EMPLOYMENT TRIBUNALS

Claimant:	**Mrs M Littlewood**		
Respondent:	**Aviva Employment Services Ltd**		
Heard at:	**Leeds**	**On:**	**8, 10, 11 and 12 October 2018 and 26 October 2018 (deliberations)**
Before:	**Employment Judge Davies**		
	Mr M Brewer		
	Ms R Hodgkinson		

Representation

Claimant:	In person
Respondent:	Ms Amartey (counsel)

RESERVED JUDGMENT

1. The Claimant's claim of failure to make reasonable adjustments for disability with respect to the suggestion that she should have been permitted to handle inbound calls only or to reduce the number of inbound calls she was required to answer during the period 19 September 2016 to 28 November 2016 is dismissed on withdrawal by her.
2. The Claimant's claim of indirect age discrimination based on the contention that people of her age group are less able to absorb new information or study for exams than people of a younger age is dismissed on withdrawal by her.
3. The Claimant's remaining claims of disability discrimination (direct discrimination, failure to make reasonable adjustments, discrimination arising from disability and disability related harassment), age discrimination (direct and indirect age discrimination and age related harassment), indirect sex discrimination and unfair dismissal are not well-founded and are dismissed.

REASONS

Introduction

1.1 These were claims of disability discrimination (direct discrimination, failure to make reasonable adjustments, discrimination arising from disability and disability related harassment), age discrimination (direct and indirect age discrimination and age related harassment), indirect sex discrimination and unfair dismissal brought by Mrs M Littlewood against her former employer Aviva Employment Services Ltd. The Claimant represented herself. The Respondent was represented by Ms Amartey of counsel.

1.2 The Tribunal was provided with a joint file of documents and we considered those to which the parties drew our attention. A small number of further documents was admitted by agreement during the course of the hearing.

1.3 The Tribunal heard evidence from the Claimant on her own behalf. For the Respondent we heard evidence from Mr C Newsam (Wealth Telephony Sales Manager), Mrs A Baguley (Customer Manager Team Leader), Ms J Pardavila (PMI Claims Service Manager) and Mr A Fitzpatrick (Employee Relations and Global Employment Policy Lead).

The issues

2.1 The Respondent accepted that the Claimant was disabled within the definition in the Equality Act 2010 at the relevant times by virtue of the physical impairments of Type 1 diabetes and a hearing impairment in one ear. Further, it accepted that it knew of the disabilities at the relevant time. The issues to be determined were therefore as follows:

Preliminary: time limit for discrimination complaints

2.1.1 In respect of each of the discrimination complaints relating to events that occurred before 3 May 2017, was there conduct over a period such that the complaints were presented within three months (plus early conciliation extension) of the end of that period?

2.1.2 If not, is it just and equitable to extend time for bringing those complaints?

Failure to make reasonable adjustments

2.1.3 Did a provision, criterion or practice ("PCP") of the Respondent's, a physical feature or the absence of an auxiliary aid put the Claimant at a substantial disadvantage in relation to her employment in comparison with persons who are not disabled? The Claimant relies on:

Between 1 January 2016 and 19 September 2016

2.1.3.1 a PCP of requiring her to pass the six modules of the Diploma in Regulated Financial Services ("the Diploma") within 18 months and subsequently 24 months, which she says put her at a disadvantage because she was unable to pass the examinations within the time period as a result of her diabetes;

2.1.3.2 PCPs of awarding car parking spaces based on seniority and/or requiring an employee to pay £56 per month for a car parking space, which she says put her at a substantial disadvantage because having to walk a longer distance from her car meant that she was unable effectively to manage her blood sugar levels;

2.1.3.3 a PCP of periodically binning the contents of communal fridges and/or the lack of an auxiliary aid (a personal fridge), which she says put her at a substantial disadvantage because her insulin was thrown away and she was unable effectively to manage her blood sugar levels;

2.1.3.4 a PCP of requiring her to use a telephone headset and/or the lack of an auxiliary aid (a different type of headset), which she says put her at a substantial disadvantage because she was allergic to the telephone headset on account of her diabetes;

2.1.3.5 a PCP of increasing performance targets in around January 2016, which she says put her at a substantial disadvantage because it caused stress and therefore affected her blood sugar levels;

2.1.3.6 a PCP of measuring performance by reference to the number of telephone calls made, which she says put her at a substantial disadvantage because her hearing impairment led her to use email rather than telephone contact;

Between 19 September 2016 and 28 November 2016

2.1.3.7 a PCP of requiring her to answer inbound calls, which she says put her at a substantial disadvantage because she was unable to take breaks when required and as a result unable effectively to manage her blood sugar levels;

2.1.3.8 a PCP of dictating her breaks by reference to the i360 computer system, which she says put her at a substantial disadvantage because she was unable to take breaks when required and as a result unable effectively to manage her blood sugar levels; and

2.1.3.9 a PCP of prohibiting her from taking time away from calls except at designated break times, which she says put her at a substantial disadvantage because she was unable to take breaks when required and as a result unable effectively to manage her blood sugar levels.

2.1.4 If so, what steps was it reasonable for the Respondent to have to take to avoid the disadvantage? The Claimant relies on:

2.1.4.1 allowing her extra time to pass the Diploma and/or providing regular monthly reviews of her study progress and/or providing additional study material free of charge;

2.1.4.2 providing her with a car parking space free of charge close to the building;

2.1.4.3 providing her with a personal lockable fridge;

2.1.4.4 not requiring her to use a telephone headset and/or providing her with a different type of headset;

2.1.4.5 not increasing her targets;

2.1.4.6 measuring her performance by reference to emails as well as or instead of telephone calls;

2.1.4.7 allowing her the flexibility to regulate her blood sugar levels as and when required;

2.1.4.8 removing her from the i360 system and/or giving her the flexibility to regulate her blood sugar levels as and when required;

2.1.4.9 allowing her to eat at her desk and/or giving her flexibility to leave her desk and/or avoid taking calls;

2.1.5 Did the Respondent fail to take those steps?

Unfavourable treatment

2.1.6 Did the Respondent treat the Claimant unfavourably by putting her on a PIP and/or threatening her with termination of her employment?

2.1.7 If so, was it because of something arising in consequence of her disability, namely a lower number of telephone calls made because of her hearing impairment?

2.1.8 If so, was the Respondent's treatment a proportionate means of achieving a legitimate aim?

Direct disability discrimination

2.1.9 Did the Respondent treat the Claimant less favourably than a comparator (Mr H) in whose circumstances there was no material difference compared with the Claimant's by Mr Newsam placing her on a PIP and/or informing her that her employment would be terminated up to 19 September 2016?

2.1.10 If so, was it because of disability?

Disability related harassment

2.1.11 Did the Respondent engage in unwanted conduct related to disability by Mr Newsam placing the Claimant on a PIP and/or telling her that her employment would be terminated up to 19 September 2016?

2.1.12 If so, did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Direct age discrimination

2.1.13 Up to 19 September 2016, did the Respondent treat the Claimant less favourably than an actual or hypothetical comparator in whose circumstances there was no material difference compared with the Claimant's by:

- 2.1.13.1 Mr Newsam investing more time nurturing young talent, in particular by offering to mentor the Claimant's daughter;
- 2.1.13.2 Mr Newsam asking the Claimant if she had ever considered "working in a charity shop" during her first one-to-one meeting with him;
- 2.1.13.3 Mr Newsam placing the Claimant on a PIP when he did not place Mr H on one although Mr H had not passed the Diploma; and/or
- 2.1.13.4 Mr Newsam giving Ms S preferential treatment relating to study material?

2.1.14 If so, was it because of age?

The Respondent denies less favourable treatment and does not argue in the alternative that any treatment was justified.

Age related harassment

2.1.15 Alternatively were the matters set out above unwanted conduct related to age?

2.1.16 If so, did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Indirect age discrimination

2.1.17 Did the Respondent apply a PCP of requiring the Claimant to pass the Diploma within 18 months and, subsequently, 24 months?

2.1.18 If so, did or would the Respondent apply that PCP to persons in the age group 20 to 30?

2.1.19 If so, did or would the PCP put persons aged over 40 at a particular disadvantage compared with persons aged 20 to 30?

2.1.20 If so, did the PCP put the Claimant at that disadvantage?

2.1.21 If so, can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim?

Indirect sex discrimination

2.1.22 Did the Respondent apply a PCP of requiring the Claimant to pass the Diploma within 18 months and, subsequently, 24 months?
2.1.23 If so, did or would the Respondent apply that PCP to men?
2.1.24 If so, did or would the PCP put women at a particular disadvantage compared with men?
2.1.25 If so, did the PCP put the Claimant at that disadvantage?
2.1.26 If so, can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim?

Unfair constructive dismissal

2.1.27 Was the Claimant dismissed, i.e.:
- 2.1.27.1 Was the Respondent in breach of the contract of employment?
- 2.1.27.2 If so, was it a fundamental breach going to the root of the contract?
- 2.1.27.3 If so, did the Claimant resign in response and without affirming the contract?

Note: The Claimant relies on a breach of the implied term of mutual trust and confidence between employer and employee based on all the matters above. She says that the last straw was a failure to take her evidence or concerns seriously in May 2017.

The Facts

3.1 The Respondent is part of the well-known insurance provider, Aviva. It is the company that employs Aviva's employees.The Claimant started working for the Respondent on 4 March 2013 as a Wealth Account Telephony Manager. She had a panel of 60-100 accounts, namely firms of financial advisors. In broad terms her role was to manage relationships with those firms so as to drive business to Aviva.

3.2 The Claimant has two disabilities as defined in the Equality Act 2010: type I diabetes and hearing loss in her left ear. The Respondent accepts that she was disabled at all relevant times and that it knew she was.

3.3 The Respondent requires all its Wealth Account Telephony Managers to achieve the Chartered Insurance Institute's Diploma in Regulated Financial Services. The Diploma comprises six modules, R01 to R06. There is no legal requirement for these employees to have such a qualification but the Respondent regards it as a benchmark that sets it apart from its competitors. The Claimant was aware of the requirement before she started work. At that time the Respondent required its Wealth Account Telephony Managers to achieve the Diploma within 18 months of starting their employment and the Claimant knew that. The Respondent provides and pays for the detailed study materials for each exam and the first exam sitting. It also provides five days of paid study leave per year, one day's paid leave for each first exam sitting and travel costs for each first exam sitting.

3.4 The Claimant's line manager initially was Mr Walker. Her evidence was that he did not put pressure on her to pass the Diploma, particularly since he too was in the position of having to pass it. Despite what the Claimant said, it was clear that Mr Walker did place some emphasis on the need to pass the Diploma. For example,

the Tribunal saw the Claimant's end of year review documents for 2014. By that date, she had exceeded the 18 month deadline for achieving the Diploma but had passed only three of the six modules. Her own comments in her end of year review set out her plans for achieving the Diploma. Mr Walker noted that she had only managed to pass one exam that year and that she was, "behind on where she needs to be" in respect of her exams. He suggested that one problem had been trying to focus on more than one exam at a time. In cross-examination the Claimant accepted that at this time Mr Walker was telling her that she was behind where she should be.

3.5 In October 2015 Mr Newsam became the Claimant's line manager. He was responsible for a team of 10 Wealth Telephony Account Managers in Sheffield.

3.6 They exchanged a series of emails in early November 2015. On 3 November 2015 Mr Newsam emailed the Claimant about her Diploma progress. He referred to a meeting earlier that day. He confirmed that she had been in her role for 32 months, that she had 18 months from her start date to achieve her Diploma and that she had successfully completed three of the six exams. He explained that the Claimant would shortly be given a timeframe in which to achieve her Diploma, most likely six months, and said that if she did not do so they would have to "explore other opportunities for you within the business." The email indicated that they had discussed study plan options and that the Claimant was going to take extended lunches and use all PDP time to help prepare for her exams. Mr Newsam asked the Claimant to let him know if he could support her in any other way.

3.7 Mr Newsam sent a further email on 10 November 2015. Having spoken to the relevant people he confirmed that the Claimant had six months in which to complete her Diploma starting from 3 November 2015 and that failing to do so would lead to a formal capability programme. He said that he wanted to support the Claimant as much as he could and asked her to have a think about anything else he could do. The Claimant replied that day. She said that it was pointless dwelling on the numerous reasons why she was in the position she was in ("putting the requirements of the job first, lack of support due to being a "straggler" etc") and that she would focus on what needed to be done. She said that in the circumstances she was very grateful for an extended deadline. She said that she had had offers of support from particular colleagues and that together with the offer from Mr Newsam of extended lunch hours and the occasional late night stay, with a bit more focus, she was hoping this would be enough to get her through. The Claimant did not make any reference to her disabilities, age or domestic responsibilities.

3.8 The Claimant's evidence was that everything changed when Mr Newsam became her line manager. She said that Mr Newsam was an upcoming star in Aviva's eyes, but she thought he was, "Only interested in getting to the top did not care who he stood on along the way." She said that she, "Soon christened him in my head as "the smiling assassin"". She said that signs that she was not wanted in Mr Newsam's team began to appear. He paid little attention to what she was doing and did not organise joint visits, call listening or other types of measurement that he carried out with the other members of the team. He seemed to want to spend a lot of time with the younger team members. He was involved in mentoring young and upcoming talent and the Claimant considered that he was more focussed on

this activity than doing his own job. Her evidence was that she, "Started to sense that he wanted to build a "suited and booted" young dynamic team." She said that he was, "Obsessed with statistics and spreadsheets, rather than people management." His spreadsheet was all about call activity and pushing on the phone for sales, and she soon found herself at the bottom of his spreadsheet because she communicated more by email. She then said that at their review session things took a turn for the worse when he painted a picture of her in a very poor light: lazy at picking up the phone, not hitting his required level of phone activity and still not having the Diploma. She said that she tried talking to him about issues associated with her diabetes that she was experiencing at the time and that he just was not interested. Then she said, "It was in that meeting that he asked me whether I had considered an alternative career "such as working in a charity shop."" She described this as a "lightbulb moment" because she immediately knew that he was being "ageist" as "most charity shop workers are elderly ladies." She said that she could suddenly see that she did not fit into Mr Newsam's idea of a "spreadsheet hitting dream team of suited and booted thirtysomethings and that he was not spending any time supporting me, as, in truth he was planning to manage me out of the business." She said that she cried all the way home and that when she told her husband what had happened he immediately mentioned discrimination.

3.9 The Claimant was asked about her first review meeting with Mr Newsam in her evidence to the Tribunal. She said that she raised concerns about her diabetes and also about her age and domestic responsibilities when she first sat down with Mr Newsam. She was asked when that was and she said that it was just after Christmas. She was reminded that Mr Newsam had taken over in October and she confirmed that she was saying that she had no opportunity before December to say to him that achieving the Diploma was a problem because of her age, domestic responsibilities and disabilities. She said that she did not feel there was the right opportunity. Her attention was drawn to the emails above suggesting that they had met in November 2015, and she then said that this must have been when it happened. The Claimant was asked specifically what she had said to Mr Newsam about her age, domestic responsibilities and diabetes. She said that she "would have" explained that she just been put on an insulin pump, about her family responsibilities and finding time to revise. It was pointed out that she had used the words "would have" rather than saying what happened and she answered, "Why would I not?". The Employment Judge reminded her that she must not make assumptions. If she could remember what happened she should say so; if not, she should say so. She then answered, "I can't remember. I know I've had that conversation with him." It was put to the Claimant again that she did not tell Mr Newsam that she was unable to meet the Diploma deadline because of family responsibilities and she disagreed. Again, she said, "Why would I not raise those issues?" She was reminded again that she should tell the Tribunal whether this did or did not happen or whether she could not remember and she answered, "I certainly would have had that conversation." Her attention was then drawn to her email of 10 November 2015. It was suggested to her that this was the direct opposite of telling Mr Newsam that she would struggle to meet the deadline because of her age, domestic responsibilities or disabilities. She replied, "I would accept that. I was playing the game. You are going to force this on me I'll go with it."

3.10 The Tribunal found that this was one of many examples of the Claimant viewing matters with hindsight or giving an account that supported her Tribunal claim. She was giving evidence of how she thought things must have been or what she thought she should have told Mr Newsam rather than describing what actually happened. The Tribunal found, as reflected in the contemporaneous documents, that the Claimant was given a new six-month deadline for completing her Diploma and that Mr Newsam offered her whatever support she required. The Claimant did not request any additional support and she did not raise any concerns or issues relating to her age, domestic responsibilities or disabilities.

3.11 The Claimant was also asked about the "charity shop" comment in cross-examination. She said that this took place the first time she sat with Mr Newsam as a line manager in a one-to-one and was shortly before she got an email extending the deadline for completion of the Diploma. She repeated that this was a lightbulb moment for her when she realised that Mr Newsam did not want her. She was asked whether she had been to see her trade union or spoken to Mr Newsam's manager and she said that she did not do so at that point: "It was a hunch, a feeling. Mr Nicey Nicey was a bit of a smiling assassin."

3.12 Mr Newsam denied making any such comment. There was no mention of it in the Claimant's ET1 claim form. The first reference was in further particulars of claim provided on 2 November 2017. Further, the Claimant had instructed a solicitor to prepare a detailed written grievance in January 2017. There was no mention of this comment, which the Claimant now describes as so pivotal, in that grievance either. The Claimant was unable to explain when asked why she had not referred to such an important aspect in her grievance or claim form. She said that it was Mr Newsam's word against hers, and said that she could remember clearly the occasion, which room she was in what she was wearing and so on.

3.13 The Tribunal accepted that the Claimant was upset at this first one-to-one meeting. Mr Newsam was highlighting some concerns about her performance and failure to achieve the Diploma. However, the Tribunal found that Mr Newsam did not make any comment about working in a charity shop. We preferred his evidence. It was simply not plausible that this was a lightbulb moment for the Claimant and yet she made no reference to it until two years later, despite having made a detailed written grievance with legal advice.

3.14 These are two examples of the Claimant's evidence lacking credibility, and the Tribunal found her evidence generally to be lacking credibility in the same way. She often appeared to avoid answering direct questions or made assumptions about what would or should have happened rather than saying what did happen. The evidence she gave frequently bore no relation to the contemporaneous documents, and she was unable to account sensibly for that. She often suggested that she was playing the game or had given up.

3.15 We have referred above to some of the Claimant's comments about Mr Newsam. She frequently suggested in her evidence that he was covering his back or was paying lip service to processes. The Tribunal found that from a very early stage in his management of her the Claimant formed an adverse perception of Mr Neewsam, and that this was at least in part because he had raised performance concerns at their first one-to-one meeting. She seemed to take nothing he said or

did at face value and to assume the worst motives on his part. It seemed to the Tribunal that as a result she did not engage with him at face value. For example, if he made an offer of support she assumed it was not genuine. When he referred her to OH she said that she saw this as him, "Covering his back so he could manage me out." The Tribunal considered that it was the Claimant's assumptions and misperception of Mr Newsam that underpinned the whole of what followed, rather than something untoward on Mr Newsam's part. Her evidence to the Tribunal was skewed by that perception. In many respects she appeared to be reinventing what had happened. Very often in answer to counsel's questions about why she had not done or said something at a particular meeting she said that she had given up by that stage. However, as the findings of fact below indicate, the Tribunal found that far from reaching a point where she gave up raising concerns or asking for help, in fact there was never really a point at which the Claimant had started doing so.

3.16 Having made those general observations, we return to the chronology. Mr Newsam conducted an end of year review with the Claimant at the end of 2015. He recorded that she had the lowest activity levels of all the team and that this needed to change in 2016. At the same time he made a number of positive remarks about the Claimant's performance. Mr Newsam identified self-development as the key area for the Claimant's focus in 2016. As part of that he referred to the exams. He said that the Claimant was "nothing but tenacious" and said that he wanted her to take advantage of extended lunches and two afternoons per month to study. Mr Newsam recorded that the Claimant had achieved her new business target but pointed out that the bar had been raised in 2016. This was a reference to the Claimant's targets being increased 2016, along with those of her peers. There was no dispute that her targets were increased for 2016 and Mr Newsam acknowledged that the "stretches were significant." The Claimant wrote her own comments in the end of year review. She recorded that the exams were still a battle but said that she had set herself the personal goal of achieving the Diploma by the end of 2015. She referred to challenges, including the change of team and management, and she also said that with the demands of her "job and family life" she had found revision more difficult than she expected. She did not refer to any disability and did not say anywhere that it was difficult to achieve activity targets because of her hearing impairment or diabetes. She said in cross-examination that this was because the PDR was "a boasting file for pay."

3.17 In January 2016 the Respondent's policy changed, so as to allow two years from an employee's start date for the completion of the Diploma. By then, the Claimant had taken nearly 3 years. She had failed some of the modules more than once.

3.18 On 13 January 2016 the Claimant received a letter informing her of a medical appointment on 3 February 2016. For the appointment she was required to carry out various tests of her fasting basal rates, which involved fasting and checking her blood glucose levels every two hours overnight. In her witness statement the Claimant said that she tried to show the letter to Mr Newsam because she had an exam coming up. She said that he simply told her that she could not cancel the exam if she wanted to keep her job, whether she had to get up in the night every two hours or not. In cross-examination she was asked when she showed the letter to Mr Newsam. She said, "It would have been not long after it was issued, surely." She was reminded not to make assumptions and she said that her normal practice

was to approach Mr Newsam to say that she needed time off for an appointment. The conversation "would have been" that she had the appointment and needed time off and that she also needed to discuss that the overnight testing would impact on her performance and specifically her ability to revise for the exam on 10 February 2016. She was asked again whether she remembered the conversation or was making an assumption. She said that she did remember the conversation and that she had to cancel the medical appointment as a result of her conversation with Mr Newsam. It was put to the Claimant that Mr Newsam said that he had never seen the letter and that the Claimant had never asked to cancel her exam. The Claimant said that Mr Newsam was lying, asking, "Why would I not show it to him? It would be normal practice. I'd always ask the time off." The Tribunal saw the notes of an improving performance meeting on 7 June 2016 (see below). The Claimant agreed the notes were accurate at the time. They record her referring to this appointment in that meeting with Mr Newsam. On that occasion she said that she had missed an important medical appointment because she could not commit to what they were asking her to do; they were asking her to record her blood sugars every two hours in the night. She said that due to pressures at work she could not commit to this though she was not blaming Aviva. That is obviously inconsistent with what she said in her witness statement. The Claimant also subsequently discussed these events in a telephone consultation with OH. During that conversation, she told the OH advisor that she had to cancel this appointment in February because she would have had to get up every two hours in the night to check her blood sugar. She said that she had exams that week and that she thought she just could not commit to setting the alarm clock and getting up every two hours, then doing a full day at work and then revising. It just became too much. Her consultant was quite angry with her that she was not putting her diabetes first. The Claimant volunteered this example to the advisor and described it in her own words. There was no suggestion whatsoever that she had raised it with Mr Newsam or asked if she could cancel the exam and received the response suggested in her witness statement. The Tribunal found that this was because her account to the OH advisor was the accurate one. We accepted Mr Newsam's evidence that the Claimant did not show him the letter or asked to cancel her exam.

3.19 The Claimant passed module R02 in February 2016 but failed module R03 on 13 April 2016. She and Mr Newsam met on 15 April 2016. Mr Newsam recorded their discussion in an email later that day. He recorded that the Claimant had two exams left to pass by the extended deadline of 2 May 2016 and noted that the first available re-sit for R03 was 4 May 2016. He confirmed that as a result of the Claimant's progress towards her Diploma, her new business ("NB") sales performance (currently 67% of target), her Aviva Investors Fund ("AI") sales performance (currently 27% of target) and her activity being approximately 50% of her peer group's, a performance management process was to be commenced. They had discussed that process briefly but would have a further discussion on 26 April 2016 in the Claimant's one-to-one meeting. Mr Newsam confirmed that that discussion would cover not only the objectives and timeframe for the performance management process but other matters, including how Mr Newsam could support the Claimant.

3.20 On 18 April 2016 the Claimant went off sick with stress. She was absent for approximately four weeks and returned to work on 18 May 2016, having been signed fit for work by her GP. She had an initial conversation with Mr Newsam

during which he indicated that he would leave her to settle in for a couple of weeks before they discussed the performance management process.

3.21 On 24 May 2016 the Claimant emailed Mr Newsam to let him know that she had applied for an "Intermediary Consultant role in Healthcare". She said that she was sure Mr Newsam would understand why she had taken the decision.

3.22 The Claimant's one-to-one meeting was rescheduled for 3 June 2016. In advance of the meeting Mr Newsam emailed the Claimant with an agenda. He explained that he would be inviting the Claimant to a formal improving performance meeting on 7 June 2016. This was a meeting to review her performance, agree what action she would take to meet her objectives and targets and agree how Mr Newsam could support her. Mr Newsam sent the Claimant a further email after their discussion attaching a formal invitation to the meeting on 7 June 2016 and various other documents. He asked the Claimant to come to the improving performance meeting prepared to agree what steps she believed she could take to improve her performance, what were "realistic measures" for the 12-week improving performance process, and what additional support she needed from Mr Newsam or the team. Again, Mr Newsam assured the Claimant that she would have his full support and encouraged her to ask if she thought he could help in anyway.

3.23 The Tribunal saw notes of the improving performance meeting itself, which were taken by a notetaker. The Claimant attended with a trade union representative. The notes record that early in the meeting the Claimant asked what the possible outcomes were and Mr Newsam recorded that there were four possible outcomes: performance improves and the process ends; the improving performance process is extended; an alternative role is found; or your contract is ended on the grounds of capability. The Claimant indicated that the exam pressure was making her ill and that she needed to consider her health. She asked whether the improvement plan would jeopardise getting a different role and Mr Newsam said that he would take advice from HR. There was then a discussion of the Claimant's targets and performance. Mr Newsam asked if there was anything that had contributed to the Claimant's performance. She talked about a lack of training. The discussion moved on to the Claimant's exams and the Claimant talked about a lack of support. Mr Newsam said that the Claimant had had extended lunches and a half day study per month in addition to the standard study days and assistance. The Claimant said that she did not learn well in short bursts and that a quick 30 minutes did not work for her. Mr Newsam immediately suggested that he was happy to offer a study day each month. The Claimant then said that finance was an issue. She had taken R02 four times and spent money on travel to the nearest exam centre in Nottingham. Mr Newsam said that he was happy to pay for travel from now on. The Claimant then said that she felt the playing field was not level because others had received exam books free of charge. She had requested a book for R03 on 15 February 2016 and was told it was her own responsibility. It had cost her £70. She was not prepared to give examples of people getting books free of charge because it was not fair on other colleagues. Mr Newsam said that he was not aware that this had happened and asked the Claimant to speak to him if it happened again. Later in the meeting the Claimant pointed out that her holidays were in the negative because she had been using them for study days. She said that she had been off with stress for four weeks. Mr Newsam immediately suggested that he could give her an extra study day. Then the Claimant said that she had a disability, but she

did not like using it as an excuse. She referred to the fact that she had been using an insulin pump since the previous July and that she suffered from blurred vision, brain fog and tiredness. She said that she was under immense pressure. She had missed an exam and it had cost £30 for a doctor's letter. The notes record that Mr Newsam suggested a break at that point. After the break the notes record that Mr Newsam moved on to a discussion of the exam policy rather than further discussion of the Claimant's disability. He asked if there was anything else she wanted to say and she referred to the missed medical appointment (see above). The meeting notes then record that Mr Newsam and the Claimant discussed what her targets should be for the performance management process. The Claimant was recorded as saying that she felt the proposed call activity was "fair.". Mr Newsam suggested a target of achieving one exam pass by 31 August 2016 with one day per month at home to study. The Claimant pointed out that she had 14 days' holiday within the next 12 weeks and asked if there was any flexibility. Mr Newsam immediately said that the deadline could be set to 13 September 2016 and the Claimant thanked him for the flexibility and support. There was further discussion of other performance targets.

3.24 After the meeting, on 8 June 2016, Mr Newsam wrote to the Claimant enclosing a copy of the agreed action plan and the minutes of the meeting. He reiterated his commitment to helping the Claimant meet the objectives and said that if there was any additional support he could arrange she should let him know. He noted that while he hoped the Claimant's performance would improve, if she did not meet her targets that might result in an adjustment to her existing duties, an offer of an alternative role or her contract of employment being ended. The letter, which was a standard format, informed the Claimant that she could appeal against the decision. On 13 June 2016 the Claimant emailed Mr Newsam to confirm that she was happy with the meeting notes as they stood. The Tribunal found that the minutes were an accurate record of the meeting on 7 June 2016. In her oral evidence the Claimant suggested that they were not accurate in some respects, but neither she nor her union representative said that at the time. The Tribunal considered that this was more a case of the Claimant thinking with hindsight about what she would or should have said rather than reflecting on what was in fact said.

3.25 It was suggested to the Claimant that if she had felt unable to pass one exam in 13 weeks she would have said so. She said that there were only so many times she could "bang her head against a brick wall" and that she had said it numerous times. She said that she had told Mr Newsam numerous times that because of diabetes, stress (related to diabetes) and other diabetes-related issues she struggled with the exams. She said that she agreed with the objective of passing one exam because she had given up. She said that Mr Newsam just was not listening to her. She was asked when it was that she had told Mr Newsam about her difficulties in taking exams. She said that it "would have been" discussed on her return to work. When asked if she remembered whether it was discussed on that occasion she said that it definitely was. Mr Newsam said that the first time the Claimant mentioned that her disabilities were part of the problem was at the meeting on 7 June 2016 (see further below). The Tribunal preferred Mr Newsam's evidence. We did not accept the Claimant evidence that she had identified difficulties related to her disabilities when she returned to work in May 2016.

3.26 The Claimant was asked in more detail about the meeting on 7 June 2016. She agreed that Mr Newsam had made clear in advance that one of the things to be discussed was what support she might need. Her attention was drawn to the entry where Mr Newsam offered her another study day per month and she said that she would argue that one was not enough. She was asked whether she had said that at the time and she said that she had given up and had a defeatist attitude. She was asked about Mr Newsam's follow-up letter with the further offers of support. She said that she took it as "lip service". She did not know what support he could offer. The only thing was time off which he was not prepared to do. It was pointed out to her that she had not said that one day was inadequate and she agreed. It was suggested to her that she had not asked Mr Newsam for anything he had refused. She said, "Why ask for something you know can't happen?" It was suggested to her that that would make sense if she had made a request that had been refused and she agreed that that was fair. As we have already explained above, the Tribunal was simply unpersuaded by the Claimant's suggestion that she was now banging her head against a brick wall and had given up. There was no evidence before us to suggest that she had been asking for help or support from Mr Newsam that had been refused, nor that she had been identifying issues related to her disabilities and had been ignored. We found that she had not.

3.27 As indicated above, Mr Newsam's evidence was that the first time the Claimant referred to disabilities was at the meeting on 7 June 2016. That was why he had referred her to OH after the meeting. The Claimant suggested to Mr Newsam in cross-examination that he deliberately skirted this issue in the meeting by taking a break and then talking about something different after the break. He disagreed and said that he was not skirting the issue because he immediately referred the Claimant to OH. Mr Newsam did indeed promptly refer the Claimant to OH and the Tribunal accepted his evidence that he was not trying to avoid this issue.

3.28 To summarise, therefore, in advance of the improving performance meeting Mr Newsam provided appropriate information and offered support to the Claimant. There was a detailed discussion during the meeting. Mr Newsam agreed to all the Claimant's requests for support made during that meeting and repeated the offer of support in correspondence after it. The Claimant did not raise any issue or concern relating to her age or domestic responsibilities. She did raise a concern relating to disabilities and that led to a referral to OH. She agreed to the plan.

3.29 On 14 June 2018 Mr Newsam emailed the Claimant to say that he had met with a manager called Mr Gayton that day and they had got onto the subject of recruitment. Mr Newsam had asked if the Claimant had made contact and Mr Gayton said that she had and he was expecting her to book some time in. Although Mr Gayton was not currently recruiting he was keen to talk to the Claimant. He was not concerned with Diploma progress. Mr Newsam suggested that it was definitely worth having a coffee with Mr Gayton soon and exploring options. Mr Newsam also said that he was happy to talk to managers around Sheffield if that would help the Claimant. The Claimant replied later that day. She said that she had made an initial approach to Mr Gayton but that he was busy. She was going to book some time in with him. If she were to consider an internal move she thought that Healthcare would hold the most appeal for her. She would keep Mr Newsam informed.

3.30 It was the Claimant's evidence that by this stage Mr Newsam had repeatedly made clear to her that she would be out of a job at the end of September and needed urgently to look for another role. She said that Mr Newsam had made it perfectly clear in their private conversations that she would lose her job and that that is why she was trying to find another role within Aviva. Mr Newsam denied this. He said that it was appropriate, and indeed his obligation, to tell the Claimant the possible outcomes of the performance improvement process and that he did say that one of those options was dismissal on the grounds of capability. However, he had not told the Claimant that she had to seek an internal transfer because she was going to be dismissed. He wanted to work with her to improve her performance but felt that it was only fair to tell her the beginning of the formal process that termination of her employment was a possibility.

3.31 In cross-examination the Claimant repeated that Mr Newsam told her that he was going to terminate her employment if she did not find another role. She referred the Tribunal to Mr Newsam's email of 3 November 2015 (see above) in which he warned the Claimant that if she failed to secure her Diploma within the required timeframe they would have to explore other opportunities for her within the business. It was put to her that Mr Newsam was not telling the Claimant that her employment was to be terminated. She said that it said to her that if she was to remain in employment she had to go into another role. She was also asked about her evidence that Mr Newsam kept saying that she would be out of work by September. She said that he did so in their informal meetings. She said that he gave a different view in the formal meetings which were on the record. It was then put to the Claimant that she had applied for a role in Healthcare on 24 May 2016, before any of the formal or informal review meetings. She then said that there had been several conversations and that she had been heavily influenced to apply for other roles. The Claimant was given the opportunity to identify documents during a break in the hearing to support her contention that it was threats to her job that led her to apply for other roles. After the break she identified Mr Newsam's email of 14 June 2016 referring to Mr Gayton. She said that she thought it could be read as Mr Newsam pushing her out of her role. She confirmed that there were no other documents. The Claimant was asked about the notes of the meeting on 7 June 2016, where Mr Newsam was recorded as referring to 4 possible outcomes of the performance management process. She was asked why she had not said at the meeting that Mr Newsam had already told her that her employment would be terminated if she did not find an alternative role. Again, she said that she had given up arguing and was defeatist. The Claimant spoke to an OH advisor on 16 June 2016. She told the advisor that it was hanging over her head that she might lose her job in three months. The advisor asked if that was what they were saying the outcome was and the Claimant said that this was "worst-case scenario". She said that in two months' time her performance would be reviewed. If her manager thought she had made some efforts but was not quite there he had the option to extend and put her on another plan for three months, or it was an option that he decide she ought to look for another role within Aviva or that her contract was brought to an end. Again, what the Claimant told the OH advisor was in marked contrast to her evidence to the Tribunal.

3.32 Taking into account the inconsistencies in the Claimant's oral evidence, the documents and what she told the OH advisor, again the Tribunal had no hesitation in accepting Mr Newsam's evidence that he did not tell the Claimant that her

employment would be terminated if she did not find another role, threaten her or force her to look for alternative roles. He, properly, identified the four possible outcomes of the performance management process. It was the Claimant, of her own volition, who applied for a role in Healthcare on 24 May 2016. She did so in the context that she was experiencing stress, which was both linked with and detrimental to her diabetes. Mr Newsam offered and provided support to the Claimant in seeking an alternative role and that was the context for his conversation with Mr Gayton in June.

3.33 On 16 June 2016, after their telephone consultation, the OH advisor wrote a comprehensive follow-up letter to Mr Newsam. She reported that the Claimant's recent episode of stress was related to work and personal issues. The Claimant had explained that changes at work, exam pressures, meeting performance measures and concerns about her performance had all impacted on her. In addition, she had type I diabetes, which was controlled via an insulin pump. Before the insulin pump her diabetes was poorly controlled. The advisor explained that many factors can contribute uncontrolled diabetes, including stress and irregular eating patterns. She reported that the Claimant's diabetes control was now much improved although she did notice symptoms such as blurred vision if her sugars became too high. The advisor also reported that the Claimant had hearing loss in her left ear and experienced frequent ear infections. She recommended a workstation assessment to deal with the hearing loss. The Claimant had reported that she could find background noise difficult. Frequent ear infections also made it difficult for the Claimant to wear a hearing aid. The advisor recommended asking Action on Hearing to help with advice. There was no suggestion that the Claimant found it difficult to make telephone calls. The advisor considered that the Claimant was fit for work assuming adjustments could be made. She advised that it was important to allow the Claimant enough flexibility to take meal breaks when needed, so as to control her blood sugar. She reported that the Claimant had twice lost insulin that was stored in the communal food fridge and recommended that she be provided with her own lockable fridge to store her insulin. She reported that the Claimant had explained that she could have a fairly lengthy walk from her car to the office. The advisor said that while the Claimant's diabetes was stabilising it would be helpful if she could be supported in having an allocated parking space near the building on a temporary basis. The additional exercise associated with the walk to the office might further impact on her sugar levels whilst her condition had not fully stabilised. The advisor also recommended carrying out a stress risk assessment. She identified that uncontrolled diabetes may cause symptoms such as blurred vision and poor concentration but explained that once the Claimant's diabetes was controlled she would not anticipate it having any significant impact on her performance.

3.34 Mr Newsam was advised by HR that the report did not prevent him from continuing to manage the Claimant's performance appropriately. It was important to address the adjustments as well. The Claimant's first informal performance review meeting took place on 21 June 2016. She and Mr Newsam discussed the OH report. The notes of the meeting record that Mr Newsam had arranged for Mr Beanland to complete a workstation assessment and to investigate obtaining a personal lockable fridge for the Claimant. Mr Newsam had also arranged a parking space. Emails show that he had contacted the car park administrator and the health and safety team. They had agreed to provide a car park space temporarily until the end

of September. The cost was £58 per month which would be deducted from the Claimant's salary. Mr Newsam had forwarded these emails to the Claimant asking for her confirmation about the deductions.

3.35 Returning to the informal review meeting, the notes indicate that there was a methodical and constructive discussion of the Claimant's progress and the Tribunal found that this reflected what took place.

3.36 The first formal performance review meeting took place on 5 July 2016. There was a notetaker and the Claimant was accompanied by a trade union representative. During the meeting Mr Newsam mentioned the OH report recommendations. The Claimant said that she was not going to store her insulin in the fridge. She was going to look at buying a portable wallet. She said that she had not heard anything back from the car parking space and was exploring headset options, but was allergic to the foam in her current one. They went on to review her performance over the last four weeks. She had made some progress with her call activity but not with her sales targets. The Claimant confirmed that she had an exam booked and had booked two days' holiday to study. She was going to use a study day for the day of the exam. Mr Newsam immediately offered her an additional study day. They then reviewed the Claimant's action plan. During the course of that discussion Mr Newsam asked the Claimant what a realistic target for call activity was. He asked her whether she needed any other support and she said that she did not. She did not say that her age, domestic responsibilities or disabilities were affecting her ability to achieve the required level of performance. In cross-examination she was asked why she had not explained that she had difficulties with the targets because of her disabilities. She said that she was going through the motions. She had given up. She knew that Mr Newsam was using this as a vehicle to get her out of the business. We have already made findings above about the way the Claimant's perception affected the way she participated in the process.

3.37 Mr Newsam sent a follow-up letter on 7 July 2016 confirming that as the Claimant's performance had not improved as much as they agreed, the formal improving process would continue. He enclosed an updated copy of the action plan and again repeated his offer of additional support. The letter, as usual, set out the possible consequences of not meeting the targets and also the Claimant's right of appeal. The Claimant subsequently confirmed that the notes of the meeting were accurate.

3.38 The second informal review meeting took place on 19 July 2016. The Claimant had passed exam R03, which Mr Newsam described as a "fantastic result." They went on to discuss the three remaining measures and the need for them to be achieved to bring the formal performance management process to a close. The Claimant's targets had been reviewed with Mr Newsam's manager and were reduced to 80% discrete monthly performance.

3.39 Mr Beanland met the Claimant and Mr Newsam on 20 July 2016 to review the OH recommendations. He sent a follow-up email confirming that a car parking space had been organised for the Claimant for three months. He said that the Claimant had bought a specifically designed coolbag for her insulin, which meant she did not need to keep it in the work fridge. He said that they would monitor the success of this to see if it was a suitable solution. He said that he had started the process to request a set of non-foam earphones. Leatherette headphones were subsequently obtained and the Claimant was able to use them without difficulty.

3.40 One of the Claimant's complaints to the Tribunal is that the Respondent failed to provide her with a personal lockable fridge. In her witness statement she said that this was deemed "too expensive" by Mr Newsam. She was asked about this in her evidence. Her attention was drawn to the fact that she had declined the offer of a fridge because she decided to buy the coolbag. For the first time she said that the coolbag had not proved successful so she had been to see Mr Newsam again to ask about a fridge. She said that he looked on the Argos website and told her that it was too expensive. Mr Newsam said that this did not happen. The Claimant's attention was drawn to what she said in a grievance meeting the following March when Ms Pardavila referred to evidence that she had declined the fridge. The Claimant said at that stage that it was a commonsense approach; she used a coolbag which was about £14. That ended up not really working so she stored her insulin in the communal fridge. Ms Pardavila asked her to clarify whether she had declined the fridge and the Claimant agreed that she had done so "on the grounds of common sense." The Tribunal did not accept the Claimant's evidence that she had gone back to Mr Newsam about the fridge and that he had refused on the grounds that it was too expensive. Her position was inconsistent. Further, this would have been inconsistent with Mr Newsam's whole approach to the adjustments recommended by OH.

3.41 The Claimant also complains to the Tribunal about not being provided with a car parking space free of charge. There was no evidence that she had raised any concern about the cost at this time and the Tribunal found that she did not do so. The context is that her net pay was around £2,500 to £3000 at that time. When the three months expired the Claimant did not ask for the car parking space to be extended. She told the Tribunal that she could no longer afford it because she had moved to a role with a lower salary by that stage. However, she did not make any request at the end of the three months to be provided with a car parking space free of charge or at all.

3.42 The Claimant also criticised Mr Newsam in her evidence for not carrying out a stress risk assessment as recommended by OH. He said that the Claimant told him she had had a look at the stress risk assessment form and did not see any value in completing it. The Tribunal accepted Mr Newsam's clear recollection.

3.43 The Claimant's mid-year review for 2016 took place on 25 July 2016. In her comments about completing her Diploma the Claimant recorded that the demands of the job together with health issues had got in the way. She referred to not having the right level of support. She pointed out that she now only had R04 outstanding.

3.44 One of the Claimant's targets was to have her call activity and panel coverage above benchmark. Mr Newsam recorded that she was consistently at the bottom of the activity leaderboard and had only contacted 76% of her panel whereas coverage of 100% over half a year was expected. The Claimant explained in her comments that her call time was a major focus and that she had managed to increase it in June despite demands that took her away from the phone and study leave taking her away from the business. She aimed to achieve a minimum average of three hours per week as standard. She did not mention that her health or disabilities affected her ability to undertake call activity. The Claimant was asked in cross-examination about why she had not said to Mr Newsam that call activity

was an issue because of her disabilities. She said that she would have thought he would have known the obvious. Then she said that she did tell him that she could not make calls because of a hearing problem. She referred to a conversation about moving her desk. Then said that she would have discussed it and finally that she did not remember. At a different stage when asked the same question she again said that the only purpose of the mid-year review was a "chance to boast and say why you deserve a pay rise." In her questions of Mr Newsam the Claimant said that she had asked for reasonable adjustments because she had asked to be moved to a different desk. Mr Newsam said, "The conversation was, if you are looking to move people around I'd prefer this position because of my hearing." Mr Newsam said that he acted on that. The Tribunal accepted that there had (on a different occasion) been a conversation as Mr Newsam described: the Claimant expressed a preference for a particular desk because of her hearing loss. However, we found that she had not on this (or any) occasion said to Mr Newsam that making telephone calls or hitting call activity targets was an issue for her because of her hearing loss or disabilities.

3.45 Another of the Claimant's targets discussed in her mid-year review was to obtain at least one asset transition from her panel and she explained in some detail the progress she was making with that goal with a number of clients. In broad terms she had deals in the pipeline that were likely to ensure she met that target.

3.46 In mid-July Ms Baguley had four customer management team roles available, which were advertised on the jobs board on the Respondent's intranet. On 19 July 2016, the day before the mid-year review, the Claimant had emailed Ms Baguley to say that she had recently spoken to Mr Gayton and expressed an interest in the Customer Management Consultant roles on offer. She asked to visit the Department next week to observe, meet staff and listen into some calls. That led to an "awareness session" taking place on 26 July 2016. Afterwards, the Claimant emailed Ms Baguley and Mr Gayton. She said that she had spent over an hour with Mr Emery and it had given her a valuable insight into the role. Therefore, she wanted to register her interest in the vacancy. The email was headed "Healthcare Job Opportunities."

3.47 We return to that process below, but we note that meanwhile the second formal performance review meeting took place on 16 August 2016. There was again a note taker and the Claimant was accompanied by her trade union representative. She agreed the minutes afterwards. There was a detailed discussion of the Claimant's remaining performance measures and her action plan. Mr Newsam made repeated offers of support. Mr Newsam mentioned that the Claimant had applied for a healthcare role and she explained that the interview was the next day. Mr Newsam offered support in preparing for that. At the conclusion of the meeting he summarised the position: they were still looking for the Claimant to improve her performance activity, her call activity was inconsistent, she was significantly below the AI target and they needed to see consistency in her platform numbers. As usual, Mr Newsam wrote a follow-up letter on 17 August 2016. It followed the same format including reference to the possible outcomes and to the Claimant's right of appeal.

3.48 The Claimant was interviewed by Ms Baguley and Mr Emery on 17 August 2016. The Tribunal saw their interview notes and score sheets.

3.49 On 19 August 2016 at 4:45pm the Claimant texted Mr Newsam to say that she wanted to appeal the outcome of the second formal performance review meeting and that the notes were inaccurate. Mr Newsam was on leave but he emailed Ms Richards in HR, copying in the Claimant and his own line manager Mr Morris. He said that he had asked the Claimant to email them on Monday to confirm her grounds of appeal and to highlight the inaccuracies in the notes. He asked them to progress the appeals process because he was on leave until 5 September 2016.

3.50 Very shortly after texting Mr Newsam the Claimant received a telephone call from Mr Gayton offering her the job with Ms Baguley. It was her case that this was engineered because she had appealed Mr Newsam's decision. The Tribunal had absolutely no hesitation in rejecting that suggestion. The timing was plainly a coincidence. The job offer did not come suddenly out of the blue. The Claimant had applied for the role before her annual leave, had attended an interview only two days earlier and was then offered the role. The suggestion that Mr Newsam was trying to prevent the Claimant's appeal from being heard, when he had emailed HR and his manager, copying in the Claimant, asking them to progress it while he was on annual leave simply made no sense. In any event, the Tribunal was quite satisfied from Ms Baguley's evidence that it was her decision to whom these roles should be offered, and that having interviewed the Claimant she selected her. The Claimant's perception of these events as some kind of cover-up illustrated how skewed her perception was.

3.51 It was also the Claimant's case that she had been tricked or misled into taking this role. She said that she had applied for a different role altogether as an Intermediary Consultant in Healthcare but had been put into this role unwittingly. Again, the Tribunal rejected that. It did not bear scrutiny in the light of the contemporaneous documents. They clearly showed that she had applied for the Intermediary role by 24 May 2016 and that two months later she made a separate application for the role in Ms Baguley's team. Further, she did so having spent an hour with Mr Emery observing and finding out about the role. Ms Baguley telephoned the Claimant on 22 August 2016 to ask if she had considered the job offer and the Claimant told her that she would love to join the team. On 5 September 2016 by way of reply to Mr Newsam's email of 19 August 2016, the Claimant withdrew her appeal in the improving performance process because she had accepted an alternative role.

3.52 The Claimant makes a number of complaints of sex and age discrimination against Mr Newsam. One of her comparators is a colleague in Mr Newsam's team, Mr H. Mr Newsam's evidence was that Mr H's performance, both in general and in context of the Diploma, far exceeded the Claimant's. Mr H had taken some resits but had not taken three years to achieve the Diploma; he was still within the two-year period allowed. The Claimant did not know whether that was correct. In terms of telephone statistics Mr Newsam said that Mr H was ranked 13th whereas the Claimant was 28th. The relevant statistics were provided to the Tribunal and they supported Mr Newsam's evidence. The Tribunal accepted that Mr H's performance was not comparable with the Claimant's. Her performance was substantially worse.

3.53 Another of the Claimant's comparators was Ms S. Her particular complaint was that Ms S had been given materials for exam preparation free of charge when the

Claimant had not. In her witness statement she said that she was not receiving study material free of charge, unlike Mr Newsam's girlfriend, Ms S. There was no dispute that Ms S was indeed Mr Newsam's girlfriend. The Tribunal saw a number of emails about study materials. On 15 February 2016 Ms S emailed the Claimant with the text of an email she herself had sent asking for study materials. The Claimant replied to ask which email address she had sent it to and Ms S replied with the Respondent's learning support general email address. She added, "You didn't get the advice from me ha ha." The Claimant then emailed the learning support team in the terms suggested. They replied noting that she had taken the exam previously and asking why she was ordering the materials. The Claimant replied to say that she had sat the exam well over a year ago and that the current material was out of date. She asked whether she able to upgrade the book. She sent a further email a few days later asking for confirmation whether she was able to obtain the study material via the learning support team or not. The Tribunal did not see any response to that email. Taken at its highest, all the exchange showed was that Ms S suggested emailing to ask for the materials, and that when she did so the Claimant's request was questioned.

3.54 In cross-examination, the Claimant said for the first time that Ms S had told her in the ladies' bathroom at work that Mr Newsam had told her to email the learning department to obtain these materials. She accepted that the address Ms S gave her was the same email address she always used to obtain such materials. As set out above, the Claimant raised a concern about unfairness relating to study materials with Mr Newsam on 7 June 2016. He said that he was not aware it had happened and asked her to speak to him if it happened again. In cross-examination, Mr Newsam said that he had not helped Ms S get the material. He did not believe the Claimant had ever asked him to fund resits or additional material.

3.55 It was not clear on the evidence before the Tribunal what materials Ms S got free of charge nor what the eventual outcome to the Claimant's exchange with the learning support department was. However, even if Ms S did get materials free of charge the Tribunal accepted Mr Newsam's evidence that he did not help her to do so. There was no special or secret email address he provided. The email address Ms S gave the Claimant was the standard learning support email. Nothing in the emails suggested that Mr Newsam was somehow involved behind the scenes and the Tribunal found that he was not. We noted that even if Mr Newsam had assisted Ms S the obvious explanation for that would have been that she was his girlfriend not that she was younger than the Claimant.

3.56 Another of the Claimant's complaints is that Mr Newsam invested more time nurturing young talent than supporting the Claimant, including by offering to mentor the Claimant's daughter when she started work for the Respondent. In her witness statement she said that after her daughter started Mr Newsam was "soon offering to mentor her." Mr Newsam's evidence was that *the Claimant asked him* to meet her daughter and that he agreed to do so. They met for approximately an hour and discussed opportunities and career development at the Respondent. When it was put to the Claimant that Mr Newsam's meeting with her daughter had been at her request she said that she did not remember asking him and did not know whether this was one occasion for one hour. Given the Claimant's lack of recollection, the Tribunal accepted Mr Newsam's evidence. More generally, the Claimant said that

Mr Newsam spent more time with the younger members of the team going out on visits with them, mentoring and supporting them and so on. She was asked if she had ever asked Mr Newsam to go on a visit with her or carry out such activities and she said that she had not. She was asked whether the other members of the team had asked and she said that she did not know. Mr Newsam said that part of his role as a manager at the Respondent was to coach others and he did so. The evidence before the Tribunal did not support a finding that Mr Newsam favoured younger people. Rather, it indicated that the Claimant did not ask for such support from Mr Newsam; others who did so received it.

3.57 The Claimant started as a Retention Consultant in Ms Baguley's team on 19 September 2016. She was one of a team of four supporting the transition of work from Eastleigh. There were 10 others in Ms Baguley's team but they were operating in a different work stream.

3.58 Ms Baguley's evidence, which the Tribunal accepted, was that the Claimant did not mention during the course of the recruitment exercise that she suffered from any disabilities and that Ms Baguley knew nothing of her medical conditions until later. The Tribunal considered it somewhat surprising, given the recent reference to OH and acknowledgement that the Claimant was likely to meet the definition of disability in the Equality Act, that there was no process for ensuring that this information was passed on to Ms Baguley.

3.59 In any event, Ms Baguley said that she first became aware that the Claimant had a hearing difficulty during an impromptu visit by the Claimant to Ms Baguley's team before 19 September 2016. There was a light-hearted conversation about where the claim was going to sit and Ms Baguley told her to "take your pick" of the empty desks. The Claimant responded by requesting a specific desk because she was "hard of hearing" and wanted to be positioned so that she could easily converse with the rest of the team. That was the first time Ms Baguley heard of the Claimant's hearing impairment. The Claimant never mentioned it again. She did not recall ever hearing the Claimant ask someone to speak up or repeat anything. The Claimant never requested any adjustments, and the Claimant never said that she found it difficult to handle customer calls. Ms Baguley's view was the Claimant had a very pleasant yet confident telephone manner. She also pointed out that as a new starter all of the Claimant's calls were monitored throughout her time on Ms Baguley's team. No issue with her hearing was raised or identified. Ms Baguley said that the Claimant had brought her own telephone headset with her from her previous role and did not raise any concern about that.

3.60 Ms Baguley became aware of the Claimant's diabetes because she regularly talked about it after joining the team. Ms Baguley remembered that on the Claimant's first day in the role she and other new starters took part in an introductory exercise during which the Claimant told everyone that she was diabetic and this led to a discussion about the condition. Ms Baguley therefore emailed the first aiders to let them know that a member of her team had diabetes. Ms Baguley said that she recalled saying to the Claimant early on that if she ever needed additional breaks or to eat outside of normal break times then she would of course accommodate it. Ms Baguley said that the Claimant had never requested any adjustments for her diabetes. The Tribunal accepted Ms Baguley's evidence.

3.61 The Claimant and the other three new starters had a 16 week induction programme during which they would be on the phones taking inbound calls from customers. Once they had been signed off they would have moved to an almost exclusively outbound calls team. Ms Baguley was confident that the Claimant understood this, not least after the Awareness Session she had undertaken.

3.62 A number of the Claimant's complaints about her time in this role relate to the need for her to have sufficient flexibility to take breaks and regulate her blood sugar levels as required. The Claimant said that she was prevented from doing so first by the requirement to answer inbound calls itself; secondly because her breaks were dictated by the i360 computer system; and thirdly because Ms Baguley prohibited her from taking time away from her calls outside designated break times.

3.63 Ms Baguley dealt with each of those matters in her evidence. She explained that the inbound calls line requires employees to be at their desk, logged in and ready to take calls from customers. However, the Claimant was never prevented from taking a break in between calls because once a call was concluded she could have placed her settings to "Wrap Up," or "Personal Break" or "Lunch." That would have prevented any further calls from being transferred to her number and she could have taken a break. In oral evidence Ms Baguley explained that even in the middle of a call the Claimant could simply have ended the call if she needed to. There were occasionally emergencies where this happened and someone else took over a call.

3.64 The i360 system is a system that automatically assesses the level of customer demand and the number of telephone operatives and uses that information to allocate time slots for meal or refreshment breaks. Ms Baguley was not happy that the Claimant and her three new colleagues were on that system because she did not consider it appropriate for the work they did. They were only on it for two or three weeks at the start but then Ms Baguley succeeded in having them removed from the system. In any event, Ms Baguley was clear that the Claimant could have taken a break whenever she needed.

3.65 In her witness statement, the Claimant said that she was told when she could take a break and when she could eat by the i360 system. She said that this was not safe for an insulin-dependent diabetic and said that she soon found herself being "formally reprimanded" after urgently correcting low blood sugar in the kitchen instead of being at her desk ready to take calls. Ms Baguley said that there was no prohibition on eating at desks and that this was common. Ms Baguley said that the Claimant had "distorted the facts" in relation to a particular incident. Ms Baguley said that there were a number of occasions in late September or early October when the Claimant and the other three new starters either arrived late for work or arrived before 9am but were not logged into the phone by 9am. There were also occasions when they would delay logging onto the phones for example because they were chatting, making drinks or preparing breakfast. Ms Baguley felt that these late starts were becoming increasingly common so she sent an email to the team emphasising the importance of being at work and logged on by 9am. Ms Baguley said that the Claimant did not say that she needed longer after arriving at the office in order to manage her blood sugar levels and that if she had done so she would have put systems in place to accommodate a later start. The Tribunal saw the email, which was directed at the whole team. The Claimant told the

Tribunal that Ms Baguley was telling her she could only have a hypo before 9am. She agreed that Ms Baguley had asked her and the other team members to be at their desks by 9am but she said that she would not be able to do that. The Tribunal accepted Ms Baguley's evidence that there was a general issue with team members not being logged on and ready to take calls at 9am and that she raised it as such. The Claimant did not suggest to her that this had anything to do with her diabetes. If she had done so Ms Baguley would have accommodated it.

3.66 The Claimant was off work sick from 14 November 2016 to 16 November 2016. Her evidence was that she was reprimanded for not using the sickness reporting line. That took place when she did her return to work interview with Ms Baguley. The return to work interview form prompts the interviewer to record whether reporting procedures were followed. Ms Baguley had written, "No but corrected after conversation." The Claimant's evidence was that she thought the procedure was to report her absence to her line manager and that is what she did. In cross-examination she accepted that she now understood that there was a procedure, which was to telephone the sickness reporting line. She was asked why in those circumstances it was inappropriate for her manager to ask her to follow that process. She said, "I picked up the phone to her I thought that would be correct I couldn't believe I was being told not to." She was asked again what was wrong with her manager pointing out to her that there was a different process she should have followed. At that stage she said for the first time that it was Ms Baguley's manner, which she described as "frosty." She said that Ms Baguley was telling her off not informing her. The Tribunal did not accept the Claimant's evidence. It seemed to us that her issue was with being corrected at all when she thought she should have been able to telephone her line manager. The Tribunal considered it appropriate for Ms Baguley to instruct her as to the correct sickness reporting procedure.

3.67 The Claimant's evidence in her witness statement was that after the issue with late starts she started being "blackballed". She said that she asked for annual leave to see her daughter sing in church, which was refused despite only one other team member being off that day. She said that she was told off for not using the sickness reporting procedure. She said that she was ignored and cut out of the conversation on the team's WhatsApp group. She said that when she returned to work from her three days' absence she said, "Hello" but was ignored by the other team members. She asked her colleague Ms F if another team member was off work and Ms F asked her, "Why don't you just read your fucking emails?" Ms F turned her back on her and she was then ignored for four days. In her oral evidence, the Claimant said that the change of attitude took place after she returned to work from her three-day sickness absence, not after the issue with late starts.

3.68 Ms Baguley's evidence was that the only indication the Claimant had ever given her that all was not well was when she once walked past her as she was at the vending machine. The Claimant told her that Ms F, "has a face on with me." Ms Baguley was surprised. She had not noticed a frosty atmosphere in the office. Ms Baguley offered to speak to Ms F to resolve the situation but the Claimant was adamant that she should not intervene. Ms Baguley therefore took no further action, the matter was never mentioned again and Ms Baguley saw nothing untoward in the Claimant's relationship with Ms F from that point onwards. Ms Baguley's evidence was that the Claimant did not tell her that Ms F had sworn at

her and that if she had done so she would have dealt with it regardless of the Claimant's wishes. It was put to the Claimant in cross-examination that Ms Baguley had asked her if she wanted to deal with it and that she had declined. The Claimant's answer was, "Why would I say that?" She was asked the question a second time and then she said that she had told Ms Baguley she wanted her to deal with it. During the course of her grievance the Claimant told Ms Pardavila something different. She said then that Ms Baguley told her, "Leave it with me and I'll speak to her" but that she never heard anything more. Again, the Tribunal preferred Ms Baguley's version of events. The Claimant appeared to have been distorted with the benefit of hindsight.

3.69 Ms Baguley also dealt with the Claimant's allegation that she was refused annual leave to watch her daughter sing in church. She said that although the Claimant received an automated email declining her request she remembered talking to the Claimant across the desks about it. There was already one person off that day and because of the capacity plan Ms Baguley was unable to agree to the Claimant's request. However, she asked the Claimant what the holiday was for and when the Claimant told her she said, "You're not missing that. Find out what time it is and you can go and come back. We'll work around it." Ms Baguley's original evidence was that she recalled the Claimant saying that her mother could go instead and so it was not an issue. The Claimant's mother sadly passed away some time ago and in cross-examination Ms Baguley apologised; she thought the Claimant had referred to her mother but she was confident that she had said that somebody could get there. The Claimant said that there had been no such conversation. The Tribunal preferred Ms Baguley's evidence.

3.70 On 28 November 2016 the Claimant went on sick leave and she never returned to work after that date.

3.71 The Claimant was asked in her evidence about attempts by Ms Baguley to contact her to arrange a home visit. It was suggested to her that by that point she had already decided she was not coming back to work at the Respondent. She answered, "I'd decided how on earth could it possibly be addressed. After all that's gone off. I'm in a job I didn't apply for. I've had this treatment. What could they possibly do to put it right?" She was asked whether that meant that she had indeed decided she was not coming back and she answered, "I suppose I'd decided yes that was the only option." The Tribunal saw the Claimant's GP records. On 28 November 2016 the GP had recorded that the Claimant was very stressed at work and was going to start looking for a new job but thought time off was needed for anxiety. On 12 December 2016 the GP recorded that the Claimant was wanting to find another job. On 4 January 2017 the GP recorded that the Claimant had not been back to work but did not think she could. She realised the situation could not continue. She had contacted an employment specialist solicitor who she was talking to today to bring an action against her employer for how she had been treated. She was looking for alternative work and trying to terminate her employment. On 31 January 2017 the GP recorded that the Claimant could not face going back, had contacted her union and solicitor and would take out a grievance procedure. On 13 February 2017 the GP recorded that the Claimant was seeing an employment specialist solicitor. It might take two weeks for the process to go through. She was thinking of becoming self-employed but she could not hand

in her notice until the case was resolved. She could not go back in this environment.

3.72 The Claimant was asked about this in her evidence. It was suggested to her that she had already decided to resign regardless of the outcome of her grievance. She disagreed and said that she wanted to go through the grievance process first. She accepted that it did not read that way. She said that if she had continued in employment she would have been accepting the Respondent's treatment of her. She was prepared to be open-minded. She needed to follow a grievance. She had not acted on any of what her GP had said. She was concentrating on her health and letting a solicitor deal with the work stress. The Claimant was also asked about what she told Ms Pardavila when they spoke on the telephone about her grievance. Ms Pardavila asked the Claimant what she was looking for as an outcome and the Claimant told her there was "no way" she could go back to her job. She wanted to be made redundant from her original role, which would allow her to get better and get her Diploma in order to get another job. She said that she had decided it would be wrong to accept her employer's misconduct. She said that she was prepared to go along with the grievance and appeal but did not have a great deal of faith.

3.73 Looking at all the evidence, the Tribunal found that, as the GP had recorded, the Claimant had decided to resign and went to see a solicitor to see what could be done about what she regarded as the Respondent's mistreatment of her. Reading between the lines, it appears that her solicitor advised her she needed to go through a grievance process and that was put in motion. We find that she was going through the motions on the basis of such advice, but that she had already decided to leave. That is consistent with the multiple entries in the GP notes, with what she told Ms Pardavila and with some of her answers to the Tribunal.

3.74 Her solicitor did indeed lodge a grievance on her behalf on 9 February 2017 and that was dealt with by Ms Pardavila. The Claimant questioned whether she was impartial. It appears that after the event unnamed colleagues suggested to the Claimant that Ms Pardavila could not be impartial because she knew Mr Newsam well. In her evidence Ms Pardavila disagreed. She said that although she had worked for the Respondent in Sheffield for 28 years it was only the last three that she had been in the same building as Mr Newsam and she could categorically say that she did not know him until she interviewed him for this grievance. Indeed, she had said at the outset of their interview that she could not believe she had worked there so long and not met him before. She worked on a different floor from Ms Baguley. She knew her to say "Hello" to in the corridor but had no friendship or working relationship with her. The Tribunal accepted that evidence and accepted that there was nothing to suggest that Ms Pardavila was not impartial. Indeed, all the evidence before the Tribunal of the investigations she carried out into the Claimant's grievance and the careful response she gave to it suggests the opposite. She carried out a thorough and careful consideration before rejecting most of the grievance. That included speaking to the Claimant in detail by telephone twice, interviewing Ms Baguley, Mr Newsam, Mr Gayton, Mr Walker and one of the Claimant's colleagues and sending emails with other queries. She gave the Claimant a detailed outcome in person on 17 March 2017 and followed up with a detailed outcome letter on 20 March 2017.

3.75 The Claimant appealed against that outcome and Mr Fitzpatrick was appointed to deal with the appeal. He re-interviewed a number of people and also interviewed two of the Claimant's colleagues from her time in Ms Baguley's team. He spoke at length to the Claimant on 28 April 2017. The Claimant sent a number of follow-up emails and Mr Fitzpatrick explored those matters further. He sent the Claimant a detailed outcome letter on 12 May 2017. He upheld a very small part of the appeal. There were minor aspects in which Mr Fitzpatrick's approach could be criticised but the Tribunal was quite satisfied that he was doing his best to do a thorough and careful job in dealing with the grievance appeal. The Claimant also suggested that Mr Fitzpatrick was not impartial. That was not put to him in cross-examination but he addressed it in his witness statement. He said that he had never met the Claimant before and had not worked with Mr Newsam, Ms Baguley or Ms Pardavila previously. Again, the Tribunal could see no basis for finding that Mr Fitzpatrick lacked impartiality. He too did everything he could to address the Claimant's grievance appeal.

3.76 On 15 May 2017, three days after receiving the appeal outcome, the Claimant emailed her resignation. She said that she had been left with no choice in the light of her recent experience regarding the grievance she had raised. She described the appeal outcome as a "whitewash." She said that she regarded this as a fundamental breach of contract as she had been forced into a role that was unsuitable following discriminating, harsh and unfair treatment. Her health, reputation and career prospects had been damaged as a result.

3.77 Next, we deal with evidence relevant to the Claimant's indirect discrimination and reasonable adjustments complaints. The Claimant's first proposition was that a requirement to pass a Diploma puts women at a disadvantage compared with men. The Tribunal was not prepared to take judicial notice of such a proposition. The Claimant produced some information relating to exam sittings at Oxford. The Tribunal did not consider that it supported the contention that women are likely to be disadvantaged by a requirement to pass a Diploma. The Claimant's general argument was that women are more likely to have domestic or caring responsibilities and that this makes it more difficult for them to carry out personal study in their own time so as to pass exams. This is rather different from the more familiar situation, where it is often held that a requirement to work full-time puts women at a disadvantage. That is because a greater likelihood of having domestic or caring responsibilities is likely to prevent more women from being able to carry out full-time work. But what is at issue here is carrying out personal study at a time of one's choosing, not a requirement to attend work. The Claimant said that each exam was meant to require 60 hours' study time. As noted above, the Respondent gave as standard five days' paid study leave per year. Assuming candidates do three exams per year, approximately 180 hours' study time would be required, of which approximately 40 would come from the study days. That would leave a requirement of 140 hours' personal study per year, or 2-3 hours per week. The Tribunal was not shown evidence to suggest that women would be less able to achieve that than men. Of course a requirement to carry out personal study requires all candidates, men and women, to sacrifice some of their personal time, but that can be done outside of working hours and fitted around caring or domestic responsibilities. Further, even if there were such a general disadvantage, the Claimant gave evidence of how she did fit the personal study time in, around her other responsibilities. For example, she described working in the caravan on the

drive at weekends while her husband was responsible for their twelve year old daughter.

3.78 The Claimant advanced a similar proposition in respect of age: she said that people of the age group over 40 were more likely to have family or caring responsibilities than people in the age group 20 to 30. For the same reasons, even assuming that the older age group is more likely to have family or caring responsibilities, the Tribunal was not satisfied that this put them at a disadvantage in achieving the Diploma, nor that the Claimant was put to such a disadvantage.

3.79 The Claimant also said that her disabilities put her at a number of substantial disadvantages and we deal with those next. We start with the type I diabetes and associated issues. We read carefully all the material the Claimant provided about her condition, as well as the OH report from June 2016. That information indicated that when blood sugar is not well-managed individuals can experience symptoms such as brain fog, blurred vision and fatigue. Some of the issues associated with the Claimant's diabetes can cause decreased concentration and motivation, and can have a negative impact on academic and professional performance. Stress can have a negative impact on blood sugar control, and, additionally, type I diabetes can itself be a cause of stress. The after-effects of a hypo can include lack of concentration and someone who had experienced a hypo would not be fit to do an exam straightaway. While the Claimant did not experience all of these issues all of the time, we accepted her evidence that she did experience them some of the time. We considered whether this was at such a level that it had an impact on her ability to study for and pass the Diploma. Her evidence was not entirely consistent: she began by saying that in some instances her diabetes played a part and in others not at all. Stress played a bigger part. However, when pressed about this, she said that her diabetes always had some impact. Nonetheless, the Tribunal accepted that at times she experienced some of the symptoms referred to above, and that, cumulatively, this will have had some, more than trivial, impact on her ability to study and pass the Diploma. To that extent, her diabetes put her at a substantial disadvantage in that it sometimes made it harder for her to study and, in turn, to pass the exams.

3.80 At the same time, the Tribunal noted the Claimant's evidence that she was perfectly capable of all the material covered, given the correct amount of study time for her, and that she agreed that the biggest factor in the delay in passing her Diploma was that Mr Walker had lulled her into a false sense of security.

3.81 The Claimant also said in cross-examination that a combination of the factors set out above hindered her in meeting her other targets, and again, the Tribunal accepted that on occasions it did so. That impact was more than minor or trivial. In addition, she said that increasing her targets increased her stress and that this, in turn, had a negative impact on her blood sugar control. The Tribunal accepted that it did so. It was one of the matters that was causing stress to the Claimant and, in general terms, that sometimes had an impact on her blood sugar control.

3.82 Lastly, the Claimant said that her hearing impairment put her at a substantial disadvantage because it made it more difficult for her to use the telephone and/or she preferred to use email. It seemed to the Tribunal that the Claimant's preference for email was a personal one. She found it more efficient and did not want to spend

time discussing golf or other small talk. She has a hearing impairment in one ear. There was no evidence to suggest that this impedes her ability to deal with clients by telephone. There was an issue with the headset, because she was allergic to the original headset. That was related to her diabetes. When the headset was replaced, it solved that problem. The Tribunal did not accept, on the evidence, that the Claimant's hearing loss on one ear put her at the substantial disadvantage of making it harder for her to deal with clients by telephone.

3.83 We turn finally to the evidence relevant to time limits. The Claimant was asked about why she had not presented her Tribunal complaint sooner. She said that her treatment in Mr Newsam's department and Ms Baguley's were linked by her wanting to appeal the outcome of the performance management meeting and being persuaded not to. She said that she was ill with stress and anxiety and issues associated with her diabetes. She was not mentally or physically up to putting a claim in. She agreed that she had seen a solicitor in early January 2017 but had not contacted ACAS until August 2017. She said that she was waiting for the outcome of the grievance and appeal and thought that that was the right thing to do. She said that she did not have ongoing advice from a solicitor; she had paid a fixed fee to have a solicitor send a letter on her behalf. She agreed that she was a member of a trade union and that the trade union were involved throughout the grievance and grievance appeal. The last time she interacted with them was when she attended the grievance appeal. Around the time she handed in her notice she stopped being a member because she said she could not afford the fees. She spoke to her trade union representative after the appeal and he told her to contact ACAS.

Legal Principles

4.1 Claims of discrimination are governed by the Equality Act 2010, s 4 of which provides that age, disability and sex are protected characteristics. Section 39 Equality Act 2010 makes it unlawful for an employer to discriminate against an employee by, among other things, subjecting him or her to detriment and s 40 makes it unlawful for an employer to harass an employee. Sections 13, 15, and 19-21 and 26 of the Equality Act 2010 provide, so far as material:

> **13 Direct discrimination**
> (1) 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.
> …
>
> **15 Discrimination arising from disability**
> (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.
> …
>
> **19 Indirect discrimination**
> (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.

(3) The relevant protected characteristics are -
age;
…
sex;
…

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A'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.
…
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
…

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
…

26 Harassment

(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 in subsection (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.
(5) The relevant protected characteristics are –
age;
disability;
… .

4.2 The time limits for bringing claims of discrimination are governed by s 123, which provides, so far as material, as follows:

123 Time limits

(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of -

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment Tribunal thinks just and equitable.

…

(3) For the purposes of this section -

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

…

4.3 As regards extending time, the Tribunal has a wide discretion under s 123(1)(b) to do what it thinks is just and equitable in the circumstances, but bearing in mind that time limits are exercised strictly in employment cases, and that there is no presumption that a Tribunal should exercise its discretion to extend time. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time and the exercise of discretion is the exception rather than the rule: see *Robertson v Bexley Community Centre* [2003] IRLR 434, CA.

4.4 Whether a Claimant succeeds in persuading a Tribunal to grant an extension in any particular case is a question of fact and judgment, to be answered case by case by the Tribunal: see *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327, CA.

4.5 The factors that are to be considered by the civil courts under s 33 of the Limitation Act 1980 in determining whether to extend time in personal injury actions may provide a helpful checklist: see *Southwark London Borough Council v Afolabi* [2003] IRLR 220, CA. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

4.6 The burden of proof is dealt with by s 136 of the Equality Act 2010. The Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 gave authoritative guidance as to the application of these provisions and the Tribunal has had regard to it. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

4.7 As regards failure to make reasonable adjustments: the Tribunal must consider the PCP or auxiliary aid, the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the Claimant. It should analyse what steps would have been reasonable for the

respondent to have to take to avoid that disadvantage. It is for the Tribunal to judge objectively what adjustments were reasonable. The EHRC Code of Practice on Employment (2011) advises at paragraph 6.28 that the factors that may be relevant to an assessment of reasonableness include: whether taking any particular steps would be effective in preventing the substantial disadvantage; practicability; financial and other costs and disruption; the employer's financial and other resources; the availability of financial and other assistance and the type and size of the employer.

4.8 The right not to be unfairly dismissed is set out in s 94 of the Employment Rights Act 1996. Section 95 of that Act defines what is meant by dismissal. This includes (s 95(1)(c)) what is usually called constructive dismissal, i.e. where the employee terminates the employment contract, with or without notice, in circumstances where he or she is entitled to so without notice by reason of the employer's conduct. It is well-established (see *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221) that in considering whether an employee has been constructively dismissed, the issues for a Tribunal are:

4.8.1 Was there a breach of the contract of employment?

4.8.2 Was it a fundamental breach going to the root of the contract, i.e. such as to entitle the employee to terminate the contract without notice?

4.8.3 Did the employee resign in response and without affirming the contract?

4.9 It is an implied term of the contract of employment that the employer will not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The employer must in essence demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract: see *Frenkel Topping Ltd v King* UKEAT/0106/15/LA at paragraphs 12-15. Individual actions taken by an employer that do not by themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim unfair dismissal. The final act in such a series (or "last straw") need not be of the same character as the earlier acts but it must contribute to the breach of the implied term: see *Omilaju v Waltham Forest BC* [2005] IRLR 35 CA.

4.10 The essence of constructive dismissal is repudiation by the employer, which is accepted by the employee. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as being at an end. The employee's resignation must be in response (at least in part) to the repudiation, which must be the effective cause of it: see *Nottinghamshire County Council v Meikle* [2005] ICR 1, CA.

Application of the law to the facts

5.1 Against the detailed findings of fact set out above, the Tribunal turns to the issues in this case. We set out our reasons briefly. In most respects they follow inevitably from the findings of fact for which reasons have been given.

Time limit for discrimination complaints

5.2 The Tribunal assumed that all of the Claimant's complaints of discrimination formed one course of conduct over a period. They related to her experiences in Mr

Newsam's team and then Ms Baguley's team. She went on long-term sick leave on 28 November 2016 and did not return to work after that. She does not complain that the handling of her grievance was discriminatory. In those circumstances, the last matter of which she complained must have taken place on or before 28 November 2016 and the time limit for presenting a Tribunal complaint (or contacting ACAS to start early conciliation) was 27 February 2017. She did not present her complaint until August 2017. Her discrimination complaints were therefore presented outside the statutory time limit.

5.3 The Tribunal considered whether they were presented within such further period as was just and equitable. We found that they were not. It is for the Claimant to satisfy the Tribunal time should be extended. Although the Claimant said that she was not mentally or physically up to putting a Tribunal claim in, we noted that she was able to put in a very detailed grievance with help from a solicitor in January 2017. Furthermore, she had help and advice from her trade union throughout her grievance and grievance appeal until she handed her notice and she was able to participate fully in the grievance and grievance appeal process. Therefore, we did not accept that she was prevented by mental or physical ill-health from putting in a Tribunal claim within the time limit. Further, a solicitor was involved at an early stage and her trade union throughout. She had access to appropriate advice that could and should have covered the basics of Tribunal time limits. The delay was around six months – double the primary time limit itself. Inevitably, that has an impact on the cogency of the evidence. There were matters the witnesses could not remember. Plainly, the Claimant would suffer prejudice if she was unable to pursue her discrimination complaints. However, she could still advance her constructive unfair dismissal complaint, relying on those matters by way of background. On the other hand, the Respondent would face very substantial discrimination complaints brought well outside the statutory time limit, which could have been brought in time. Weighing all the relevant considerations, the Tribunal found that the prejudice to the Respondent was greater. We did not consider that it was just and equitable to extend time for bringing the discrimination complaints.

5.4 However, having heard the evidence and made findings, we set out below what our decision would have been on the discrimination complaints if we had extended time.

Failure to make reasonable adjustments

5.5 We start with the reasonable adjustments complaints:

5.5.1 First, the Respondent applied a PCP of requiring the Claimant to pass the Diploma within 18 months and subsequently 24 months. For the reasons set out in the findings of fact, the Tribunal found that the Claimant's type I diabetes did put her at a substantial disadvantage in comparison with others when it came to passing the Diploma. The cumulative effect of symptoms associated with her condition made it somewhat harder for her to study on occasions and, in turn, somewhat harder for her to pass the exams. It is therefore necessary to consider what steps it was reasonable for the Respondent to have to take to avoid that disadvantage. The Tribunal considered that it was reasonable for the Respondent to have to extend the deadline for the Claimant to achieve the Diploma. That would alleviate the disadvantage. However, the Tribunal found that the Respondent had taken that step. By 2016 the deadline had been extended to 3 years two months. Mr Newsam extended it further by requiring the

Claimant to pass only one of the two outstanding exams in 13 weeks. She did not suggest that she needed longer because of her disability and indeed she passed the exam within that deadline. She moved into a new role in which the Diploma was no longer required and the question of extending the deadline for passing the last exam became academic. The Tribunal also noted that Mr Newsam gave the Claimant a number of additional study days during the performance management process, which would also have helped to alleviate this substantial disadvantage. We were quite satisfied that he took such steps as was reasonable to avoid any disadvantage arising from the impact of the Claimant's diabetes on her ability to study for and achieve the Diploma. The Claimant suggested that it would also have been reasonable for the Respondent to provide regular monthly reviews of her study progress. There was no evidence before the Tribunal about this. The Claimant does not appear to have raised this suggestion at the time, despite repeated invitations from Mr Newsam to tell him what support he could give. Further, there was no evidence before the Tribunal that monthly reviews would have alleviated the disadvantage caused by the Claimant's diabetes. Lastly, the Claimant suggested that it would have been reasonable for the Respondent to provide additional study material free of charge. Apart from the occasion when she complained of unfairness, the Claimant did not ask Mr Newsam for study material free of charge. The context is that at the time she was earning roughly £2000-3000 net per month. The Tribunal did not consider that the provision of further study material free of charge was a reasonable step for the Respondent to have to take to avoid the disadvantage arising from the Claimant's diabetes.

5.5.2 The Respondent did apply a PCP of allocating car parking spaces in accordance with its policy and requiring employees to pay £56 a month for a car parking space. The Tribunal found that the PCP of allocating car parking spaces in accordance with its policy put the Claimant at a substantial disadvantage because she did not qualify for a space (at least while her blood sugar was not stable). That meant she could face a much longer walk from her car into the building and this made her blood sugar levels harder to manage. The Tribunal considered that a reasonable step to take to avoid the disadvantage was to provide a car parking space to the Claimant. That was done. Once the issue was raised with OH they recommended that the Claimant be given a car parking space for a temporary period of three months. That was consistent with her position that she needed to stabilise her blood sugar levels. She did not raise any concern about paying for the space at that time. When the three months expired, she did not ask for an extension or raise any concern about the cost. She was aware of the OH advice recommending that she be given a space temporarily and she did not question that at the time. In those circumstances it was not reasonable for the Respondent to have to provide the parking space for a longer period or free of charge.

5.5.3 The lack of an auxiliary aid (a personal fridge) did put the Claimant at a substantial disadvantage because she needed to store her insulin and on occasion it was disposed of when the communal fridge was cleaned. However, the Tribunal did not consider that it was reasonable in the circumstances for the Respondent to have to provide a personal fridge to the Claimant to avoid that disadvantage. That is because when it offered

to do so she declined on the basis that she had bought a special cool bag. It was left that she would see how this worked and, as set out in the findings of fact, she did not go back to Mr Beanland or Mr Newsam after that to say that the cool bag was ineffective or to request a personal fridge.

5.5.4 The lack of an auxiliary aid (a telephone headset with leatherette earpieces) put the Claimant as a substantial disadvantage because she was allergic to the telephone headset on account of her diabetes. The Tribunal considered that it was reasonable for the Respondent to have to provide her with an alternative headset once she had raised the concern, which she did for the first time when she spoke to OH. It did so.

5.5.5 As set out in the findings of fact the Tribunal accepted that a PCP of increasing performance targets in around January 2016 put the Claimant at a substantial disadvantage because it caused stress and that affected her blood sugar levels. The Claimant suggested that a reasonable step to avoid that disadvantage would have been not to increase her targets at all. The Tribunal did not consider that that would have been reasonable because the Claimant never suggested it at the time. It was reasonable to adjust the Claimant's target so as to reduce the stress and, as set out above, Mr Newsam did so. The findings of fact make clear that throughout the performance management process he was at pains to discuss the Claimant's targets with her and agree appropriate levels.

5.5.6 The Respondent did apply a PCP of measuring performance by reference to the number of telephone calls made. However, the Tribunal was not persuaded on the evidence that this put the Claimant at a substantial disadvantage because her hearing impairment led her to use email rather than telephone contact. The evidence suggested that this was personal preference rather than a hearing issue. Even if the Claimant were put at a substantial disadvantage, the Tribunal did not consider that it would have been reasonable for the Respondent to have to measure the Claimant's performance by reference to email contact as well. Put simply, she never raised this at the time or suggested that it was necessary.

5.5.7 When she moved to Ms Baguley's team, the Respondent did apply a PCP of requiring the Claimant to answer inbound calls. However, as dealt with in detail in the findings of fact, the Tribunal did not accept that this prevented the Claimant from taking breaks when required. She could put her phone to "Wrap Up" or to "Personal Break" or "Lunch," which would prevent any further inbound calls and enable her to take a break. In an emergency, she could simply have handed over a call (inbound or outbound) to a colleague part way through if required. Therefore, a requirement to answer inbound calls did not put her at the substantial disadvantage contended for.

5.5.8 Likewise, even when she was on the i360 system she could take a break when required and Ms Baguley made it clear to her that she could do so. In any event, she was swiftly removed from that system. Again, the i360 system did not put her at the substantial disadvantage contended for.

5.5.9 Again, as the findings of fact make clear, Ms Baguley did not prohibit the Claimant from taking time away from calls except at designated break times. On the one occasion when Ms Baguley reminded the Claimant and her colleagues that they needed to be at their desks and ready to start

taking calls at 9am, the Claimant did not suggest that she had been dealing with a hypo. She knew perfectly well that she could take a break to deal with a hypo if she needed to. She was not put at the substantial disadvantage she alleged.

Unfavourable treatment

5.6 The Tribunal accepted that being put on a PIP might be regarded as unfavourable treatment. As explained in the findings of fact, the Tribunal did not accept that the Claimant was threatened with termination of her employment. However, she was warned that this was one possible consequence of the PIP process. The question is therefore whether the unfavourable treatment of putting her on a PIP or giving her such a warning was because of "something arising in consequence of" her disability. The Tribunal did not accept that the low number of telephone calls made by the Claimant arose in consequence of her hearing impairment. As set out above we found that the Claimant preferred to communicate by email, but that this was not because of her hearing loss.

Direct disability discrimination

5.7 As explained the findings of fact, the Claimant was not informed that her employment would be terminated at any point. She was told that this was one possible outcome of the performance management process. She was, of course, put on a PIP. However, the Tribunal did not consider that by putting her on a PIP Mr Newsam treated the Claimant less favourably than a comparator in whose circumstances there was no material difference. The Claimant relied on Mr H. The Tribunal found that Mr H's circumstances were materially different. While he had not yet achieved the Diploma, he was still within the two-year deadline. Further, his performance was superior to the Claimant's. For example, he was 13th in the call activity leaderboard and she was 28th. In any event, the Tribunal was quite satisfied that Mr Newsam put the Claimant on the PIP because he was concerned about her performance and not because of any disability.

Disability related harassment

5.8 The Claimant was not informed that her employment would be terminated at any point. She was told that this was one possible outcome of the performance management process. She was put on a PIP. However, the Tribunal found that putting the Claimant on a PIP was not unwanted conduct related to disability. It was simply a process for managing and improving performance that was falling below what was required. Even if it had been unwanted conduct related to disability, the purpose was plainly not to violate the Claimant's dignity or create a humiliating environment for her, nor did the Tribunal find that this was its effect. The detailed findings of fact demonstrate the care and attention to detail with which Mr Newsam managed the process. He did all he could to support the Claimant in improving her performance. Even if the Claimant's perception was that this violated her dignity or created a humiliating environment for her, that was not reasonable in the circumstances.

Direct age discrimination

5.9 Turning to the complaints of direct age discrimination, the Tribunal found that there was no less favourable treatment of the Claimant:

5.9.1 For the reasons set out in the findings of fact, Mr Newsam did not treat the Claimant less favourably than an actual or hypothetical younger

comparator by failing to mentor her, or to accompany her on visits or undertake other supportive or coaching activities. He held a one hour coaching session with her daughter because the Claimant asked him to. He did carry out coaching activities because that was part of his role. Likewise, he went on visits with colleagues. However, the Claimant never asked him to carry out any such activities with her.

5.9.2 Mr Newsam did not ask the Claimant if she had ever considered working in a charity shop.

5.9.3 For the reasons already given in respect of direct disability discrimination, Mr Newsam did not treat the Claimant less favourably than a comparator in materially the same circumstances by putting her on a PIP. Mr H was not in materially the same circumstances.

5.9.5 For the reasons set out in the findings of fact, Mr Newsam did not give Ms S preferential treatment relating to providing study material free of charge.

Age related harassment

5.10 The above matters did not amount to unwanted conduct related to age:

5.10.1 Mr Newsam's lack of mentoring or coaching the Claimant was nothing to do with age. She did not ask for such support.

5.10.2 Mr Newsam did not ask the Claimant if she had ever considered working in a charity shop.

5.10.3 Putting the Claimant on a PIP was nothing to do with age.

5.10.5 Mr Newsam did not give Ms S preferential treatment relating to providing study material free of charge.

Indirect age discrimination

5.11 The Respondent did apply a PCP of requiring the Claimant to pass the Diploma within 18 months and, subsequently, 24 months. That PCP applied or would apply to persons aged 20 to 30. However, for the reasons explained in the findings of fact above, the Tribunal did not find that the PCP put persons aged over 40 at a particular disadvantage. Nor did it put the Claimant at that disadvantage.

Indirect sex discrimination

5.12 The Respondent did apply a PCP of requiring the Claimant to pass the Diploma within 18 months and, subsequently, 24 months. That PCP applied or would apply to men. However, for the reasons explained in the findings of fact above, the Tribunal did not find that the PCP put women at a particular disadvantage. Nor did it put the Claimant at that disadvantage.

Unfair constructive dismissal

5.13 The Tribunal found that the Respondent did not fundamentally breach the contract of employment. We have made detailed findings of fact about the matters giving rise to the discrimination complaints. None of those complaints is made out. Mr Newsam was not trying to manage the Claimant out of the business and she was not forced into the role in Ms Baguley's team or misled into accepting that role. Ms Baguley did not prevent her from taking breaks or managing her blood sugar; reprimand her for not using the sickness reporting line; refuse to let her hear her

daughter sing in church or fail to investigate a complaint about Ms F. She did not exclude the Claimant.

5.14 That, then, brings us to the handling of the Claimant's grievance about these matters. As explained in the findings of fact, the Tribunal found that both Ms Pardavila and Mr Fitzpatrick conscientiously dealt with, respectively, the Claimant's grievance and grievance appeal. The Claimant's perception of their findings is no doubt affected by her perception of the underlying events, with which we have dealt in detail above. After hearing the evidence, the Tribunal has found that the underlying events that gave rise to the grievance did not occur in the way the Claimant says. That is the context in which we reject the Claimant's suggestion that the grievance and grievance appeal amounted to a "whitewash." Ms Pardavila and Mr Fitzpatrick considered her complaints carefully and, for the most part, rejected them. That does not mean that they did not consider them properly. Nothing in the handling of, or approach to, the grievance amounted to conduct that was calculated or likely to destroy or seriously damage mutual trust and confidence. Therefore, there was no fundamental breach of contract.

5.15 Even if the rejection of the Claimant's grievance had been a fundamental breach of contract (or had contributed to such a breach), the Tribunal found that the Claimant had decided to resign long before her grievance was concluded. She decided to resign not long after she had started her long term sick leave and before she saw a solicitor. She did not resign in response to any aspect of the grievance handling or outcome.

5.16 Accordingly, the Claimant was not constructively dismissed and her complaint of unfair dismissal cannot succeed.

Employment Judge Davies

28 November 2018