EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs A Withers	AND	Department for Work and Pensions

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 4, 5 and 6 February 2019

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mrs W Richards Wood
Mr I Ley

Representation

For the Claimant: Dr A Davis, Friend
For the Respondent: Mr A Midgley of Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are dismissed.

REASONS

1. In this case the claimant Mrs Angela Withers, who remains employed by the respondent, claims that she has been discriminated against because of a protected characteristic, namely her disability. It was confirmed on behalf of the claimant at this hearing that the claimant's claims are for discrimination arising from disability, and because of the respondent's alleged failure to make reasonable adjustments. The respondent concedes that the claimant is disabled, but contends that there was no discrimination, and asserts that in any event claims are out of time.
2. We have heard from the claimant. For the respondent we have heard from Mrs Natalie Puckey, Mrs Julie Hearn, Mrs Arlene Gaunt, Mrs Jo Eaton and Mrs Kat Kilkelly.

3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The claimant Mrs Angela Withers joined the Civil Service in December 1994 and originally worked as a full-time Trade Union representative. At the times material to this claim, the claimant was employed by the respondent Department for Work and Pensions as an Executive Officer. She worked in the Child Maintenance Group on the Accuracy Checking Team. It was her responsibility to check the accuracy of the work of Administrative Officers to ensure that the assessments which they had made with regard to the amount of child maintenance payable were correct. She dealt with a variety of claims including complex and high value claims. If these claims were incorrectly assessed this would create problems and more work both internally and externally and potentially overpayments and/or underpayments of the necessary child maintenance.
5. The claimant was an experienced member of her team and her work was valued. Unfortunately, the claimant suffered from ill-health, and in particular her health issues included type 2 diabetes, vertigo, depression/anxiety, fibromyalgia, and cellulitis. The respondent concedes that each of these five impairments is a disability for the purposes of the relevant legislation. As a result of these conditions the claimant had a poor attendance record, which resulted in a formal written warning and subsequently a final written warning under the respondent's Attendance Management Procedures. The claimant remains in the respondent's employment, and the essential element of this claim is that the claimant complains that the respondent discriminated against her when it issued both of these warnings.
6. Whenever the claimant was absent, then her colleagues would be required to undertake the work that she was unable to do. If they could not do this work because of their own work pressures, the result was that there would be fewer checks performed which had a potential impact on the accuracy of assessments. This in turn might have significant impact on potentially vulnerable members of society. The respondent's evidence is that there is a Service Level Agreement in place (SLA) which requires the respondent to comply with an internal 24-hour deadline for completing checks and returning them to Administration Officers. The claimant initially disputed this, but accepted in cross-examination that there was an SLA in place with effect from May 2016 which is during the time relevant to this claim. The respondent was unable to cover absences by way of offering overtime to other staff, because overtime was generally an exception for that team because it was normally only used for front line customer facing teams.
7. The claimant had historically requested adjustments in connection with her normal working pattern and this had been accommodated by the respondent. The claimant had 10 non-contracted weeks throughout the year, which enabled her to take one week off at Easter, five weeks off in the summer, one week off for October half term and three weeks off at Christmas, to cover her family and domestic commitments. The claimant worked full-time during the weeks that she was at work but two full days each week (Tuesdays and Thursdays) were taken up in completing her duties as a Trade Union representative.
8. The respondent has a very lengthy and detailed sickness policy known as the Attendance Management Procedures. We have to say we found this document somewhat overcomplicated in places, but in any event the relevant sections are now set out in some detail in order to put respondent's actions in context.
9. In the section headed: "Sick Leave and Sick Pay" employees are advised of their sick pay entitlement, and under paragraph 26 headed "Unsatisfactory Attendance", employees are advised: "If you are absent due to sickness for eight days (pro rata for part time staff) or four spells of absence, or more in any 12 months your manager will talk to you formally."
10. There is a section of this policy headed "Taking Formal Action" which provides as follows: "If you have a high absence rate, your manager will use the Attendance Management Procedures to find a solution that will enable you to return to work or improve your attendance. The earliest they will start the formal process is when your absence level has

reached the Trigger Point. This is the point at which your manager is required to interview you formally. The outcome of formal action is not predetermined and interviews can result in one or more of the following outcomes: (i) The provision of help e.g. a reasonable adjustment, referral to physiotherapy, referral to the employee assistance provider; (ii) The procurement of advice e.g. from the Occupational Health Service or Telereal Trillium who provide advice/solutions on office accommodation and furniture; (iii) The issuing of a Formal Written Warning; (iv) A decision not to issue a Formal Written warning; (v) A decision to increase the Trigger Point and to defer future formal action if you are disabled. This Trigger Point is called the Disabled Employee's Trigger Point …"

11. Further explanation under "Taking Formal Action" at paragraph 2.4 provides: "If the Trigger Point is increased it is known as the Disabled Employee's Trigger Point. The Disabled Employee's Trigger Point will be made up of the normal eight days (less, pro rata for employees who work part of the year or are not contracted to work every day) or four spells of absence for non-disability-related absences and an additional number of days for absences related directly to the disability. This decision will be made on a case-by-case basis; there must not be any local predetermined blanket limit on what the DETP should be. Formal action will begin when: Absences that are not related to the disability reach or exceed eight working days or four spells of absence; or the combination of disability-related and any non-disability related absences reach or exceed the Disabled Employee's Trigger Point. This means that whether an employee is disabled or not, formal action will begin at eight days or four spells of absence for absences unrelated to disability. But disabled employees have the flexibility to use these eight days (or some of them) as well as the additional number of days which have been agreed, for absences relating to their disability if needed … The formal stages for irregular absences are: Stage I - First written warning; Stage 2 - Final written warning; Stage 3 - Consideration of dismissal/demotion; Stage 4 – Dismissal/demotion.
12. The Attendance Management Procedure also has a section which provides advice to managers under the heading Attendance Advice. The advice is given by way of questions and answers, and there are 39 specific questions, with detailed answers provided. The four which are relevant for today's proceedings are questions 8, 9, 33 and 36.
13. Question 8 asks: "How do I decide what a Disabled Employee's Trigger Point should be?". The advice provided is this: "The manager and employee's joint objective should be to help the employee to meet the normal attendance standard, if possible. Any discussion about Trigger Points should, therefore, start with an exploration of whether any reasonable adjustments would enable the employee to meet the normal Trigger Point. Managers must award a Disabled Employee's Trigger Point where the employee is disabled and it would be a reasonable adjustment taking account of all relevant circumstances. This would apply in cases where, but for this flexibility, a disabled employee would not meet DWP's attendance standard and would effectively be prevented from working for the Department because of absences linked to their disability. The approximate number of extra days to be allocated should in all cases be reasonable, taking account of the employee circumstances and the business impacts. In deciding what the Disabled Employee's Trigger Point should be, the manager should take account of: (i) What is reasonable: the manager will have to take a view of what level of absence can be supported by the business, taking account of factors such as the cost, effect of the delivery of services and disruptive effect on colleagues. Decisions should be made on a case-by-case basis - it is not appropriate to impose a local predetermined blanket limit; (ii) The absence record: past absence due to a disability can be used as an approximate indicator of the likely absence level in the future; (iii) Stability of the condition: the likely level of absence will be affected by whether or not the condition is stable. Managers need to be aware that new courses of treatment can result in temporary improvement or deterioration, which could distort the absence pattern. Managers should be cautious about taking decisions based on what might be temporary changes and absence levels ... Managers should try to determine the approximate level of the Disabled Employee's Trigger Point based on the information available and through discussion with the employee. They should aim to avoid reference to Employee Services. The Occupational Health Service will not advise on what the Disabled Employee's Trigger

Point should be and managers should not refer cases on this point. The manager should contact Employee Services or the Occupational Health Service for help if required. Occupational Health Service can advise on whether the employee's condition has stabilised if this is not clear, the effects of treatment etc. They can also advise on adjustments that should be considered to maximise the employee's attendance. Disabled Employees' Trigger Points should be managed with a small amount of leeway to avoid causing anxiety from the risk of a warning. Once set, a Disabled Employee's Trigger Point should not be reduced or removed upon review, on the basis of improved attendance, unless any improved attendance has been sustained for at least 12 months."

14. Question 9 asks: "When should the manager consider taking attendance management action for someone with a Disabled Employee's Trigger Point?" The advice given in reply is this: "If the employee has absences that are unrelated to the disability and these reach or exceed the usual eight days Trigger Point or four spells, the manager should consider taking formal action in the normal way. If the combination of disability-related and any non-disability related absences reach or exceed the Disabled Employee's Trigger Point then formal action should also be considered. Example - Deciding what is a reasonable level of absence to support for a disability is not an exact science and decisions to take formal action should not turn on a disabled employee going a day or two over their trigger point. Before taking action, the manager should first consider whether the reasons for the Disabled Employee's Trigger Point being reached or exceeded and the business impacts of this justify tolerance of the higher level of absence. The manager should consider taking formal action where: (i) There has been no relevant changes to the employee's disability such as treatment or prognosis; and/or (ii) Absences are in excess of what the Occupational Health Service considers reasonable for the condition, taking into account the nature of the disability, the employee's record, treatment history etc; (iii) The Disabled Employee's Trigger Point has been reached or exceeded and the absences have risen to a level which can no longer be supported … Up to date Occupational Health Service advice may be needed to establish whether there has been any change to the disability and the effects/effectiveness of treatment. Levels of disability related absences will vary, and may include peaks and troughs, so it would not normally be appropriate for an isolated peak of absence alone to justify unsatisfactory attendance action. The Disabled Employee's Trigger Point support irregular attendance and should not normally be used to trigger unsatisfactory attendance action in cases of continuous absence.
15. Question 33 asks this: "Are spells pro-rated for part-time employees or increased for employees with a DETP?". The reply given is this: "No. Days will be pro-rated for part-time employees or increased for employees with a DETP, but the Trigger Point is four spells in a rolling 12 month period for all employees, regardless of their working pattern. A spells of absence trigger point does not apply to disability related absences".
16. Question 36 asks this: "What should a manager consider when deciding whether to treat an absence as exceptional?" The reply given is this: "People can experience isolated incidents of absence or one-off illnesses or injuries. There are a number of circumstances where an absence would be treated as exceptional: (i) The absence is due to gender reassignment; if an absence goes beyond three months OH advice should be sought; (ii) An illness or condition which is usually only experienced once such as chickenpox; (iii) An illness or condition which is fairly uncommon or unusual; (iv) An illness or condition which is fairly common but has had an uncommon or unusually extreme impact such as cases requiring hospital treatment; (v) The absences following an accident or injury … A manager should not try to decide whether an absence is unlikely to re-occur. The manager must decide whether to treat an absence as exceptional based on the facts of the case at that time. Where an absence has been treated as exceptional but there are subsequent absences for the same reason, or related to it within the rolling 12 month period, that absence will be taken into account when considering whether to give a written warning."
17. Against the background of this detailed policy, the respondent took the following action.
18. The claimant had 15 working days absence between 18 January and 5 February 2016 which was recorded as resulting from a change in her diabetes medication. At that time the respondent wrote to the claimant as follows: "The recent 15 day absence was due to a

change in your diabetes medication and this is supported by OH advice. As such I consider it to be an isolated peak which is now under control. Although at this time I do not feel formal action is appropriate, I do need to advise you that if another absence does occur due to your diabetes, this absence can be reconsidered." In other words the respondent exercised its discretion under its policy not to take action against the claimant in respect of this absence at the time it occurred, but reserved the right to do so in the event that there was any further diabetes-related absence.

19. This further diabetes -related absence occurred on 19 September 2016 when the claimant had another day off which was recorded as resulting from a change in diabetes medication. This prompted a review of the claimant's attendance record, and taking into account the earlier 15 days absence, the claimant exceeded the trigger points. In the previous year the claimant's sickness absence was four days in October 2015 for cellulitis; one day in December 2015 for vertigo; the 15 days in January and February 2016 (as mentioned above) and the one day in September 2016 both relating to a change in the diabetes medication. These absences of 21 days all related to absences which were otherwise covered by the 11 days' DETP and the DETP was therefore exceeded. In addition, the claimant had two days' sickness in April 2016 and one day in July 2016 for illnesses which were not related to DETP or her disabilities. As at September 2016 the claimant benefited from the usual trigger point of seven days (the normal period was eight days, but the pro rata equivalent rounded up for the claimant was seven days), but also had an additional 11 days by way of Disabled Employee's Trigger Point (DETP) as a result of a previously agreed arrangement under which six days were allowed for diabetes, and five days for vertigo.
20. The claimant was called to a formal attendance review meeting. The claimant's trade union representative raised a query ahead of that meeting as to why the 15 day period which had earlier been disregarded was now included again. Mrs Kilkelly, from whom we have heard, explained that the 15 day period of absence had been brought back into consideration because the claimant had a further instance of sickness for diabetes, and the respondent had previously advised that in that event that period of absence would be reconsidered.
21. There was some debate as to whether cellulitis was linked to the claimant's diabetes. At that stage it was not accepted by the parties that cellulitis was a separate disability, and Occupational Health were asked to advise on that point. Either way the claimant exceeded her trigger points. If the cellulitis was not linked to her diabetes, as she now suggests, then that absence would have been applied to her normal (non-disability) trigger point of seven days, which (with the other three days under consideration) would have exceeded that trigger by 19 days. Alternatively, if it were linked to her disability of diabetes, then that 15 days would have exceeded the six days DETP for that disability.
22. Mrs Kilkelly decided to issue a first written warning, which was confirmed by letter dated 13 October 2016. The review period following this warning was for six months from 11 October 2016 to 10 April 2017. The claimant was informed that if her attendance became unacceptable during this review period, then the matter might be progressed to a Final Written Warning. However, if the attendance was satisfactory, then there would then be a Sustained Improvement Period for 12 months under which attendance will be monitored from 10 April 2017. In confirming the position Mrs Kilkelly decided to exclude the four days absence of cellulitis in October 2015 from consideration. Mrs Kilkelly noted that the DETP had been exceeded by 16 days which the respondent's business was unable to tolerate.
23. The claimant appealed against the imposition of that first written warning, and her appeal centred around the reconsideration of the 15 day absence and why this had been included. The change of medication had given rise to a urinary tract infection and a chest infection and the claimant argued that there was no conclusive link between these infections and the change of the diabetes medication. The respondent refused the appeal, effectively because it had reserved the right to reconsider the 15 day period of absence in the event of further absence, either because of the disability of diabetes, or any absence related to it, as allowed by the Attendance Management Procedures, and in any event given that the respondent was therefore entitled to reconsider the 15 day period of absence, the trigger points were exceeded whether the absence was disability-related or not.

24. Unfortunately, the claimant had another 16 days absence within the first three months of the review period. She was absent for one day for flu on 31 October 2016; diabetes related illness for one day on 29 November 2016; and cellulitis leading into depression (which was recorded by the respondent as being diabetes-related) for 14 days from 3 January to 20 January 2017. The pro rata trigger points during this six-month review period were 3 ½ days rounded up to 4 days for normal trigger points, and three days DTP for diabetes and 2 ½ days rounded up to 3 days for DETP vertigo. This was a tolerance of 10 days in total against 16 days of actual sickness absence.
25. During this period the respondent had referred the claimant to Occupational Health, and in a report dated 13 January 2017 it was noted that the claimant had recurrent bouts of cellulitis around the injection site for her treatment of diabetes. It also noted that the claimant's GP prescribed appropriate medication to treat her cellulitis and had increased her antidepressant medication. Mrs Kilkelly formed the view that the cellulitis was linked to the claimant's diabetes and therefore this absence would have to be covered by the existing DETP for diabetes. She did not consider it appropriate to extend the existing DETP by adding a separate additional trigger point for cellulitis. The claimant already benefited from the existing additional 11 day DETP for diabetes and vertigo.
26. Following another formal attendance review meeting Mrs Kilkelly decided to issue the claimant with a final written warning. This warning was dated 23 February 2017 and was confirmed in a letter dated 1 March 2017. Mrs Kilkelly reviewed the claimant's sickness record, the Occupational Health reports, and had also telephoned an OH nurse for advice, and recorded that the previous three absences by reason of cellulitis (one day in November 2013, four days in October 2015, and 14 days in January 2017) were in all probability linked to the diabetes. She stated: "This is the reason why I am not putting in place an additional DETP for cellulitis. You currently have a DEPT of six days for your diabetes." She noted in her letter that the seven day standard trigger point and the 11 day DETP was already "fairly excessive" and that the business could not support extending the trigger point further.
27. The claimant submitted a detailed and lengthy appeal against that final written warning. At the appeal hearing on 31 March 2017 the two main points were summarised as follows: "(i) The current DETP should be increased to reflect all of the claimant's conditions and to take into account her recent absence and the cellulitis; and (ii) Consideration should be given to the fact that although DETPs are in place in respect of the claimant's disabilities, the actual DETP still puts her at a substantial disadvantage when compared to able-bodied colleagues, as the DETP does not reflect the number of previous absences for the conditions".
28. The respondent rejected the claimant's appeal, not least on the basis that the existing DETP in place (of an additional 11 days per year) was 137.5% of the standard trigger point and very much at the upper limit of what could be regarded as reasonable. Whether the cellulitis was linked to the diabetes or not was considered to be immaterial when considering the number of days of DETP, because the claimant already had a reasonable adjustment in place to her normal trigger point in relation to her disabilities. That decision was communicated to the claimant by letter dated 26 April 2017.
29. The claimant then decided to issue these proceedings. She approached ACAS under the Early Conciliation provisions and notified ACAS on 7 June 2017. ACAS issued the Early Conciliation Certificate on 29 June 2017. These proceedings were issued on 14 August 2017.
30. Having established the above facts, we now apply the law.
31. This is a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from a disability, and failure by the respondent to comply with its duty to make adjustments.
32. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-

term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person. In addition, paragraph 6(1) of Part 1 Schedule 1 EqA provides that Cancer, HIV infection and multiple sclerosis are each a disability.

33. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This 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.
34. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
35. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
36. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
37. We have considered the cases of Environment Agency v Rowan [2008] IRLR 20 EAT; Archibald v Fife Council [2004] IRLR 651 HL; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265; Kingston-upon-Hull City Council v Matuszowicz [2009] EWCA Civ 22, Pnaiser v NHS England [2016] IRLR 170 EAT; Kapenova v Department of Health [2014] ICR 884; Bilka-Kaufhaus GmbH v Weber von Hartz [1987] ICR 110 ECJ; Homer v West Yorkshire Police [2012] IRLR 601 SC; Hardy & Hansons plc v Lax [2005] IRLR 726 CA; R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293; Cross v British Airways plc [2005] IRLR 423 EAT; Redcar and Cleveland Borough Council v Bainbridge [2007] IRLR 91; Hardy & Hansons plc v Lax [2005] IRLR 726 CA; O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145; Robertson v Bexley Community Service [2003] IRLR 434 CA; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
38. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
39. We have not heard any evidence as to the extent of the claimant's illnesses and impairments, but this is because (following earlier case management directions) the respondent has seen the relevant medical evidence and Occupational Health reports and accepts that for the purposes of these proceedings at all material times the claimant was

a disabled person within the meaning of the EqA by reason of five disabilities. These are type 2 diabetes; vertigo; depression/anxiety; fibromyalgia; and cellulitis. We therefore find that the claimant was a disabled person at all material times by reason of each of these impairments.

40. The claimant was assisted throughout these proceedings by her friend and representative Dr Davis who has made a number of assertions and representations on her behalf. These have not always directly addressed the necessary legal tests to be applied in respect of the claims to be determined by this tribunal, namely those under section 15 EqA in respect of discrimination arising from disability, and under sections 20 and 21 EqA for failure to make reasonable adjustments. Nonetheless we have set them out and included our considerations on these points, and have then set out our deliberations with regard to the relevant legal tests below.
41. With regard to the out of time points generally, the claimant asserts that there was a continuing act of discrimination up to and including the final appeal decision, and relies on the decision of Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT 034216/LA. We deal with the time points below, because we consider the test to be different for each of the two claims.
42. During his closing submissions Dr Davis referred us to some statistics. These were not drawn to our attention at any stage during the evidence in these claims and we make no findings of fact in this respect, not least because the respondent did not have the opportunity to challenge or discuss these statistics.
43. In the first place, statistics have been produced from the Labour Force Survey which compares sickness absence rates, namely the percentage of working hours which are lost because of sickness absence for employees. A long-term health condition is defined as one which lasts for 12 months or longer. The latest statistic is for 2017 which shows that 1.2% of working hours are lost for those who do not have a long-term health condition, compared with 3.9% of working hours which are lost for those that do have a long-term health condition. In other words, the percentage of days lost because of sickness is slightly more than three times higher for someone with a long-term health condition, as compared with someone who does not have such a condition. Dr Davis also produced statistics which are said to indicate that the respondent's Disabled Employees' Trigger Points generally allowed are lower than a figure which should reflect this first statistic.
44. As we understand it, it is therefore argued on behalf of the claimant that where the normal trigger point is eight days, then an allowance of at least three times this for DETPs should be made for an employee such as the claimant with a number of long-term health conditions, failing which the claimant will suffer some form of disadvantage as compared to an employee without a long-term health condition. In addition it is pointed out on behalf of the claimant that the claimant will also choose to use some of her annual leave when ill to avoid further sickness days which would then count against the DETPs, and the respondent is a very large public sector organisation which should be able to absorb her absences, particularly as a substantial part of her duties are as a trade union representative and the absences therefore do not affect the respondent's business efficiency to the same degree.
45. This line of argument is one of the constituent elements of the claimant's complaints about the first written warning on 11 October 2016, and the final written warning on 23 February 2017, which are addressed below, in the context of the two statutory claims to be determined by this tribunal.
46. We deal first with the claim relating to reasonable adjustments.
47. Applying Environment Agency v Rowan, the tribunal must identify the provision criterion or practice (PCP) applied by the employer; the identity of non-disabled comparators where appropriate; and the substantial disadvantage suffered by the claimant; before considering the extent to which any adjustment is reasonable.
48. In this case there is a PCP operated by the respondent, namely the Attendance Management Procedures which is a policy which requires an employee to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanction. In addition, we find that the claimant was placed at a substantial disadvantage in

comparison with someone who did not have a disability, because a person such as the claimant with a number of disabilities will require higher, more regular or more frequent periods of absence and is therefore at greater risk of disciplinary sanction.

49. We find therefore that this engages the statutory duty and the respondent is required to make such adjustments to the policy as are reasonable.
50. With regard to the first written warning, the claimant's complaint centres around the reconsideration of the earlier 15 day absence which had initially been excluded from the trigger point calculations, but subsequently reconsidered and included, with the result that the first written warning was then triggered. The change of medication had given rise to a urinary tract infection and a chest infection and the claimant argued that there was no conclusive link between these infections and the change of the diabetes medication. As we understand the claimant's argument, it was not related to her diabetes, and should not therefore have been reconsidered and included just because there was another separate day of diabetes-related absence.
51. The respondent's position was that it had reserved the right to reconsider the 15 day period of absence in the event of further absence, either because of the disability of diabetes, or any absence related to it, as allowed by the Attendance Management Procedures, and in any event given that the respondent was therefore entitled to reconsider the 15 day period of absence, the trigger points were exceeded whether the absence was disability-related or not.
52. Given that we have found that the statutory duty to make adjustments is engaged, the correct legal question to be answered is the extent to which the respondent has or has not failed to make a reasonable adjustment. At the time of issuing the first written warning, the respondent had already made an adjustment to accommodate the claimant's disabilities, by allowing 11 days DETP (over and above the seven days trigger point for non-disability-related absences). There appears therefore to be two questions which arise: first, should the respondent have made an adjustment to exclude the 15 day absence and not reintroduced it into the calculations, and secondly (if not) whether the DETP should have been extended.
53. We find in the first place that it was reasonable for the respondent to operate Attendance Management Procedures, in order to monitor and control sickness absence amongst its employees which would otherwise affect the efficiency of its operations. Under the relevant policy the respondent exercised a discretion initially to exclude 15 days absence, but made clear that it would not continue to do so if there were other instances of absence subsequently related to it, which there was. In our judgment this was a reasonable step in continuing to monitor and address the claimant's extended sickness absence. Given that the claimant already had reasonable adjustments in place generally with regard to her workplace (for instance her agreed reduced work schedule), and also had the benefit of a specific adjustment of extended DETPs to accommodate her disability, we cannot conclude that it was unreasonable for the respondent to include the disputed 15 day period of absence.
54. Similarly, given the adjustments already in place, we do not find that it was necessary or reasonable for the respondent to have to extend the 11 days DETP in addition to the seven days normal trigger points. The respondent had an ongoing need for its employees to provide regular and effective service in their role, and extended absence from an employee such as the claimant had an immediate and disadvantageous effect on the remaining members of staff and their efficiency.
55. It is argued on behalf of the claimant that a higher DETP would have prevented the disadvantage which the claimant suffered, and by reference to the statistics, on average someone with a long-term health condition would have three times the level of sickness absences compared with someone without such a condition. However the statistics do not break down the general percentage of sickness absence taken by those with long-term health conditions into those with a disability, or days within their total which are not related to a disability. To allow three times the sickness absence on average would be 21 days total absence rather than the claimant's normal trigger point of seven, and the claimant

was already afforded a total of 18 days. The extra three days would not have rescued the claimant from breach of trigger points.

56. In any event the claimant has not identified (in the context of her extended sickness absence resulting from a number of disabilities) what she says the higher DETP would be as being necessary to prevent the disadvantage, so we cannot say whether any such imaginary figures are reasonable or would have avoided the warnings.
57. With regard to the second and final written warning, the same considerations apply. The nub of the claimant's complaint in this respect, as confirmed in her appeal, is that first the current DETP should have been increased to reflect all of the claimant's conditions and to take into account her recent absence and the cellulitis; and secondly that consideration should be given to the fact that although DETPs are in place in respect of the claimant's disabilities, the actual DETP still puts her at a substantial disadvantage when compared to able-bodied colleagues, as the DETP does not reflect the number of previous absences for the conditions. However, there is only a certain level of absence which can be supported by the respondent's business taking into account the factors such as cost, effective delivery of services, and disruptive effect on colleagues. There must come a point when the respondent cannot agree to any further extension of the DETPs regardless of the number of disabilities which an employee might have, because to allow continual extensions of the DETPs to cover all separate disabilities could give rise to circumstances where that employee might never be fit for work, but would be excluded from sanction by all of the extended DETPs.
58. For all of these reasons we do not find that it would have been reasonable for the respondent to have made a further adjustment to extend the adjustment already in place which allowed 11 days DETP to accommodate extra absence caused by the claimant's disabilities.
59. We therefore dismiss the claimant's claim for reasonable adjustments.
60. In any event we find that the claim in respect of reasonable adjustments is out of time. Applying Kingston-upon-Hull City Council v Matuszowicz, omissions for the purposes of s20 EqA cannot form part of a series of acts. Time begins to run from the point at which the respondent failed to comply with the alleged duty. In the claimant's case this is from the final written warning on 23 February 2017, when the respondent is said to have failed to have made the necessary adjustment to increase the level of DETPs so as to avoid triggering a final written warning. Although there was confirmation of the respondent's approach (and continued failure to make the adjustment to the existing DETP's) when the claimant's appeal was refused, and this was communicated on 26 April 2017, the appeal is effectively confirmation of the omission to make the adjustment which commenced at the time of the final written warning. It cannot be said in this context to be a continuing act for the purposes of section 123(3)(a) EqA.
61. The normal three month time limit therefore starts to run on 23 February 2017, and expired on 22 May 2017. The claimant did not notify ACAS under the Early Conciliation provisions until 7 June 2017, by which stage the claim was out of time. She does not therefore enjoy an extension under the Early Conciliation provisions. These proceedings were then issued on 14 August 2017 nearly three months out of time.
62. We have not heard any evidence or submissions to the effect that it would be just and equitable to extend time. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

63. For these reasons we would have dismissed the claimant's claims in respect of the respondent's alleged failure to make reasonable adjustments in any event as they were presented out of time.
64. We now turn to the claim under s15 EqA for discrimination arising from disability.
65. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) 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.
66. In this case the unfavourable treatment complained of is the application of both the first written warning and the final written warning. We find that that was a disadvantage to the claimant and that the claimant was unfavourably treated by reason of the application of the Attendance Management Procedures which led to these warnings. That was something which had arisen in consequence of the claimant's disabilities, namely her sickness absence for disability related purposes. We find therefore that the claimant suffered less favourable treatment as a result of something arising in consequence of a disability. There was a causal link between the claimant's disability-related sickness absence, and the imposition of the written warnings.
67. The claimant will therefore succeed in this claim unless the respondent's actions are justified which requires the respondent's actions to be a proportionate means of achieving a legitimate aim.
68. We find that this claim was presented in time, because the less favourable treatment arising in consequence of the claimant's disability, namely the final written warning, remained in place to the claimant's disadvantage both before and after the appeal process. That disadvantage remained in place at the time the claimant issued these proceedings.
69. We have been reminded by the respondent that the defence of justification does not fail merely because there is a less discriminatory means of achieving the legitimate aim in question (Kapenova v Department of Health). Budgetary considerations may justify discrimination if they are in combination with other reasons (Cross v British Airways plc and Redcar and Cleveland Borough Council v Bainbridge). It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter (Hardys & Hansons Plc v Lax).
70. We also have in mind the decision of O'Brien v Bolton St Catherine's Academy and the references to Homer and (R) Elias. We find that the respondent did have a legitimate aim, namely the monitoring and management of its employees' sickness absences to seek to provide the most efficient service to its end users and to minimise the impact on fellow employees.
71. The question which therefore arises to be determined is the extent to which the imposition of the first and final written warnings were a proportionate means of achieving that legitimate end.
72. As noted above in our findings of fact, the work which the claimant undertook was high-value and complex, and if the respondent failed to have employees in place with the claimant's level of experience then both the number and accuracy of referrals from junior staff would be affected. If the claimant was unable to undertake the work herself because of sickness absence, then her colleagues would be required to undertake the additional

workload. The shortfall could not be accommodated by way of overtime, which was an exception in the claimant's department. Delays and inaccuracies in the assessments had significant potential adverse effects on vulnerable members of society. Although the claimant disputes that there was any particular time pressure with regard to her work, we have found that at least from May 2016 there was a service level agreement in place which required decisions to be resolved within 24 hours.

73. Against this background the respondent sought to manage the claimant's sickness absence by way of the first written warning, which had reintroduced the earlier 15 day absence, and imposed the final written warning without extending the DETP's for an arguably different disability of cellulitis when diabetes had already been accommodated by a separate DETP. The question arises as to the extent to which this was a proportionate means of achieving the above legitimate aim.
74. We bear in mind the following factors. First, there was only a limited level of absence which could be supported by the respondent's business taking into account factors such as cost, efficiency of delivery of service, and disruptive effect on colleagues. Secondly, the decisions made by the respondent with regard to the claimant bore in mind the claimant's specific circumstances. Mrs Kilkelly assessed the claimant's absences by way of their number, their duration and their causes, and whether they related to existing or new disabilities, and on the basis of medical advice from Occupational Health. She did not merely adopt a blanket policy approach. Mrs Kilkelly adopted an approach which considered the likely level of sickness absence in the future and the frequency and length of absences attributable to each condition over a number of years. She considered the policy in detail, in particular the guidance given under question 9 and the three "gateways" for taking action against disabled employees when the DETP's were exceeded.
75. In conclusion therefore we find that Mrs Kilkelly had regard to all of the relevant factors, and took decisions in a reasonable fashion. We find that decision was justified in the sense that it had full regard to the business needs of the respondent and adopted an approach which was reasonable and necessary for the efficient running of the respondent's business. We therefore find that the actions of the respondent were a proportionate means of achieving their legitimate aim.
76. For these reasons we also dismiss the claimant's claim for discrimination arising from disability under section 15 EqA.
77. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 29; a concise identification of the relevant law is at paragraphs 31 to 38; how that law has been applied to those findings in order to decide the issues is at paragraphs 39 to 76.

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Employment Judge N J Roper
Dated 6 February 2019