EMPLOYMENT TRIBUNALS

Claimant: Ms Nicola Banner

Respondent: Worcestershire Health and Care NHS Trust

FINAL HEARING

Heard at: Birmingham **On:** 8 to 10 & 15 to 16 May 2018
(16 May tribunal deliberations in private only)

Before: Employment Judge Camp Members: Mr N Forward
Mr P Davis

Appearances
For the claimant: in person
For the respondent: Ms N Owen, counsel

RESERVED JUDGMENT

(1) In this reserved Judgment, references to numbered allegations are to paragraphs of the annex to the written record of the preliminary hearing on 17 February 2017 before Employment Judge Algazy QC, which will be referred to in the Reasons, below, as the "list of issues".

(2) The respondent unlawfully discriminated against the claimant in the following ways:

a. by harassment related to disability by requiring her to announce visits to the lavatory (allegation 2.1.4) and by providing her with a leaflet at the same time as making a comment about her vomiting (allegation 2.1.5);

b. by dismissing her (allegation 4.1.10), which was unfavourable treatment under section 15 of the Equality Act 2010 ("EQA").

(3) The complaints relating to allegations 2.1.6 and 4.1.6 (concerning a discussion about a medical appointment) are, by consent, dismissed upon withdrawal pursuant to rule 52.

(4) The claimant's other complaints all fail and are dismissed.

(5) Judgments and reasons for the judgments are published, in full, online shortly after a copy is sent to the claimant and respondent in a case.

REASONS

Introduction; complaints & issues

1. The claimant, Ms Nicola Banner, was employed by the respondent at Kidderminster Health Centre as an administrator in Child and Adolescent Mental Health Services from 7 March 2016 until her dismissal with effect on 14 September 2016. She was dismissed because she failed her probationary period. Following a period of early conciliation from 5 October to 19 November 2016, she presented her claim form on 12 December 2016. She claims disability discrimination.

2. There have been two preliminary hearings. The first is the one referred to in paragraph (1) of the Judgment. The complaints and issues we were to decide are set out in sections 2 to 5 and 7 of the list of issues, produced following that preliminary hearing. There are:

   2.1 eight complaints of disability-related harassment (allegations 2.1.1 to 2.1.8 in the list of issues; from this point onwards, unless otherwise indicated, three digits separated by full stops – e.g. "2.1.1" – is a reference to a sub-paragraph of the list of issues), one of which was withdrawn during the hearing;

   2.2 eight complaints (4.1.1 to 4.1.8), one of which was also withdrawn, of discrimination under EQA section 15 – "section 15" – relying on the same allegations of fact as the harassment complaints;

   2.3 two further allegations of section 15 discrimination (4.1.9 and 4.1.10);

   2.4 reasonable adjustments complaints relying on five PCPs (5.1.1 to 5.1.5), a "PCP" being a "*provision, criterion or practice*" under EQA section 20(3).

3. We have not, in fact, dealt with everything identified in those sections of the list of issues. We have only dealt with the things that we needed to in order to decide the claimant's complaints and explain our decision.

4. At the start of this final hearing, we asked the claimant and respondent's counsel, Ms Owen, to confirm that the list of issues was accurate and complete. They both confirmed this. Ms Owen also told us that in relation to the section 15 complaints, the respondent was only raising a justification defence to allegation 4.1.4: "*being required by Anne Brown to announce visits to the bathroom*". The respondent's case on this point was that, to the extent the claimant was required by Anne Brown to do this, it was a proportionate means of achieving a legitimate aim, namely the health and safety of staff.

5. Near the start of this hearing, it was agreed that we would not deal with any remedy issues at this stage; in particular, if we decided that the claimant's dismissal was discriminatory, we would not go on to decide whether any compensation for dismissal should be reduced to take into account any possibility that the claimant would still have been dismissed even if there

hadn't been any discrimination. If the parties cannot agree remedy between themselves, we'll decide all remedy issues at a hearing on 13 August 2018.

6. The second preliminary hearing, which was in June 2017, was to decide whether the claimant was at all relevant times a disabled person under the EQA because of each of the conditions she relied on as disabilities. The result of that preliminary hearing was a decision that the claimant is and was a disabled person because of each of the following: a stomach condition; erosive oral lichen planus – which we'll refer to as her "mouth condition"; insulin dependent diabetes; migraine. Part of the respondent's defence to the section 15 and reasonable adjustments complaints is that it did not have knowledge of disability.

The law

7. The relevant law is accurately summarised in Ms Owen's helpful skeleton argument dated 8 May 2018. We don't think it is necessary for us to go much beyond that. We note the wording of the relevant parts of the EQA in particular sections 15, 20, 26, and 123. In terms of case law, we were particularly assisted by, and have applied the law as explained:

    7.1 in relation to the section 15 and reasonable adjustments claims, by the Court of Appeal in Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 at paragraphs 15 to 29, 43 to 47, 57 to 68, 73, and 79 to 80;

    7.2 in relation to the harassment claim, by the EAT in Richmond Pharmacology v Dhaliwal [2009] ICR 724, at paragraph 7 to 16;

    7.3 in relation to time limits, by the Court of Appeal in in Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640, in particular paragraphs 14 to 20; and by the EAT in Hale v Brighton & Sussex University Hospitals NHS Trust [2017] UKEAT 0342_16_0812, at paragraphs 34 to 44.

The facts

8. Most of our findings on disputed questions of fact are not set out in this section of these Reasons; they are set out in the section headed "*Decision on the issues*".

9. By way of background, we refer to Ms Owen's chronology and cast list which, with the correction of one date in the chronology (a one-to-one meeting was on the 9th and not 8th June 2016), should be deemed to be incorporated into these Reasons. The main relevant events are set out immediately below.

10. For most of her employment with the respondent, the claimant worked in an office with two women who were at roughly the same level as her: Julie Kane and Julie Lee. Above the claimant in the hierarchy – but not, we think, in a direct line management relationship with her, in part, perhaps, because he was initially on his probationary period too – was James (Jim) Hughes, but she

didn't have much to do with him day-to-day. Above him (but possibly not his line manager) was Anne Brown, who sometimes worked in the same office as the claimant and sometimes worked elsewhere, and who was in practice the claimant's line manager, at least until August 2016. She was, however, an agency worker and not the respondent's employee. Above Anne Brown was Stephanie Andrews. Like Mr Hughes, Ms Andrews had little day-to-day involvement with the claimant.

11. On 18 March 2018 there was a verbal altercation or disagreement between the claimant and Julie Lee. Each complained about the other. As part of her complaint, Julie Lee spoke about the claimant "*huffing and puffing*". The claimant's case is that that was an offensive reference to her doing controlled breathing to alleviate symptoms of her stomach condition. Julie Lee also complained about Julie Kane. The claimant and Julie Lee were both spoken to, separately, by Ms Andrews on the day. No disciplinary or similar action was taken against either of them. Unfortunately, though, the relationship between the two of them never recovered. As we heard no witness evidence from Julie Lee, we are not in a position to say whose fault, if anyone's, that was.

12. On 7 April 2016, there was a one-to-one meeting between the claimant and Mrs Brown, during which, amongst other things, the claimant complained about her mouth condition. In an email to Mrs Brown the following day, she wrote, "*when my condition flares up it's painful in my mouth and throat*".

13. Between 17 and 20 May 2016, the claimant was off work with diarrhoea and vomiting.

14. On 9 June 2016, at the claimant's instigation, there was a meeting between her and Mr Hughes during which she made a number of complaints about her working life. One of these was that she was having to take too many telephone calls. There had been an office move and the main number for the office given out by the respondent was the number of the telephone that was now on the claimant's desk.

15. The same day, Julie Kane sent Mrs Brown an email complaining about the claimant. The claimant didn't know about the email or the complaint at the time, but saw it in one of the drawers in Mrs Brown's desk on 17 August 2016 when she was looking for something else.

16. The following day, there was a formal "Month 3" probationary period assessment meeting between the claimant and Mrs Brown. A number of things were discussed, including: what were described by Mrs Brown in the probationary period assessment form as "*repeated lengthy absences from the office*", in relation to which Mrs Brown, "*reminded* [her] *again to say where she is going in case of fire*"; a complaint by the claimant about the quantity of telephone calls she was dealing with; a request by Mrs Brown that the claimant spend less time on each call, "*as she is getting too involved …* [she should] *not be on the telephone half an hour*".

17. The probationary period assessment form had parts to be completed by Mrs Brown and a part for the claimant's comments. Mrs Brown completed her parts of it by the end of June 2016 and the claimant completed her part and sent it back to Mrs Brown around early July. One of the claimant's comments in her part of the form was that having to announce where she was going when leaving her desk could be "*very humiliating*" and "*degrading*" as, "*due to my stomach condition linked to my diabetes there may be days when I have to repeatedly visit the toilet*".

18. On or around 24 June 2016, an incident occurred which is mentioned in the list of issues as allegations 2.1.5 and 4.1.5. Precisely what happened is very much in dispute. But it is common ground that Mrs Brown provided the claimant with a sexual health leaflet about chlamydia and possibly one other, from the British Pregnancy Advisory Service, and that, to some extent at least, the claimant was upset by this.

19. There was a "*Month 5*" probationary period assessment meeting between the claimant and Mrs Brown on 9 August 2016. One of the things that was discussed was the comments the claimant had written on the "*Month 3*" probationary period assessment form, including her comments about her stomach condition. Mrs Brown told the claimant that her probationary period was going to be extended. She also said she was going to refer the claimant to occupational health for "*support and guidance regarding her sensitivity and ailments*". She was, though, busy with other things and did not get around to making the referral. The claimant self-referred around 22 August 2016.

20. On 17 August 2016, the claimant found a pile of documents of the kind that might end up in a personnel file in an unlocked drawer of Anne Brown's desk. Some related to her and some to colleagues. They included Julie Kane's email to Anne Brown of 9 June 2016. Anne Brown was on holiday at the time and the claimant had been looking for a stack of forms kept in that desk. Later the same day, the claimant and Stephanie Andrews had a conversation about what had happened and the claimant gave her the documents for safekeeping. The conversation developed into a more general discussion about the claimant's dissatisfaction at work. The claimant mentioned the incident with the leaflets of 24 June 2016. She also told Ms Andrews that she had written out 12 pages describing other incidents that had happened. Ms Andrews typed up a note of what had happened on the same day.

21. In the trial bundle, there are several pages of handwritten notes the claimant made about things that she alleges happened to her during her employment. She could not remember precisely when she made them, but she told us that they were written for her own benefit and that some were written at or just after the events they describe and some a while later. The notes fit with what the claimant told us about them, in that some read as if they were written contemporaneously and others were evidently written retrospectively. During August 2016, she used these notes and her memory to produce a typed up record of events. We think it is these typed notes that the claimant was referring to when she mentioned to Ms Andrews having 12 pages of records of

incidents. The version of the typed notes we have runs to 13 pages, but it includes notes about things that happened after 17 August 2016. Despite being asked for them by Ms Andrews, the claimant never provided the respondent with her "*12 pages of incidents*" before the end of her employment.

22. The respondent was concerned that what the claimant had done on 17 August 2016 was a breach of confidentiality. Ms Andrews began an investigation into this on 18 August 2016.

23. The claimant went off sick on 25 August 2016 and did not return to work before her dismissal, except to attend a final, "*6 month*", probationary period assessment meeting on 14 September 2016. The Med 3 fit notes give "*Stress at work*" as the reason. This was the fourth formally recorded period of sickness absence the claimant had had during her employment.

24. On 30 August 2016, Anne Brown wrote to the claimant inviting her to the probationary period assessment meeting. The letter stated that there were three potential outcomes of the meeting: successful completion of probation; a three month extension; dismissal with immediate effect and pay in lieu of notice.

25. In an email of 5 September 2016 sent to various people within the respondent, Stephanie Andrews wrote that the respondent was "*likely to terminate the contract for Nicola Banner on 14 September under the probationary contract*" and that she had "*grave concerns that Nicky* [the claimant] *has acted in a way that has breached other people's confidentiality etc*".

26. On 6 September 2016, the claimant sent Stephanie Andrews a letter, dated the previous day, raising a formal grievance. The grievance letter included an allegation that the claimant had been the victim of disability discrimination.

27. On 8 September 2016, Ms Andrews wrote to the claimant responding to her grievance letter. One of the things she told the claimant was that the 6 month probationary period assessment meeting would be conducted by Mr Hughes instead of by Anne Brown, because the claimant's grievance was mainly about Mrs Brown.

28. On 13 September 2016, an occupational health nurse asked Ms Andrews to make a management referral of the claimant to occupational health and Ms Andrews asked Mrs Brown to begin doing so.

29. The 6 month probationary period assessment meeting was conducted by Mr Hughes on 14 September 2016 as planned. The claimant was told she was being dismissed. The form recording what happened at the meeting that was completed by Mr Hughes suggests there were potentially three reasons for this: she had had four periods of sickness absence during her probationary period; she was deemed not to have met targets allegedly set for her at the previous probationary period assessment meetings; the incident on 17 August 2018. During the meeting, the claimant made allegations of disability discrimination.

30. The claimant's dismissal was confirmed in a letter from Mr Hughes of 6 October 2016, which was in a standard form.

Decision on the issues

31. We shall now go through each of claimant's complaints.

32. Complaints 2.1.1 and 4.1.1 are harassment and section 15 complaints relating to "*comments (Ann Brown/Julie Lee) about the claimant "huffing and puffing" from 18 March 2016*".

33. Taking the list of issues in conjunction with the claim form, it appears to us that 2.1.1 and 4.1.1 are each made up of three separate complaints.

34. The first is a complaint against Julie Lee about her complaining about the claimant "*huffing and puffing*". The only time we are satisfied Julie Lee used those words, or anything like them, in connection with the claimant is in relation to events of 18 March 2016. That incident is documented and we can see from the contemporaneous notes of an interview with Julie Lee that she did indeed use the phrase "*huffing and puffing*" when describing the claimant's alleged behaviour towards her. As an allegation of disability discrimination, however, it is not made out.

35. For this conduct potentially to be related to or connected with disability in some way, that phrase would have to be a reference to what the claimant described as her "*controlled breathing*". The claimant uses controlled breathing to help alleviate the symptoms of her stomach condition.

36. We are not satisfied that what Julie Lee described as "*huffing and puffing*" was the claimant doing controlled breathing. We note that Julie Lee made the same complaint, at the same time, using the same phrase, against Julie Kane. No one has suggested Julie Kane ever did controlled breathing.

37. We don't think Julie Lee was talking about controlled breathing at all. We think what she was referring to was the claimant and Julie Kane allegedly audibly expressing their exasperation with her.

38. Further, even if this section 15 and harassment complaint was otherwise valid, it has not been brought within the relevant time limits. It is not, in our view, part of any "*conduct extending over a period*". It is the one and only complaint concerning conduct of Julie Lee that we are satisfied is to any extent made out on the facts; the other complaints with any validity involve other people. This was, then, a one-off act by Julie Lee which occurred in March 2016, well outside the primary 3 month limitation period.

39. So far as concerns whether it would be "*just and equitable*" to extend time in accordance with EQA section 123 so that this complaint could proceed, it is for her to persuade us that time should be extended. She has put before us no

material whatsoever, or even presented any argument, in support of such an extension. For example, within her evidence, she did not to any extent seek to explain why she waited until she did before going through the early conciliation process; and we have no idea why. No reason at all for extending time has been put before us. In the absence of any material supporting an extension of time, there is no proper basis for allowing this complaint to proceed in accordance with EQA section 123(1)(b), even if it were an otherwise valid complaint.

40. The same goes for any other complaint that is not part of conduct extending over a period and that was presented outside the primary 3 month limitation period.

41. We should perhaps add that although we are conscious that there does not necessarily have to be a good reason for the delay in bringing the claim, it cannot in our view be enough to justify an extension of time for there simply to be no significant prejudice to the respondent caused by the delay. If that were enough, then: it would mean that the respondent had to justify not extending time, rather than the burden being on the claimant; it would in practice mean that an extension of time would be made in almost every case where the delay in bringing proceedings was weeks or months rather than years, because it will be a rare case where prejudice is caused by such a relatively short delay.

42. The second complaint falling under 2.1.1 and 4.1.1 is a complaint about comments allegedly made by Anne Brown connected with the claimant's controlled breathing.

43. In the contemporaneous or near-contemporaneous documentation, the only clear reference to a comment that might possibly be related to controlled breathing is an allegation that Anne Brown would say things like, "What are you sighing for?" That is a comment that, even if Anne Brown said it, might very well have nothing to do with controlled breathing. We note the lack of specifics from the claimant in terms of what Anne Brown said and allegedly when and in what precise context. We also note the claimant's failure to recall in her handwritten notes any specific instances of comments being made that clearly related to controlled breathing. Although if such comments were frequent (as the claimant alleges they were), we would not expect the claimant to record all of them in those notes, her failure to record anything that clearly related to controlled breathing at or near the time does cause us to doubt the accuracy of what she recalls now.

44. Our conclusion on this point is that we are not satisfied that at any relevant time (let alone at a time within the primary 3 months' limitation period) anything was said by Anne Brown that related to disability. The claimant hasn't persuaded us that if comments were made about her allegedly sighing, they related to her doing controlled breathing. In addition, so far as the harassment

complaint is concerned, we are also not satisfied that anything that was said that might conceivably relate to controlled breathing had the requisite "*purpose or effect*" under EQA section 26(1)(b).

45. The third subsidiary complaint coming under 2.1.1 and 4.1.1 is a complaint that when the claimant tried to speak to Julie Lee about her [the claimant's] controlled breathing, Julie Lee stated that she didn't believe what she perceived as "huffing and puffing" was because of the claimant's illness and that she [Julie Lee] didn't regret a single word. (We note that in connection with this there is an allegation about "*sniggering*" in the claimant's witness statement at paragraph 8, but this is not an allegation made in the claim form or the list of issues and therefore it is not before the tribunal as a freestanding complaint and we shall not refer to it again).

46. The first reason why this complaint fails is that it has the same time limits problem as the first subsidiary complaint considered above. Time limits are not its only problem, though.

47. It is highly plausible that Julie Lee might have said just such a thing to the claimant; we are prepared to accept (in the absence of any direct evidence from her) that she did. However, we doubt what she said has the necessary purpose or effect under EQA section 26 to succeed as a complaint of harassment. And in relation to both the harassment complaint and the section 15 complaint, we don't think what Julie Lee said related to disability, nor that she said this because of anything arising in consequence of disability. Although we have no statement from her, we can get a good idea of why she said what she said and what was going on in her mind at the time from the notes of her discussions with Ms Andrews on 18 March 2016. Based on what she told Ms Andrews, we think the reason she would have made any such remarks to the claimant was because she thought that the claimant was sighing in exasperation when she was doing what Julie Lee had described as "*huffing and puffing*" and that (regardless of whether the claimant did have a disability and did do controlled breathing to alleviate symptoms of that disability) that the claimant was not telling the truth when she attributed the particular instances of [alleged] "huffing and puffing" to her controlled breathing. Further, we have already – above – decided we are not satisfied that the thing Julie Lee was aggrieved about was the claimant doing controlled breathing.

48. In summary, nothing Julie Lee said on and around 18 March 2016 was about the claimant's controlled breathing.

49. All allegations made under 2.1.1 and 4.1.1 therefore fail and are dismissed.

50. Allegations 2.1.2 and 4.1.2 are harassment and section 15 discrimination relating to, "*transferring main office telephone calls to the claimant and*

comments (Anne Brown/Julie Lee/Julie Kane) about the claimant refusing to take them or making excuses from 10 May 2016".

51. As written in the list of issues, there are two allegations here. The first relates to transferring calls to the claimant's telephone. Insofar as there is a harassment or section 15 claim about transferring main office telephone calls to the claimant, it doesn't get off the ground. Main office telephone calls arrived at the claimant's desk simply because after an office reorganisation, the number of the phone that was on her desk happened to be the number most often given out as the main office number. There is no evidence that this was deliberately engineered to get at the claimant or anything of that kind; it had to be on someone's desk; it was just the claimant's bad luck. It may have had a particularly adverse impact on the claimant because of her health condition, but the reason for this happening was not related to disability or to anything arising in consequence of disability.

52. Turning to the alleged comments about the claimant "*refusing to take calls or making excuses*", insofar as we can pin this down to anything specific at all, there are two particular allegations: that Julie Kane told the claimant to "*suck it up*" when the claimant complained about the volume of calls she had to handle; and that Ann Brown allegedly, on one occasion, threatened the claimant with dismissal if the claimant refused to take calls.

53. The allegation about Ann Brown appears in the evidence as an exchange between her and the claimant recorded in the notes of the 3 months' probation review meeting on 10 June 2016. What is recorded is that the claimant complained about the number of calls that were coming in to her and about Julie Lee not handling her fair share of calls. The sentence containing the relevant exchange is, "*I* [Julie Brown] *asked NB* [the claimant] *are you refusing to answer the phones as it is a requirement of the post, she replied no, I want JL to distribute the calls equally.*"

54. The claimant had and took an opportunity to comment on those notes. In her comments on them she did not challenge the account given of that exchange between her and Julie Brown. We accept it as reasonably accurate. It is that exchange which the claimant has characterised as a threat of dismissal.

55. As to whether there is a valid claim here, we note, first, that there are time limits issues.

56. Secondly, looking at the harassment complaint, we are willing to accept that this was unwanted conduct (which, we note, is not the same as unreasonable conduct). However, it does not, in our view, relate to disability.

57. The reason it does not relate to disability is that we are not satisfied that at that meeting the issue the claimant had with telephones was anything to do with her mouth condition. The day before this meeting, the claimant had had a

meeting with Jim Hughes which he documented. Although the claimant did not have an opportunity to comment on Jim Hughes's notes, the fact that Jim Hughes records the claimant's issues to do with the telephones in a similar way to the way in which they are recorded by Anne Brown in her notes of the meeting on 10 June provides support to the respondent's case that the mouth condition was not the problem at that time. The problem with telephones identified in the notes of both meetings was an issue to do with fairness. What the claimant was complaining about was that Julie Lee was not taking her fair share of telephone calls.

58. We again note that the claimant had an opportunity to comment on Anne Brown's notes of the meeting on 10 June. In her comments, she said nothing about her mouth condition at all. At a previous meeting, in April 2016, the claimant had made a comment or correction to notes that Anne Brown had made specifically highlighting her mouth condition. We think that if her concern in June was a concern about her mouth condition rather than a concern about fair distribution of duties, she would have raised it in her comments and she did not do so.

59. Also, we do not accept that Ann Brown said anything to the claimant in connection with the telephones issue at that meeting that had the relevant purpose or effect under EQA section 26. Certainly, what is recorded in the notes of the meeting as having been said did not do so.

60. We turn to the complaint about Julie Kane allegedly saying, in connection with the telephones issue, something like, "*You have got the main number so just suck it up and stop making excuses.*" Although she denied using the phrase "suck it up", Julie Kane accepted that she might have said something to the effect that the claimant just had to put up with the situation.

61. We have already explained we are not satisfied that the claimant's complaint at the time was anything to do with her mouth condition. It follows from this that what Julie Kane had to so say was nothing to do with that condition either. We are also not satisfied that anything that was said by Julie Kane had the necessary purpose or effect under EQA section 26.

62. Turning to the allegation 4.1.2 – the section 15 complaint about telephones – this fails for much the same reasons that complaint 2.1.2 – the equivalent harassment complaint – fails. Arguably this was unfavourable treatment but it was not because of anything arising in consequence of disability. Anything that was said to the claimant in relation to this was because she complained about the volume of calls and the fact that in her view Julie Lee was not pulling her weight. The claimant complained about this because she thought it was unfair, not because of her mouth condition.

63. Complaints 2.1.3 and 4.1.3 are about "*comments about sickness and/or regular eating from 10 May 2016*".

64. Two sets of complaints are made here. The first set of complaints is described in the claim form as, "*daily comments by Anne Brown and Julie Kane such as "You aren't sick again are you?" "Why don't you just go home if you are not well?" "I've never known anyone so ill." "Have you got diarrhoea?" "Oh, for God's sake what's the matter with you now?"* ". The second set of complaints is described in the claim form as "*daily*" comments from Julie Kane and Anne Brown about "*regular eating because of stomach conditions. Julie Kane commenting that because I was eating, I should have been on lunch but I was taking an extra lunch later on so, in her opinion, I was having an hour instead of 30 minutes. Also, Anne Brown and Julie Kane commenting "God, you're always eating." "You can't be ill because you are always eating."* ".

65. Neither set of comments is in the claimant's handwritten notes. In the claimant's typed up note, what is written is virtually identical to what is in the claim form.

66. Looking first at the alleged comments about regular eating, we note that this allegation / these allegations were not really put to the respondent's witnesses; certainly no specifics were. Indeed, the allegations suffer from the same lack of detail and specifics as many other allegations, in terms of precisely what was allegedly said, by whom, and when. The only part of these allegations that seems to us to be reasonably clear boils down to a complaint about the contents of the email of Julie Kane of 9 June 2016. For reasons we shall explain below, that email was not sent because of anything to do with disability or because of anything arising in consequence of disability.

67. In paragraph 16 of her witness statement, the claimant complains about getting "*daily comments from Julie Kane or Anne Brown about being on lunch because I was eating something*". By the end of her evidence and that of the respondent's witnesses, she and the respondent appeared to agree: that other people ate at their desks and ate other than during a designated lunch break; that no one made comments to or about them in relation to this, or otherwise criticised them for it. (Whether or not there is agreement, we have decided that this was what happened). Because of this, we don't think such comments were made because anyone had a problem with the claimant eating at her desk or eating other than at lunch time; logically, if people had a problem with the claimant it must have been to do with something particular to her.

68. Part of the respondent's witnesses' evidence was to the effect that there was a perception that the claimant did not pull her weight, leaving others (Julie Lee and Julie Kane in particular) to do an unfairly large share of the work. That evidence is consistent with the contents of Julie Kane's email of 9 June, which she elaborated on in her oral evidence. What happened, so far as Julie Kane was concerned, was that: the claimant had had a prolonged trip to occupational health during which she had not had time to have lunch; she came back and then very shortly afterwards left the office to go to speak to the

learning disabilities team; the claimant had been on her mobile phone checking her messages all morning; the claimant was in the habit of eating her lunch at her desk and then going off for lunch. The email concludes: "*It's now 1 and she is in the corridor chatting with Heather and Jim.*"

69. What is reflected in the email is that any comments made about the claimant eating were to do with a perception that the claimant was not working whilst she was eating her food at her desk and was then taking a separate lunch break. This meant, Julie Lee and (through her) Julie Kane thought, the claimant was taking more than her permitted half an hour for lunch.

70. This perception about the claimant taking longer breaks than she was allowed to was particular to her, in that others ate at their desks outside of their designated lunch breaks without a similar perception arising in relation to them. It was part and parcel of a broader perception about how hard the claimant worked. This perception, and Julie Kane's and Julie Lee's criticisms of the claimant, may have been completely unfair, but that doesn't make them anything to do with the claimant's disabilities (or with anything arising from them).

71. Further, the perception seems to have come from Julie Lee. The gist of Julie Kane's evidence on this point was that she thought the claimant was not working when she was eating at her desk outside of her 'official' lunch break because of what Julie Lee had told her. We think that if Julie Lee got what she told Julie Kane from anywhere other than from what she thought she saw the claimant doing, it was from personal ill feeling. It is obvious from the contemporaneous correspondence that Julie Lee took against the claimant right from the start. And the evidence gives us no good reason to tie that personal ill feeling to the claimant's disabilities or to anything arising from them. Unfortunately, people sometimes just don't like other people, for no particular reason, good or bad.

72. In her email of 9 June 2016, Julie Kane did not express herself in an appropriate and professional way. But nothing in the email had anything to do with the claimant's disabilities and we don't think any other comments connected with the claimant eating at her desk and/or eating outside of a designated lunch break had anything to do with them either.

73. Turning to the alleged comments about sickness, we are not satisfied that such comments were made.

    73.1 If such comments had really been made daily or very regularly from early May onwards, we think something about them would have been written in the handwritten notes – not every such comment, but at least a few examples.

73.2 On 9 June 2016, the claimant had a meeting with Mr Hughes. She had arranged the meeting herself and she had arranged it because she wanted to raise a number of issues about her work. By that stage she had allegedly faced a barrage of comments about sickness for a month or so which she took offence to. If this were so, she would, we think, have raised this with Mr Hughes. She did not do so. Had she done so, something about it would have been in his meeting notes. He recorded other complaints the claimant made. Why would he conceal complaints about comments, but not those other complaints?

74. We are not suggesting that the claimant was deliberately not telling us the truth in relation to this or any other part of her case. But in relation to alleged comments about sickness, it is largely one person's word against another's and given this, and given the lack of contemporaneous corroborative evidence, we are not satisfied on the balance of probabilities that the claimant's recollection is accurate.

75. Complaints 2.1.4 and 4.1.4 are "*being required by Anne Brown to announce visits to the bathroom*".

76. Anne Brown's oral evidence before us on this point was a little inconsistent and self-contradictory. Nevertheless, we think she ultimately conceded in her oral evidence that the claimant did have to announce what was sometimes described as "*lengthy*" absences from her desk; that is to say, the claimant was expected to say where she was going. What "*lengthy*" means in this context was not very clear. We recall somebody referring to "20 minutes" at one point. Our understanding is that what was meant was an absence longer than could be accounted for by popping to the loo or to another office in the normal course of work, in the way that someone other than the claimant might.

77. We also accept – and Anne Brown anyway seemed to us to have conceded by the end of her oral evidence – that it didn't make any difference what the reason for the claimant needing to be away from her desk for a "lengthy" period of time was: if the claimant was, for whatever reason (including going to the lavatory), potentially going to be a long time away from her desk, she would have to tell colleagues where she was going.

78. We note that Anne Brown specifically mentioned in her evidence sending people to look for the claimant in the lavatory when discussing the claimant being away from her desk for longer than could be accounted for by a normal visit to the lavatory. Why, we ask ourselves, would Anne Brown hope to find the claimant in the lavatory in those circumstances? Our answer is: probably because she knew that that was where the claimant was supposed to be, because the claimant had said so, because the claimant had been complying with the respondent's requirement / expectation.

79. We also note that in her comments on the probation period assessment form following the probation review meeting on 10 June 2016, the claimant complained about having to announce where she was going and stated, "*I find this very humiliating sometimes as, due to my stomach condition linked to my diabetes, there may be days when I have to repeatedly visit the toilet.*" In other words, there is contemporaneous documentary evidence supporting this claim.

80. In addition, the claimant gave evidence, which we accept, that her stomach condition meant she would often need to visit the lavatory for lengthy periods of time.

81. Putting all of that together, we are satisfied that the claimant was indeed required, or at least expected, to tell colleagues where she was going when she was going to the loo and thought she might need to be a long time in there.

82. The specific aspect of the respondent's requirement which the claimant's claim is about is announcing visits to the lavatory. She is not complaining about any requirement to tell people where she was going in relation to potentially lengthy absences for other reasons. Bearing this in mind, that requirement (which, it should be borne in mind, necessitated her effectively telling her colleagues every time she had a problem with her bowels) certainly, in our view qualifies as unfavourable treatment under EQA section 15 and unwanted conducted under EQA section 26.

83. Dealing first with the harassment complaint, we ask ourselves whether this conduct related to disability. We find that it did, in that it was about announcing lengthy visits to the loo and the reason the claimant would be making lengthy visits to the loo was because of her stomach condition. The next question is: did it have the requisite purpose or effect under EQA section 26(1)(b)? We are satisfied that it did. We think most people would, at the very least, find it embarrassing to have to announce to colleagues whenever they were going to make a lengthy visit to the lavatory. The claimant stated in terms in late June or early July in her comments on her probation period assessment form that she found it "*very humiliating*" and "*degrading*". She wrote those comments well before she intimidated a potential tribunal claim. The respondent failed to pick this up to any extent until the 5 months' review, and it appears that, even then, no action of any substance was taken. This is perhaps surprising given that the claimant's comments on the 3 months' review were looked at during the 5 months' review.

84. In conclusion, this was unwanted conduct which continued for a prolonged period, which the respondent did not address, which the claimant reasonably found degrading and humiliating, and which, in all the circumstances, constitutes disability-related harassment under EQA section 26.

85. The respondent appeared to be trying to defend this complaint on the basis that in practice the claimant never did tell people where she was going. That, at least, was an allegation Anne Brown made during her oral evidence.

86. We don't accept the allegation as a matter of fact. First, it was not put to the claimant in cross-examination. Secondly, prior to Anne Brown telling us this in her oral evidence, we had not understood it to be any part of the respondent's case that the claimant never complied with the requirement to tell people where she was going if she was going to be away from her desk for a long time. (This would of course explain why it was not put to the claimant).

87. Thirdly, the issue about letting people know where the claimant was going was expressly raised during the claimant's probationary review. In that context, if the claimant was refusing to comply with a management instruction, particularly one that (according to the respondent) was an instruction put in place for health and safety reasons, it is inconceivable to us that the claimant would not have been taken to task as part of her probationary review for her non-compliance. If she persisted in refusing to tell her managers or anyone else where she was going, as Mrs Brown effectively suggested she had done, she would surely have been disciplined for it. Yet the comment made in relation to this issue in the 5 months' review – in Mrs Brown's handwritten annotations on the 3 months' review form – was that this aspect of the claimant's performance had "*improved*".

88. Moving on to the similar section 15 complaint – complaint 4.1.4 – this complaint fails. The unfavourable treatment is a requirement or expectation to announce potentially lengthy visits to the lavatory. That unfavourable treatment is not something that the claimant had to do because of anything arising in consequence of disability. It was imposed because of a perception that she tended to leave her desk for long periods of time without anyone knowing where she was going or what she was doing, and that when she was away from her desk she was not always engaged in work she was supposed to be doing.

89. That perception did not arise in consequence of disability. It did arise partly (but not mainly) because of the claimant's long visits to the lavatory and her need to make long visits to the lavatory arose, in turn, in consequence of disability. However, the connection between the unfavourable treatment and those long visits which arose in consequence of disability is, in our view, too tenuous for the section 15 complaint to be made out.

90. In any event, the claimant has succeeded in a virtually identical harassment complaint and it makes no difference at all in terms of remedy whether she wins or loses the section 15 complaint.

91. Although it is not strictly necessary for us to deal with the point, we should like to make clear we do not accept the respondent's suggestion that the

requirement / expectation that the claimant tell colleagues where she was going when she was about to be away from her desk for a lengthy period was to do with health and safety. It was, once again, all to do with the respondent's concern – legitimate or illegitimate – that the claimant was not pulling her weight.

92. Complaints 2.1.5 and 4.1.5 are harassment and section 15 complaints about the incident on 24 June 2016. It is alleged that Anne Brown threw down onto the claimant's desk a leaflet about chlamydia and one about pregnancy termination, and made a comment (connected with the claimant trying out online dating) along these lines: "*You might need these if you are slagging around. In fact, check with your doctor next time you're there, it* [pregnancy] *might be the reason you are feeling sick all the time.*"

93. Anne Brown told us that nothing like that was said. She admitted passing to the claimant a leaflet about chlamydia and said it was possible the other leaflet might have been with the first one, unnoticed by her. She explained that healthcare leaflets of many different kinds routinely found their way into the office and if they were of no interest to her, they would be passed around. The gist of her evidence was that nothing in particular was meant by it, any more than anything had been meant by whoever had provided the leaflets in the first place.

94. On balance, by the finest of margins, we prefer the claimant's version of events to Anne Brown's. Although, based on the rest of the evidence, this behaviour was out of character for Mrs Brown and although it is rather odd that the claimant did not complain about the incident until August, we come down on the claimant's side because:

    94.1 the claimant recorded the incident in her handwritten notes, which were written in or around July 2016, shortly after the incident. For those notes to be inaccurate to the extent they would have to be for the respondent's version of events to be correct, the claimant would, we think, either have to be deliberately making this up or to be deluded. Both these things are inherently implausible. It would, for example, be rather an extraordinary thing to make up; even more so to make it up, record it in a private handwritten note, and then not mention it to anyone at the respondent until some 2 months after the incident in question;

    94.2 the claimant did raise this with the respondent on 17 August 2016, again suggesting (if she did not just invent it) that she genuinely thought that this was what had happened to her only 6 weeks or so previously;

    94.3 until the hearing, the respondent did not really explain why Anne Brown might think it appropriate to pass to the claimant a leaflet about chlamydia. On the evidence as it stood before Anne Brown appeared as a witness, we could think of no plausible explanation for her providing the

leaflet to the claimant other than malice on her part. The explanation came for the first time during cross-examination. It was not put to the claimant by counsel, who we are sure would have put it had she been aware of it prior to Anne Brown giving her oral evidence. It was not, for example, given in the respondent's amended Response, which states that it was prepared after the respondent "*had the opportunity to consult with Anne Brown in relation to this incident*". Given that the respondent has been professionally represented throughout these proceedings, it is almost inconceivable that Anne Brown was not questioned about this incident in some detail; equally so that if she was questioned about it and told the respondent's advisers what she told us during cross-examination, that it would not have been written into the amended Response and her witness statement;

94.4 the claimant had a period of sickness absence for diarrhoea and vomiting only a few weeks before 24 June 2016, so Anne Brown might be expected to have in her mind at that time the claimant having a problem with sickness.

95. Accordingly, we find it more likely than not that Anne Brown passed to the claimant a pregnancy advice leaflet at the same time as making some comment about the claimant's sickness potentially being attributable to pregnancy. This was unwanted conduct related to disability, namely the stomach condition, and whatever its purpose, clearly, in our view, had the necessary effect under EQA section 26.

96. Before we consider the section 15 complaint about this – 4.1.5 – we shall deal with the obvious time limits issue that arises.

97. For reasons we explained when discussing 2.1.1 and 4.1.1, 2.1.5 would be out of time unless it is part of a course of discriminatory "*conduct extending over a period*" which continued on and/or after 6 July 2016. We find that it is. The course of conduct in question is a discriminatory state of affairs which could be described as a lack of consideration for the claimant in relation to her stomach condition. The discriminatory requirement to inform colleagues about lengthy visits to the lavatory – 2.1.4 – is also part of this course of conduct.

98. There are obvious differences between the two complaints that we consider to be part of the same course of conduct: 2.1.4 and 2.1.5. For example, we have not found that the claimant was required to tell people when she was going to the loo out of malice; whereas Anne Brown's comments to the claimant on 24 June 2016 do seem to have been malicious. What they have in common, however, and what ties them together into a single course of conduct, is that they both stem from lack of thought and consideration for the claimant's feelings in connection with her stomach condition.

99. The incident on 24 June was not, then, an independent isolated act and the time limit for bringing a complaint in relation to it runs, at the earliest, from the last date when the requirement or expectation that she would announce absences from her desk for loo breaks was imposed. It was, we find, still be imposed on her at the time of the probationary period review meeting on 9 August 2016, when the claimant's comments about it in the notes of the previous review meeting were discussed. Accordingly, complaint 2.1.5 was presented within the primary time limit for bringing EQA claims.

100. We can deal with complaint 4.1.5 briefly. The events of 24 June 2016 fit much more comfortably within the framework of a disability-related harassment complaint than they do within the framework of an EQA section 15 complaint. In addition, it is much harder to view 4.1.5 – a section 15 complaint – as part of a single course of "*conduct extending over a period*" which includes harassment complaint 2.1.4 than it is to view harassment complaint 2.1.5 in this way. In short, we uphold allegation 2.1.5 and dismiss allegation 4.1.5.

101. Allegations 2.1.6 and 4.1.6 have been dismissed upon withdrawal.

102. Allegations 2.1.7 and 4.1.7 relate to the email of 9 June 2016 from Julie Kane to Anne Brown. We have already effectively dealt with them when considering 2.1.3 and 4.1.3, above. 2.1.7 and 4.1.7 fail because the email did not relate to disability and was not written because of anything arising in consequence of disability. The email was written because Julie Kane thought the claimant was not, on 9 June 2016, doing her fair share of work and she did not think this because of any of the claimant's disabilities, nor because of anything arising in consequence of any of them.

103. Allegations 2.1.8 and 4.1.8 are disability-related harassment and section 15 complaints about, "*the comments and actions of Jim Hughes on 14 September 2016*". They concern the following conduct (as set out in the claim form): "*Jim Hughes talking over me when I was trying to explain personal health issues. When I started to become distressed, he was smirking/chuckling*"; "*Jim Hughes told me that the Equality Acts didn't apply during the probationary period and that my supposed disabilities therefore weren't relevant.*"

104. It is accepted by Mr Hughes that the meeting became a little heated. In fact, the overall picture of the meeting painted by the claimant and by Mr Hughes is not vastly different. It is likely that in the context of such a meeting, at some point Mr Hughes talked over the claimant (and vice versa). This had nothing whatever to do with any of the claimant's disabilities or anything arising from them: it is just the nature of the meeting that took place.

105. We turn to the allegation that Mr Hughes was at some point smirking and/or chuckling. We accept Mr Hughes's evidence that he certainly did not intentionally do anything to make light of the situation. He was probably nervous and nerves can make people do odd things and come across in an

odd way. We accept the claimant genuinely perceived that he was smirking or chuckling; but we are not satisfied that, objectively, that was actually the case. The claimant was upset and was not well disposed to Mr Hughes even before the meeting started, and she became even less so once she realised he was dismissing her. This would have affected how he came across to her, including how she interpreted his facial expressions, body language, and so on. We don't think he did anything that was objectively inappropriate in this respect, but even if he did do anything like smirking or chuckling, this would, we think, have been the result of nerves and not anything directly or indirectly to do with any of her disabilities.

106. It is inherently unlikely, and we do not accept, that Mr Hughes told the claimant that the EQA did not apply during her probationary period. It would be such a strange thing for anyone to say in such a meeting, whether they believed it to be true or not. It is extremely improbable that anyone occupying Mr Hughes's position in an organisation like the respondent could genuinely believe it, and if Mr Hughes did not believe it, why would he say it? He was not personally concerned about the allegations of discrimination, in that he ignored them when deciding what he should do. It was not something being relied on by the respondent at the time either, judging by the contents of Ms Andrews's response to the claimant's grievance letter.

107. We think the most likely explanation is that the claimant is mistaken. She probably misheard and/or misunderstood what was said during what was evidently a heated meeting where people did talk over each other.

108. So far as concerns the allegation that the claimant was told her disabilities weren't relevant, the respondent agrees there was some discussion about the EQA and disability discrimination; this is confirmed in Mr Hughes's contemporaneous notes. However, we don't think any more one was said than that the claimant did not disclose her disabilities to the respondent at the start of her employment and that any disability she had wasn't relevant to the conduct issue which was a substantial part of the reasons for her dismissal. Again, the most likely explanation for the claimant remembering the conversation differently from Mr Hughes is mishearing and misunderstanding.

109. The reason Mr Hughes said this [that the claimant did not disclose her disabilities to the respondent at the start of her employment and that any disability she had wasn't relevant to the conduct issue] was that that was what he believed and because he thought it helped the respondent to defend and deflect the claimant's allegations of disability discrimination.

110. What Mr Hughes said was unwanted conduct and unfavourable treatment; and it related to disability; but it did not have the requisite purpose or effect under EQA section 26, nor did it arise out of any of the things listed in paragraph 4.3 of the list of issues (the paragraph in which the "*something*"s relied on in

accordance with section 15 are identified). Complaints 2.1.8 and 4.1.8 therefore fail.

111. The final two allegations are freestanding section 15 complaints.

112. 4.1.9 is a complaint about the extension of the claimant's probationary period on 9 August 2016, i.e. the decision of Anne Brown recorded in the probationary period assessment form as, "*I informed Nicky that I was going to extend her probation period and identified the areas that need to improve.*"

113. This decision was indubitably unfavourable treatment, but is only discrimination under EQA section 15 if the claimant's disability-related absences from her desk formed a significant part of the decision to extend probation. We are not satisfied that they did. The only discernible reason for thinking that they might have done is the reference in the 5 months' probation review form prepared by Anne Brown to a perceived need for "*everyone* [to be] *working as they should be, not on mobiles or absent from their desks etc.*"

114. In the probation review form, it is also noted that the perceived problem with the claimant being absent from her desk inappropriately was improving or had improved. In her oral evidence, Anne Brown told us she could recall just one instance between the 3 month and 5 month reviews of the claimant being absent from her desk inappropriately for a prolonged period. Bearing in mind that the original perception of a problem with the claimant being away from her desk related mainly to absences that were not disability-related, we think that the impact of disability-related absences on the decision to extend probation was, at most, very marginal indeed. This claim therefore fails.

115. 4.1.10 is about dismissal.

116. The decision to dismiss was primarily taken by Ms Andrews and Mr Hughes. Both of them confirmed in their oral evidence, as we understood it, that the claimant having had four periods of sickness absence during her probationary period was a small but real part of their decision to end her employment, i.e. it was an effective cause of her dismissal. It is possible – and we haven't yet made any decision on the point – that the claimant would have been dismissed anyway for reasons that had nothing to do with any of her disabilities. But even if she probably would have been dismissed come what may, that would not prevent the decision to dismiss potentially being discrimination under section 15.

117. The periods of sickness absence that were taken into account were:

    117.1 17 to 20 May 2016, which was a period of absence for diarrhoea and vomiting and was, we find, related to the claimant's stomach condition;

    117.2 21 July 2016 – we are not sure what this was for. Possibly it was for a headache but that doesn't mean that it was necessarily for migraine and

the evidence that it was or might have been is unsatisfactory and unconvincing. We are not satisfied that this absence was disability-related;

117.3 10 to 16 August 2016, for migraine – clearly disability-related in our view;

117.4 25 August 2016 to the end of employment for stress at work. There is insufficient evidence pointing to this being disability-related for us to be satisfied that it was. The claimant believing that it was does not make it so.

118. The gist of the evidence about the reasons for dismissal was that, so far as concerned sickness absence, what was significant was that the claimant had four – and not fewer – separate periods of absence during her probationary period. In other words, each of those periods of absence was crucial. Given this, and given that two out of those four periods of sickness absence were disability-related, it follows that dismissal was unfavourable treatment because of something arising in consequence of disability. As no justification defence has been put forward, the respondent's only potential defence to this complaint is lack of knowledge of disability.

119. The question for us is therefore: did the respondent not know and could it not reasonably have been expected to know at around the time of dismissal that the claimant had either of the relevant disabilities: migraines; the stomach condition?

120. We bear in mind that even if the respondent knew (or ought to have known) about the claimant's migraines and her stomach condition, this would not necessarily mean that the respondent knew (or ought to have known) that she was a disabled person because of them.

121. With our employment law knowledge, we know it is likely that anyone who – like the claimant – genuinely suffers from full-blown migraines is a disabled person under the EQA. However, the relevant staff at the respondent did not know and could not, we think, reasonably have been expected to know this. On the evidence before us, the only time, to the respondent's knowledge, migraines were an issue during the claimant's employment, was a one-off episode of sickness absence in August 2016. On the evidence before us, the claimant did not suggest to the respondent that there was or might be any ongoing problem in this respect. We also don't think it would have been reasonable to expect the respondent to refer the claimant to occupational health in connection with migraines, simply because she was once off work with them. The claimant did not mention them in her grievance, nor [we find] during the dismissal meeting on 14 September 2016 with Mr Hughes.

122. In conclusion on this point, we are satisfied that the respondent did not know and could not reasonably have been expected to know that the claimant was a disabled person because of migraines.

123. The claimant's stomach condition was not something that during her employment any lay person at the respondent, even one with HR expertise, would think of as potentially being a disability. It would take expert advice from occupational health, possibly with some input from lawyers, for the respondent to realise that the claimant was a disabled person because of it.

124. It is inherently unlikely, and we are not satisfied, that the claimant, on 21 March 2016, in discussions with Anne Brown about the "*huffing and puffing*" allegation, went into anything like the detail about her stomach condition that – according to her witness evidence – she now remembers having done. We don't think, insofar as a stomach condition or problem was mentioned at all, that at that stage the claimant said anything that ought reasonably to have triggered an occupational health referral or anything of that kind.

125. The claimant was off sick with diarrhoea and vomiting in May 2016, but, again, we are not satisfied that anything was said by the claimant in connection with this to indicate that there was a serious ongoing problem of the kind that might potentially constitute a disability, or that ought to have led to her being referred to occupational health.

126. The claimant did, however, raise her stomach condition in late June or early July 2016 in her comments on the 3 months' review form. This was not long after the period of sickness absence for diarrhoea and vomiting in late May (albeit the claimant didn't link it in her comments to that period of sickness absence).

127. Anne Brown received the claimant's comments around early July 2016. We think Anne Brown ought reasonably, in light of those comments, to have referred the claimant to occupational health in relation to her stomach condition in mid to late July and certainly in early August. During the meeting – the 5 months' review – on 9 August 2016, Anne Brown herself said she was going to do a referral. Although Anne Brown told us in her oral evidence that she was going to refer the claimant purely for diabetes and her mouth condition, we think she must have had the stomach condition in mind as well, given that it was the stomach condition that had been raised by the claimant in her comments on the 3 months' review from which were discussed at the 5 months' review. In any event, the claimant had linked the stomach condition to diabetes in her comments, so a referral in connection with diabetes would necessarily, we think, have incorporated a referral for the stomach condition.

128. The claimant also specifically discussed her stomach condition in her grievance letter of 5 September 2016, in a passage that begins, "*The other side of this is that I am entitled to recognition of my disability.*" In addition, as

late as 13 September 2016 the respondent's occupational health department was contacting Ms Andrews in its HR department seeking a referral to occupational health because the claimant had, "*stated that she has medical conditions that may require adjustments to be made in the workplace under the Equality Act 2010.*"

129. Had an occupational health referral been done when we think it ought to have been done, i.e. early August 2016 at the latest, and had that referral been dealt with reasonably, and had the respondent acted reasonably on the recommendations/report that ought [reasonably] to have been produced as a result of that referral, the respondent would, in our view, have had knowledge that the claimant was a disabled person because of her stomach condition prior to dismissal. Certainly, the respondent has failed to satisfy us that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person because of her stomach condition at the time she was dismissed.

130. Accordingly, one of the four periods of sickness absence which were an effective cause of the claimant's dismissal was related to a disability which the respondent ought to have known about. The section 15 complaint relating to dismissal therefore succeeds.

131. We turn, finally, to the reasonable adjustments claim.

132. The alleged PCPs relied on are set out in 5.1.1 to 5.1.5.

133. 5.1.1 is "*the requirement to only eat during lunch break*". Any complaint based on this alleged PCP fails because there was no such requirement. Employees, including the claimant, were allowed to eat outside of lunch breaks. As we have already explained, the perceived problem with the claimant's eating habits was that she was thought to take breaks from work totalling more than half an hour for her lunch.

134. Alleged PCP 5.1.2 is "*the requirement to deal with large volumes of telephone calls*".

135. This was a PCP the respondent had. We are not, however, satisfied that at any relevant time it caused the claimant significant difficulties connected with her disability. The issue connected with telephone calls the claimant raised was an issue to do with fairness. There was briefly a problem connected with the claimant's mouth condition early on in her employment, but we accept the respondent's evidence that the claimant was taken off the phones for a period in response to that and only put back on the phones when she was willing to take calls again, i.e. a reasonable adjustment was made the only time the duty to make reasonable adjustments might have arisen in connection with this PCP. Any complaint based on 5.1.2 therefore fails.

136. Alleged PCP 5.1.3 is "*being called into meetings without notice*".

137. Insofar as this PCP existed, it was not one that caused the claimant substantial disadvantage in connection with her disability at any relevant time. Indeed, upon analysis, not even the claimant is really alleging it did. The complaint based on this PCP relates to a one-off instance where the claimant was called into a meeting without notice and so didn't take her medication. The problem that arose was not, though, to do with the meeting being without notice. Instead, it arose because meeting went on longer than the claimant was expecting it to and because the claimant did not ask to leave to take her medication.

138. If the PCP as set out in the list of issues, in 5.1.3, was not in fact the PCP the claimant is relying on, we ask ourselves what the relevant PCP might be. If it were something like "having long meetings without notice", the only substantial disadvantage to the claimant potentially caused by that PCP would be a risk of the claimant not taking her medication on time. The respondent didn't have any knowledge of, nor ought the respondent to have had knowledge of, that substantial disadvantage. Even if the respondent had knowledge of that substantial disadvantage, the only steps it would be reasonable for the respondent to have to take to avoid that disadvantage would be permitting the claimant to leave the meeting to take her medication if she asked to. We find that Anne Brown would have permitted the claimant to do that had the claimant asked; but she didn't.

139. The respondent did not, therefore, fail to comply with the duty to make reasonable adjustments in relation to PCP 5.1.3 or anything like it and any related complaint fails.

140. Alleged PCP 5.1.4 is "*counting sickness absence against employees on probation*".

141. What this alleged PCP is referring to is the fact that the claimant's four periods of sickness absence were, as we have already found, an effective cause of her dismissal.

142. The respondent has a written policy relating to probationary periods. This states: "*In instances of sickness absence due to a disability, the Manager has a duty make reasonable adjustments and should contact HR regarding this*". The respondent did not do this in the claimant's case. It misapplied its own policy, in other words.

143. Nottingham City Transport Limited v Harvey [2012] UKEAT 0032_12_0510 is to the effect that a one-off misapplication of a policy is not a PCP in accordance with EQA section 20. There was no evidence before us that the respondent was in the habit of taking disability-related absences into account when deciding that someone had failed their probation period and should be

dismissed; as far as we know on the evidence, what happened to the claimant was a one-off. 5.1.4 was therefore not, in fact, a PCP in the particular circumstances of this case and any reasonable adjustments claim based on it therefore fails.

144. Alleged PCP 5.1.5 is "*the requirement to announce where the claimant was going every time she left the office*".

145. Any complaint based on this alleged PCP fails because there was no such requirement. The actual requirement was for the claimant to tell somebody where she was going when was potentially going to be out of the office for a lengthy period. It is not for us to change the claimant's PCP's for her. We checked at the start of the hearing with both parties that the list of issues was accurate and the claimant confirmed that for her part it was.

146. In any event, the claimant has already succeeded on what is in practice an identical disability-related harassment complaint. Were she to succeed in this reasonable adjustments complaint too, it would make no difference whatsoever to remedy nor, indeed, to anything else that we think is of significance.

147. In summary, all of the reasonable adjustments complaints fail.

CASE MANAGEMENT ORDER

148. This order is made on the tribunal's own initiative. The parties are strongly encouraged to try to resolve all remedy issues between themselves, but in case they are unable to do so, they must, within 14 days of the date this is sent to them: agree (subject to the tribunal's approval) case management orders leading up to the one day remedy hearing that has already been listed in August; inform the tribunal in writing what has been agreed; or, if agreement cannot be reached, inform the tribunal in writing what they propose in terms of case management orders.

Employment Judge Camp

26 June 2018