what support was said to be necessary but was not provided. The claimant has failed to discharge the burden on him to show that on those dates the respondent applied a PCP as alleged.

65 We have found that on 28 November 2014 the claimant raised a complaint about Ms Parkes continuing as his line manager. He was absent from work from 15 December 2014 to 7 January 2015. During the 27 days he was at work the respondent took steps to ensure his contact with Ms Parkes as his line manager was limited and when he continued to express his unhappiness further action was taken and Ms Parkes was replaced by AG by 16 January 2015. We conclude that no requirement was applied to the claimant on 28 November 2014 that he continue to work with Ms Parkes as alleged.

66 As far as the provision of informal coaching was concerned the claimant was content that such support was made available to him which was of course to his benefit; the alleged PCP applied to him was that he was required to avail himself of it at a time when he was under pressure. We have found that on 23 June 2016 he was told when that coaching support was available for him to utilise (or not) as he felt fit prior to the commencement of the PIP while he was carrying out his normal daily duties. When he complained on 30 June 2016 that he had been unable to take up the coaching support due to the demands of work having taken OH advice on 8 July 2016 by 12 July 2016 he was informed by the respondent that the period for such informal coaching to take place was extended. Although he was subject to a first written warning the PIP had not commenced he was participating in normal daily duties and the period during which informal coaching was made available to him (offered in accordance with OH advice) was to precede the PIP. We conclude that the respondent did not apply the PCP as alleged since we are not satisfied that the claimant was under pressure at the times it was provided to him.

67 However even if the PCPs were applied to the claimant as alleged as **Rowan** made clear it is necessary for the tribunal to make findings of the nature and extent of the substantial disadvantage to which the claimant (as a disabled person by reason of anxiety and depression) was put by the application of the PCPs in comparison to a person who is not disabled in order to consider what steps it would have been reasonable for the respondent to take to prevent or mitigate that disadvantage. Mr Johnston has submitted that a performance management process will necessarily place an individual who is disabled by reason of depression and anxiety at a substantial disadvantage in comparison with those who are not disabled. He went on to say that the threat of a sanction if the required level of improvement is not achieved is by its very nature stressful. He described the 'snowball effect' in terms of stress as the process progresses and sanctions in the event of failure become more severe. Although a non-disabled person would also suffer stress when subjected to performance management a disabled person is occasioned substantial disadvantage because they are more inherently vulnerable to the stress created and more likely to suffer higher levels of stress and anxiety that an non-disabled person would and any exacerbation is likely to adversely affect their ability to perform.

68 In our judgment that submission does not identify the nature or extent of any substantial disadvantage at all let alone that to which this claimant was said to be put by the application of the PCPs alleged. It does not sit happily with the claimant's own (inconsistent) evidence that (notwithstanding the application of the Performance Policy to him) his performance had not been poor or the respondent's assessment that by August 2016 it was improving.

69 The claimant has alleged he was not given the opportunity to re-familiarise himself with the workplace and/or his performance objectives and build confidence which led to an exacerbation of his health and him being issued with a verbal and first written warning. No cogent evidence has been provided about the nature and extent of any such exacerbation or when it occurred or how the exacerbation resulted in the imposition of a warning.

70 The claimant has alleged that he was not given sufficient opportunity to improve his performance, placing him under further stress exacerbating his condition and resulting in him being issued with a verbal and first written warning. No cogent evidence has been provided about the nature and extent of the stress or any such exacerbation in his condition or when this occurred or how this resulted in the imposition of either the verbal or first written warning.

71 The claimant has alleged that he was not given sufficient support and that his medical evidence was not considered .The nature and extent of any substantial disadvantage to which he as a disabled person was put by any PCP is not identified at all.

72 The claimant has alleged that due to the nature of his "conditions" he struggled to process information given to him during performance assessment and this exacerbated his condition. He does not identify the conditions or condition to which he refers and no cogent evidence has been provided about the nature or extent of his struggle to process information or about the nature and extent of the exacerbation in his condition or when this happened and how the struggle to process information exacerbated his condition.

73 The claimant has alleged that on occasions he may be unable to perform at the same level or maintain that performance on a consistent basis due to the nature of his disability. No cogent evidence has been provided about what it is about the claimant's disability which affected his performance as alleged or the circumstances in which that disadvantage might occur or the occasions when it did or nor are the aspects of his role which he may be unable to perform to the requisite or consistent level identified .

74 The claimant has also alleged that by continuing to work with Ms Parkes his condition and its effects exacerbated. The claimant was not required to continue working with Ms Parkes after on 24 November 2014 in the same way they had worked together hitherto. Their contact was limited after 28 November 2014 and she ceased to be his line manager after 16 January 2015.No cogent evidence has been provided about the nature or extent of exacerbation of the effects of his condition or when this happened. The OH report dated December 2014 described him as fit for work and did not indicate an exacerbation and the GP's letter dated 7 January 2015 was silent on this point.

75 Finally the claimant has alleged that in relation to the provision of informal coaching on 23 June 2016 and 12 July 2016 at a time when the claimant was under pressure meant he could not take advantage of /benefit from that coaching. No evidence has been provided that his inability to do so had anything to do with his disability.

76 The claimant has failed to prove the nature and extent of the substantial disadvantage(s) to which he alleges he was put by the application of the PCPs. It follows that we are unable to judge if any adjustment proposed by the claimant was reasonable.

77 As far as knowledge is concerned since the claimant has not established the nature and extent of the substantial disadvantage(s) to which he was put by the application of the PCPs it cannot be said that the respondent knew or ought to have known that he was likely to be placed at those disadvantages.

78 The claimant's complaints of disability discrimination fail and are dismissed.

Employment Judge Woffenden
21 March 2017