EMPLOYMENT TRIBUNALS

Claimant: Mrs A Roche

Respondent: Tameside & Glossop CCG

Heard at: Manchester **On:** 14, 15 and 16 August, and in chambers on 4 October 2019

Before: Employment Judge Franey
Mrs C Linney
Mrs C A Titherington

REPRESENTATION:

Claimant: Mr J Roche (Claimant's Husband)
Respondent: Ms L Carr, Solicitor

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaints of harassment related to disability contrary to section 26 Equality Act 2010 fail and are dismissed.

2. The complaints of direct disability discrimination contrary to section 13 Equality Act 2010 fail and are dismissed.

3. The complaints of indirect disability discrimination contrary to section 19 Equality Act 2010 fail and are dismissed.

4. The complaint of discrimination arising from disability contrary to section 15 Equality Act 2010 in relation to dismissal succeeds

5. The complaints of a breach of the duty to make reasonable adjustments contrary to sections 20 and 21 Equality Act 2010 succeed in relation to the failure to allow the claimant to have flexible start and finish times each day without prior notice. All other complaints of a breach of that duty fail and are dismissed.

6. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

7. Any award in respect of losses resulting from the dismissal will be reduced by 10% on account of an unreasonable failure by the claimant to comply with the ACAS Code of Practice by not pursuing any appeal against dismissal.

8. There was no unreasonable failure by the respondent to comply with the ACAS Code of Practice and no increase in any award is appropriate.

9. There will be no reduction to any award by reason of contributory conduct on the part of the claimant.

REASONS

Introduction

1. Following a period of early conciliation between 6 July and 1 August 2018, the claimant lodged a claim form on 30 August 2018 complaining of unfair dismissal and of disability discrimination. She said that her disabling conditions were ulcerative colitis and a generalised anxiety disorder, and she said that she had been harassed and subjected to disability discrimination in her role as an Individualised Commissioning Administrator ("ICA") for the respondent between August 2017, when she had a short-lived return to work, and April 2018 when she was dismissed on grounds of capability having been off sick for some eight months.

2. By its response form of 9 October 2018 the respondent defended the proceedings. It did not accept that the claimant was a disabled person by reason of either condition, but in any event denied any breach of the Equality Act 2010. It said that there had been a fair dismissal for capability and that any adjustments which were reasonable had already been made.

3. The issues were clarified at a preliminary hearing before Employment Judge Warren on 7 November 2018. A detailed List of Issues formed part of that Case Management Order. Provision was made for an amended response and the case listed for a three day hearing in August 2019.

4. The amended response was provided on 28 November 2018. It did not change the substantive basis of the defence.

Issues

5. At the start of the hearing we discussed the issues with the representatives. There were some amendments to be made to the List of Issues which appeared in the Case Management Order from the preliminary hearing. In particular, the claimant accepted that the principal reason for dismissal related to her capability. The respondent had conceded in March 2019 that the claimant was disabled by reason of both ulcerative colitis and anxiety. There were some time limit issues which needed to be addressed in relation to events prior to 7 April 2018.

6. The result of that discussion was an amended List of Issues which was agreed by the parties prior to submissions. That agreed List of Issues was as follows:

1. Unfair dismissal - section 98(4) Employment Rights Act 1996

1.1. Was the dismissal, which the claimant accepts was for a reason relating to her capability, fair or unfair applying the general test of fairness under section 98(4)?

2. Harassment related to disability - section 26 Equality Act 2010

2.1. Did the respondent engage in unwanted conduct as follows:

2.1.1. Taking files out of the cupboard and piling them behind the claimant on her return to work after sickness absence

2.1.2. Persistent belittling by Amanda Ostell and Samantha Holgate suggesting at a meeting and by later email that the claimant should seek counselling to enable her to deal with her manager's strong personality

2.1.3. Agreeing to flexible working and then later suggesting it needed to be agreed in advance and be dependent on there being a business need

2.1.4. Constantly being required to explain her embarrassing and personal bowel condition and mental health on a weekly basis whilst away from work on sickness absence to different managers

2.1.5. Providing an out of date policy on flexi working, advising the claimant that she did not qualify, and then failing to supply an up to date policy when the claimant highlighted the issue, and not applying up to date legislation when considering her application.

2.1.6. Threatening to dismiss her on ill health grounds?

2.2. If so, was that conduct related to the claimant's protected characteristic of being a disabled person by reason of ulcerative colitis and anxiety?

2.3. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

2.4. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

3. Direct disability discrimination -section 13 Equality Act 2010

3.1. Has the respondent subjected the claimant to the following treatment?

3.1.1. Refusing to deal with an application for flexible working;

3.1.2. Failing to follow a grievance procedure;

3.1.3. Any of the treatment set out above not found to have been harassment.

3.2. If so, has the respondent treated the claimant less favourably than it would have treated a hypothetical comparator in the same material circumstances who was not a disabled person?

3.3. If so, has the claimant proved primary facts from which the Tribunal could properly conclude that the difference in treatment was because of disability?

3.4. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

4. <u>Indirect disability discrimination - section 19 Equality Act 2010</u>

4.1. Did the respondent apply the following provisions, criteria and/or practices ('PCPs"), namely:

4.1.1. Requiring employees in the claimant's role to work strict fixed hours in the office;

4.1.2. Requiring employees in the claimant's role to carry confidential notes home for meetings the following day;

4.1.3. Piling all the outstanding work behind employees in the claimant's role on return from sickness absence;

4.1.4. Requiring employees in the claimant's role to facilitate a weekly CHC meeting on a rota;

4.1.5. Requiring employees in the claimant's role to work for up to four hours at the CHC meeting without a break;

4.1.6. Requiring employees in the claimant's role to listen to conversations in the CHC meeting about serious health conditions?

4.2. Does the application of any such PCP put other people with anxiety and ulcerative colitis at a particular disadvantage when compared with persons who do not have this protected characteristic?

4.3. Did the application of the provision put the claimant at that disadvantage in that?

4.3.1 Working strict hours was stressful as she sometimes had flare ups of her colitis, and had to be late to work;

4.3.2 Carrying confidential patient notes was stressful as she was worried they could be lost or stolen and she would be blamed;

4.3.3 Piling work behind the claimant made her feel harassed;

4.3.4 Attending the CHC caused her stress and anxiety which triggered her bowel condition. If she left to go to the toilet, the meeting would stop and wait for her until she returned. The toilet facilities were not adequate.

4.4. If so, does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

5. Discrimination arising from disability section 15 Equality Act 2010

5.1. Can the respondent show that on 13 April 2018 it did not know and could not reasonably have been expected to have known that the claimant was a disabled person?

5.2. If not, it being conceded by the respondent that dismissal of the claimant was unfavourable treatment because of "something" (her absence record and likely future absence) which arose in consequence of disability, can the respondent show that dismissing the claimant was a proportionate means of achieving a legitimate aim taking account (amongst other things) of the claimant's absence from the attendance review hearings?

6. Reasonable adjustments: section 20 and section 21

6.1. Did the respondent apply any of the following PCPs:

6.1.1. Requiring employees in the claimant's role to work strict fixed hours in the office;

6.1.2. Requiring employees in the claimant's role to carry confidential notes home for meetings the following day;

6.1.3. Making employees in the claimant's role attend CHC meetings as facilitator, in a building with only one single sex/disabled toilet;

6.1.4. Requiring employees in the claimant's role to listen to conversations in the CHC meeting about serious health conditions;

6.1.5. Refusing flexi time facilities without prior authorisation and business need being considered each time;

6.1.6. Failing to consider up to date legislation and policies when an employee applied for flexible working?

6.2. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

6.2.1. Her anxiety was exacerbated; and/or

6.2.2. Her ulcerative colitis was made worse?

6.3. If so, can the respondent show that it did not know, or could not be reasonably expected to know, that the claimant had a disability and was likely to be placed at the disadvantage set out above?

6.4. Did the respondent take such steps as were reasonable to avoid the disadvantage? The adjustments for which the claimant contends were as follows:

6.4.1. To be allowed to work flexibly;

6.4.2. To be taken off the rota for the CHC panel;

6.4.3. To be redeployed nearer to home;

6.4.4. To provide mediation to assist with the line manager's alleged bullying;

6.4.5. To work from home when necessary;

6.4.6. To start the CHC meetings later, and to break in the middle for lunch;

6.4.7. To send electronic files to CHC members or use laptops;

6.4.8. To allow the claimant to hot desk from the CCG building, where the CHC meetings were held;

6.4.9. To hold the CHC meetings in the building where the claimant worked;

6.4.10. Assistance with applying for jobs with partners in the wider organisation;

6.4.11. To allow flexible working without specific authority from the manager on each occasion;

6.4.12. To consider flexible working utilising the most recent legislation and policy.

7. <u>Time Limits – section 123 Equality Act 2010</u>

7.1. In so far as any of the matters for which the claimant seeks a remedy under the Equality Act 2010 occurred more than three months prior to presentation of her claim, allowing for the effect of early conciliation, can the claimant show that it formed part of conduct extending over a period ending on or after 7 April 2018?

7. It was apparent that there would be insufficient time to determine remedy, and in any event the claimant was potentially making a significant claim for loss of pension rights if she succeeded. We agreed that a further remedy hearing would be arranged if appropriate. However, there were some matters which would arise naturally out of the evidence in relation to liability and it was agreed that these would be addressed in this part of the hearing:

(a) Whether any compensation should be reduced on account of contributory fault by the claimant in failing to engage with the attendance management process from January 2018;

(b) Whether there should be any adjustment to compensation on account of an unreasonable failure by either party to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

Evidence

8. The parties had agreed a bundle of documents which ran to over 650 pages. Some documents were inserted into the bundle and given page numbers during the hearing. Any reference to page numbers in these Reasons is a reference to that bundle unless otherwise indicated.

9. The respondent called three witnesses to give evidence. Michelle Walsh was the Deputy Director of Quality and Safeguarding who was involved in the claimant's brief return to work in August 2017. Amanda Ostell was the Individualised Commissioning Team Manager and the claimant's line manager. Gill Gibson was the Director of Quality and Safeguarding who took the decision to dismiss the claimant.

10. The claimant was the only witness on her side.

11. All four witnesses had prepared a witness statement for this hearing. In addition the claimant had prepared a disability witness statement as she had not been informed that the respondent had conceded that she was a disabled person. We read all those statements before the witnesses answered questions.

Relevant Legal Principles – Unfair Dismissal

12. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.

13. The potentially fair reasons in Section 98(2) include a reason which:-

> "**relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".**

14. Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

15. Where the respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in Section 98(4):

> **"…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

16. It has been clear ever since the decision of the Employment Appeal Tribunal ("EAT") in **Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439** that the starting point should be always the wording of Section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or without that band. This approach was endorsed by the Court of Appeal in **Post Office –v- Foley; HSBC Bank Plc –v- Madden [2000] IRLR 827**.

17. The application of this test in cases of dismissal due to ill health and absence was considered by the EAT in **Spencer –v- Paragon Wallpapers Limited [1976] IRLR 373** and in **East Lindsey District Council –v- Daubney [1977] IRLR 181**. The principles emerging from those authorities were reviewed by the Court of Session in November 2013 in **BS v Dundee City Council [2014] IRLR 131** in which at dismissal the employee had been off sick for about 12 months (after 35 years' service) with a sick note for a further four weeks. The Court said this at paragraph 27:

> "**Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."**

18. In **DB Shenker Rail (UK) Limited –v- Doolan [UKEATS/0053/09/BI**). In that case the EAT (Lady Smith presiding) indicated that the three-stage analysis appropriate in cases of misconduct dismissals (which is derived from **British Home Stores Limited –v- Burchell [1978] IRLR 379**) can be applicable in these cases.

Relevant Legal Principles – Disability Discrimination

19. The complaints of disability discrimination were brought under the Equality Act 2010. Section 39(2)(c) and (d) prohibit discrimination against an employee by dismissing her or subjecting her to a detriment. Section 39(5) applies to an employer the duty to make reasonable adjustments.

20. Section 40(1)(a) prohibits harassment of an employee. Conduct which constitutes harassment cannot also constitute a "detriment" (section 212(1)), meaning that it can only be pursued as a harassment complaint.

Burden of Proof

21. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

22. Consequently it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

23. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden or proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Time limits

24. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) 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 …**
>
> **(2) …**
>
> **(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".**

25. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis [2003] IRLR 96.**

Knowledge of Disability

26. A section 15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability. This is also part of the knowledge defence applicable to complaints of failure to make reasonable adjustments.

27. The Code suggests that "Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled

person"" (para 5.14). The Code gives an example, at paragraph 5.15, of where a sudden deterioration in an employee's time-keeping and performance and change in behaviour at work should alert an employer to the possibility that these were connected to a disability and lead the employer to explore with the worker the reason for the changes and whether difficulties are because of something arising in consequence of a disability, in this example, depression.

28. Further, paragraph 6.19 of the Code says:

> **"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 upon 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.**
>
> **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 enquiries 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."**

29. As to the extent of an employer's enquiries into whether an employee is disabled under the EQA, see **Gallop v Newport City Council [2014] IRLR 211**. An unquestioning reliance on Occupational Health advice may not be sufficient to enable the employer to rely on the knowledge defence.

30. Knowledge on the part of a person employed by the respondent is likely to be imputed to the respondent. It will either be actual knowledge, or knowledge which ought reasonably to have been transmitted to the appropriate person. If it is an independent service provider, however, paragraph 6.22 of the Code suggests that information or knowledge will not be imputed to the employer. Each case will turn on its own facts.

Direct Disability Discrimination

31. Direct discrimination is defined in section 13(1) as follows:

> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

32. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

> **"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."**

33. Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person's abilities. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability. Further, as the Employment Appeal Tribunal and appellate courts have emphasised

in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

Discrimination arising from disability

34. Section 15 of the Act reads as follows:-

> **"(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".**

35. Save for the knowledge defence, the issue in this case was justification under section 15(1)(b). That is considered further below. The Equality and Human Rights Commission Code of Practice in paragraph 5.2.1 suggests that if a respondent has failed to make a reasonable adjustment it will be very difficult for it to show that its unfavourable treatment of the claimant is justified.

Indirect Discrimination

36. Indirect discrimination is prohibited by section 19 Equality Act 2010 which reads as follows:

> **"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic;**
>
> **(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;**
>
> **(c) It puts, or would put, B at that disadvantage; and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim."**

37. Disability is one of the protected characteristics which is relevant to section 19. Section 19(2)(d) gives the employer a justification defence equivalent to section 15(1)(b).

Justification

38. Considering the justification defence requires an objective assessment which the Tribunal must make for itself following a critical evaluation of the position. It is not simply a question of asking whether the employer's actions fell within the band of reasonable responses.

39. The Code addresses this both in relation to section 15 and to section 19.

40. In paragraph 4.27 the Code considers the phrase "a proportionate means of achieving a legitimate aim" and suggests that the question should be approached in two stages:-

* is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

* if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

41. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts (see **Hampson v Department of Education and Science [1989] ICR 179**). Paragraph 4.31 includes the following:-

> **"although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."**

42. In **Hardys & Hansons plc v Lax [2005] ICR 1565** (Court of Appeal) Pill LJ said in paragraph 32:

> **"…I accept that the word "necessary" …. is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, 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."**

Reasonable Adjustments

43. The duty to make reasonable adjustments appears in Section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(3):-

> **"the first requirement is a requirement, 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, to take such steps as it is reasonable to have to take to avoid the disadvantage".**

The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **Environment Agency –v- Rowan [2008] ICR 218** and reinforced in **The Royal Bank of Scotland –v- Ashton [2011] ICR 632.**

44. The phrase "provision, criterion or practice" ("PCP") is broadly interpreted. The Code says (paragraph 6.10):

> **"[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."**

45. In **Lamb v Business Academy Bexley EAT 0226/15** the EAT commented that the term "PCP" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability". It is also generally unhelpful to distinguish between "provisions", "criteria" and "practices": **Harrod v Chief Constable of West Midlands Police [2017] ICR 869**.

46. Nevertheless, there are some limits to what can constitute a PCP. In particular there has to be an element of repetition, actual or potential. A genuine one-off decision which was not the application of policy is unlikely to be a "practice": **Nottingham City Transport Ltd v Harvey [2013] All ER(D) 267 (Feb), EAT**. The one-off application of a flawed disciplinary process to the claimant was not a PCP. There was no evidence to show that the employer routinely conducted its disciplinary procedures in that way.

47. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being "more than minor or trivial". It must also be a disadvantage which is linked to the disability. That is the purpose of the comparison required by section 20.

48. Even if a PCP causes disadvantage, the duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20).

49. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is addressed by the Code at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes 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 and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

50. As for time limits in reasonable adjustment cases, a failure to make a reasonable adjustment is generally discrimination by omission. Section 123(3)(b) EQA provides that a failure to do something is to be treated as occurring when the person in question decided on it. If an employer positively decides not to make a reasonable adjustment time will run from that point: **Humphries v Chevler Packaging Ltd EAT 0224/06**.

51. The position was considered by the Court of Appeal in **Hull City Council v Matuszowicz [2009] ICR 1170**. There was no clear moment in time where the employer consciously decided not to make the adjustment in question. This engaged section 123(4) which specifies when a person is deemed to have decided to fail to do something. There are two alternatives:

(a) when the person does an act inconsistent with making the adjustment; or

(b) at the end of the period in which the person might reasonably have been expected to have made the adjustment.

52. However, there have been cases where the obligation to make an adjustment was found to be a "continuing state of affairs" meaning that the duty was breached every day – see for example **Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil UKEAT/0097/13.**

Harassment

53. The definition of harassment appears in section 26, for which disability is a relevant protected characteristic, and so far as material reads as follows:

"(1) A person (A) harasses another (B) if -

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

Relevant Findings of Fact

54. This section of our Reasons sets out the broad chronology of events based on facts which were not in dispute or those where any dispute was easily resolved. Any disputes of importance to the conclusions will be addressed in the Discussion and Conclusions section below.

Background

55. The respondent is an NHS Clinical Commissioning Group responsible for commissioning clinical services for patients. It operates from a number of different locations and shares premises and managers with Tameside Metropolitan Borough Council ("TMBC").

56. The claimant was employed in administrative roles from November 2005. During 2015 she was working in a role as a Patient Transport Booking Adviser. There were two people in this role, and each of them occasionally helped out another team based in the same office, the Individualised Commissioning Team. That was managed by Mrs Ostell.

57. Between October 2014 and March 2015 the claimant had six months off work with stress due to some very difficult family circumstances. In August 2015 (page 146) the claimant had been diagnosed with ulcerative colitis. She was prescribed medication. One effect of the condition was the need to use the toilet more frequently, and sometimes at very short notice. However, the claimant was able to manage this and it did not impact significantly upon her work. Her successful return to work in 2015 was acknowledged in a performance and development review from September 2015 (page 57). She was complimented on having undertaken her role with great professionalism.

2016 – ICA Role

58. The diagnosis of ulcerative colitis was recorded on a return to work interview form in January 2016 (pages 607-608). The claimant had been off for a few days due to stress/anxiety but declined counselling because the issues were not work related.

59. In October 2016 the claimant expressed interest in moving to the Individualised Commissioning Team as an ICA. It had become apparent that there was not enough work for two Patient Transport Advisers. Her email of 25 October 2016 appeared at pages 57a-57b. She summarised her administrative experience, and made clear that she was used to dealing with calls of a distressing or upsetting nature. She was aware from occasionally helping out the Individualised Commissioning Team that sometimes they had to consider medical records which showed distressing or upsetting conditions.

60. Although this was not in her witness statement, the claimant told us in her oral evidence that prior to taking up the role she had an informal discussion with Mrs Ostell and another manager, Ms Wilkinson, about the role and that she informed Mrs Ostell at that meeting of the diagnosis of ulcerative colitis. Unfortunately, this point was not put to Mrs Ostell when she gave her evidence, and her position in her

witness statement and oral evidence remained that she did not know of the diagnosis prior to the claimant going on long-term sick leave in August 2017. We will return to that issue in our conclusions on the question of knowledge.

61. The claimant started in her new role as an ICA on 7 November 2016. Her statement of terms and conditions appeared at pages 320-328.

62. The role was primarily office based, taking telephone calls from patients and families and dealing with administrative matters. Every week, however, one of the two ICAs had to attend a Continuing Healthcare Panel meeting ("CHC panel"). This was a multidisciplinary meeting where decisions were made as to what services would be commissioned for a series of patients. The role of the ICA was to ensure the meeting ran smoothly, including completing the forms which were a formal record of the meeting, and escorting a series of nurses and other professionals in and out of the meeting as each patient's case was discussed in turn.

63. The claimant and her colleague took it in turns to support the CHC panel, meaning that the claimant had do it once every fortnight. She encountered some difficulties in the period from February 2017 onwards when the meetings took place at Tameside General Hospital.

64. Firstly, the meetings would last for several hours from 9.00am and it was difficult for her to take anything more than a quick toilet break. There were toilets on each floor of the venue but they were frequently in use.

65. Secondly, the claimant had to bring the patient records to the meeting. They would be collated the previous day with a 1.00pm deadline for healthcare professionals to submit their information. The office had moved in February 2017 so that from the claimant's house her office and Tameside General were in different directions. Because she worked fixed hours from 9.00am to 5.00pm Monday-Friday, she could not go into the office first for 9.00am and then take the records to Tameside General. Instead she would take the patient records home on the eve of the CHC panel, and then go directly to Tameside General the following morning. This caused her some concern about the security of the patient records whilst they were in her care.

66. Thirdly, as part of compiling the paperwork for the meeting the claimant had to read some distressing accounts of medical problems experienced by others, particularly children, and she would find these particularly upsetting given her own family experiences. Her symptoms of anxiety on occasion would be triggered by these records.

67. There was, however, no record of any complaints or representations made by the claimant about these problems in the period prior to August 2017.

August 2017

68. In early August 2017 the claimant had eight working days off sick on a self-certificated basis. She notified Mrs Ostell by text on 2 August that she was having a flare-up, meaning of her ulcerative colitis.

69. The claimant returned to work on 14 August. Mrs Ostell was absent and she met by Michelle Walsh, Mrs Ostell's deputy. The claimant had spoken to Ms Walsh during her absence. It was common ground that Ms Walsh took a significant number of files off the shelf behind the claimant and laid them out on the desks. Ms Walsh maintained that this was a routine matter which she did from time to time to help with prioritisation of files where there was a backlog, and that that it was intended to be helpful to the claimant. The claimant alleged that it was an act of disability related harassment. She alleged that Ms Walsh greeted her in a curt manner, saying only "You better now?" before getting the files out onto the desk in silence. She alleged that Ms Walsh did this in order to draw attention to the fact that she had been off work and that a backlog of work had resulted. We will return to this issue in our conclusions.

70. Although she felt embarrassed and humiliated, the claimant continued to work for the next day or so, but the symptoms of ulcerative colitis were severe. Additional medication was required during a flare-up, and the need to use the toilet during the night disrupted her sleep and left her fatigued. The toilet visits would not be short and could take up to 25 minutes. The claimant was anxious that even though she went to the toilet several times before leaving for work, she might not be able to get to a toilet if she needed to go again urgently before she got to work. At the office there were two toilets on the second floor for all staff and visitors, and the cubicle door opened directly onto the reception area. She was concerned about her privacy and dignity if she had to make frequent lengthy toilet trips.

71. As a consequence of these concerns the claimant went home early on 16 August 2017 and began a period of sick leave which was to last until her dismissal. She was certified unfit for work by a fit note of 22 August 2017 on account of a "stress related problem", and remained certified unfit on that basis by a series of monthly fit notes (page 637).

72. A referral to Occupational Health ("OH") was made at the end of August 2017. It had not been received by the time of a sickness absence management meeting on 15 September 2017 (page 68).

<u>October 2017</u>

73. The OH report was dated 2 October 2017. It was based on a telephone consultation with an OH adviser. The report appeared at pages 560-562. It confirmed that the claimant was unfit for work due to ongoing reported symptoms of emotional ill health and no definite return to work date could be identified. There had been a referral for Cognitive Behavioural Therapy ("CBT"), and the clinical opinion was that the claimant had symptoms of anxiety and stress. The sources of pressure were work related. It was unlikely that the claimant was covered by the Equality Act 2010 because with counselling and CBT a good recovery was expected.

74. The report also made a brief mention of ulcerative colitis as follows:

> **"With regards to underlying reason for attendance, Mrs Roche is under the care of a specialist for ulcerative colitis and has been prescribed medication, however currently her condition is stable. Mrs Roche informs me she has had one period of sickness absence relating to her condition"**

75. The OH advice recommended a workplace stress risk assessment on return to work, and arrangements for a phased return.

76. There was another sickness absence management meeting on 25 October 2017 (page 74). The OH report was discussed. It was agreed that a return to work was not imminent. The claimant required a higher level of CBT so that had not yet properly begun. It was agreed that there would be another meeting in four weeks to discuss barriers to a return to work.

November 2017

77. A third sickness absence management meeting took place on 28 November 2017. It was again conducted by Mrs Ostell, together with Samantha Holgate of Human Resources ("HR"). No notes were kept but an outcome letter was issued on 4 December 2017 at pages 86-87. According to the letter, the claimant explained that following her return to work on 14 August 2017 she felt overwhelmed at the pace and volume of work. She had anxieties around processing cases where clients were young or had medical conditions with resonated with her because of family life. The claimant thought it was unlikely she would be back at work in December based on how she felt at the time. There was discussion of what could be done to support a return to work. The letter said that:

> **"[Samantha Holgate] was clear that you are integral to this process as there is only you who knows how you feel so suggestions around reasonable adjustments, redeployment etc needs to come directly from you."**

78. The letter said that any suggestions for reasonable adjustments would be discussed at the next meeting and then consideration would be given to them. The next meeting was arranged for 21 December 2017.

Meeting 21 December 2017

79. The same three people were present at that meeting on 21 December 2017. No formal note was kept although there were brief handwritten notes at page 91. The handwritten notes recorded a discussion about reasonable adjustments. The note attributed to the claimant the following:

> **"Flexible on time, start and finish times, day to day I don't know. Anxious about the work coming in if that comes in late. When I am having counselling will I be able to get the time for it? Face to face six sessions. How would redeployment work?"**

80. The note recorded Ms Holgate saying that she held her hands up and had not read the policy. There was then a note of a brief exchange in which flexitime was mentioned.

81. The claimant maintained that she had explained in this meeting that she needed flexibility day to day so that if she could not be at work on time because of a need to use the toilet that would not be a problem, and equally that she could leave early at the end of the day if necessary. She believed that it was agreed at the meeting that she could have this flexibility. On that basis she anticipated being able to return to work on 15 January 2018.

Letter 27 December 2017

82. The impression of Mrs Ostell about that point was quite different. Her perception of how the meeting went was set out in a detailed outcome letter dated 27 December 2017 (pages 96-98), which the claimant received on 6 January 2018. The letter recorded that when asked what adjustments she needed the claimant responded as follows:

> **"Phased return**
>
> **Additional training – back to basics**
>
> **Support around the weekly panel meetings**
>
> **To be able to work flexibly – i.e. stay beyond your normal working day if tasks need to be completed and take the time back at a time of your choice."**

83. The letter went on to say that the claimant had not been able to articulate effectively what in her current role caused anxiety. There was a discussion about aspects of the job that were found challenging. The letter recorded that the claimant said that although she struggled to read, hear or learn about medical conditions, recent life experiences had changed her outlook and it may be that that would be less significant and no longer an issue. Facilitating and taking minutes at the CHC panel meetings was difficult because documentation would arrive in the office late. Unfortunately it seemed there was little that could be done about that.

84. There was also a discussion about varying management styles. It was about what happened when Mrs Ostell was on leave. Implicitly it was about the approach of her deputy, Ms Walsh. The letter recorded:

> **"Again we talked about this issue at length and when broken down it was apparent that there is a difference in personalities and styles of management however you agreed that the work and accountability requested of you is not in any way unreasonable. We considered that your anxiety could be due in part to your interpretation of requests coming from a strong, driven personality rather than a criticism of your pace or abilities and you acknowledged that this could be the case. Samantha asked if you could consider discussing this matter with your counsellor when you resume your CBT sessions and work on developing some coping strategies and you agreed this would be beneficial."**

85. Pausing there, this response formed the basis of the second allegation of harassment in these proceedings and we will return to it in our conclusions.

86. In relation to redeployment, the letter said the following:

> **"The other matter which you were asked to consider at our last meeting was redeployment. We briefly discussed this again at the meeting but you were clear that this was not something you wanted to pursue at this time. Samantha suggested that it might be useful to look at NHS jobs and Greater Jobs Tameside websites to see what opportunities are currently available as you have the choice to change jobs independently at any time."**

87. In relation to returning to work, a phased return of two weeks which could be extended by a further two weeks was agreed. Basic update training would be undertaken in that period.

88. In relation to flexible working the letter said the following:

> **"Following your initial four weeks you will have the ability to work in a flexible manner as requested in line with the needs of the business. Please note that the accruing of flexitime is subject to there being a business need for the member of staff to be working beyond their contracted hours and the taking back of accrued hours has to be in line with the team's business requirements."**

89. The letter ended by saying that there would be a meeting on 8 January to discuss arrangements for a return on 15 January 2018.

6 – 17 January 2018

90. The claimant received this letter badly. The arrangements regarding flexible working were not what she thought had been agreed at the meeting on 21 December. The requirement for any flexibility to meet business needs did not appear workable when she needed to come into work late or leave early on days when her colitis was particularly bad. She interpreted this letter as going back on what had been agreed.

91. Having received the letter on Saturday 6 January, the claimant sent an email on Monday 8 January (page 99) saying that she could not attend the meeting as she was unwell. Her email went on as follows:

> **"Thank you for the letter I received on 6 January 2018, which mentions being able to work flexibly. It would be helpful to me to receive clarification as to how the flexible working you refer to in the letter would work and if you can please send a copy of the CCG flexitime policy."**

92. The claimant did not make clear her view that the letter did not reflect what had been agreed at the meeting. Nor did she feel able to attend the meeting on 8 January to make this point and seek clarity.

93. Having received the email Mrs Ostell tried to ring the claimant but without success. She asked for a call the following day to understand if the claimant was going to return to work on 15 January.

94. On 9 January the claimant sent an email just after 1.00pm (page 102) saying that she would update Mrs Ostell after seeing her GP and counsellor about the letter. The response 15 minutes later (page 102) said:

> **"As you are aware, I have just tried to call you on your mobile. I need to speak to you regarding your return to work date and we could also discuss any concerns you have.**
>
> **As per the attendance management policy email is not an acceptable method of contact and if we could have a conversation I may be able to answer any queries you have.**
>
> **I'd be grateful if you could give me a call asap."**

95. Not having heard from the claimant, on 11 January Mrs Ostell sent a letter by email (pages 108-109) which formally requested that the claimant ring the office to confirm her intentions about returning to work on 15 January. The letter reiterated that communication by email was not acceptable under the attendance management policy. There was a brief call later that day but the claimant was too upset to discuss

matters properly. Instead she sent an email at lunchtime (page 107) saying that she found it difficult to verbally discuss her sickness, and that the attendance management policy seemed to indicate that the employee and manager can decide on the form of communication so she would prefer email. She confirmed that she would not be returning to work on 15 January as she was still unwell. She hoped to return in the near future. Her email ended as follows:

> **"I believe it may ease my anxiety if we could clarify the terms of the adjustments we discussed on our meeting on 21 December. Your letter mentions being able to work flexibly, however, my request is specifically for flexitime. If this is agreeable could you please send a copy of the policy so I can understand the terms?"**

96. The reference to the attendance management policy made by the claimant was to the policy which was inserted into our bundle as pages 374a-374jj. It was the policy in force in 2017. Clause 1.5 on page 374i said that the employee manager should decide on the form that contact would take. However, that policy had been superseded in January 2018 by a new policy which was a joint policy with TMBC. That policy appeared at pages 355-374. The claimant was not yet aware that there was a new policy.

97. On 12 January 2018 the claimant was certified unfit for work again by her doctor (page 643).

Letter 18 January 2018

98. Mrs Ostell was working with Ms Holgate on a reply to the claimant. A draft letter was circulated. It made provision for an Attendance Review Hearing ("ARH") under the new policy, which was a hearing at which dismissal could be considered.

99. The letter was issued to the claimant on 18 January 2018 (pages 113-114) with a covering email at page 110. It also attached the new sickness absence policy (pages 355-374) and the flexible working policy (pages 341-354). This was the first response to the queries the claimant had raised by email on 8 and 11 January 2018 about the flexitime policy.

100. The letter explained that the new policy came into effect on 1 January 2018. The suggestion was made for telephone contact on a weekly basis with Mrs Ostell.

101. In response to the claimant's request for clarity about the adjustments, the following appeared in the letter:

> **"I apologise if I have misunderstood your request at our meeting on 21 December 2017. I understood your request to be able to work flexibly for an interim period following your return to work. To which I agreed in order to help facilitate an early return to work. The example that you gave was to be able to work beyond 5.00pm should you have a deadline to meet e.g. if panel documents arrive late or you have a task to finish. The option to work flexibly is at the discretion of the Head of Service and purely around the needs of the Service. Any time accrued should be taken back at the earliest opportunity and not banked.**
>
> **Flexitime is an option which is by application. However, I must draw your attention to section 2 – 2.3 – 2.5 outlining that you have a right to apply for flexibly working but there is no guarantee a change will be made. I have enclosed a copy of the policy for your reference as requested."**

102. Pausing there, three points were noteworthy about this response. Firstly, the flexibility now appeared to be restricted to the return to work period rather than after that initial phase. Secondly, it remained the case that management understood the flexibility to be needed in order to complete work, not as a consequence of the ulcerative colitis. Thirdly, the policy which was attached was out of date because in paragraph 2.4 on page 344 it said the statutory right to apply for flexible working only applied to employees with parental responsibility for a child aged 16 and under. That restriction had been removed from the legislation in 2014. However, it is right to note that the policy was not restricted to the statutory right: paragraph 2.3 made it clear that any employee with 26 weeks of continuous employment had the right to apply for a change in contracted hours of work. The covering letter also made it clear that the claimant could make an application.

103. Mrs Ostell's letter went on to say that as the claimant had not returned to work the matter would be referred to an ARH. It said:

> **"The purpose of an Attendance Review Hearing is to review your sickness absence from work and the impact on service delivery, consider support offered and/or implemented, review available medical information, determine what further support could be offered to you, and ultimately determine whether the level of your absence/s can be sustained for the future. Your future employment would be discussed at such a hearing, including discussions as to whether to terminate your employment due to your incapacity to carry out your contractual obligations as Individualised Commissioning Team Administrator because of your ill health…"**

104. The claimant was very worried by the reference to the possibility of termination. She formed the view that she would be dismissed at any such hearing. She was worried about the impact on her mental health if she attended a hearing and was told that she was being sacked. She was very mistrustful because of what she saw as a complete change in position about flexible working between the meeting on 21 December and the letter of 27 December 2017. She did not regard the letter of 18 January 2018 as making matters clear as it still missed the point.

ARH Invitation 25 January 2018

105. The formal invitation to the Absence Review Hearing was issued on 25 January 2018 (pages 137-138). The letter came from Mrs Gibson who was going to chair the hearing. Mrs Ostell would be present as well. The purpose of the hearing was reiterated in the third and fourth paragraphs, but the reference in the letter sent on 18 January 2018 to discussing what further support could be offered was omitted. The claimant had the right to submit documentation and to be accompanied by her union representative.

106. A statement of management's position for that meeting was prepared by Mrs Ostell with HR input. It appeared at pages 173-179. It went through the history in some detail. It said that the claimant had been clear that she did not wish to consider redeployment at the meeting in December. It said that her role was vital and the service and her colleagues had been impacted significantly during her absence due to increased workload. This reflected the fact that a colleague had had to cover the role of the claimant and the attendance at CHC panel meetings once a fortnight. This had taken that colleague away from other duties.

Claimant's Statement 2 February 2018

107. On 2 February 2018 the claimant sent a statement of her position for the ARH. It appeared at pages 139-144. She attached the report from August 2015 confirming her diagnosis of ulcerative colitis, which also made reference to chronic diarrhoea. She raised some issues with stress resulting from training when she had changed roles, but then explained how attendance at the CHC panel meetings caused her stress. This resulted from discussion of extreme cases, and her concern that she would need to leave the meeting and for the meeting to stop while she went to the toilet. There were problems in the submission of paperwork late for that meeting, and the concern about taking the panel paperwork home with her overnight for the panel meeting the next day.

108. The statement went on to provide a summary of the issue about files with Ms Walsh in August 2017, and then gave a history of the attendance meetings. She said that on 21 December she had explained the principle of flexitime. Mrs Ostell had not seemed familiar with it but eventually that point was accepted. She said:

> **"I was disappointed that my requests for adjustments could not be agreed at the meeting and I was worried about returning to my duties at panel. However, I felt that with flexitime I could stay at work until the panel paperwork packs were finished, perhaps leave the packs at the office overnight and start earlier the next day to collect the paperwork before the meeting. This would reduce my stress around the data protection issue and I would feel that I could take the time to make sure that the packs had been prepared properly. I also thought that the time accrued could be taken either at the end of the day or as a day off if needed during the month."**

109. The statement then explained that on receipt of the letter on 6 January she noticed that her requests for flexitime had been redefined as "working flexibly with time off in lieu". She said that any time accrued was to be taken back as soon as possible with prior agreement from a manager, which would not give her any discretion on her start and finish time and would not be an adjustment. She felt it was a fundamental change in what she had requested. She had asked for the flexitime policy as a means to get a mutually acceptable definition of flexitime as a reasonable adjustment. She said that she had checked the statutory provisions and that they had changed so the policy provided was out of date.

110. Her statement ended with a paragraph ended "Summary" where the claimant said:

> **"I have asked for three simple adjustments for my disabilities, phased return, flexitime and defined support with CHC panel. In the six months I have been off, all I have received in terms of help are emails and letters sent to me which show a pattern of avoiding offering any adjustments, where meeting notes are lacking important facts and adjustments are being offered and then rescinded…This hostile and misleading treatment has escalated my anxiety and stress levels and left me in a position where I do not trust that adjustments will ever willingly be implemented. I am concerned that this behaviour is a deliberate attempt to increase my stress levels and force me to leave the organisation. Furthermore, misinforming me of my statutory right to request flexible working has denied me another option to help me return to work, as has refusal to implement any adjustments. The way that I have been treated is harassment. In addition, the failure to implement adjustments is disability discrimination."**

Alternative Roles

111. On 4 February 2018 Ms Walsh sent an email to fellow managers (page 168) which suggested two possibilities for posts to get the claimant back to work. One was a return to her previous role as a Patient Transport Administrator. Mrs Gibson explained in her oral evidence that in fact it had already been decided that the patient transport posts were going to be outsourced to the North West Ambulance Service. Plans had been afoot for 18 months or so. The post had not been transferred but it was not going to be a post for much longer. The second post was described as "Interceptor". This was a post at a lower band. The email from Ms Walsh said that the post still had a panel meeting although it was easier than the CHC panel. Mrs Gibson said in her email response (page 168) and in oral evidence that she wanted to discuss this further with the claimant.

Grievance 8 February 2018

112. On 8 February 2018 the claimant submitted a grievance by email to Mrs Gibson. Her covering email appeared at page 180. A copy was also sent to Ms Holgate.

113. The grievance procedure appeared at pages 375-391. It required grievances to be submitted using the Notification of Grievance form which formed Appendix C to the procedure. The procedure had a section dealing with overlap with other procedures which read as follows (clause 3.6.1 on page 379):

> **"Commencement of the grievance procedure should not deter the progress of any other procedures. However, in some circumstances, it may be appropriate to temporarily defer another procedure i.e. the disciplinary procedure of the capability procedure in order to address the grievance. Where the grievance is unrelated to any other process, it will be appropriate to deal with both issues concurrently."**

114. The procedure went on to say that within five working days of receipt of the notification form, the officer dealing would write to the employee advising of the date of the grievance hearing, which would take place within the next five working days.

115. The claimant completed the notification form but was unable to detach it from her electronic copy of the grievance procedure. When she submitted her email she attached the whole procedure, not simply Appendix C. The form indicated that she attached a further copy of her "background information for the ARH" (pages 141-144), and an additional document which appeared at pages 181-182.

116. In the additional document she set out the nature of her grievance. She said there had been little consideration for her long-term health conditions. She raised concerns about storing CHC panel documents at her home overnight, and said that she felt her line manager had been aware of her problems with anxiety but did not attempt to help. She said she had been denied her request for flexitime as a reasonable adjustment, and told to ring Mrs Ostell weekly even though she had a fit note to cover the time. She had been sent the application form for flexible working but misinformed about the policy and her right to request it. She said that both anxiety and ulcerative colitis were disabilities and that management were aware of both of them.

117. We accepted the claimant's evidence that her intention in lodging this grievance was to arrange a meeting to discuss it at which the threat of dismissal would not be present. She believed that the lodging of her grievance would cause the capability process to be temporarily deferred as envisaged by clause 3.6.1. She did not feel able to attend the meeting at which she might be dismissed, but a meeting solely to discuss her grievance would not have that threat hanging over it.

118. Unfortunately, the fact that the claimant had completed the pro forma at Appendix C was overlooked, no doubt because it was still attached to the whole policy rather than provided as a separate document. In her email response of 9 February at page 187 Mrs Gibson noted that the appendix form had not been used and it was not clear whether it was at an informal or formal stage. She also pointed out that the grievance was related to matters to be discussed at the forthcoming ARH on 12 February. The documents provided with the grievance would be considered at the ARH.

ARH 12 February 2018

119. The claimant was not well enough to attend the ARH on 12 February. She confirmed that by email in the early hours of the morning (page 189). It went ahead in her absence and was adjourned.

120. The outcome of the ARH was set out in a letter from Mrs Gibson of 27 February 2018 at pages 195-204. It made reference to the pack prepared by management and to the claimant's written documents, including the grievance. Mrs Gibson said it was unfortunate that neither the claimant nor her representative had been present as it would have helped her to have gained a better understanding of the situation from the claimant's perspective.

121. The history of absence and the OH report was summarised together with the medical position as it was understood to be. It was unclear whether the health situation had improved, maintained or worsened during absence.

122. In a section headed “work related concerns” Mrs Gibson referred to some issues about the CHC panel meetings. As a result of the discussion with Mrs Ostell she was able to confirm that the claimant would not have to do more than print off one copy of documents received after the 1.00pm deadline the previous day, and that there was no requirement for her to take any confidential information home. That practice could cease immediately.

123. Further, the concerns about the approach of Ms Walsh had been discussed again and it was noted that the claimant had agreed in 2017 to address coping strategies with her counsellor.

124. The stress indicator tool had still not been completed or returned.

125. The letter then addressed the question of adjustments. It said that in the meeting on 21 December the claimant had requested additional training, support, and the ability to work flexibly by staying beyond the normal working day if tasks needed to be completed. The letter said:

> **"Further, following your return to work you would have the ability to work in a flexible manner as requested, in line with the needs of the business. It was clarified in the letter dated 27 December 2017 that accrual of flexitime is subject to there being a business need for you to be working beyond contracted hours and the taking back of accrued hours has to be in line with the team's business requirements."**

126. The letter went on to address what Mrs Gibson thought was a confusion between flexible working and flexitime. She understood the claimant wanted to explore flexitime which allowed her vary working hours on a more fluid basis. Her letter said:

> **"This is referenced in section 3.6 of the policy and then signposts employees to look at a flexitime scheme for further detail. When I have explored this further, I have identified that there is no current document in existence which details a flexitime scheme and I have concluded that this reference at section 3.6 is an error when the policy was issued in July 2014. I have raised this and asked that this be addressed and amended as soon as possible.**
>
> **Due to the nature of the demands of the role, I can see that there is a need to have an administrator available in the office during the office hours of 8.30am and 5.00pm, Monday to Friday, in order to respond to customer enquiries and to offer administrative support to the wider team. However, after discussions with Mandy, the possibility of implementing a staggered start/finish time on a rota basis during the working day, in agreement with other administrative colleagues, could be facilitated. For example, staggering start times of 8.30am, 9.00am and 9.30am. In practice, this may provide you with the flexibility to start later and finish later on some days, perhaps for example the day before a CHC panel. This would allow you to work flexibly, whilst also meeting the demands of the service.**
>
> **Alternatively, if you are requesting a different working pattern, such as part-time working, compressed hours, job share, etc., you also have the option to apply for this option, if you prefer."**

127. Pausing there, it is noteworthy that this letter did offer a suggestion about staggered start times which was more detailed than what had previously been put on paper. It also envisaged arrangements continuing after the initial return to work period, unlike the letter in mid January. However, from the claimant's perspective the arrangement still missed the point. Having a rota involving a colleague and the claimant starting at different times on different days would not assist with the unpredictable need for time off due to the effects of ulcerative colitis. From the claimant's perspective, this letter took matters no further.

128. The letter went on to record that the claimant had said in December she was not interested in considering an alternative role at that time.

129. It ended by saying that the ARH had been adjourned to 14 March. Some written questions were provided to the claimant for her to answer in person at that meeting, or in writing in advance if she preferred. There were some actions to be taken which included a requirement for the claimant to contact Mrs Ostell by telephone on a weekly basis regarding health updates and recovery progress. The claimant was invited to contact Mrs Gibson or Mrs Ostell if she had any queries.

130. The list of questions appeared at pages 203-204. The claimant completed her answers at pages 205-206. She confirmed her health conditions including ulcerative colitis and anxiety. She provided an update on counselling and other therapies. She

said she would be able to return to work if flexitime was an option and the other issues raised were resolved fully. She confirmed her request was for an option to work flexitime as per usual flexitime rules. She said her anxiety had increased following the correspondence after the meeting in December.

Grievance Letter 27 February 2018

131. On 27 February 2018 Mrs Gibson also wrote to the claimant about the grievance. The letter appeared at pages 193-194. It said that the points raised all related to the management of her attendance and therefore would be dealt with under the attendance management procedure. The letter said that the ARH had been reconvened for 14 March and Mrs Gibson would be pleased if the claimant could attend so that she could explore the situation further. She said that the claimant could lodge a formal grievance using the appropriate form if there was anything with which she remained dissatisfied. Mrs Gibson had still not realised that the claimant had already completed the form. Neither the claimant nor her union representative corrected this misapprehension.

March 2018

132. There was no further contact from the claimant until 12 March when Mrs Ostell attempted to contact her. That resulted in an email from the claimant that evening saying she could not attend the meeting on 14 March (page 212). Her email said that her union representative could attend but only if the meeting was on 16 March. Mrs Ostell responded that evening with an email (page 211) enclosing a letter which appeared at page 213. The letter asked the claimant to call her about the meeting on 14 March, and pointed out that the claimant had not been maintaining contact by telephone on a weekly basis and had not completed the stress risk assessment form. The claimant responded the next day to say she was sorry for the delay and would send the paperwork (page 214).

133. The ARH was postponed to 13 April and a meeting to discuss the risk assessment was arranged for 16 March. An email from Samantha Holgate (page 219) confirmed that she expected the claimant and her union representative to attend that meeting with Mrs Ostell and Ms Holgate. The intention was to use the stress risk assessment tool as a means of generating a discussion about the barriers to a return to work to see what could be done to help the claimant come back.

134. The completed risk assessment form was submitted via the union representative. At just after 3.00pm on 15 March 2018, however, the union representative emailed to say that the claimant was “not well enough to attend the meeting tomorrow”. They were going to wait for the OH appointment.

135. Following a discussion with the union representative Ms Holgate confirmed by email at page 239 that the risk assessment would have to be picked up in the ARH on 13 April. A date for an OH appointment was awaited.

136. On 19 March Mrs Gibson sent to the claimant by email a letter which appeared at pages 249-250. It confirmed receipt of the written answers to the questions and of the stress risk assessment form. Mrs Ostell was on leave and there was no opportunity to meet to discuss the risk assessment prior to the ARH. Mrs

Gibson set out again the action points from her previous letter of 27 February which would be reviewed at the ARH on 13 April 2018.

OH Report 26 March 2018

137. The OH appointment took place on 22 March 2019. It was an appointment with Dr Helliwell in person not by telephone. His report dated 26 March 2018 appeared at pages 566-568. The focus was on whether the claimant was well enough to attend a meeting. The report recorded a large number of pressures on the claimant. It said she had some significant health problems and needed to take medication, but flare-ups of the colitis from time to time will mean she needed quick access to a toilet. It may be that she would need to go so often that she would not be well enough to attend work on those days and disability related absence might have to be looked at. She was likely to be a disabled person by reason of the bowel condition.

138. As for the meeting, Dr Helliwell confirmed that the claimant was well enough to attend but he recommended a meeting off site in a neutral environment using two rooms so that the trade union representative could go back and forth between the two rooms in the same way as for an ACAS style meeting. After a meeting the task was to address perceptions about stress at work, which would need a further meeting at a neutral off site venue.

139. In response to some specific queries Dr Helliwell provided the following answers:

- The likely date for return to work would have to be after a structured meeting with the claimant and after some progress in terms of perceptions about the workplace.
- The ill health was related both to work and to her home situation.
- The claimant may have difficulty travelling to other sites unless confident that there would be adequate toilet facilities.
- Disability related absence should be considered as an adjustment.
- It was unclear whether the claimant was likely to render reliable service and attendance in future.
- She was fit for alternative employment and fit to continue in her current post.

ARH 13 April 2018

140. Upon receipt of this report the venue for the meeting was changed to a former High School in Denton. The claimant was notified of this by email of 6 April 2018 (page 280). The email said there was ample on site free car parking. It also said:

> **"There is no reception, so upon arrival please telephone either XXX XXXX or XXX XXXX to gain entry to the building. Please then take a seat in the foyer."**

141. The email made no mention of the toilet facilities at this venue. The claimant was concerned at this. She did not know whether she would be left waiting in the foyer with no-one to tell her where the toilet was if she needed it. She was not to know that in fact the plan was to come and meet her there as soon as she rang to say that she had arrived. She was also very concerned at what she believed was the inevitability that she would be dismissed at that meeting. She was unable to attend it. This was confirmed by her union representative on 9 April 2018 (page 281).

142. An updated evidence pack was prepared for the meeting together with a management statement which brought matters up-to-date. It appeared at pages 294-298. Mrs Ostell gave a chronology of her unsuccessful attempts to contact the claimant and have a discussion with her on the telephone.

143. The attendance review meeting took place on 13 April 2018 with the claimant not present.

Dismissal letter 23 April 2018

144. The outcome was set out in a letter of 23 April 2018 at pages 304-311. Mrs Gibson confirmed that the hearing went ahead in the absence of the claimant. The historic details of absence reasons, OH referrals and meetings with managers was set out. The letter said that the adjustments recommended in the OH report had been made in relation to the venue for the meeting, and that there were toilet facilities at both locations where the claimant would be required to work. The fact the claimant had not attended meetings in 2018 was mentioned, as was the fact that the risk assessment meeting had not taken place.

145. The changes in CHC panel arrangements (regarding late submissions and not having to take documents home) could be implemented immediately. There would be very limited interaction with Ms Walsh so that was not considered to be a problem.

146. In relation to flexible working, the letter essentially took the same position as the letter of 27 February. The claimant could discuss and agree in advance with her manager any circumstances where it would be helpful to start early or work later. Staff were not encouraged to stay beyond their normal working time but if the situation arose that flexibility would apply. There was also the option of staggered start/end times. No flexible working application had been received and Mrs Gibson had not been able to discuss this further with the claimant.

147. The letter went on to say that there was another fit note received valid until 8 May 2018 and the GP had not identified any adjustments or alternatives to assist to get the claimant back to work. There was no indication of any return to work date. The claimant had said in December she was not interested in redeployment.

148. The letter addressed the impact on service delivery and said:

> **"Mandy [Ostell] explained that your role was critical, and that this role is required to be undertaken during your absence. Failure to undertake this role would result in a significant detrimental impact for extremely vulnerable service users. As such, the need to engage cover during your absence, to fulfil the role, was crucial.**

> **Mandy confirmed that the majority of your role continues to be undertaken by another work colleague, who had been transferred into the team from another department. Whilst the ability to deliver the service in this team has been maintained, this has meant the priority work in another team is not being undertaken, and the indirect result of your absence has resulted in a continuing inability to progress priorities elsewhere."**

149. The letter confirmed the decision to dismiss in the following terms:

> "**I considered carefully all of the available information relating to your medical conditions, your continuous absence from work since 16 August 2017, the likelihood of you being able to return to work, and likely timescales involved. I also considered the support that has been provided by your line manager in addressing any concerns you have raised, identification of reasonable adjustments, and support offered to facilitate a return to work.**
>
> **Despite the level of support offered unfortunately a return to work has not been achieved nor is it likely in the foreseeable future. Therefore I determined that your employment with the CCG be terminated with statutory notice due to your incapability to carry out your contractual obligations because of ill health."**

150. The letter ended with a right of appeal, which the policy envisaged would be heard by the CCG's Chief Officer or a committee of a Governing Body. The claimant did not exercise her right of appeal.

Submissions

151. At the conclusion of the evidence each side made an oral submission to the Tribunal.

Respondent

152. For the respondent, Ms Carr began with the unfair dismissal complaint and submitted that the dismissal fell within the band of reasonable responses. The claimant was in a critical role and had been absent for eight months by the time of dismissal, and attempts to engage her and get her to come to a hearing had been unsuccessful. The three adjustments which the claimant said she had asked for in her statement for the ARH had all been done, and there was nothing more the respondent could do without clarity from the claimant as to what exactly she was looking for. A suggestion of staggered start times had been made in relation to flexible working but the claimant did not come back and say (whether by email or in person) that this was not what she was looking for. The changes she needed to the CHC panel had been agreed so far as practicable. There was nothing more the respondent could do to get her back to work. Even the stress risk assessment meeting had been one the claimant had not attended, despite that being outside the attendance review hearing procedure. It was a fair dismissal and no appeal had been pursued.

153. Ms Carr then addressed the disability discrimination complaints following the order of the List of Issues. It is unnecessary to record every point that she made. We took them all into account whether recorded here or not.

154. On the question of knowledge, she disputed that the respondent had actual or constructive knowledge of the claimant being a disabled person whether in relation to anxiety or the ulcerative colitis. The medical information available at the time of

dismissal was very limited. The suggestion in the OH report that the claimant probably was a disabled person by reason of the colitis was not sufficient. As for the anxiety, even though the claimant had been off for six months in 2015 and then eight months in 2017/2018, that was not enough to mean that the respondent knew or ought to have known that it was a disability.

155. Ms Carr then addressed the question of the harassment allegations. The allegation about Ms Walsh and the files on the desk was an isolated matter which was out of time. The suggestion that the claimant undertake coping strategies with her counsellor was one with which the claimant agreed. There was no belittling of her. The case on flexible working was based on a misunderstanding. It had been agreed that there would be flexible working and the claimant never supplied the details of what precisely she was looking for. The weekly calls did not require her to explain her condition every time but simply to provide an update on the situation. The "threat" of dismissal was simply the application of the respondent's policies. We were invited to reject all the harassment complaints.

156. Nor were any of those matters capable of being direct disability discrimination. A non-disabled comparator in the same circumstances would have been treated in exactly the same way. As for the grievance, there had been confusion over whether the pro forma had been completed but this had nothing to do with disability.

157. In relation to the indirect disability and reasonable adjustments complaints, Ms Carr made oral submissions on the PCPs on which the claimant relied. She pointed out that the claimant was offered flexibility in relation to working hours, and that some of the requirements in relation to the CHC panel meeting had been removed in early 2018. Those PCPs which were applied either did not put disabled people at a particular disadvantage, or if they were nevertheless justified.

158. Similarly, in relation to reasonable adjustments there were a number of instances where the respondent did not know and could not reasonably have known of the substantial disadvantage on which the claimant now relied. The information about her toilet breaks was much more extensive in this hearing than it had been at the time. A number of the adjustments were matters which had never been raised and could not reasonably have been anticipated by the respondent as being desired.

159. Finally, the complaint of discrimination arising from disability in relation to dismissal should be dismissed because dismissal was justified as a proportionate means of achieving the legitimate aim of providing the service that the respondent was required to provide and operating in an effective manner.

Claimant

160. On behalf of the claimant Mr Roche made an oral submission. He emphasised that there should have been redeployment rather than dismissal, and the position in relation to flexitime was as set out in the claimant's grievance. The claimant was convinced that the ARH would result in dismissal, and the informal meeting she wanted to discuss matters never happened. She lodged her grievance in an attempt to get that informal meeting. Although she had said in December that she was not interested in redeployment, that had been raised again in the grievance document and should have been addressed.

161. As for knowledge of disability, Mr Roche submitted that the respondent was aware of the ulcerative colitis diagnosis, and the relevant managers (Mrs Ostell and Mrs Gibson) were themselves experienced nurses who should have known what that condition would involve. There was therefore constructive knowledge that this was a disability even if no actual knowledge until the OH report arrived. Similarly with the long-term mental health problems, it was known to the respondent that the claimant had been off work for several months in 2015/2016, and there should have been further enquiries to identify whether this too was a disabling condition.

162. On the question of why the claimant had not attended the meeting on 8 January, Mr Roche said that she had wanted to get clarity first, thereby explaining her email asking for the policy and how the arrangements for flexibility for work in practice. The response that came back took a different position and this made matters worse. The suggested of staggered start times involving her fellow ICA simply would not achieve what she needed. She wanted to have a discussion but without the threat of dismissal hanging over her.

163. In relation to the harassment allegations Mr Roche submitted that the incident with Ms Walsh was part of a continuing act which went on into 2018 because the matter was still raised in the later correspondence. The claimant was convinced that Ms Walsh had done this deliberately to demonstrate the backlog caused by her absence from work. There was no need for the weekly call. It was unnecessary and outside policy. He withdrew, however, the allegation of harassment which appeared as issue 2.1.5, accepting that the fact the flexible working policy was out of date had nothing to do with disability. Mr Roche also withdrew the allegation of direct discrimination about refusing to deal with an application for flexible working, accepting that no such application had been made. He submitted, however, that the confusion over the grievance was influenced by the fact the grievance was itself about disability discrimination.

164. Mr Roche then addressed the indirect and reasonable adjustments complaints, making submissions on the various PCPs and the perspective of the claimant as to the steps that needed to be taken by way of reasonable adjustments. He submitted that there was knowledge of the substantial disadvantage resulting from the colitis because the effects of that condition are well-known and easily ascertainable, particularly by medically qualified managers.

165. On the question of discrimination arising from disability Mr Roche submitted that dismissal was not justified.

Remedy Submissions

166. In addition to the above submissions on liability, both sides addressed us on the three remedy issues. Ms Carr said that the claimant's failure to appeal was an unreasonable breach of the ACAS Code of Practice. An appeal would have enabled her to put her case to someone else at a higher level. Mr Roche opposed this on the basis that the claimant had lost confidence and if she succeeded in an appeal and overruled Mrs Gibson she would still have to return to work with her.

167. Mr Roche submitted that there should be an increase in compensation because the grievance was not handled properly. Ms Carr resisted this on the basis

that there had been a genuine misunderstanding about whether the claimant had completed the pro forma, but in any event the respondent was looking to have a grievance meeting once it had discussed the grievance with the claimant at the attendance meeting.

168. Finally, Ms Carr submitted that the claimant's failure to engage with the respondent after December 2017 amounted to contributory fault which should result in a reduction in compensation, but Mr Roche resisted this on the basis that the claimant was suffering from a significant mental health issue as well as colitis, and she had been making efforts to get clarity so that she could attend a meeting without fear of being dismissed.

169. At the conclusion of the oral submissions the Tribunal reserved its judgment.

Discussion and Conclusions – Disability Discrimination

170. Although the unfair dismissal complaint appeared at the start of the List of Issues, we decided to deal with that at the end of our deliberations. We addressed the disability discrimination complaints first. The relevant paragraph number from the list of issues set out above will be indicated in **bold.**

Harassment

171. We took into account the legal framework under section 26 Equality Act 2010 summarised above and considered the individual allegations of harassment which appeared in the List of Issues. It was convenient to consider each factual allegation in **2.1** in turn and apply the statutory tests to it (**2.2 – 2.4**).

172. The first allegation (**2.1.1**) was about Ms Walsh taking files out of the cupboard and piling them behind the claimant on her return to work in August 2017. Ms Walsh did not dispute that she did this. She explained that it was a routine action intended to help members of staff with a backlog of work by prioritising what was important and urgent. We accepted her evidence that she would do it whenever a backlog had developed, whether a member of staff had been off sick or not.

173. The Tribunal unanimously concluded that this allegation was out of time. It was not linked to any of the later treatment about which the claimant complained. We rejected Mr Roche's suggestion that it was linked because it featured later on. That was only because the claimant raised it as a concern later on.

174. Had the allegation been brought within time we would have found that it was conduct not related to disability. It arose simply because a backlog had developed and was action that Ms Walsh would have taken for a period with a backlog with no health issues or sickness absence.

175. This allegation of harassment was dismissed.

176. The second allegation of harassment (**2.1.2**) related to a discussion in the meeting on 21 December 2017 and the outcome letter of 27 December 2017. In paragraph 38 of her witness statement the claimant said that Mrs Ostell and Ms Holgate sought to minimise the bullying behaviour of Ms Walsh by saying she had a strong personality and suggesting that the claimant should speak to her counsellor

about this. The letter expanded on that point and said that the claimant's anxiety could be due in part to her interpretation of requests from a strong, driven personality and that the claimant acknowledged it could be the case. It recorded that Ms Holgate had asked if the claimant could consider discussing the matter with her counsellor when she resumed her CBT, and that the claimant had agreed this would be beneficial.

177. There was no dispute of fact. It was clear that at the meeting and in the outcome letter Ms Holgate suggested that the claimant could discuss with her counsellor strategies for coping with the way she believed Ms Walsh was behaving.

178. We were satisfied that this was unwanted conduct. The claimant explained in her witness statement that she was not happy with this and felt she was being "gaslighted", although she acknowledged that she did not object to it during the meeting, or after receiving the letter of 27 December. Her objection was clear: the effect of this was to suggest that the problem was with her perception of events, rather than acknowledging that Ms Walsh might be in some way responsible for the issue.

179. We were satisfied that this was also something related to disability. The suggestion of counselling was only made because the claimant was receiving counselling, having been off work since August with anxiety. It was a suggestion that arose out of her mental health condition and the treatment she was receiving.

180. The key question was whether this conduct had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We were satisfied that the managers were well intentioned: this was not a case where they had that purpose. In deciding whether the conduct had that effect we had to take into account the circumstances of the case, the perception of the claimant, and whether it was reasonable for conduct of this kind to have that effect.

181. The perception of the claimant was clear. She felt offended and humiliated by this suggestion. It gave her the impression that her managers thought that the problem was in her mind rather than that Ms Walsh had behaved in any way which was inappropriate.

182. As far as the circumstances were concerned, however, we noted that the claimant had not made any direct allegation of bullying or inappropriate treatment by Ms Walsh. This was a sickness absence review meeting convened to discuss the continuing absence and ways to get the claimant back to work. The treatment she had received from Ms Walsh was not at the heart of her request for adjustments. According to the letter (there were no notes of the meeting) this point only emerged during further discussion. It is also correct to say that during the meeting the claimant did not object to the discussion and the suggestion that was being made.

183. Given those circumstances, we were satisfied that it was not reasonable for this suggestion to have the proscribed effect. It was remiss of the managers not to have acknowledged that there might be some conduct of the part of Ms Walsh that was contributing to the situation. A better approach would have been to have acknowledged that and to have undertaken to speak to Ms Walsh about the impact

her behaviour was having on the claimant. The managerial response was looking only at one side of the problem. However, given the lack of any objection, and the tentative and supportive way in which the suggestion was couched in the letter, we were satisfied that it was not reasonable for this to have the proscribed effect. The complaint of harassment on this point therefore failed.

184. The next allegation of harassment (**2.1.3**) concerned the discussions about flexible working. We reviewed the way in which these discussions developed.

185. They were first discussed at the meeting on 21 December 2017. The handwritten note of that meeting at page 91 recorded the claimant saying that she needed to be flexible on start and finish times, and "day to day I don't know". That was an accurate record of the problem for her due to the need for the toilet because of ulcerative colitis. She could not predict which days she might need to start late or finish early due to that medical issue.

186. This point was missed in the letter of 27 December 2017. It talked about working flexibly in the sense of staying beyond the normal working day if tasks needed to be completed. It acknowledged that this flexibility could extend beyond the initial four week phased return period, but only in line with business needs. The letter did not recognise that it was personal needs of the claimant which gave rise to the problem.

187. The letter mentioned the flexible working policy. The claimant requested it by email of 8 January. She received it with the letter of 18 January. That letter apologised for misunderstanding the request about flexible working, but then said that the request was understood to be only for an interim period upon return to work. It repeated the misapprehension that the request was dependent on business needs rather than personal needs. Finally, the flexible working policy which was attached was out of date because it referred to statutory requirements which had changed in 2014. Understandably the claimant took the view that this letter still missed the point.

188. The claimant sought to explain her position in her statement of 2 February 2018 for the ARH. She did want flexibility to stay at work to complete panel paperwork packs, leave them there and then collect them early the next morning to go to the panel meeting. This would avoid the need for her to take the packs home. However, that did not address her need for flexibility at short notice due to the colitis. The claimant made the point on page 143 that the possibility of working flexibly with time off in lieu would not give her any discretion on her start and finish times and would not be the adjustment she wanted. She felt she had specifically explained this in the meeting on 21 December. Effectively the same point was made in her grievance of 8 February, although not there spelling out exactly what she needed.

189. Mrs Gibson responded to this in her letter of 27 February 2018 (pages 195-204). It repeated the misapprehension from the letter of 27 December about what the claimant had wanted by way of working flexibly. However, Mrs Gibson did address the confusion between flexible working and flexitime. She acknowledged that the claimant wanted to vary her working hours on a more fluid basis, but said there was no flexitime scheme. What she envisaged, however, (page 200) was a rota giving staggered start/finish times on different days. From the claimant's perspective this missed the point because it did not give her day-to-day flexibility she required.

190. There were no further substantive discussions about flexible working. The claimant did not attend the stress risk assessment meeting or the final ARH. The dismissal letter of 23 April 2018 took the same position as the letter of 27 February. Mrs Gibson made the point that she had not been able to discuss this further with the claimant because the claimant had not been able to attend the meetings. The matter was not raised again because there was no appeal.

191. Applying the law to that factual situation, we concluded that there had been unwanted conduct. The day-to-day flexibility the claimant asked for in the meeting on 21 December was not agreed, but the unwanted conduct arose when the letter was issued which completely missed that point. It simply addressed a different point about flexibility, namely the need to work later and start earlier to finish the packs for the CHC panel and leave them in the office overnight. This was unwanted for the claimant because it failed to address her need for day-to-day flexibility on a basis that could not be predicted.

192. That unwanted conduct was also related to disability. The discussion arose because of the ulcerative colitis and the claimant's need for flexibility.

193. The question was whether it had the purpose or effect of creating the proscribed environment. Although it was regrettable that the letter did not address at all the discussion about day-to-day flexibility, we were satisfied that the managers were not acting with the purpose of causing the claimant to feel humiliated or offended. The question was whether it had that effect.

194. The circumstances of the case included the fact that he claimant had not been as clear as she might have been. We concluded that this had been mentioned in passing in the meeting, and the claimant did not immediately seek to correct the letter by explaining what she needed. We concluded that despite the claimant's perception, it would not be reasonable to view a misapprehension of this kind as having the proscribed effect when the claimant could easily have corrected it by letter or email and sought clarification of the position on what she really wanted, namely day-to-day flexibility. We therefore concluded that this allegation did not amount to harassment contrary to section 26.

195. The fourth allegation of harassment (**2.1.4**) was about the claimant being required to explain her medical condition on a weekly basis whilst on sick leave to different managers. The claimant dealt with this in paragraph 91 of her witness statement. She explained that on 12 February she had been instructed to telephone a different manager because Mrs Ostell was on leave. The requirement to contact Mrs Ostell by telephone on a weekly basis was confirmed in the letter of 27 February 2018. The letter said at page 201 that the claimant had to contact Mrs Ostell by telephone on a weekly basis.

196. This was unwanted conduct as far as the claimant was concerned, and it was related to her disability. However, the circumstances were such that we were satisfied it was not reasonable for this to have the proscribed effect, despite the claimant's perception. She had been off since August 2017 and had not attended any meetings since 21 December 2017. The letter from Mrs Gibson recorded that the claimant had been expected to contact Mrs Ostell weekly since January but had not done so. There was no requirement in the letter that in those calls she provide

any details of her health condition. The claimant may have felt obliged to do that when she had to speak to a different manager while Mrs Ostell was on leave, but that was not the intention. We were satisfied that this conduct fell below the threshold at which it could be considered harassment.

197. The fifth allegation of harassment (**2.1.5**) was withdrawn by Mr Roche during submissions.

198. The sixth allegation (**2.1.6**) was about the threat of dismissal. We will return to this when considering the dismissal itself.

199. Allegations **2.1.1 – 2.1.5** were dismissed**.**

Direct Disability Discrimination

200. The first allegation of direct discrimination (**3.1**) related to the flexible working application. Mr Roche withdrew this during the hearing.

201. The second related to the failure to follow a grievance procedure (**3.2**). We were satisfied there was no evidence from which we could conclude that the way in which the respondent dealt with the grievance was because the claimant was a disabled person. The burden of proof did not shift. The failure to acknowledge that she had completed the required form, which impeded consideration of the grievance in the first instance, was due solely to the fact that the form had been attached not as a separate document, but as part of the grievance procedure itself. The claimant had been unable to detach it from that document. This caused a miscommunication. It would have been exactly the same for an employee who was not disabled who attached the form in the same way.

202. Secondly, the grievance was viewed as one which overlapped with the attendance management issues and it was therefore suggested that it be dealt with at the same meeting. We were satisfied this would have been exactly the same had the claimant not been a disabled person as there was clearly a degree of overlap between the matters raised in her grievance and the attendance management issue.

203. Accordingly the way in which the grievance was handled was not direct disability discrimination.

204. The final part of the direct discrimination allegation (**3.3**) was to put the harassment complaints in a different way. We considered those matters taking into account our factual findings summarised in the harassment section above.

205. The first allegation related to Ms Walsh taking files from the cupboard and piling them behind the claimant on her return to work. There was no evidence that she would have treated a person who was not disabled any differently. We accepted Ms Walsh's evidence that she had done it for others even when there was no sickness absence.

206. Next was the way in which the issue between the claimant and Ms Walsh was dealt with. We were satisfied that the respondent would have dealt with the matter in exactly the same way for a person who was not disabled but who was having counselling. It was easier to suggest that the employee raise it with her counsellor

than to tackle Ms Walsh about the issue. There was no less favourable treatment of the claimant because of disability.

207. Similarly, we were satisfied that the confusion about what the claimant sought by way of flexible working was not less favourable treatment because she was disabled. The confusion was due to other factors, including lack of attention to detail when compiling the outcome letter from the meeting. There was nothing to suggest that it would have been any different had the person seeking flexible working arrangements not been disabled.

208. Finally, in relation to the requirement to contact Ms Ostell weekly, we were satisfied it would have been exactly the same for an employee without a disability who had been off work since August and who had failed to maintain regular contact since January.

209. For these reasons all complaints of direct disability discrimination failed and were dismissed.

Indirect Disability Discrimination

210. We reminded ourselves of the legal framework summarised above. The starting point for any complaint of indirect discrimination is the PCP. The claimant put her case on the basis of six different PCPs. We considered it convenient to deal with each in turn, deciding whether it was applied, considering whether it put disabled people at a particular disadvantage and the claimant at that disadvantage, and then considering whether it had been justified (**4.1 – 4.4**).

211. The first PCP (**4.1.1**) was requiring employees in the claimant's role to work strict fixed hours in the office. We found that this PCP was applied by the respondent. Mrs Ostell explained in her oral evidence to the Tribunal that the respondent needed to know when people in the claimant's role would be coming into the office to ensure that the telephones were staffed. That was why the later discussions about flexibility raised the possibility of a rota, which would still provide fixed times for employees to come into work even if those times varied with the rota. We were also satisfied that this placed people disabled by reason of ulcerative colitis at a particular disadvantage. It is a condition which by its very nature can give rise to an urgent need to use the toilet, and the duration of that can be unpredictable. It was also evident that the claimant herself was at that disadvantage. Her request for flexibility day to day was made in the notes of the meeting of 21 December 2017.

212. Accordingly the issue was whether the respondent could justify the treatment as a proportionate means of achieving a legitimate aim. The legitimate aim on which it relied was the need to provide its service in an effective manner. More specifically, the respondent needed the team to be available to answer the telephones during the working day, not least because sometimes the queries would be of an urgent nature affecting the scheduling of treatment for a particular patient. We were satisfied that the respondent had shown that having a system whereby staff generally had fixed working hours was a proportionate means of achieving a legitimate aim. There was no way of achieving the aim of ensuring that the team had staff to answer the telephone during the relevant hours without some degree of certainty overall about

when people would be working. This allegation therefore failed. Whether that PCP should reasonably have been adjusted for the claimant will be considered below.

213. The second PCP (**4.1.2**) was about the requirement for confidential patient notes to be taken home and brought to meetings the following day. This allegation failed because no such PCP was applied. The claimant took it upon herself to do this because she lived in between the office and the venue for the meeting the next morning. It was confirmed that there was no such requirement in the letter of 27 February 2018 at page 198.

214. The next PCP (**4.1.3**) was one of piling outstanding work behind employees in the claimant's role on return from sickness absence. We were satisfied that Ms Walsh did have that practice. She would do that whenever there was a backlog of work building up by taking it out and putting it in piles depending on priority. However, there was no evidence from which we could conclude that it put disabled people with anxiety at a particular disadvantage. Assistance from a manager on what was to be prioritised might well reduce anxiety about the mountain of work to be tackled. The fact that it was not welcome by the claimant was not sufficient to establish group disadvantage. In any event this allegation was out of time for reasons summarised in the harassment section above.

215. The next PCP (**4.1.4**) was of requiring employees in the claimant's role to facilitate the weekly CHC meeting on a rota. This was an expectation of the role, but as a PCP it did not create any disadvantage for disabled people generally. There was simply no evidence of that. The claimant had some specific difficulties with this which are addressed by the next two PCPs. This allegation of indirect discrimination failed.

216. The next PCP (**4.1.5**) was requiring employees in the claimant's role to work for up to four hours at the CHC meeting without a break. The difficulty with this allegation, we concluded, was that it was common ground that the claimant was able to leave those meetings to use the toilet when the need arose. She had not made any complaint about this in the six months between February and August 2017, only raising it as a concern in February 2018 in view of a prospective return to work. As phrased the PCP was not applied by the respondent because natural breaks in the meeting could be taken to allow someone to use the toilet. Alternatively, a PCP of that kind was not one which gave rise to any particular disadvantage for disabled people. This allegation failed.

217. The final PCP (**4.1.6**) was the requirement for employees in the claimant's role to hear conversations in the meeting about serious health conditions. That PCP was applied but there was no evidence from which we could conclude that it put people disabled by anxiety at a particular disadvantage. The upset and distress experienced by the claimant was a consequence of her own life experiences. In any event, even if the PCP had been potentially discriminatory, we would have found that it was a proportionate means of achieving a legitimate aim. The whole purpose of these meetings was to discuss the details of individual cases so as to decide what treatment was appropriate.

218. For those reasons all allegations of indirect disability discrimination failed and were dismissed.

Breach of duty to make reasonable adjustments

219. Having reminded ourselves of the legal framework summarised above, we decided to proceed by firstly considering whether the respondent knew or ought reasonably to have known that the claimant was a disabled person. If so, we would then consider each PCP in turn and consider whether it put the claimant at a substantial disadvantage, whether the respondent knew or ought reasonably to have known of that disadvantage, and if so whether the respondent failed in its duty to make such adjustments as it was reasonable to have made to avoid that disadvantage.

220. In relation to knowledge of the disability (**6.3**), the test is whether the respondent knew that the claimant was a disabled person or ought reasonably to have known that. We took into account the extracts from the Code to which reference is made above.

221. Dealing first with ulcerative colitis, the diagnosis was recorded on a return to work form in January 2016 (pages 607-608). We discounted the claimant's evidence that she told Mrs Ostell about this later on, because that was evidence which Mrs Ostell did not have the chance to answer as it did not appear in the claimant's witness statement. Nevertheless it was clear that the respondent knew of the diagnosis from 2016. The next occasion on which this was raised was in early August 2017 where the claimant notified Mrs Ostell that she was having a flare-up. She was off work for eight working days on a self-certificated basis. Her return to work was short-lived, and her sick leave which began on 16 August 2017 was certified as due to a stress related problem. Accordingly the referral to OH which resulted in the report of 2 October 2017 was a referral about stress and anxiety, not about ulcerative colitis. However, the report said (page 561) that she was under the care of a specialist for ulcerative colitis and had been prescribed medication although currently her condition was stable. She had had one period of sickness absence relating to her condition. The sickness absence review outcome letter of 4 December 2017 briefly mentioned colitis but focussed on the mental health issue. The same was true of the discussion in December. The continuing absence was predominantly due to the mental health issues, although the claimant did mention the colitis in her February documents. The OH report of 26 March 2018 (pages 566-568) referred to her having flare-ups from time to time, needing quick access to a toilet, maybe so often that she would not be well enough to attend work on those days. Dr Helliwell said that potentially the respondent may need to look at disability related absence for this type of condition. He also said that the disability legislation was likely to apply to her bowel condition.

222. Putting these matters together we were satisfied that the respondent ought reasonably to have known that the claimant was disabled by reason of ulcerative colitis from the OH report in early October 2017. Although that report said that he condition was stable and there had been only one period of sickness absence, it also said that the claimant had been prescribed medication and was under the care of a specialist. Those matters ought to have been enough to put an employer on notice that there might be a disability issue, and it was reasonable for the employer to make further enquiries as to whether there would be a substantial adverse effect on day-today activities if there was no medication being taken. In any event, it was abundantly clear to the respondent by the time the second OH report was received in

March 2018 that the claimant was likely to be covered by the Act, as has since been retrospectively conceded.

223. We considered whether there was knowledge or constructive knowledge of the anxiety being a disabling condition. The claimant had been off work for six months into early 2015, but had achieved a successful return to work according to her September 2015 performance assessment. That would not put the respondent on notice that there might be a disabling mental health condition. In mid August 2017, however, the claimant went off work and was certified unfit for work due to stress and anxiety right up until she was dismissed in April 2018. In that period the respondent had the first OH report of 2 October 2017 which recorded current symptoms and said no definite return to work date was due as it would depend upon response to CBT counselling, but which expressed the view that the Equality Act was unlikely to apply as she could be expected to make a good recovery with the counselling planned. We were satisfied that the respondent could not reasonably have known that in fact the claimant was disabled by reason of anxiety by this point. It was entitled to rely upon this OH advice.

224. The second OH report came some five months later at the end of March 2018. It was focussed upon efforts to get the claimant back to work, by way of a meeting in the first instance. Dr Helliwell said that the disability legislation was likely to apply to the bowel condition, but did not mention the mental health condition. It was reasonable to infer that he did not consider the mental health condition to be a disability at that stage. This was contrary to what the claimant herself had asserted in her grievance documentation (e.g. page 141) where she said that she was disabled by reason of anxiety and ulcerative colitis. She said there that she had suffered from anxiety for several years. We concluded unanimously that the respondent could not reasonably have known that the claimant was in fact disabled by reason of anxiety at this stage. It took the reasonable step of making a further OH referral and asking the doctor to advise on that point. The advice which was given was that she was not covered by the Equality Act in relation to anxiety. There was nothing obviously incorrect about the OH report, and nothing to alert management to the fact that it might not be accurate. The claimant had been off work for seven months by then, and was still having treatment which it was hoped would achieve a significant improvement. In those circumstances we concluded that the respondent had demonstrated that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person by reason of anxiety.

225. Having made the finding that there was knowledge of disability by reason of ulcerative colitis but not by reason of anxiety, we turned to the individual PCPs set out in **6.1**. Where we found that a PCP was applied, we considered issues **6.2 – 6.4.**

226. The first PCP (**6.1.1**) was the requirement to work strict fixed hours in the office. We were satisfied that that did apply and that it put the claimant at a substantial disadvantage because her ulcerative colitis meant that she could not predict the days upon which she might need to arrive late or leave early. The respondent knew that the claimant was disabled by reason of ulcerative colitis. Did it also know that she was likely to be at that disadvantage? We accepted the claimant's evidence that she had explained this at the meeting on 21 December 2017, as confirmed by the note at page 91 which recorded that she wanted flexibility on start and finish times day to day. The question was therefore whether it would

have been reasonable to have allowed the claimant that adjustment, and if so whether that complaint was brought within time.

227. We were satisfied that this was an adjustment which could reasonably have been implemented. There was indeed a need for there to be staff in the claimant's team to answer calls during ordinary working hours, and in general this was a justifiable approach to organising the working hours of the team, but there were two people doing the claimant's job and a third member of that team who could also answer the telephone. Further, although it was not the case that other teams would answer the telephone as a matter of course, we were told in evidence that they would do so if asked. We thought it significant that the request by the claimant for day-to-day flexibility at the meeting on 21 December 2017 had been completely overlooked in the outcome letter from that meeting. There was no explanation of why that was not practicable. The point was misunderstood and the letter concentrated on the business needs rather than the needs of the claimant as a disabled person. Although we were not concerned with the process, as opposed to the merits, we were satisfied that this showed that the respondent had not given proper consideration to whether it was possible to adjust its general approach in a way which would enable the claimant to have this flexibility. On the evidence we heard we were satisfied that these arrangements would have been possible, and would have made a difference to the claimant by avoiding the disadvantage. We concluded, therefore, that there was a breach of the duty to make a reasonable adjustment of allowing the claimant flexibility in her start and finish times without prior arrangement which would have avoided (or at least substantially reduced) the stress she felt because of being worried about a flare-up of her colitis affecting her ability to get to work on time or to stay at work until her finish time.

228. As for time limits, we were satisfied that this was an adjustment which should have been made when the claimant returned to work. Of course, that return to work never happened. However, the matter was still unresolved at dismissal. The claimant pressed the point in her grievance of 8 February. The OH report of 26 March 2018 at page 566 referred to the possibility of flare-ups from time to time. Had the respondent not misunderstood the issue in December 2017, it would reasonably still have been considering whether that was an adjustment which could have been made. In these circumstances the duty to make that adjustment continued up until the time the claimant was dismissed (23 April 2018), and therefore this complaint was brought within time and succeeds.

229. The second PCP (**6.1.2**) was of requiring employees in the claimant's role to carry confidential notes home for panel meetings the following day. For reasons set out above we found this PCP was not applied. In any event it related to her anxiety which the respondent did not know was a disability.

230. The third PCP (**6.1.3**) was about the CHC panel meetings being held in a building with only one single sex/disabled toilet. There was a factual dispute about the number of toilets available in the panel building, but in any event we were satisfied that the respondent did not know and could not reasonably have been expected to have known that the claimant was likely to be at any disadvantage. There had been no problems during the six months between February and August 2017 when the claimant was in work, and she did not mention it during her absence from work. Her concerns about the panel meetings in her document at page 141 did

not mention the availability of toilets, focussing instead on the need for breaks and the requirement to take papers home before the meeting. The respondent could not have known that this was a substantial disadvantage and therefore the duty to make reasonable adjustments had not arisen.

231. The next PCP (**6.1.4**) was about conversations in the panel meeting about serious health conditions. As explained above, we were satisfied that there was no way this could reasonably be avoided. The whole purpose of the meeting was to discuss such matters so that decisions about treatment could be made.

232. The next PCP (**6.1.5**) related to the refusal of flexitime facilities without authorisation and business need. This was essentially the same point as in the first PCP. The respondent did apply this PCP in its letter of 27 December 2017 and thereafter, and it knew or ought reasonably to have known that the claimant would be at a substantial disadvantage because her ulcerative colitis meant that she needed flexibility day to day without prior authorisation and irrespective of business need. For the same reasons this allegation of a breach of the duty to make reasonable adjustments succeeded.

233. The final PCP (**6.1.6**) was about a failure to update the reference to legislation in the policy. This was an error by the respondent but it did not place the claimant at a substantial disadvantage because of her disability. It placed any employee seeking flexible working at the same disadvantage. Accordingly, the complaint of a breach of the duty to make reasonable adjustments on this point failed.

234. In summary, therefore, all complaints of a breach of the duty to make reasonable adjustments failed save for the adjustment of allowing the claimant to have flexibility day by day without prior notice to arrive at work late or finish early if her ulcerative colitis made that a necessity for her.

Discussion and Conclusions - Dismissal

235. The decision to dismiss the claimant featured in three of her legal complaints: harassment, discrimination arising from disability, and unfair dismissal. We considered each in turn.

Harassment

236. The harassment allegation (**2.1.6**) concerned the threat to dismiss the claimant. This related to the letter of 15 January 2018 at pages 113-114 which invited the claimant to an ARH and made clear that one outcome could be termination of her employment due to incapacity. The possibility of dismissal remained in place until that decision was actually taken in April 2018. This was clearly unwanted conduct for the claimant, and it was related to her disability (anxiety) in that the absence which gave rise to this arose because of her disability. However, we unanimously concluded that it did not have the proscribed effect on the claimant's environment. It was not reasonable for the claimant to regard her dignity as violated or that she was put in an environment which was hostile, offensive, humiliating or degrading. The reality is that she had been off sick since August, had intended to return on 15 January 2018 but been unable to do so, and was now entering a further period of potentially open-ended sickness absence. It was

appropriate for the respondent to invoke its formal sickness absence management procedures, and a requirement of fairness that the claimant be made aware that one outcome could be termination of her employment. Accordingly, the complaint that this was harassment related to disability failed and was dismissed.

Discrimination Arising from Disability

237. The next matter we considered was the complaint that dismissal was discrimination arising from disability contrary to section 15 Equality Act 2010 (**5**).

238. The first question (**5.1**) was whether the respondent had succeeded in the knowledge defence. We already considered this in relation to reasonable adjustments above. By the time of the dismissal decision the respondent knew that the claimant was a disabled person by reason of ulcerative colitis, but did not know and could not reasonably have been expected to have known that she was also a disabled person by reason of anxiety. However, we concluded that that was not fatal to this complaint. Although the primary reason for the claimant's past and anticipated sickness absence was her anxiety, that absence also arose in consequence of her ulcerative colitis. A number of her concerns about the way in which a return to work would be managed arose out of the colitis and its effects upon her day-to-day life. A good example would be the concern about flexibility day-to-day in hours of work. Accordingly, we regarded the respondent's concession as rightly made: the dismissal of the claimant was unfavourable treatment because of absence which arose in consequence of her disability of ulcerative colitis, even though it was also affected by her anxiety. That meant that the question for the Tribunal to determine was whether dismissing the claimant was a proportionate means of achieving its legitimate aim of an effective running of the service (**5.2**).

239. That was also to a large extent the issue which arose in the unfair dismissal complaint (**1.1**). The claimant accepted that the principal reason for dismissal related to her capability. The question of whether the dismissal fell within the band of reasonable responses is in many cases very closely aligned to the question of whether it can be justified under section 15, as the Court of Appeal observed in **O'Brien v Bolton St Catherine's Academy [2017] ICR 737**.

240. Looking firstly at the matter under section 15, we were satisfied that the respondent did have a legitimate aim of maintaining an effective and efficient workforce so as to meet its service delivery commitments. The question was whether the respondent had shown that there was no less discriminatory way of achieving this aim than dismissing the claimant.

241. The absence of the claimant was significant. She had been off work for eight months. The respondent had obtained up-to-date OH advice. The report of 26 March 2018 did not offer any clear date for a return to work. It said that other steps would need to be taken first, that the prospects of reliable attendance in the future would depend on the resolution of issues at home, that the claimant was able to attend a meeting and that she was fit for her current post (presumably if the other steps were taken and were successful). The clear recommendation of the OH report was that there be an off site meeting in a neutral environment using a set up similar to an ACAS style consultation, to enable the claimant to understand the issues and to express her own wishes. That would need to be followed by a stress risk

assessment. Once those matters had taken place there could be a date for a return to work.

242. We also accepted the respondent's case that the absence of the claimant had a significant impact on its operation. The dismissal letter explained that the claimant's absence had been covered by moving someone from a different team, which had meant that priorities in that team were not being addressed. This was not a case where the respondent could reasonably be expected simply to carry absence for an indefinite period without any prospect of a return.

243. Ms Carr also argued strongly that the position was not helped for the claimant by her lack of engagement with the absence management process. The claimant explained to our hearing that a significant factor preventing her attending these meetings was the possibility that she might be dismissed at one of them. However, it was clear that was not articulated to the respondent at the time. The first meeting not attended by the claimant was the meeting on 8 January 2018 intended to discuss arrangements for her return to work a week later. The receipt of the letter of 27 December 2017 contributed to her inability to attend that meeting. Once the possibility of dismissal was raised in the letter of 18 January, the claimant did not attend any further meetings. There was a series of emails from her and from her union representative indicating this prior to each proposed meeting. In none of those emails between February and April, however, was it explained that it was the threat of dismissal which was preventing the claimant attending. Further, the claimant was not well enough to attend the stress risk assessment meeting in mid March even though that had nothing to do with dismissal.

244. Nevertheless, we were unanimously satisfied that there were steps which the respondent could reasonably have taken which were less detrimental to the claimant than dismissal but which would still have achieved its legitimate aim.

245. The first step was to have made the adjustment sought by the claimant on 21 December 2017 to allow her flexibility in start and finish times without prior notice where the effects of her ulcerative colitis required it. For reasons set out above, we concluded that this was an adjustment which could reasonably have been made. In fact it was one which the respondent never properly considered. Had that been discussed and agreed at the time, a significant impediment to a return to work would have been removed and it would have been much more likely that the claimant would have returned to work in January or shortly thereafter. It was the mismatch between the discussion on 21 December and the contents of the letter of 27 December 2017 which caused the downward spiral in the relationship from that point onwards.

246. Secondly, the respondent could reasonably have adopted the recommendations of the OH report of March 2018 that there be a structured meeting with the claimant and a stress risk assessment before a decision was taken about the likelihood of a return to work. The respondent did implement some of the practical recommendations by holding the ARH at a neutral venue with two rooms available, and Mrs Gibson intended that it would be an opportunity for discussion with the claimant about what she wanted, but unfortunately the claimant was unable to attend that as it was still a meeting at which the threat of dismissal hung over her. What the respondent failed to do was to separate the structured discussion about

those matters from a decision on the continuation of her employment despite the recommendation in the OH report to do exactly that.

247. Accordingly, the Tribunal unanimously concluded that the respondent had failed to show that dismissal was a proportionate means of achieving its legitimate aim. A less discriminatory way of achieving that aim would have been to have arranged a discussion meeting with the claimant at which there was no prospect of dismissal, followed by a stress risk assessment, with the adjustment in relation to flexible start and finish times having been agreed in principle. That would have created a completely different environment in which it was much more likely the claimant would have engaged with the process and been able to offer a return to work in a reasonable period.

248. For those reasons the complaint under section 15 succeeded.

Unfair Dismissal

249. That left the question of fairness in the unfair dismissal complaint (**1.1**). It did not succeed simply because the section 15 complaint had succeeded, but there were similar factors to be considered.

250. We were satisfied that the respondent genuinely believed that the claimant was not likely to return within a reasonable period, and there may well have been reasonable grounds for that belief based on the history of absence and the OH report.

251. However, the respondent had not investigated the matter to a reasonable extent because it had failed to carry out the structured neutral meeting without the threat of termination of employment which was recommended by the OH report. A discussion of that kind, particularly coupled with agreement in principle to allow the claimant the flexible working hours she wanted, was a step which an employer acting reasonably would have taken. The extent to which that would have been effective, and whether the claimant would have been able to return to work is a matter to be addressed at a remedy stage.

252. For those reasons the complaint that the dismissal was unfair also succeeded.

Discussion and Conclusions – Remedy Issues

253. There were three remedy issues on which we heard evidence and submissions and the Tribunal reached a conclusion on them as follows.

254. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 empowers a Tribunal to increase or reduce any award by up to 25% on account of an unreasonable failure to follow the ACAS Code of Practice where it is just and equitable to make that adjustment.

255. Firstly, we considered that the claimant did act unreasonably in failing to pursue an appeal against dismissal. That was a breach of the ACAS Code of Practice. An appeal would have been an ideal opportunity for the claimant to have set out very clearly what she was looking for in terms of adjustments and why she

had not been able to attend any of the meetings during 2018. The appeal would have been determined by someone at a more senior level. On behalf of the claimant Mr Roche said that she had lost confidence and would still have had to have worked with Mrs Gibson if an appeal had succeeded. In our judgment those were not good reasons for failing to appeal. They were matters which could be addressed at the appeal stage if dismissal was going to be overturned. We concluded that a reduction of 10% to the compensatory award was just and equitable to reflect the claimant's failure to appeal.

256. The next question was whether there should be an increase in compensation because of an unreasonable failure by the respondent to comply with the ACAS Code in relation to the claimant's grievance. When the grievance was lodged it had the form at Appendix C attached as part of the whole grievance procedure but this was missed by the respondent. Mrs Gibson's email of 9 February 2018 at page 187 said that the form had not been completed but indicated that the matters raised could be discussed at the ARH. Those matters were indeed considered although of course the claimant was unable to attend. Because it was not appreciated that a formal grievance had been lodged, the detailed outcome letter from the ARH (the dismissal letter) did not expressly mention the grievance, although the points raised in the grievance had been considered and were addressed in that letter. It was remiss of management not to have appreciated that Appendix C had been completed, although equally the claimant could easily have corrected that misapprehension upon receipt of the email of 9 February 2018. Given that the grievance was acknowledged in writing and the claimant was invited to a meeting at which it was to be discussed, and given that the dismissal letter did cover the substantive content of the grievance, we were satisfied there was no unreasonable failure to comply even though the root cause was an error on the part of the respondent. No increase in compensation was appropriate.

257. The final matter relating to compensation was whether it should be reduced on account of contributory fault on the part of the claimant in not engaging with the respondent after December 2017. A reduction because of contributory fault by the employee can apply both to the basic award and to the compensatory award by virtue of differently worded provisions in sections 122 and 123 Employment Rights Act 1996 respectively. We had regard to the decision of the Court of Appeal in **Nelson v BBC (No 2) [1980] ICR 110** to the effect that the statutory wording means that some reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy.

258. We were satisfied that the claimant had not acted in a way that was culpable or blameworthy. She had been clear at the meeting of 21 December 2017 (page 91) what she wanted, but the note of that meeting recorded that she was struggling to articulate matters. The deterioration in her communication with the respondent after receipt of their letter of 27 December 2017 was a reflection of the fact that the letter did not address what had been discussed at the meeting about the flexibility she was looking for. The claimant was disabled by reason of anxiety in this period, and the introduction of the possibility of dismissal by the letter of 18 January 2018 did not help matters either. The claimant's failure to articulate clearly what she was looking for and/or to attend any of the meetings was not a matter which should justify any reduction in compensation.

Remedy Hearing

259. The following case management orders will apply, time in each case running from the date upon which this Judgment is sent to the parties. As these orders have been made without consulting the parties any application for a variation should be made promptly.

(a) Within 14 days each side should indicate its availability for a remedy hearing with a time estimate of one day in the period between 13 January and 5 June 2020.

(b) Within 21 days the claimant must serve an updated schedule of loss with any additional documents relevant to remedy.

(c) Within 35 days the respondent must serve a counter-schedule of loss with any additional documents relevant to remedy.

(d) Within 49 days any additional witness statements for the remedy hearing must have been served.

(e) Five copies of all the above must be provided to the tribunal by 9.30 am on the day of the remedy hearing.

Employment Judge Franey

25 October 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
29 October 2019

FOR THE TRIBUNAL OFFICE