Case Number: 2501337/2017

THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Falconer**

Respondent: **The Commissioners of Her Majesty's Revenue & Customs**

Heard at: **North Shields** **On:** **11-16 June 2018 inclusive**
1-4 October 2018 inclusive

Deliberations: **5, 19 & 24 October 2018**
and 17 January 2019

Before: **Employment Judge Morris**
Members: **Miss B G Kirby**
Ms R Bell

Representation:

Claimant: **Mr R Stubbs of Counsel**
Respondent: **Ms G Parke of Counsel**

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant's complaint that the respondent failed to comply with its duty under section 20 of the Equality Act 2010 to make adjustments is well-founded.

2. The claimant's complaint that the respondent discriminated against her contrary to sections 15 and 39 of the Equality Act 2010 by treating her unfavourably (including by dismissing her) because of something arising in consequence of her disability is well-founded.

3. The claimant's complaint that she was dismissed by the respondent in that she terminated her contract of employment in circumstances in which she was entitled to terminate it without notice by reason of the respondent's conduct (pursuant to section 95(1)(c) of the Employment Rights Act 1996) and that that dismissal was an unfair dismissal by reference to sections 94 and 98 of that Act is well-founded.

4. This case will now be listed for a one-day hearing to determine remedy.

REASONS

Representation and evidence

1. The claimant was represented by Mr R Stubbs, of counsel, who called the claimant to give evidence.

2. The respondent was represented by Ms G Parke, of counsel, who called the following employees of the respondent to give evidence, Mr A Falcus, Mrs E Roen, Mr D Moody and Mr K Hunt.

3. The Tribunal also had before it a number of documents contained in an agreed bundle, which was supplemented throughout the hearing. The numbers shown in parenthesis are the page numbers in that bundle.

The claimant's complaints

4. The claimant's complaints are as follows:

   4.1 A failure on the part of the respondent, contrary to section 21 of the Equality Act 2010 ("the 2010 Act"), to comply with the duty imposed upon it by section 20 of that Act to make adjustments.

   4.2 Discrimination arising from disability as described in section 15 of that Act by subjecting her to detriment and dismissing her contrary to sections 39(2)(c) and (d) respectively of the 2010 Act.

   4.3 Constructive dismissal, as described in section 95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act"), which dismissal was unfair contrary to sections 94 and 98 of that Act.

The issues

5. The agreed list of issues as determined at a preliminary hearing on 11 December 2017 are as follows:

   Time

   5.1 In respect of any complaint and having regard to s.123(3) of the 2010 Act was the complaint brought within the period of 3 months (together with any extension provided by ACAS Early Conciliation) from the date of the act to which the complaint relates?

   5.2 If the complaint was not brought within the primary time limit is it just and equitable to extend time?

   Disability

5.3 Does the claimant have a physical or mental impairment that has a substantial adverse effect on her ability to carry out normal day-to-day activities?

Reasonable adjustments

5.4 Did the respondent have in place any of the provisions, criteria or practices ("PCP"s) set out in the Particulars?

5.5 In respect of each PCP, did it place the claimant at a substantial disadvantage in comparison to a person who was not disabled?

5.6 Did the respondent take such steps as were reasonable to have to take to avoid the disadvantage?

Note: the claimant's case is that whilst these are stand-alone reasonable adjustments claims, had reasonable adjustments been made, the claimant would also not have been constructively unfairly dismissed.

Section 15 Equality Act 2010

5.7 In respect of each of the matters set out in the Particulars, did the respondent treat the claimant unfavourably because of something arising in consequence of her disability?

5.8 In respect of each, is the respondent able to demonstrate that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

5.9 If the claimant was dismissed, did the dismissal of the claimant arise in consequence of her disability?

5.10 If the claimant was dismissed, is the respondent able to demonstrate that the dismissal was a proportionate means of achieving a legitimate aim?

Constructive unfair dismissal

5.11 Did the claimant terminate the contract under which she was employed in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct?

Findings of fact

6. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities:

6.1 The respondent is a well-known large employer with significant resources including as to human resources. Some 7,253 employees are located at the respondent's site in Newcastle upon Tyne where the claimant worked

with approximately 4,500 working in the PT Operations Command ("PT Ops") within which she worked.

6.2 The claimant commenced her employment with the respondent on 16 January 2006 as an Administrative Officer.

6.3 In 2008 the claimant was found to have a serious heart condition, "dilated cardiomyopathy", which reduced her energy, concentration and memory and left her very tired and affected her day-to-day activities.

6.4 The Tribunal is satisfied that from this time the claimant met the definition of a disabled person contained in section 6 of the 2010 Act.

6.5 From this point in the claimant's employment a number of occupational health ("OH") reports were obtained in relation to the claimant. In essence, that dated 25 February 2009 (82B) recorded the claimant's condition and offered the opinion that she was unfit to perform her duties as a Contact Centre Advisor and suggested an adjustment to remove the claimant from online work to an offline clerical post. It also advised that the Disability Discrimination Act was likely to apply. The OH report dated 16 February 2010 (82D) once more recorded the claimant's condition and provided answers to 17 specific questions including that "an increased tolerance of her absence of perhaps 50-100% of that normally applied would seem not unreasonable in this case".

6.6 Despite her condition, the claimant continued to work to a satisfactory level repeatedly scoring an "achieved" mark in her performance reviews. Indeed, in 2011, she was awarded the top marking of "exceeded", which the claimant attributed to supportive management at that time.

6.7 In 2013 the respondent introduced what has been referred to as a "flexing environment" (also referred to as "flipping") the essence of which was that to make best use of its staffing resource all employees should be able to transfer, sometimes at very short notice, between various work types (referred to within the respondent as "workloads").

6.8 In the context of the claimant's work involving short-term workloads with a high volume of training with which the claimant suggested she was struggling, an OH report was obtained dated 17 October 2012. It made recommendations that the claimant be placed in a more structured, repetitive role (thus avoiding anxieties caused by flexing work types) to better suit her health needs and coping ability. This resulted in the claimant being moved to the Pensions Account Maintenance ("PAM") Team. There were two PAM Teams, one managed by Mr Oliver then Mrs Roen and the other by Mr Falcus. They were located within the same open-plan office and the two managers worked closely together especially during the absence of one of them, which would be 'covered' by the manager who was at work.

6.9 In 2013/14 the claimant was absent due to sickness (40A) commencing 8 July 2013. Her absence was processed by the respondent through its Attendance Management Procedures including the claimant being issued

with a first written warning for attendance on 17 February 2014 (88). The claimant's attendance was monitored for a period of six months and, by 18 October 2014, was considered to be satisfactory. According to the respondent's attendance management process, that satisfactory attendance then had to be maintained for a further 12 months: known as the Sustained Improvement Period.

6.10 Also during this period, on 3 March 2014, it was agreed that the claimant's working hours would be reduced from 30 to 24 each week, which would comprise four 6-hour days.

6.11 A letter from the claimant's Consultant Clinical Psychologist dated 13 November 2014 confirmed the claimant's condition and its effects at this time.

6.12 In November 2014 Mrs Roen took over the PAM Team from Mr Oliver and became the claimant's Line Manager. Also during this period the claimant's workload (and that of the remainder of her team) was flexed to the Record Retrieval Service ("RRS"). The claimant excelled in this role to the extent of being asked to provide assistance to others. In January 2015 the claimant's PAM Team then flexed off RRS onto PAM Calculations.

6.13 On 15 December 2014 the claimant commenced a further period of sickness absence which continued until January 2015 (94-97). Once more the claimant's absence was pursued through the attendance management process with Mrs Roen writing to her on 13 January 2015 and then meeting the claimant at her home (with Mr Falcus as note-taker) on 21 January 2015 (101-103). Matters discussed included the question of reasonable adjustments, reduced hours, a phased return to work, refresher training and the consequences of the claimant not returning to work.

6.14 On 2 February 2015 the claimant commenced a phased return to work of two hours each day for two weeks and met Mrs Roen that day (116-117). The claimant was advised that although her attendance had been satisfactory as at October 2014, in accordance with the Attendance Management Procedure she should have been placed on a Stage 2 review period for a further 12 months so as to ensure that her improved attendance was sustained. Any further absence within that further review period could have resulted in her being given a final warning. The claimant's then Line Manager, Mr Oliver, had however omitted to inform the claimant of these procedural requirements and, therefore, it was now to be imposed from that date of October 2014 although, given the circumstances, the claimant's recent absence would not trigger the possibility of a final warning. She was, however, advised that regard would be had to that recent absence if there were to be further absence before the end of that Sustained Improvement Period in October 2015. The claimant's evidence was that was "very unfair" but the Tribunal considers it not to be unreasonable not least because it accorded with the respondent's procedure and did not seek to initiate action against the claimant in relation to her absence at a time when she was unaware of

this further Sustained Improvement Period. At this meeting the claimant enquired about medical retirement, which Mrs Roen agreed to look into.

6.15 Towards the end of the claimant's phased return period the claimant and Mrs Roen met on 19 February 2015. The claimant advised that she was struggling with continued tiredness and that her doctor suspected Chronic Fatigue Syndrome ("CFS"). Then, on 5 March 2015, they met again and agreed that the phased return would end on 12 March. The claimant would then take some leave. Mrs Roen advised her that an OH referral had been arranged for 12 March. The claimant enquired about returning to the RRS work where she had excelled and worked, on average, eleven hours for four days each week plus overtime at weekends despite having the same medical conditions. Her evidence was that such work had been hard enough to keep her engaged yet easy enough not to tire her out mentally. At this time the relationship between the claimant and Mrs Roen was good as appears to be clear from the penultimate paragraph of the note of the meeting (122), "I asked Lisa if there was anything else I could do for her and she advised I have done everything to help her get back to work and she knows the support is there."

6.16 The claimant attended the further OH review on 12 March 2015. The report (124) recorded the significant impact of the claimant's condition on her concentration levels and that she is struggling with her current role and the intense training requirement. It was suggested that the respondent should, "Consider redeployment to a role that is less complex, does not require intense long term training and has constant workloads for example as in the RSS work she described" and "modifying the application of the attendance process accordingly" (125).

6.17 Mrs Roen sought advice from Mr Moody as to the content of the OH report. His advice was that the future strategy of PT Ops was around flexibility, that he could see "no reason why Lisa can't fulfil this expectation given the right level of support and with reasonable adjustments" and that the claimant should remain in her PAM Team being given work that does not require intense training and that her Performance Indicator ("PI") should be fair and in line with reasonable adjustments. He continued that she should be exempt from work likely to cause her condition to deteriorate; eg telephony (125B). Mrs Roen advised the claimant of this on 21 May 2015 (98A and 99-103). The Tribunal is satisfied that this represents a fairly reasonable approach on the part of Mr Moody but, unfortunately, this approach was not followed by Mr Moody and others in the later stages of these matters.

6.18 On 11 June 2015 the claimant commenced a period of sickness absence, which was to continue until 22 February 2016. During that period the claimant was moved into the second PAM Team managed by Mr Falcus. On 24 July 2015 he wrote to the claimant (126) inviting her to attend a meeting with him on 29 July 2015 to discuss her progress and future action. He (with Mrs Roen as note-taker) visited the claimant at her home on that day (127) and discussed various matters with her such as a phased return, the provision of a trainer/mentor for a new work type known

as P11D and reasonable adjustments albeit that further advice was awaited from the claimant's GP.

6.19 In Mr Falcus' absence, Mrs Roen had a keeping in touch ("KIT") call with the claimant on 2 September 2015. Mr Falcus (again with Mrs Roen as note-taker) then visited the claimant once more at her home on 7 November 2015. Amongst matters discussed in what the Tribunal considers to have been a reasonable meeting were that the claimant's GP had referred her for cognitive behavioural therapy ("CBT"), the implications of chronic fatigue syndrome ("CFS"), the claimant raising ill health retirement ("IHR"), Mr Falcus asking if she had considered reverting to a lower Administrative Assistant (AA) grade and the claimant remarking that the problem was not the work (136-137). The claimant also advised that if/when she returned to work she would be looking at changing her working pattern to become two eight-hour days each week.

6.20 Two further KITs took place on 22 and 24 December 2015. During the first the claimant advised that she was to attend CBT and CFS clinics in January 2016 and, during the second, Mrs Roen advised her that Mr Moody had said that, on her return, the minimum the claimant could work to sustain productivity would be three days per week at six hours per day (138 and 139).

6.21 The claimant returned to work on 22 February 2016 when she met Mr Falcus who agreed to her proposal for a phased return lasting four weeks with her hours increasing gradually, the idea being to build up to two eight-hour days at the end of the phased return period. If the claimant could show that she could cope, her hours would be permanently reduced from the previous contract of four 6-hour days to "two days per week totalling 16 hours" (141A).

6.22 On 7 March 2016 Mr Falcus wrote (142) to invite the claimant to a meeting to consider her attendance under Stage 2 of the respondent's Attendance Management processes. The meeting took place on 9 March 2016 (143-144) where the claimant advised that she was awaiting advice from her referral to the CFS clinic, that she was "managing fine with her reduced hours" and that there was "nothing else Andrew [Falcus] could do for her". Mr Falcus advised the claimant that "if she couldn't manage 2 days he wouldn't have an option but to look at dismissal or Ill Health Retirement" and that her attendance would continue to be reviewed.

6.23 The outcome of that meeting was that in view of the claimant's absence from 13 June 2015 to 22 February 2016, which was considered to be unsatisfactory, she was given a final written warning and a final review period from 15 March to 16 September 2016 (146). Mr Falcus also noted in that letter his concern about the potential impact of the claimant's absence and her ability to meet her performance management review ("PMR") objectives.

6.24 The claimant's phased return pattern was intended to increase to two days of eight hours in the fourth week of her phased return. In accordance with the respondent's policy, she would not be allowed to take annual leave

during that phased return period as it would obviously impact upon the assessment of that trial period. In the absence of Mr Falcus, however, the claimant approached Mrs Roen to request annual leave for the afternoon of the first day of the fourth week of her phased return period (14 March 2016) and all of the second day of that week (15 March 2016). When Mrs Roen asked if she was still on her phased return period (what she described as her "rehab hours") the claimant replied that she had achieved her target of eight hours the previous week. That was not correct. Although the claimant had worked one day at eight hours during the previous week, the target in the phased return period was to achieve two days at eight hours so as to see whether the claimant could work that pattern permanently. Relying upon the information provided to her by the claimant, however, that she had achieved her target hours Mrs Roen agreed to the claimant's requests for leave on 14 and 15 March 2016.

6.25 Immediately thereafter the claimant commenced a period of arranged annual leave from which she returned on 30 March 2016. An effect of the claimant taking leave on 15 March 2016 was that Mr Falcus was unable to meet with her at the end of the phased return period on that date to discuss and agree her future working pattern in respect of both hours and days; which had been trialled during the phased return period.

6.26 As a consequence, Mr Falcus could not submit to the respondent's HR department the required E-form to amend the claimant's working pattern from four days of 6 hours to two days of 8 hours. Thus, until that form was submitted subsequently the claimant's previous contractual hours of four days at 6 hours were continued, including during her holiday, in respect of which she continued to be paid by reference to the previous contractual hours.

6.27 In early April 2016 the claimant and Mr Falcus met. The claimant's preference was to work two 8-hour days on a Tuesday and a Wednesday, which was agreed. Mr Falcus explained the consequence of the delay in submitting the E-form, which was that she had been continued on her previous contractual hours of four days of 6 hours and had received pay on that basis, which would result in overpayment that would need to be addressed. He offered two options: first, using annual leave; secondly, paying back the overpayment. He suggested, however, that an alternative would be to delay the start of the new pattern of two 8-hour days until 4 April 2016, which the claimant agreed. The difficulty with this alternative approach, however, was that the claimant had not completed her flexi-time record sheets to reflect the 6 hour/four day pattern of working. Mr Falcus therefore sat with the claimant at her workstation and amended her sheets so that they accorded with that pattern. The claimant gives examples of the changes he made including that on 14 March 2016 to show that she had finished work at 15.20 rather than 11.05 and converting 15 March to special leave from annual leave. Mr Falcus states that he completed the amended sheets consulting with the claimant at all times: the claimant, however, states that it was Mr Falcus who corrected the sheets without reference to her albeit accepting that he did so at her workstation. Having considered the evidence of the claimant and Mr Falcus (particularly their oral evidence) the Tribunal accepts the evidence of the claimant in this

respect. It also accepts, however, that Mr Falcus acted as he did by amending the flexi-sheets with the best of intentions so as to reduce the impact on the claimant. Nevertheless, the following day, 4 May 2016, the claimant was concerned about what had occurred and went to see Mrs Roen. The Tribunal fully understands why the claimant would be concerned that her flexi-sheets had been amended and, therefore, no longer accurately reflected the work that she had undertaken and does not accept the evidence of Mr Falcus that there was no need for the concern because no one would find out and even if this were to be discovered he would explain what had occurred.

6.28 She informed Mrs Roen about her concerns and asked that Mr Falcus' Manager, Mr Moody, be made aware of those concerns. Although there is a significant conflict of evidence on this point, again given the oral evidence (this time of the claimant, Mrs Roen and Mr Moody) and the email exchange of 4/5 May 2016 between Mr Moody and Mr Gebbie (the claimant's trade union adviser at the time), the Tribunal prefers Mrs Roen's evidence that she did update Mr Moody about the claimant's concerns albeit probably briefly.

6.29 Later that day Mrs Roen met the claimant again to obtain more detail of her concerns. As she would not be in work the following day (and Mr Falcus was not in work that day) she wrote an email to Mr Falcus (152) recording the claimant's concerns. In that email it is also recorded that the claimant had said that she felt she was unable to work with Mr Falcus as she felt she would be stressed because of concerns that she had raised and this would not be good for her heart condition; and that she had requested a move from PAM and a phone call that day. As the claimant had requested that Mr Moody should be made aware of these issues Mrs Roen also copied her email to him. Although Mrs Roen was criticised in cross-examination about the fact that she had referred the concerns to Mr Falcus rather than escalating them to Mr Moody, given that the claimant's concerns were related to Mr Falcus, the Tribunal accepts that it is good practice to enable concerns to be dealt with, at least initially wherever possible, as between the parties involved.

6.30 The claimant's evidence was that although Mrs Roen had agreed to refer her concerns to Mr Moody and confirmed that she had done so, when the claimant had asked her, on union advice, to confirm in an email that she had made Mr Moody aware of the matter she had admitted that she had not actually spoken to Mr Moody regarding her flexi-sheets. Further, that she told the claimant that Mr Falcus would not be happy with her for causing trouble and taking this issue to Mr Moody. As indicated above, for the reasons given, we preferred the evidence of Mrs Roen. In that we do not suggest that the claimant was lying in this respect as there can be a whole host of reasons why evidence might differ. We repeat, however, that we prefer Mrs Roen's evidence that she did speak to Mr Moody as requested, did not admit that she had not done so and did not state that Mr Falcus would not be happy with the claimant for causing trouble. The claimant states that she was very upset at this time and the Tribunal accepts that but notes that even in her witness statement she refers to being made "paranoid". The claimant continues in her witness statement

that she felt that Mrs Roen, Mr Moody and Mr Falcus "were all being deliberately obstructive with me, and I felt like I had no support to get this issue resolved all of which left me feeling extremely stressed and anxious". The Tribunal is satisfied, however, that while that was probably the claimant's genuine impression, her managers being obstructive and not supporting her is inconsistent with the generality of the evidence including Mr Moody's exchange of emails with Mr Gebbie (151C-151B above), Mr Moody's comment in his email that "nothing seems insurmountable" and his setting up a meeting with Mr Gebbie and Mr Falcus on 6 May 2016 (151D), which appears to have had a positive outcome to the effect that Mr Falcus and the claimant would sort out the issues between them.

6.31 The claimant then met with Mr Falcus, accompanied by Mr Gebbie, on 11 May to discuss her concerns arising from which, at her request, Mr Falcus changed her start date for her new working pattern back to 21 March 2016. As to the claimant's request that she be moved from PAM, she was informed that such a move would not be taking place and that she must put more effort into working with her manager. (154-157).

6.32 On 17 August 2016 the claimant met Mr Falcus. She stated that she wanted to work additional hours and days to build up flexi-time to cover her hospital appointments rather than using disability adjustment leave ("DAL") (163A). Also at that meeting, Mr Falcus noted that he was very pleased with the progress that she had made in learning the EFN4 workload but her Performance Indicator ("PI") of 18 would need to have improve against the expected PI of 60. The claimant challenges this note and questions its authenticity. On the basis of the emails from the claimant at pages 163B and C, however, the Tribunal is satisfied that it is authentic; certainly with regard to the claimant's request to increase her working hours and, on balance of probabilities, also in respect of Mr Falcus raising the issue of her PI. The claimant's email of 17 August (163C) sets out the hours that she was seeking; being 11 hours each day, Monday to Thursday inclusive, and 6 hours 40 minutes on Friday.

6.33 By late September 2016 matters had improved somewhat and the claimant asked to be discharged from her psychologist. At this stage the claimant's workload was what is referred to as EFN4 and her PI was increasing.

6.34 On 18 October 2016 Mr Falcus met the claimant and told her that EFN4 work was being transferred elsewhere and her team would be moving to work on Scheme Reconciliation. He reassured her that the knowledge gained in her previous workload would mean that she could do the majority of the new work and he would also tailor the files for her, and she would have Mr Mark Welsh sitting beside her all day to train her.

6.35 The claimant commenced Scheme Reconciliation work that day but after only three days it began to impact on her fatigue and exacerbated her symptoms. The particular issue was work on spreadsheets. On 25 October the claimant first spoke to Ms Roen and then wrote to Mr Falcus (167). Essentially, she requested a move away from Scheme

Reconciliation to a different area because she was struggling with fatigue caused principally by the spreadsheet work, and requested that alternative area should be what is referred to as P11D, which she had done previously; but, if not that, some data entry work where there would not be so much training as OH had previously said that she should only do two hours training each day. The claimant continued her email that her tiredness had resulted in losing flexi-time that week, which she could not make up. Primarily for this reason, she requested a quick response. The claimant describes this email as a "cry for help" to which she did not received a response.

6.36 Mr Falcus was on holiday on that day of 25 October and returned on 27 October when he wrote to the claimant, not in response to her email, but with regard to LOMR and flexi-sheets; he did not mention her email. ["LOMR" stands for Local Office Management of Resources, which is a daily statistical electronic record that all staff of the respondent must complete to record, amongst other things, how many hours they have worked each day against type of work performed.] That lack of response caused the claimant to write to Mr Gebbie on 1 November (167A). She told him that no one had spoken to her, she was struggling with tiredness, she had lost 3½ hours flexi that day and had done more than four hours' training. Mr Gebbie contacted Mr Moody who responded that Mr Falcus would discuss these matters with the claimant (167B).

6.37 The claimant then attended work on 2 November but, after only 2½ hours sent an email to Ms Roen stating that she was going home having done 2½ hours she was exhausted. She commented that she had a doctor's appointment on Tuesday for her fatigue (167C).

6.38 The claimant went into work on 8 November and discovered that she had been given a "Needs Improvement" marking in respect of her half-year PMR. This shocked the claimant not least because of a conversation she had had with Mr Shaun Scott (one of the managers), which had led her to believe that she would be awarded an "Achieved" marking. She became agitated, dizzy and felt that she was going to faint. She completed an "Accident, near miss or work related ill health Report" ("ACC1") and sent it to Mr Falcus (181). Mr Falcus completed his part of the ACC1 on 9 November (186). Section 22 of that form requires the manager to "Describe recommendations made/implemented to prevent reoccurrence": in this case, therefore, the dizziness etc as a result of being given a Needs Improvement marking without previous discussion. Mr Falcus, however, did not address that issue of preventing a reoccurrence of that reaction but commented on other matters such as the claimant having "since" changed workload, which had not happened. Mr Falcus continued by stating that he would support the claimant, for example showing her how to set calendar reminders and would send a link to stress resilience guidance. This did not happen, however, before the claimant commenced further sick absence on 11 November.

6.39 Later on that morning of 8 November 2016 (10.50 am) the claimant went to see her GP regarding her fatigue. She was issued with a fit note (171A) stating that she could remain at work and commenting, "Patient is finding

that she finds the spreadsheets and guidance to be very difficult due to her health conditions and she is finding it increasingly difficult to complete a full shift. Please should she be offered alternative duties such as data entry which she manages well. This will mean that she will not currently have to go off on the sick." The claimant gave this certificate to Mr Falcus; he thinks on that day but it was not discussed at the meeting on 8 November or the following day and it appears that no action was taken further to the doctor's comments.

6.40 Later still on 8 November the claimant met Mr Falcus accompanied by Mr Gebbie with Mrs Roen as note-taker. They discussed the claimant's email of 25 October, particularly her request to move from Scheme Reconciliation work, but Mr Falcus explained that P11D work was not 'year-round work' and that the team would flex onto other work (which it ultimately did) including, possibly, to Scheme Reconciliation work. He further explained that data entry work was performed by Administrative Assistants at a lower grade than the claimant as an Administrative Officer but neither she nor Mr Gebbie were interested in what they considered to be a demotion. At the meeting they also discussed the claimant's PMR marking of Needs Improvement and the reasons for it, being particularly that her PIs were low with little sign of improvement (Mr Falcus had not received the evidence from her in respect of August) and there were other issues related to flexi-time, LOMR and not sticking strictly to her staff availability as recorded on the current Plan Network. [This is a database that employees need to complete each week, setting out when and for how long they expect to work during the following week. It allows the respondent to gauge the level of resource available. It also generates targets for employees and is used by them to record daily statistics. It forms part of the key performance indicators.]

6.41 As mentioned above, Mrs Roen attended this meeting as note-taker. Her original manuscript notes are at pages 168 to 171 and the typed version that she created from those notes is at pages 173 and 174. She submitted that typed version to Mr Falcus for his approval on 13 November (172). He made corrections and added details that he considered had been missed out and the final version of the notes is at pages 175 to 177 with an identical copy, which shows highlighted the amendments he had made, at pages 178 to 179A. By the turn of the year the claimant was concerned that she had not received the minutes so, on 3 January 2017, she sent an email to Mrs Roen and Mr Falcus requesting them. She then received them from Mr Falcus on 4 January 2017. This point is returned to, chronologically, below.

6.42 The following day, 9 November, having reflected upon the meeting on 8 November, the claimant asked Mrs Roen to confirm the reason for her Needs Improvement marking and she responded that the main reason was the claimant's low PI with no sign of improvement. The claimant therefore started checking her PI before and after the meeting in August and was of the opinion that it had improved significantly from approximately 10 to 20 before the meeting up to 51 after the meeting. She therefore submitted that evidence to Mr Falcus on 9 November (189). He met her that day (180) and reviewed the claimant's email where he

explained to her that the daily figures that she had used actually equated to 27 and although that was an improvement from her previous figure of 18 it compared with the expected standard of 60 and the team average of 95. He therefore explained that her PI still needed to improve as did her approach to the other matters they had discussed on the 8 November such as staff availability, flexi-time, LOMR and statistic sheets. They arranged to meet again on 11 November although that was not a working day for the claimant. In the event, the claimant was unwell and that meeting did not go ahead.

6.43 Also on 9 November Mr Falcus confirmed that the claimant's attendance had been satisfactory during the review period and that she would therefore then enter the 12 month Sustained Improvement Period in accordance with the respondent's attendance management procedures (188).

6.44 At one of the meetings on 8 or 9 November 2016 other matters were discussed. The claimant and Mr Falcus differed as to at which meeting but the Tribunal notes that these matters are not referred to in Mrs Roen's manuscript notes of the earlier meeting or the typed written notes that she prepared from those manuscript notes, although they are in the notes which Mr Falcus had amended some time later. The claimant is clear that they were raised at their meeting on 9 November. Particularly given the comparison with the manuscript note, the Tribunal finds, on balance of probabilities, that these matters were discussed on 9 November but also considers that nothing really turns on precisely when the discussions took place.

6.45 The matters in issue were that the claimant raised again a move to another area but Mr Falcus repeated that P11D was seasonal work. The claimant explained that she found it difficult to concentrate on spreadsheets but Mr Falcus replied that that was standard AO workload and asked if she had considered downgrading to AA grade as an option adding that Mr Moody had said that a move from PAM was not an option. The claimant's recollection was that Mr Moody had been quoted as saying, "If we move her where will it end, everyone will want a move". While that quotation does not appear in the notes of the meeting, when it was put to Mr Moody that he had said that he confirmed that that was a "fair point".

6.46 On 11 November the claimant was still not feeling well so went to her GP, who sent her to the Royal Victoria Infirmary, Newcastle upon Tyne, with a suspected blood clot, which the claimant says was diagnosed as being caused by stress. The claimant advised Mr Falcus of this by telephone that day. She was then on leave: (DAL on 15 and 16 November and Annual leave from 22 November to 5 December 2016).

6.47 On 6 December 2016 Mr Falcus spoke to the claimant about her flexi-balance. He confirmed their discussion in a memo of that day (192), which he gave to the claimant on 20 December. Mr Falcus advised the claimant that her flexi-balance of minus 30.52 was outside the respondent's flexi-tolerance and this amounted to "flexi-abuse". He

offered the claimant options to address this so as to bring the balance down to minus 9.36, which she had to do in two flexi-periods: i.e. 8 weeks in total. The options were for her to work on a non-working day or use annual leave. Neither option appealed to the claimant. In particular, she only had 13 working days available within that time frame, which would mean that she would have to work more than she considered was reasonable on all or some of those days.

6.48 The claimant told Mr Falcus that she had lost 16 hours 15 minutes from 25 October to 8 November while waiting for someone to speak to her regarding her email of 25 October and asked that the deficit be addressed by her being awarded a flexi-credit. Mr Falcus explained that he had spoken to Mr Moody and flexi-credit was not appropriate in these circumstances.

6.49 The claimant then sent an email that day (194) which the Tribunal considers to be a very important email as it sets out fairly comprehensively the claimant's situation and the background to that including the incident on 8 November and the GP's recommendations on the fit note, and her being required to address the flexi-deficit. It concludes, "I believe that my disability has been totally disregarded in this matter and that I am being forced to make the time up which could potentially have an adverse effect on my health." The importance the claimant attaches to these matters is borne out by her having sent copies of her email to several managers within the PT Ops including Ms Ayre and Mr Moody.

6.50 On 21 December, a meeting was convened involving the claimant, Mr Moody, Mr Falcus and Mr Gebbie. An email from Mr Moody that day (196) records what he considered had been a useful and productive discussion including as to the following:

(i) The claimant had emphasised that she struggles with Scheme Reconciliation work but was finding her current workload of Caseworker Voluntary Contributions to be more suitable.

(ii) The claimant wished to explore a move to P11D but he had explained that he was unware of a team that did solely that work type and had asked the claimant to identify the manager of that team. The Tribunal considers it to have been unreasonable to put the onus on the claimant in this respect given the respective positions of Mr Moody and the claimant and their ability to make appropriate enquiries.

(iii) Case worker could be an answer to the claimant's situation but everyone understood that PAM teams could be flexed off at any given time. Mr Moody agreed to investigate what the longer term plans were.

(iv) Giving the claimant flexi-credit to redress her flexi position was not an option but the time period could be extended to March 2017. Further, that as her health had stabilised "due to her currently being on Case Worker work" she could work on non-working days.

(v) The claimant's PMR markings were not assessed on the claimant's health issues as that was not how Mr Moody operated the PMR system in his group.

(vi) "any member of staff can be expected at any time to flex and upskill on a new workload based on the strategic direction of PT Operations".

6.51 Notwithstanding Mr Moody's characterisation of the meeting as being useful and productive, the very next day the claimant saw her GP. One paragraph in a letter from the claimant's doctor that day, 9 October 2017, is as follows "She attended on 22nd of December 2016 stressed at work and reporting that she felt unsupported at work, that her underlying medical conditions were not fully appreciated and that her employers were not fulfilling the requirements on her Fit Note. This was exacerbating her fatigue and causing considerable stress and further insomnia and fatigue." (429)

6.52 As mentioned above, the claimant did not receive the notes of the 8 November meeting until 4 January after she had requested them. When she did receive them she did not consider that the notes, as amended by Mr Falcus, accurately reflected their meeting. Indeed, she was of the opinion that he had entered into those notes matters that had been discussed during their meeting on 9 November 2016 (see above). The claimant raised her concerns in this respect with Mrs Roen and during their conversation she found herself struggling to breathe, experiencing palpitations and feeling dizzy. She then became unconscious leading to her being taken to hospital by ambulance.

6.53 During the hearing, issue was taken with Mrs Roen at the fact that neither she nor anyone else from the respondent had accompanied the claimant to hospital or contacted her husband. The Tribunal accepts, however, that each of those matters accorded with what the claimant said to Mrs Roen; although we note, first, that Mrs Roen remarked that, with hindsight, she would not do the same again and, secondly, another team member had sent a text message to the claimant's husband. A conflict of evidence arose from this incident relating to whether the claimant had left walking with the paramedics or had been taken on a stretcher. Mr Moody said that she had walked from the office whereas the claimant said that she had left the building on a chair/stretcher. Given the distinction between "the office" referred to by Mr Moody and "the building" referred to by the claimant, the Tribunal does not find those two accounts to be necessarily inconsistent. It does, however, reject as being inaccurate the information which Mr Moody said was conveyed to him by colleagues to the effect that later that day the claimant had been seen shopping in Newcastle.

6.54 On 5 January 2017 Mr Falcus sent a text message to the claimant saying that he had heard that she "had a bit of a turn at work yesterday and just wanted to check how you were?" He asked her to get in touch whenever best for her (209). The claimant responded by text on 9 October and said that she was seeing her doctor the following day.

6.55 On 10 January the claimant saw her GP who gave her a fit note (209) for five weeks for work stress; she also saw her consultant Dr Kerr (210). Later that day the claimant telephoned Mrs Roen and told her that she had been signed off for five weeks due to work stress. Mrs Roen advised her that she would arrange a home visit to the claimant within the next 14 days. These matters are recorded in a Sickness Absence-Day 1 Contact and KIT form (208). On the first page of that form (206) there is a section headed "What to do now:" in which it is stated "Record the absence immediately on Online HR". Mrs Roen did not do that. This is quite important because it led to the claimant being overpaid while absent due to sickness. A further action shown in the "What to do now" section is, "Complete HRACC1-/HRVIO1", which was not done until later. Each of these points is returned to below.

6.56 The home visit referred to above was conducted by Mrs Roen as Mr Falcus had relocated to Belfast permanently on 16 January 2017. The visit took place on 18 January 2017 (212). The claimant's current situation was reviewed. A new element emerged during the discussions in that the claimant said she felt that Mr Moody and Mr Falcus had been trying to force her to go on sick and had succeeded. Further, that they were trying to get her sacked. The claimant also raised completion of the ACC1 form and Mrs Roen said that she was unsure if one been filled in. Later on that day she forwarded what she thought was a mainly blank form to the claimant for completion having only entered little more than the claimant's name on the first page (223). It was at least unfortunate that Mrs Roen had in fact used a form parts of which (228) had already been completed in respect of another employee, C.

6.57 Later on 18 January the claimant had a telephone assessment with OH Assist following a referral by Mrs Roen (231). The OH report (232) rehearses the background "including a diagnosis of fibromyalgia in 2016". In answer to specific questions are the following answers:

- "Current symptoms of stress seem to be related to Mrs Falconer's perception of events at work and therefore an organisational rather than a medical solution is required to address these issues. I understand that dialogue has been opened by Management to identify and address the work related Mrs Falconer perceives and I recommend that this is ongoing to facilitate and support a return to work"

- "Mrs Falconer is not fit for work at present. I am unable to predict if Mrs Falconer will be fit to resume work at the end of the current fit note as this is likely to be dependent to some degree on the resolution of the work related concerns she has. If there is no indication of a return to work in 4 weeks' time I recommend re-referral to OH".

6.58 On 31 January 2017 Mrs Roen met the claimant (who was accompanied by her trade union representative, Mr Kane) at her home to discuss her sickness absence record (239). The claimant raised her difficulties in undertaking Scheme Reconciliation work and training for the full day (although Mrs Roen sought to distinguish training from mentoring, which

she considered the claimant was receiving) and Mrs Roen offered to assist the claimant in reducing her flexi-deficit. The claimant raised previous OH advice that she should not train for more than 2 hours in a day but the report containing that advice was no longer on the claimant's file as it had been 'weeded' by previous managers. At the meeting Mr Kane raised the absence of matters relating to the claimant's disability such as a work-place assessment that should be reviewed every six months, contact with the Reasonable Adjustments Support Team (RAST) as they could offer support and the absence of a personal evacuation plan (PEP) that should have been produced for the claimant due to her having a heart condition. None of these had been attended to and Mrs Roen confirmed that she would do so.

6.59 Arising from this meeting Mrs Roen met with Ms Ayre on 2 February 2017 in respect of which she prepared a note summarising the history of this matter thus far (241). That note contains a number of points including the following:-

- The claimant had a 50 per cent tolerance which equated to four days that could be discounted.

- The claimant's attendance was unsatisfactory and the next step was to consider dismissal.

- The claimant had not been granted a flexi-credit in respect of the time she had lost but was to make it up over a period of time. Ms Roen had advised the claimant at their meeting on 3 January that she would do everything that she could to get her back to work including Stress Reduction Plans, work-place assessments, reduced KPIs, different workloads and a move to another area.

- Even though the claimant had suffered from work-related stress her absence still had gone over acceptable levels (265 calendar days off work due to sick in the last 4 years) and dismissal needed to be considered.

6.60 These and other matters were discussed with Ms Ayre following which Mrs Roen contacted the claimant on 3 February 2017 by telephone (243) and email (244) to which she attached a note recording the outcome of the meeting with Ms Ayre and Mr Moody (245). Amongst other things, that note records that she wanted the claimant to come back to work and would put in place the four adjustments that are listed in that note, the first of which was that Mrs Roen would arrange a move for the claimant to another area of work as she had requested. Mrs Roen continued, however, that this would be a command where "you will be working on Scheme Reconciliation. As you are already familiar with this work, we will put in place full training, mentoring and support until you are comfortable with this workload". When Mrs Roen had telephoned the claimant to advise her of this on 3 February she had responded that she was not happy with that suggestion because it was that Scheme Reconciliation work that was having a detrimental effect on her physical and mental health. The Tribunal accepts that the claimant had made this point clear

to the respondent's managers and that it is, therefore, surprising that such a move was proposed by the respondent. This point was made by Mr Kane in his email to Mrs Roen of 7 February (246) in which he stated that the Scheme Reconciliation work is that with which the claimant struggled due to her chronic fatigue and caused her a lot of problems. He asked why this had been suggested, therefore, as a reasonable adjustment. Mr Kane also sought confirmation that the adjustments would be in place even if the claimant was not fit to return to work on 14 February. The Tribunal considers that to be a fair question and puts into focus Mrs Roen's evidence when she explained that she had decided not make any adjustments or other arrangements in respect of the claimant until she returned to work.

6.61 Mrs Roen responded that day (248). She explained her understanding that the claimant had said that the workload itself was not a problem but that she found completing the spreadsheets tiring. She continued to maintain that moving the claimant to another area where she did not feel stressed with management but was familiar with the work and putting in place the correct mentoring and workplace adjustments was reasonable. She confirmed in answer to Mr Kane's question that any adjustments would be put in place even if the claimant did not return to work on 14 February 2017 but that was not consistent with her oral evidence as indicated above.

6.62 On 9 February Mrs Roen asked the claimant to let her know that she would accept a move to another group that currently does solely Scheme Reconciliation on her return to work. She replied that she really struggles with this work and would not like to go back on to it, and that she had explained that she wanted to move away from that delivery group and not be on that work (249). This was reinforced by Mr Kane who wrote to Mrs Roen on 9 February requesting that Scheme Reconciliation was not a reasonable adjustment as the claimant "struggles with the work due to her disabilities" (251). Mrs Roen confirmed that she would discuss with Ms Ayre and Mr Moody the claimant's "move in view that she would like to move to another area altogether where she will not be working on Scheme Reconciliation" (251).

6.63 In light of these exchanges Mrs Roen had a further discussion with Ms Ayre the upshot of which is an email to the claimant on 10 February 2017 (253). She advised the claimant, amongst other things, that another command could accommodate a move for the claimant upon return so she would no longer have to worry about working on a command where she had experienced work related stress; another manager had taken over the EFN4 team, which was the best team to offer the claimant as she had experience of that workload and had enjoyed it; and that would "solely be the only workload you will be completing when you return to work." Thus far, therefore, this response meets the claimant's genuine concerns in that it was proposed that she would be moved to a different command under a manager different to Mr Moody. The issue, however, is that in the latter part of the email Mrs Roen continues, "However I need to make you aware in the future as all teams are now working in a flexing environment Scheme Reconciliation is also worked in the area you will be going to.

There is a strong possibility in the future you will be working on Scheme Reconciliation, but you will have all the support for this workload and the right amount of time given for your training". The Tribunal is satisfied that this inflexibility on the part of the respondent's managers demonstrates a lack of attention to the need, if necessary, to treat a disabled employee more favourably than others. Mrs Roen's point was put even more strongly by Ms Ayre who wrote to the claimant only a few minutes later adding. "Future plans would see you flex between EFN4 and SRS which would help with your condition and mean you would not be working solely from spreadsheets for long periods of time". The Tribunal does not understand why Ms Ayre considered it necessary to add this point, which had already been made by Mrs Roen apart from the fact that the "strong possibility" of working on Scheme Reconciliation work referred to by Mrs Roen had now become certain. Be that as it may, this impacted negatively on the claimant as, despite her requests and Mrs Roen having been initially accommodating, she realised that her managers were insisting that she would have to undertake Scheme Reconciliation work sometime in the future. She asked Mr Kane to intervene, which he did by writing to Mrs Roen on 14 February. He first noted that he "appreciated the reasonable adjustments had been put in place" but continued that the claimant would prefer, as mentioned before, a move out of the Delivery Group altogether because she had no confidence in any of the management chain with whom she had raised concerns" the previous year but nothing had been done within a timely manner (257). Although that email was written to Mrs Roen, Mrs Ayre replied to it enquiring whether the move outside of the Delivery Group would result in the claimant returning earlier than her current two-month fit note indicated.

6.64 On 14 February 2017 the claimant telephoned Mrs Roen (258). She advised her that she had been to the doctors and was not ready to return to work. She had been given another fit note for work related stress and anxiety for two months up to 14 April 2017. As that was Good Friday it would mean a return to work on 18 April 2017.

6.65 On 22 February the claimant had a further OH referral (261). In addition to noting that a phased return would be necessary OH advised that the claimant was not fit for work "due to her ongoing symptoms of anxiety and stress". The answers to specific questions asked of OH were as follows:-

- "Due to the chronic fatigue from which Mrs Falconer suffers, I would recommend that she does a maximum of 2 hours training per day"

- "I would recommend that Mrs Falconer avoids the Scheme Rec system due to the concentration required and the affect it has on her chronic fatigue"

- "Due to the issues Mrs Falconer feels exists within the workplace, some form of mediation with an external manager may be required."

6.66 Mrs Roen wrote to the OH adviser on 23 February 2017 (269) seeking clarification of the advice that had been given. The adviser replied that day answering her questions that the maximum of two hours training was

a permanent stance as the claimant suffers from chronic fatigue and that she had indicated that the claimant should avoid Scheme Reconciliation work as it required considerable concentration and this increases the claimant's fatigue and this in turn further impairs her concentration with the result that the claimant felt that she was unable to undertake the spreadsheets and complete them as they should be (269).

6.67 Mrs Roen also pursued her queries by way of a formal complaint to OH (263) explaining that she considered that her questions had not been fully answered and that she had received contradictory advice. She continued that she was unsure how she could manage and sustain two hours training per day on a permanent basis and, as to the claimant being unable to work permanently on Scheme Reconciliation spreadsheets due to her chronic fatigue, she enquired whether, if the correct level of reasonable adjustments and support is provided why the claimant would not be able to work on those spreadsheets. OH responded on 15 March explaining and standing by the original advice. Mrs Roen was still dissatisfied and escalated her concerns leading to a further response from OH on 4 April 2017 offering alternative approaches: OH would address again the same questions asked previously or the respondent could submit another referral with amended questions (307).

6.68 By email of 27 February Mrs Roen made the claimant aware that she had been overpaid in January of that year as her absence had not been input on to the HR system by either Mrs Roen or Mr Falcus. This issue was then pursued with the claimant by HR (279A and 284A) the amount of overpayment being £677.90.

6.69 Mrs Roen met the claimant (accompanied by Mr Kane) on 7 March 2017 (280). Amongst other things discussed were the following:-

(i) Mrs Roen explained about the claimant being offered a move to P11D work but that it could also flex onto other workloads.

(ii) That she would try her best to do everything she could to get the claimant back to work.

(iii) The claimant explained that her psychologist thought that she would not be ready to return to work before 14 April when her sick note would end and that her biggest fear was fainting in public.

(iv) That she was worried about having to pay back the overpayment of her wage.

(v) Mr Roen asked the claimant which workload she would prefer to do if she could come back to work and the claimant suggested P11Ds or RRS; and that she would like to be out of Ms Ayre's delivery group.

(vi) Mrs Roen said that she would look into a move to RRS but that team could also be flexed onto a different workload.

(vii) The claimant asked what would happen if she did not return to work and Mrs Roen explained that she would have to follow procedures and it would more than likely go to a decision maker but if she did return on 14 April she would take the matter no further.

(viii) The claimant said that she was doing all she could to come back to work and was hoping to do so after her current sick note but she could not guarantee that.

(ix) Mr Kane asked why, if there was a chance that anyone in PT Ops could flex onto Scheme Reconciliation work, the option of moving the claimant outside of PT Ops altogether had not been considered. Mrs Roen answered that she had not looked into that option as the claimant has suggested a move to P11Ds or RRS.

6.70 The Tribunal is satisfied that at this stage both the claimant and Mrs Roen were genuinely focused on getting the claimant back to work. It is noted, however, that Mrs Roen had not looked at the possibility of moving the claimant out of Ms Ayre's Delivery Group despite the claimant having requested that previously.

6.71 Mrs Roen met Ms Ayre on 9 March (285) and told her that the claimant wanted a move to RRS to which she had replied that they had already offered the claimant a move out of the command to P11D's. Further, as RRS flex onto other workloads, such as telephony and P11D area also flex onto other workloads the business had been reasonable in suggesting this move. The Tribunal is not satisfied, however, that this response to the effect that employees in other work areas can be required to flex takes proper account of what might be termed the claimant's particular status as a disabled person.

6.72 Mrs Roen telephoned the claimant on 14 March and discussed her difficulties in paying back the overpayment of salary. She told the claimant that when she returned to work she would be transferred to an area dealing with P11Ds leading the claimant to ask what other workloads that area dealt with (289). As she said, she wanted to ensure that she would return to do work that did not include the type that had caused all the issues and exacerbation of her symptoms. Mrs Roen pursued this question with Ms Ayre who the Tribunal considers was rather offhand with her answer, "This is what we are offering" and asking when the claimant would be returning to work (291). When Mrs Roen responded that the claimant had a fit note until 14 April, Ms Ayre replied, "I don't think the 14th is reasonable. We have offered Lisa everything she has asked for so would expect a RTW in the very near future". The Tribunal is satisfied that this exchange demonstrates something of a 'hardening of attitude' at least on the part of Ms Ayre who was in a position to influence and direct the managers in her Command including Mr Moody and Mrs Roen. The claimant had a fit note expiring 14 April 2017 and the Tribunal is satisfied that it was reasonable for her not to return to work until the expiry of that certificate. Ms Ayre's attitude appears not to acknowledge that the claimant had a medical certificate stating that she was not fit to be a work

and this is compounded by account not being taken, once more, of the claimant's particular status as a disabled person.

6.73 Ms Ayre's response appears to have put Mrs Roen in an invidious position (see her email to Ms Ayre of 15 March 2017 – 292) but she agreed to contact the claimant that day. Although it is undated it appears that that contact is recorded at page 305.

6.74 At this time, Mrs Roen was seeking to contact the claimant every week in accordance with the Keeping in Touch policy but the claimant found that stressful. Mr Kane intervened and suggested a reasonable adjustment to 2-weekly contact (296), which Mrs Roen agreed (299).

6.75 On 31 March 2017 Mr Kane submitted a grievance on behalf of the claimant (302), which she had actually prepared on 9 March in respect of having to repay the overpayment of her salary, which she attributed to failings on the part of her managers (303). Ms Ayre rejected the grievance as it was her opinion that it "does not pass the grievance test". Nevertheless, she stated that she was happy to meet the claimant to try and informally resolve the issue (301). Mr Kane took issue with this response but nevertheless agreed to a meeting "initially informally" (301).

6.76 The Tribunal does not consider that Ms Ayre was right to reject the claimant's grievance. While it may not have met the threshold for a grievance that is contained in the respondent's policy, it was related to her employment. The ACAS Code of Practice: Disciplinary and Grievance Procedures (2015) states that grievances "are concerns, problems or complaints that employees raise with their employers". As such, in accordance with good industrial relations practice as confirmed in that Code and the related Guide, the Tribunal is satisfied that it ought to have been considered as a grievance.

6.77 The claimant's evidence is that by this point she considered her relationship with her employer to be in tatters and while she did not want to be absent she was starting to feel more and more like everything was stacked against her and she was not being given a fair chance to get back to work. Although that might appear somewhat histrionic, the Tribunal accepts that that was the claimant's genuine perception based upon her constantly being contacted about when she would return to work and issues about her lack of trust in her managers.

6.78 The proposed informal meeting between Ms Ayre and the claimant took place at her home on 12 April, with Mr Kane in attendance (313A). It is surprising given that the subject matter of the claimant's grievance was her being required to repay the overpayment of her salary, that there is nothing in the note of that meeting to suggest that the overpayment issue was discussed at all. Instead, having considered matters of background, key points recorded by Ms Ayre include as follows:

(i) The claimant advised that she was really struggling with her current workload and that a move away from this would really help. She also explained that the relationship with Mrs Roen and Mr Moody

had broken down and she would like a move away from them. Ms Ayre had explained that this had already been offered but had not resulted in a return work.

(ii) The claimant advised that she would be comfortable if a move to P11D could be arranged as that was an area with which she was familiar and that, if so, she would come back to work immediately, albeit adding that she would speak to her psychologist the following day but was confident that she would return to work the following week.

6.79 The claimant disputed the accuracy of certain parts of this note, which she says she first saw during the disclosure process as part of these proceedings, notably that she ever said that she would come back to work immediately or that she was confident that she would return the following week. Her evidence was that she deliberately said "hopefully". Given the uncertainties surrounding the claimant's position including that she would not speak to her psychologist until the day after the meeting, the Tribunal prefers the evidence of the claimant in this respect.

6.80 These uncertainties regarding the claimant's return to work were confirmed when she did see her psychologist, and the claimant wrote to Ms Ayre on 13 April to advise her that they both felt that she was not in the right state of mind to return to work; further, that she expected her doctor to sign her off again (314). Ms Ayre responded that day and, as she had undertaken to do at their meeting, informed the claimant that she had arranged for her to move to Steve Tait's team. As intimated, on 18 April the claimant's doctor certified a further period of absence for another two months (315). The claimant spoke to Mrs Roen about this on 19 April and she arranged to go and visit the claimant on 27 April (316). Mrs Roen confirmed this by email (317).

6.81 On 19 April a meeting took place involving Ms Ayre, Mr Moody and Mrs Roen at which it was decided to refer matters to a decision maker to decide whether to dismiss or downgrade the claimant. That decision maker was Mr Hunt.

6.82 A further OH consultation took place on 20 April 2017. It did not really advance the situation as the responses to specific questions were to the effect that a further assessment would be needed when the claimant's mental health improved and she was fit to return to work (318). Interestingly, in the Disability Advice paragraph of the OH letter it is stated that it is considered that chronic fatigue syndrome is likely to be considered a disability with no mention being made of the claimant's heart condition.

6.83 When Mrs Roen met the claimant on 27 April (326), having updated her on the present position, she handed the claimant a letter advising her of the decision that had been made to refer matters to a decision maker (324). The formal reference to the decision maker is at page 323.

6.84 The claimant then went on holiday. When she returned, Mrs Roen telephoned her on 18 May. The principal purpose of that call was to advise the claimant that her year-end PMR was 'Needs Development'. This angered the claimant; first, because of the award itself and, secondly, because no one had engaged in a discussion with her prior to Mrs Roen's call. Mrs Roen said that she would raise the claimant's concerns with Mr Moody, which she did, and called the claimant again to tell her that she could appeal. Mrs Roen set out the essential points made during her two telephone calls with the claimant in an email of 18 May (335).

6.85 The claimant pursued the issue of her PMR award in an email to Mrs Roen dated 30 May (337). She requested the minutes from the mid-year and the end of year validation meetings regarding her needs improvement marking. She also stated, "I would like to put in an official grievance regarding my mid-year and end of year box marking and the decision to give me a needs improvement at the end of the year without having a meeting with me about it before you logged it on the system, I believe that I am being unfairly treated and it is verging on harassment by putting me through undue stress and anxiety by giving me this box marking 2 weeks before my decision making meeting when you know I am off with work related stress and anxiety caused by work and undergoing frequent psychology treatment at the hospital".

6.86 Mrs Roen responded to this email that day stating, "You have requested that you wish to put an official grievance in for your PMR marking. Can you please ask James to help you with the grievance in the capacity of your union rep." It has been suggested that in her email the claimant had actually raised a grievance. On balance, the Tribunal does not consider that to be the case for three principal reasons: first, the language used by the claimant was, "I would also like to put in an official grievance ….", which is not actually raising a grievance; secondly, the claimant knew the proper process for raising a grievance and had filled in the respondent's template form on the previous occasion (303); thirdly, the claimant's evidence was that the substance of the resignation letter that she ultimately came to submit was the grievance that she had prepared in June but had not submitted at that time, and she obviously therefore compiled her grievance in June after the date of her email, being 30 May. The Tribunal is further satisfied that Mrs Roen's response in the circumstances and her knowing the assistance that had been provided to the claimant by Mr Kane was reasonable.

6.87 As decision-maker, Mr Hunt wrote to the claimant on 18 November 2016 (336A) inviting her to a meeting on 1 June. That letter is dated 18 November 2016 but that must be an error probably caused by Mr Hunt making use of a previous letter as a template. In preparation for the meeting, Mr Hunt contacted Mr David Carr seeking guidance about what was involved in P11D work. Mr Carr replied on 31May 2017 (340). In essence, he explained that there was a peak period from May until September when staff flexed onto the P11D Program from other Business Areas and that for the remainder of the year there are a number of workloads undertaken by the P11D team.

6.88 The meeting between Mr Hunt and the claimant (again accompanied by Mr Kane) took place, as arranged, on 1 June 2017 (342). That was a positive meeting. Mr Hunt explained that he had arranged for a 'fresh start' for the claimant in the P11D department where she would have no connection with the previous department or managers; later adding that her new managers would arrange to 'meet and greet' her to help her move back to work. The claimant responded that although she wanted to return to work, she was sceptical about this as she had been lied to in the past with the result that she was having ongoing difficulty in trusting any managers or believing any promises that they were making. Mr Hunt reminded the claimant that if he could not get her back to work he would have to make a decision. The claimant asked if she could talk this through with her psychiatrist first as she wanted to come back to work but the thought of returning terrified her. After a short break the claimant thanked Mr Hunt and explained that this (a fresh start away from everyone involved) was exactly what she had wanted all along, that she was due to see her psychiatrist on 22 June and would ask for a fit note for an extra week, and after that appointment she would telephone Mr Hunt.

6.89 By email of 19 June (354) Mr Hunt advised Mrs Roen of the outcome of his meeting with the claimant sending a copy to Mr Moody at the same time, which Mr Moody forwarded to Ms Ayre (354). Despite Ms Ayre having thus received the update that Mr Hunt had sent to Mrs Roen, Ms Ayre wrote to him just over half an hour later requesting "an urgent update" (353). Mr Hunt duly responded (352) along the lines of his email to Mrs Roen and made the point that the arrangement with Mr Carr merely resurrected "an agreement to move Lisa into the P11D team that lapsed as she did not return to work." Ms Ayre replied that given that that had been offered to the claimant twice before and it did not result in a return to work she was "surprised it was offered again." (352).

6.90 Unfortunately, the claimant was then given another fit note from her GP on 19 June for one month due to "work related stress and anxiety". As had been agreed, she telephoned Mr Hunt after her appointment with her psychologist on 22 June. Mr Hunt wrote to the claimant's managers to update them on what the claimant had told him (359). In his email he recorded that she had told him that her psychologist did not feel that she should return to work for some considerable time and had mentioned the potential effect of stress on her heart, so there was no prospect of a return to work in the foreseeable future. He informed the managers that he had therefore told the claimant that he would need to write to her again to invite her to another meeting. He commented that he thought there was "now only one likely outcome" although he would need to hold the meeting and listen to any comments before making his decision adding that the claimant "has a number of serious medical conditions and although she has been offered a fresh start, it appears that her health not allowed her to take it."

6.91 It appears that only at this stage did Mr Hunt appreciate that consideration of IHR was a precondition to a referral to a decision maker and, therefore, to a decision by him. He wrote to Mr Moody and Mrs Roen accordingly on 29 June (360) and asked whether either of them had "considered ill-health

retirement"; he drew their attention to this requirement within the respondent's policy.

6.92 Mrs Roen's response on 5 July was clear, "During this sick absence Ill Health Retirement has not been brought up". She added that they had spoken about Ill Health in the past and referred to an occasion when she had advised the claimant to contact HR a few years ago about this. (360)

6.93 In the circumstances, Mr Hunt wrote to Mr Carr (whose P11D command it was intended the claimant would join) to explain that her managers had made an omission as they should have considered IHR as an option before submitting the case to him as decision-maker and he would now ask them to seek a view from OH (363). Noting that this process could be lengthy he asked Mr Carr if there was still the possibility of a vacancy, which Mr Carr confirmed adding his view that if they "did remove this option to support Lisa back to work then for me HMRC would not be acting reasonably". (362).

6.94 Mr Hunt then wrote to Mr Moody rehearsing the above background and adding that, as decision maker, he had received guidance on this point. Mr Hunt asked him to set the process of contacting OH in motion (364). Mr Moody replied on 10 July (365), "I think we can be confident that ill health retirement has been considered and discussed: But Lisa is absent, not because she is unable to work – but because she is stressed due to her current line management and workload situation. Elaine did talk to Lisa about IHR in the past and it was something Lisa did not want to pursue." He added that in light of the most recent OH referral, "Ill Health Retirement is not appropriate." Mr Moody sent a copy of his email to Ms Ayre asking if she had a view and she simply replied, "I would agree." (365)

6.95 The Tribunal is satisfied that although Mr Moody's response looks loosely worded, it is actually a deliberately worded reply to satisfy Mr Hunt without committing absolutely to an unequivocal statement that IHR had been considered and discussed. Similarly, the Tribunal did not accept Mr Moody's oral evidence that he could genuinely state that IHR had been discussed because he had discussed it with his senior manager Ms Ayre and, "I discussed it with Elaine Roen too", "I cascaded it back to Elaine Roen." The Tribunal is satisfied that the discussion on this topic envisaged in the respondent's policy is to be a discussion with the jobholder and not between managers to the exclusion of the jobholder. Neither does the Tribunal find credible Mr Moody's evidence that he discussed IHR with Mrs Roen or cascaded his discussion with Ms Ayre back to Mrs Roen. That is quite contrary to Mrs Roen's clear response to Mr Hunt on 5 July, "During this sick absence Ill Health Retirement has not been brought up". Had Mr Moody had the discussions with Mrs Roen that he states, that would amount to IHR being brought up, which Mrs Roen's email states had not occurred. Additionally in this connection, Mr Moody's observation, "But Lisa is absent, not because she is unable to work – but because she is stressed due to her current line management and workload situation", is another example of Mr Moody's failure to appreciate the impairment from which the claimant was suffering and its effect upon her as a disabled person; it is also contrary to OH advice at the time.

6.96 Nevertheless, in light of the misleading reassurance received from Mr Moody and Ms Ayre, Mr Hunt considered that he could proceed with his decision maker function and wrote to the claimant on 17 July inviting her to another meeting on 28 July to discuss her sickness absence (367). There was then some debate about the venue for the meeting but Mr Hunt eventually agreed (rightly, the Tribunal considers) to meet at the claimant's home. The claimant then submitted a further fit note for a month from 19 July to 18 August 2017, again citing "work-related stress and anxiety".

6.97 The meeting between Mr Hunt and the claimant (again accompanied by Mr Kane) took place on 4 August 2017. Notes of this meeting are at pages 377 to 379 but the claimant disputed the accuracy of the sections that she has highlighted on the copy of those notes at pages 380 to 382. She explained what she considered to be the inaccuracies in her oral evidence. The Tribunal is satisfied that in the overall scheme of things nothing really turns on this except in relation to the point recorded below at which it is agreed that Mr Hunt told the claimant that her managers had said that IHR had been discussed whereupon she immediately replied, "That was a lie". Additionally in this connection, it appeared that the claimant was seeking to rely upon the inaccuracies in these notes as one of the bases for her resignation but that cannot be right as she did not receive these notes until 18 August 2017 after she had resigned (391).

6.98 At their meeting on 4 August, the claimant advised Mr Hunt that her psychologist was worried about her state of mind and that she had been put on antidepressants and melatonin. She rehearsed the background including the following: it had all started with the issue with her flexi last year when Mr Falcus had deleted her flexi reports and Mrs Roen had lied when she had said that she had spoken to Mr Moody; she thought they were trying to sack her; she had received a Must Improve mid-year PMR and that had been carried forward to the end of year rating; she had been moved to spreadsheet work but has CFS due to her heart issue; OH stated she should only do 2 hours' training a day but her managers wanted to do 8 hours; the minutes [*of the meeting on 8 November 2016*] were all lies and her discussion with Mrs Roen had led to her collapse at work and Mrs Roen did not even phone her husband and had asked the claimant to complete the incident form.

6.99 Mr Hunt then informed the claimant that the business should have considered IHR and that when he had asked, "they have said that it had been discussed". The claimant's evidence is that she immediately replied, "That was a lie". Mr Hunt continued that although it was not an ultimatum, if the claimant could return to work on or before the expiry of her fit note he could stop the decision-making process and asked, "Is there any chance that you could come back before your fit note ends?" The claimant responded that she doubted it as her, "psychologist says HMRC have traumatised me. She doesn't know if I will ever". Mr Hunt concluded the meeting saying that he would have to make a decision but would take appropriate advice first.

6.100 The issue recorded above where the parties are agreed that Mr Hunt told the claimant that her managers had said that IHR had been discussed and

she says she responded that that was a lie is of some importance for a number of reasons. First, the claimant's evidence was that that information from Mr Hunt that her managers had said that IHR had been discussed, "pushed me over the edge because I knew it had not been discussed, so they were still lying – it was not a fresh start". One of the Tribunal members enquired whether the claimant felt that she had been pushed over the edge at the meeting to which she responded, "It started there but it affected me quite badly afterwards. It sounds trivial but it was the icing on the cake". The importance of this first aspect comes into focus as the claimant relies upon this as the 'last straw' in connection with her claim of constructive unfair dismissal. The second aspect of importance relates to whether the claimant's complaints to the Tribunal have been presented within the initial period of three months as required by section 111(2) of the 1996 Act and section 123(1) of the 2010 Act. Each of these two aspects of the 'last straw' and the complaints being presented 'in time' is returned to below.

6.101 As he had promised at their meeting on 4 August, Mr Hunt sent the claimant the guidance on ill-health retirement that day and followed up on 11 August asking if she wished to apply or to seek a view from OH as to whether such an application would be likely to succeed (384). The claimant replied that day stating that she did not wish to apply for IHR at the moment but stated that it would be appreciated if Mr Hunt could request the advice he had offered to see if an application had a chance of succeeding (384A).

6.102 The claimant saw her GP on 15 August 2017 as her mood had become significantly lower, she was continuously tearful, not sleeping and felt so wound up that she was struggling to even manage day-to-day tasks. A depression questionnaire that she completed had a worse score than the one she had completed previously. On 17 August the claimant saw her psychologist who asked whether, if she had to go into work that afternoon, would should she be okay? At this the claimant completely broke down and she realised that she had no trust and confidence with any of the respondent's managers after what they had subjected her to. She felt as if they had reduced her to a shadow of her former self, unable to think rationally or go about any normal day-to-day activities. It was then that she decided to resign as she felt that she was on the verge of having a mental breakdown and simply could not bear the thought of having to deal with this anymore.

6.103 The claimant returned home and wrote to Mr Hunt stating, "I would like to resign with immediate effect." and set out the reasons for her decision (388/390). Those reasons begin with the general point that she felt that "because of the treatment I have received since May 2016 until May 2017" from her managers that it made it untenable for her to return, and concluded that the claimant felt that she had "been unfairly treated all because I have a heart condition that affects my attendance". More specific reasons referred to in the resignation letter included as follows:

(i) Mr Falcus changing her flexi sheets and Mrs Roen lying to her about speaking to Mr Moody;

(ii) being asked to drop to an assistant role because of her heart medication;

(iii) being given a needs further improvement on her mid-year PMR;

(iv) the minutes of the November meeting being altered to suit their lie;

(v) sending her managers an email in November stating that she was struggling with work, having to leave early and crying at work, which resulted in an accident form and fit note from her doctor which were ignored, and taking 21 days for someone to speak to her about this;

(vi) being taken away in an ambulance unconscious and nobody telephoning her husband, receiving a text message from Mr Falcus 30 hours later, Mrs Roen lying that she had asked a member of her team to get in touch with her husband, no accident/incident form being completed for this and, when she had asked for it, Mrs Roen sent a blank copy containing another employee's details;

(vii) Mrs Roen not informing HR that she was off sick for nearly 2 months leading to an overpayment of salary of £677.90;

(viii) OH suggesting a stress reduction assessment and bespoke occupational therapy to help her return to work in April 2017, which was never done;

(ix) being given a Needs Improvement at the end of year a week before seeing the decision maker with no prior discussion.

6.104 Mr Hunt replied asking if the claimant was sure and set out the implications for her, particularly as to the financial consequences in that if she was dismissed under the respondent's Attendance Management procedures she would be entitled to compensation and there was the possibility of ill health retirement. He offered that she could rescind her resignation if she wished (388). The claimant responded that she was sure and wanted to resign with immediate effect, "I need to put an end to this as it is seriously affecting my health and home life" (388).

Submissions

7. After the evidence had been concluded, the parties' representatives made oral submissions by reference to comprehensive skeleton arguments, which painstakingly addressed in detail the matters that had been identified as the issues in this case in the context of relevant statutory and case law, for which the Tribunal was most grateful. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from the findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to our decisions.

The law

8. The principal statutory provisions that are relevant to the issues in this case are as follows:

8.1 Unfair dismissal - Employment Rights Act 1996

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if

……

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

8.2 Discrimination arising from disability- Equality Act 2010

"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.

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

8.3 Failure to make adjustments - Equality Act 2010

"20 Duty to make adjustments

(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."

"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."

"39 Employees and applicants

(5) A duty to make reasonable adjustments applies to an employer."

Application of the facts and the law to determine the issues

9. The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

10. There is a degree of overlap between the complaints presented by the claimant that the Tribunal has considered and each of the complaints was born in mind throughout our deliberations. It is considered appropriate that we should first deal with the claimant's complaint that the respondent failed to comply with its duty to make adjustments.

Disability

11. A preliminary point in this regard is whether the claimant is a disabled person as defined in section 6 of the 2010 Act and, particularly, what is the impairment that has the substantial and long-term adverse effect on her ability to carry out normal day-to-day activities? As indicated above, the claimant states that she is disabled due to "dilated cardiomyopathy", which reduces her energy, concentration and memory and leaves her very tired and affects her day-to-day activities; that she suffers from chronic fatigue syndrome due to the cardiomyopathy and the medication that she is required to take; that situations of stress or anxiety increase the effects of her disability.

12. The respondent has accepted that the claimant is disabled by reason of cardiomyopathy and that it has had knowledge of that disability since February 2014. The respondent also accepts that stress and anxiety can increase the effects of cardiomyopathy. It does not accept, however, that stress and anxiety are symptoms of cardiomyopathy or that the claimant's CFS is caused by the cardiomyopathy or the medication she takes for it.

13. Having considered all of the evidence before us as referred to above in the Findings of Fact, including that contained in the claimant's witness statement and her answers to questions asked of her at the Hearing and in the several OH reports (including that of 20 April 2017 that advised that chronic fatigue syndrome is likely to be considered a disability) and letters from medical practitioners all of which are referred to above, the Tribunal is satisfied that the CFS from which the claimant suffered is caused by the cardiomyopathy and that this is compounded by the medication she takes for the cardiomyopathy. Indeed, in the notes produced by Mrs Roen of her meeting with the claimant on 19 February 2015 she records, "The Chronic Fatigue is a symptom of the oxygen not getting into her blood properly because of her heart condition" and "She advised the medication she is on for her heart slows her heart down and this also is a cause of her Chronic Fatigue. If she decreased her medication it would put more strain on her heart, …"; although the Tribunal accepts, however, that this is only a record of what the claimant stated to her.

14. The Tribunal is also satisfied, on the same evidential basis, that the stress and anxiety from which the claimant suffered were products of her disability, which therefore comprised aspects of that disability.

15. Before addressing the particular complaints of disability discrimination, the Tribunal records some general findings that apply to many aspects of the claimant's claims in this regard. We have referred elsewhere in these Reasons to a number of positive features in this case that are indicative of good relationships between the claimant and her managers at an earlier stage (for example, the claimant commenting that Mrs Roen had done "everything to help her get back to work and she knows the support is there" (122) and that there was "nothing else

Andrew could do for her" (144) and Mr Falcus offering assistance; in May 2016 Mr Moody engaging with the claimant and her representative (151A-D) and his fairly supportive advice to Mrs Roen (125B) and she genuinely seeking the claimant's return to work and) and to the fact that matters had improved in September 2016 to the extent that the claimant asked to be discharged from her psychiatrist.

16. The Tribunal is satisfied, however, that at about that time things generally took a turn for the worse. Again, examples are given elsewhere including not referring the claimant to OH; Mr Moody unreasonably putting the onus on the claimant to identify the manager of a team undertaking solely P11D work type given their respective positions; Mr Moody's attitude to employees having to flex being an almost inviolable rule in line with the respondent's Building Our Future strategy (this is borne out, for example, in his email of 21 December in which he refers, amongst other things, to the fact that "any member of staff can be expected at any time to flex and upskill on a new workload based on the strategic direction of PT Operations" and his oral evidence that, "My role is to get everyone onto Scheme/Rec", in accordance with what he referred to as "Ministerial steer"; the claimant apparently being offered a move away from Scheme Reconciliation but then being told (in no uncertain terms by Ms Ayre) that she would nevertheless have to return to that work at some time; Mr Moody and Mr Falcus clearly being of the view that the claimant was simply declining to do work that she did not want to do ("cherry picking" as Mr Falcus described it); and what we have described as a hardening of attitude at least on the part of Ms Ayre. Significantly in this regard, we repeat the point made elsewhere that the respondent's managers seemed not to pay due regard to the impairment from which the claimant was suffering and its effect upon her as a disabled person.

17. Nowhere was that more apparent than during Mr Moody's oral evidence in relation to the claimant's wish to move to P11D work and the delay in replying to her email of 25 October 2016 when he sought to defend his failure to respond by explaining that he receives hundreds of emails from 120 staff and asked, "Is Lisa more important than the other 119? I have to prioritise". That rhetorical question and that approach of Mr Moody ignores the claimant's position as a disabled person, the nature of her disability and its impact upon her and her work. The Tribunal is satisfied that this approach of Mr Moody (reflected as it is in aspects of the approaches of Mr Falcus and Ms Ayre as identified above) is contrary to established law that the making of reasonable adjustments may necessarily involve treating a disabled employee more favourably than the employer's non-disabled workforce so as to remove the disadvantage which is attributable to the disability than: see Archibald v Fife Council [2004] IRLR 651 HL and paragraph 6.2 of the EHRC Code of Practice.

18. Mr Moody also suggested in the context of the claimant having gone home on 2 November 2016) that the claimant could have approached him directly, which is what he would have done. It was put to him that that was not an appropriate comparison as the claimant was a disabled employee. His response, "I knew she could walk, I knew she could talk" was, in the opinion of the Tribunal, glib and did him little credit. It is also contrary to the respondent's Reasonable Adjustment Process (561) which is that it "requires all managers …. to take the lead and support staff who may require reasonable adjustments".

19. In similar vein, Mr Moody was asked whether the claimant's email of 20 December 2016 (194) raised any concerns for him, particularly her suggestion that her disability had been totally disregarded in that making up time could potentially have an adverse effect on her health. He responded that he was encouraged by things that he saw: he knew that the claimant smoked and knew that if you had a heart condition you would not. Although he understood that she had a serious heart condition she must be doing not too badly, "she was okay or not taking care of herself".

20. Likewise, in connection with the claimant's requests to move to another team where she would not have to undertake the Scheme Reconciliation workload, the view that was taken by both Mr Falcus and Mr Moody (on the basis of their oral evidence) was that it was not the Scheme Reconciliation workload (and the problems that the claimant said she experienced in undertaking that work) that was the issue but simply that she did not want to do that work; to use Mr Falcus' phrase, we repeat, the claimant was "cherry picking" the work she did or did not want to do and that was being facilitated by OH. In their opinions, this was not a legitimate reason for the claimant to be transferred to another workload. As Mr Moody put it, "Just taking someone off a workload is not a reasonable adjustment" and when it was put to him that he had said, "If we move her, where will it end" he agreed that that was a "fair point". Mr Moody's observations might be right in isolation but, once more, it seemed to the Tribunal that his approach to this and other matters ignored the fact that the claimant is a disabled person, the precise nature of her disability and the impact of the Scheme Reconciliation work upon her. Even Mr Moody confirmed that, physically, the claimant could have been deployed so that she would not do Scheme Reconciliation work. He suggested, however, that it was not policy to move someone without exploring all areas. He also confirmed that he had advised Mr Falcus that the claimant saying that she was having difficulties concentrating on her workload was not a basis for a move, explaining that there can be difficulties concentrating wherever you are.

21. A final point in this general section is that the evidence of both Mr Moody and Mr Falcus was that they were best place to determine steps that might be taken and measures that might be put in place to address issues arising from the impact of the claimant's disability. This, however, is contrary to the respondent's Reasonable Adjustment Process which provides under the side heading, "Jobholder", "You will probably more aware of your requirements anyone else… (562)"

Failure to make adjustments

22. The following propositions can be said to emerge from relevant case law in the context of the above statutory framework and the Equality and Human Rights: Code of Practice on Employment (2011) ("the EHRC Code of Practice") to which the Tribunal has had regard:

    (i) It is for the disabled claimant to identify the PCP of the respondent on which she relies and to demonstrate the substantial disadvantage to which she was put by that PCP.

    (ii) There must be a causal connection between the PCP and the substantial disadvantage contended for: "It is not sufficient merely to identify that an

employee has been disadvantage, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(i) of the Disability Discrimination Act 1995 provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP.": Nottingham City Transport Ltd v Harvey UKEAT/0032/12.

(iii) It is also for the disabled claimant to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; she need not necessarily in every case identify the step(s) in detail but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable. There must be before the tribunal facts from which, in the absence of any innocent explanation, it could be inferred that a particular adjustment could have been made: Project Management Institute v Latif [2007] IRLR 579.

(iv) "Steps" for the purposes of section 20 of the 2010 Act encompasses any modification of, or qualification to, the PCP in question which would might remove the substantial disadvantage caused by the PCP: Griffiths v Secretary of State for Work and Pensions [2017] ICR 160.

(v) It is important to identify precisely what constituted the "step" which could remove the substantial disadvantage complained of: General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43.

(vi) That said, the disabled claimant does not have to show that the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage: Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10.

(vii) Once a potential reasonable adjustment is identified, the onus is cast on the respondent to show that it would not have been reasonable in the circumstances to have had to take the step(s): Latif [2007].

(viii) The question of whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include the following:

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable to take the step;

(c) the financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of the respondent's activities;

(d) the extent of the respondent's financial and other resources;

(e) the availability to it of financial or other assistance with respect to taking the step;

(f) the nature of its activities and the size of its undertaking.

(ix) If a Tribunal finds that there has been a breach of the duty, it should identify clearly the PCP, the disadvantage suffered as a consequence of the PCP and the step(s) that the respondent should have taken.

23. In connection with this complaint, the Tribunal reminded itself that it first must identify the PCP that the respondent is said to have applied: Environment Agency v Rowan [2008] IRLR 20. This is not contentious. The claimant has relied upon a single PCP being that, "she attend at work and carry out her day to day duties". The respondent has accepted that that PCP was in place.

24. As indicated above, section 20(3) of the 2010 Act provides that where an employer's PCP "puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled" the duty arises for the employer "to take such steps as it is reasonable to have to take to avoid the disadvantage".

25. The Tribunal is satisfied that the agreed PCP did put the claimant at such a substantial disadvantage. Primarily, this was because of her inability (in comparison with someone who was not disabled) due to her disability, to work in accordance with the PCP. This was so during the periods when the claimant was working 30 and 24 hours each week and continued even after she had reduced her working hours to 16 each week in an attempt to remain at work. Additionally, the claimant was further put at such a substantial disadvantage because (in comparison with someone who was not disabled) she was, due to her disability, at greater risk of dismissal under the respondent's Attendance Management Procedure than someone who was not disabled. Thus, the Tribunal is satisfied that the duty to make adjustments arose in this case.

26. In deciding what would have been a reasonable step for the respondent to take, the Tribunal took into account the factors listed at paragraph 6.28 of the EHRC Code of Practice; in this case the majority of which tend to tip the balance in favour of a particular step being taken given the type, size and resources of the respondent. The first factor is whether any particular step would have had some prospect of being effective in preventing the substantial disadvantage in respect of which we note the observation by the Court of Appeal in Griffiths that "it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness". We also reminded ourselves (as set out at paragraph 6.29 of that Code) that the test of the reasonableness of any step "is an objective one and will depend on the circumstances of the case".

27. The claimant has advanced five reasonable adjustments that she asserts would have avoided the substantial disadvantage to which she was put by the PCP (see paragraph 71 of her claim form - ET1(29)), namely:

(i) "Sensitive, supportive and proactive management;

(ii) Predictable even steady workloads;

(iii) Workloads that were not too complex for the claimant and/or which did not require intense training;

(iv) Flexibility to attend medical appointments and manage sickness absence; and

(v) Avoiding unexpected and/or stressful events at work."

28. It has been submitted on behalf of the respondent that the claimant has not sufficiently particularised the adjustments: points made include the claimant not having addressed how they would have alleviated the disadvantage and how they were capable of being met given the demands of the respondent's business. The Tribunal is satisfied, however, that in this case the claimant has provided sufficient detail of each of the five adjustments to enable the respondent to understand, in most cases prior to the hearing but, if not, certainly during the course of the hearing itself, the broad nature of the adjustment proposed so that the respondent could engage with the question of whether or not it could be reasonably achieved: Latif.

29. The Tribunal is further satisfied that in line with the above principles, the claimant has shown that the adjustments she has advanced had some prospect of avoiding the disadvantage: this aspect is explored in greater detail below in respect of the particular steps that the claimant has set out, at paragraph 72 of her claim form (29).

30. That paragraph lists a total of 27 asserted failures on behalf of the respondent to comply with its duty to provide adjustments for the claimant. The approach of the Tribunal in this regard has been to determine as follows:

(i) which of the 27 acts or omissions constitute steps that it was reasonable for the respondent to have to take to avoid the disadvantage and, therefore, potentially amount to a failure on the part of the respondent to comply with its duty to make reasonable adjustments;

(ii) which of the acts or omissions relating to any of the reasonable steps (so found) occurred within the initial time period of three months set out in section 123(1)(a) of the 2010 Act, reminding ourselves that in accordance with section 123(3)(a) on the 2010 Act "conduct extending over a period" would fall "to be treated as done at the end of the period";

(iii) whether, in respect of any acts or omissions not falling within that initial period, the claimant's complaints were presented within "such other period as the employment tribunal thinks just and equitable" in accordance with section 123(1)(b) of the 2010 Act;

(iv) in respect of which of the reasonable steps in relation to which the claimant presented her complaint 'in time', as extended if just and equitable to do so, (as so found) the respondent failed to comply with its duty to make reasonable adjustments.

31. In respect of the above approach it is accepted that an alternative would have been to address first the question of which complaints were 'out of time' and, therefore, for want of jurisdiction, should not be considered at all by the Tribunal.

The Tribunal also accepts that it need not have considered the question of which steps "potentially amount to a failure on the part of the respondent to comply with its duty to make reasonable adjustments" at stage (i) of the above approach and could have left that question until stage (iv). The Tribunal has not adopted either of those alternative approaches, however, for two reasons: first, that was not the approach of the parties at the hearing; secondly, and perhaps more importantly, by adopting the approach that we have the Tribunal is better placed to consider (if necessary) the question of extending the time limit on just and equitable grounds.

32. Of the 27 acts or omissions relied upon, applying the propositions detailed above and undertaking an objective assessment, the Tribunal is satisfied as follows:

(i) *Failed to refer the Claimant to OH from March 16 to January 2017.*

It is right that the respondent did not refer the claimant to OH from March 2016 to January 2017. The Tribunal is satisfied that at least in the earlier part of that period there was no unreasonableness on the part of the respondent in this connection given that, generally speaking, things were at least satisfactory at work. By way of example, at the meeting between the claimant and Mr Falcus (143) on 9 March 2016 she advised him that she was awaiting advice from her referral to the CFS clinic, that she was "managing fine with her reduced hours" and that there was "nothing else Andrew [Falcus] could do for her"; at their meeting on 17 August 2016 the claimant told Mr Falcus that she wanted to work additional hours and days to build up flexi-time to cover her hospital appointments rather than using disability adjustment leave ("DAL") (163A) and Mr Falcus noted that he was very pleased with the progress that she had made in learning the EFN4 workload; by late September 2016 matters had improved to the extent that the claimant asked to be discharged from her psychologist.

Things changed, however, when the claimant and the rest of her team were moved onto Scheme Reconciliation work on 18 October 2016. Events thereafter are recorded in the findings of fact set out above but key points include that the claimant wrote to Mr Falcus (167) and requested a move away from that type of work; and on 2 November, the claimant wrote to Mrs Roen (167C) to tell her that she was going home having done 2½ hours she was exhausted and had a doctor's appointment for her fatigue; on 8 November the claimant discovered that she had been given a Needs Improvement marking that caused an adverse reaction and she completed an ACC1 Report; when the claimant met Mr Falcus, probably on 9 November, she explained that she found it difficult to concentrate on spreadsheets and Mr Falcus suggested her moving to an AA grade; on 11 November the claimant advised Mr Falcus that she had been to the Royal Victoria Infirmary with a suspected blood clot diagnosed as being caused by stress; in December issues arose with the claimant not adhering to the respondent's flexi scheme leading to, first, her writing her comprehensive email of 20 December 2016 (194) that she sent to several managers in PT Operations setting out the present situation and the background to it and commenting that she believed that her disability had been totally disregarded and there was a potential adverse effect on her health and, secondly, the meeting with Mr Moody and Mr Falcus on 21 December.

In these circumstances, the Tribunal is satisfied that the claimant has discharged the initial burden of proof upon her to identify, in relation to this element of her assertions, the proposed step that she contends would have had some prospect of avoiding the disadvantage: i.e. to refer her to OH. Further, the respondent has failed to discharge the burden of proof to show that it would not have been a reasonable step to avoid the disadvantage to the claimant to have referred her to OH between October and December 2016. As such (subject to the time point considered below), it is satisfied that the respondent failed in its duty to make a reasonable adjustment in this regard.

(ii) *Caused substantial errors with the Claimant's flexi and attendance recording in April-May 2016.*

As found above, the delay in Mr Falcus submitting the E-form was due to the claimant taking annual leave during her phased return period, which she should not have done. That delay and the consequences of it are therefore attributable to her and not the respondent. As also found above, however, it was Mr Falcus who then amended the claimant's flexi-time record sheets, which then did contain substantial errors.

While the Tribunal is satisfied that that should not have occurred it is not satisfied that the claimant has discharged the initial burden of proof upon her to identify, in relation to this element of her assertions, the step that she contends would have had some prospect of avoiding the disadvantage. As such the Tribunal does not find that Mr Falcus' actions in this respect amount to a failure on the part of the respondent to comply with the duty to make reasonable adjustments.

(iii) *Failed to move the Claimant to another team and away from the line management of Mr Falcus in May 2016.*

This is factually accurate. The context was that the claimant had requested this move telling Mrs Roen that she felt that she would be stressed because of the concerns that she had raised and this would not be good for her heart condition. In these circumstances to move the claimant from the line management of Mr Falcus would have been a step that could have been taken to avoid the disadvantage caused to the claimant.

The Tribunal is therefore satisfied that the claimant has discharged the initial burden of proof upon her to identify the proposed step that she contends would have had some prospect of avoiding the disadvantage: i.e. to move her to another team. On balance, however, in the circumstances as they existed at this time the respondent has satisfied the Tribunal that it would not have been reasonable for the respondent take such a step. As such it is satisfied that the respondent did not fail in its duty to make a reasonable adjustment in this regard.

(iv) *Failed to properly assess the Claimant's PMR from March 2016 onwards.*

In light of the findings referred to above including as to the explanations Mr Falcus provided to the claimant at the meetings on both 8 and 9 November

2016, the Tribunal is not satisfied that the respondent did fail to assess properly the claimant's mid-year PMR. Similarly, the Tribunal is not satisfied that the respondent failed to assess properly her end of year PMR particularly given the circumstances of her being absent from 4 January 2017.

Thus, the Tribunal is not satisfied that the claimant has discharged the initial burden of proof upon her to show the alleged failure upon which she relies or, therefore, that there was in this respect a step that might have had the prospect of avoiding disadvantage caused by the PCP.

It follows that the Tribunal rejects the contention that in this respect the respondent failed in its duty to make reasonable adjustments.

(v) *Failed to hold regular PMR meetings with the Claimant as required under the policy.*

No evidence was placed before the Tribunal as to the existence of a policy requiring the holding of regular PMR meetings. It certainly seems to have been accepted practice for managers to discuss with the employee the PMR marking that had been awarded prior to the formal award being made (and indeed Mr Moody admitted that Mr Falcus "should have maybe had more conversations") but that is not the same thing.

It again follows, therefore, that the Tribunal is not satisfied that the claimant has discharged the initial burden of proof upon her to show the alleged failure upon which she relies or, therefore, that there was in this respect a step that might have had the prospect of avoiding disadvantage caused by the PCP. As such, the Tribunal rejects the contention that the respondent failed in its duty to make reasonable adjustments in this respect.

(vi) *Failed to respond to the Claimant's email dated 25 October 2016 properly, promptly or at all.*

The claimant wrote her email to Mr Falcus (copied to Mrs Roen) on 25 October. That email sets out clearly that the claimant is struggling with doing Scheme Reconciliation work, requests a move to a different area and asks for a quick response if possible(167). Thus the Tribunal is satisfied that the claimant has identified the step proposed.

Although Mr Falcus wrote to the claimant on 27 October he did not respond to her email, the issues in which were not pursued until the meeting on 8 November at which Mr Falcus explained that a move to P11D work was not a practical solution as it was not 'year-round work' and the team could flex onto other work.

Thus there was a response but it took two weeks, which is not prompt notwithstanding the difficulties caused by Mr Falcus and the claimant working on days such that they would only be together at work on one day week. Additionally, Mrs Roen or Mr Moody could have responded. Although he did apologise for the delay, the Tribunal has addressed above is rhetorical question, "Is Lisa more important than the other 119? I have to prioritise",

which is the Tribunal considers reflects the inappropriate approach of Mr Moody and other of the respondent's managers such as Mr Falcus and Ms Ayre to the claimant's position as a disabled person without regard to the applicable law that the making of reasonable adjustments may necessarily involve treating a disabled employee more favourably.

This general point notwithstanding, whether the eventual response by Mr Falcus was a proper response depends upon whether the claimant could have been moved to P11D work without the potential for being expected to flex onto Scheme Reconciliation work at a later date. Following Mr Hunt's intervention in May 2017 that became possible and it is reasonable to assume that it would also have been possible some seven months earlier in October 2016. Indeed, it was Mr Falcus' oral evidence that there were some individuals within the respondent's workforce who are exempt from flexing or are exempt from a particular workload. As such, the Tribunal is satisfied that the response of Mr Falcus was not a proper response.

In the above circumstances, the Tribunal is satisfied that the claimant has discharged the initial burden of proof upon her to identify the proposed step that she contends would have had some prospect of avoiding the disadvantage: i.e. to provide a proper and timely response to her email. The Tribunal is further satisfied that the respondent has failed to discharge the burden upon it to show that it would not have been reasonable in all the circumstances to take the step of moving the claimant onto P11D work without the potential for flexing. As such, the Tribunal is satisfied (subject to the time point considered below) that the respondent failed in its duty to make a reasonable adjustment in this respect.

(vii) *Failed to move the Claimant from her team to another team from October 2016 onwards.*

To an extent this point is addressed in the finding immediately above including that the Tribunal is satisfied that the claimant has discharged the first stage of the burden of proof upon her to identify the step proposed.

Even though by December 2016 the claimant had moved from Scheme Reconciliation work to Caseworker Voluntary Contributions, she was not moved to another team. As set out more fully above the Tribunal is satisfied on the basis of the oral evidence of both Mr Falcus and Mr Moody that the claimant simply did not want to do that work; she was "cherry picking" and this was not a legitimate reason for her we repeat that to be transferred to another workload. It is significant that Mr Moody confirmed that, physically, the claimant could have been deployed so that she would not do Scheme Reconciliation work but he was wholly committed to the policy described in his email of 19 May 2015 as follows, "The future strategy of PT Ops is around flexibility through Customer Services Centres. This means that all staff are expected to be able to flex onto 2-3 channels of work when the need arises through customer demand". As he put it, "If we move her, where will it end".

The Tribunal is again satisfied that the claimant has discharged the initial burden of proof upon her to identify the proposed step that she contends would have had some prospect of avoiding the disadvantage: i.e. to move

her to another team from October 2016 onwards. Further, the respondent has failed to discharge the burden upon it to show that it would not have been reasonable in all the circumstances to take the step of moving the claimant to a team with different line management and without the potential for flexing (again as Mr Hunt was able to arrange in May 2017). In these circumstances, therefore, (subject to the time point considered below) the respondent failed in its duty to make a reasonable adjustment in this respect.

The Tribunal considers that its conclusion in this regard is supported by the email from Mr Carr to Mr Hunt of 7 July 2017 referred to above in which he comments, "if we did remove this option [*i.e. of the position on the P11D Team*] to support Lisa back to work then for me HMRC would not acting reasonably" (362).

(viii) *Failed to deal properly or at all with the flexi-leave issue which ensued.*

It is not entirely clear what precisely is the "issue" that is being referred to but the Tribunal assumes (as did the respondent's representative in closing submissions) that it is that the respondent declined to award the claimant a flexi-credit, which the claimant had raised, amongst other things, in her email of 20 December 2016 (194) and which Mr Moody had said was not an option at their meeting on 21 December (196). In fact, it would have been possible: that was the oral evidence of Mr Falcus, which is borne out by the respondent's policy at page 539: "You receive a flexi credit if you are absent from work due to sickness or with permission ….". On this basis, the Tribunal rejects the submissions of the respondent's representative on this point including that, "C's flexi deficit arose as a result of C's improper operation of the flexi scheme, not her disability." Once again, therefore, the Tribunal is satisfied that the claimant has discharged the first stage of the burden of proof upon her to identify the step proposed.

The view of Mr Falcus and Mr Moody, however, was that the flexi-deficit had arisen due to the claimant going home, when she could have either remained at work undertaking different work or, if too ill to be at work, she could have gone off sick and have the time allocated as sick leave. As such, to award a flexi-credit was inappropriate. As Mr Moody put it, "she should not get up and walk out". He added that all employees had an obligation to work within the flexi parameters and he could not "see why a disabled person should be exempt", commenting that to award a flexi-credit would be contrary to his obligation to be respectful to taxpayers' money. Once again, this attitude does not pay due regard to the claimant's position as a disabled person and the requirements in this respect pursuant to Archibald as set out above.

The Tribunal is satisfied in this respect also that the claimant has demonstrated the proposed step that she contends would have had some prospect of avoiding the disadvantage: i.e. to deal properly with the flexi issue. Further, that it would have been a reasonable step to award the claimant a flexi-credit in the circumstances and that the respondent has failed to discharge the burden upon it to show that it would not have been reasonable in all the circumstances to take this step. As such, (subject to the time point considered below) the respondent failed in its duty to make a reasonable adjustment in this respect.

(ix) *Unexpectedly rated the Claimant at NI at mid-year.*

The claimant discovered that she had been given a Needs Improvement marking in respect of her mid-year PMR only when she went into work on 8 November 2016. She had no reason to expect that marking, not least because Mr Falcus had not spoken to her as he ought to have done, and therefore it was certainly unexpected. The Tribunal is satisfied that that could have been and should have been avoided. As recorded above Mr Moody admitted that Mr Falcus "should have maybe had more conversations".

It follows that the Tribunal is satisfied, first, that the claimant has identified the proposed step and, secondly, that it would have been a reasonable step for Mr Falcus to have such conversations prior to the claimant discovering her mark. It is therefore satisfied (subject to the time point considered below) that the respondent failed in its duty to make a reasonable adjustment in this regard.

(x) *Rated the claimant at NI on a basis which was incorrect.*

This assertion is not particularised but is generally addressed at point (iv) above. For the reasons explained there, the Tribunal is not satisfied that the claimant was rated incorrectly.

It follows that it rejects the contention that the respondent failed in its duty to provide reasonable adjustments in this respect.

(xi) *Failed to avoid intense training for the Claimant.*

An issue in this connection is whether there is a distinction between training, in the sense of instructing and teaching, and mentoring, in the sense of advising. Without engaging in semantics, the Tribunal accepts the claimant's evidence that the input that she was receiving from colleagues was more in the nature of training and that at times such was given to her for most of the day and on occasions all day. The respondent's representative accepted that the claimant did have to undergo training but submitted that there was no duty not to ask her to do so. That too might be right in isolation but it does not take account of, first, the claimant's disability and, secondly, the advice contained in OH reports. That of 12 March 2015 (124) records that the claimant was struggling with her current role and the intense training requirement; the Tribunal accepts the claimant's evidence that another report (since 'weeded' from the claimant's file) had recommended a maximum of two hours' training a day; that is consistent with the report of 22 February (261), which recommends that the claimant should do a maximum of two hours' training per day.

Given the above, the Tribunal is satisfied that the claimant has identified the step proposed: i.e. to avoid intense training. The Tribunal is also satisfied that it would have been a reasonable step for the respondent's managers to limit the training given to the claimant to 2 hours per day at maximum as OH had

advised and that the respondent has failed to discharge the burden upon it to show that it would not have been reasonable in all the circumstances to take this step. The Tribunal is satisfied, therefore, (subject to the time point below) that in not doing so the respondent failed in its duty to make a reasonable adjustment.

(xii) *Issued the Claimant with a warning of flexi-abuse.*

This relates to the discussion between Mr Falcus and the claimant on 6 December 2016, which he confirmed in writing (192). Mr Falcus informed the claimant how serious a failure to remain within the flexi tolerances was, confirmed that this was "flexi-abuse" and advised that failure to comply with remedying the situation "can be considered gross misconduct and will result in formal action". Given this, the Tribunal does not accept the submission made on behalf of the respondent that the claimant was not issued with a warning of flexi-abuse; neither does the Tribunal accept the distinction the respondent's representative sought to draw that the claimant had, in fact, only been warned that action could be taken if the situation was not remedied.

As explained above, the situation could have been remedied by the respondent's managers in allowing the claimant more flexibility and, specifically, by awarding her a flexi-credit as explained above. In these circumstances the Tribunal is satisfied that the claimant has sufficiently identified the step proposed.

Further, it is satisfied that it would have been a reasonable step in the circumstances for the respondent's managers to have remedied the situation of flexi-imbalance in this or other ways. Thus, (subject to the time point considered below) the respondent has failed to discharge the burden upon it to show that it would not have been reasonable in all the circumstances to take such a step and, therefore, in not doing so the respondent failed in its duty to make a reasonable adjustment.

(xiii) *Failed to award a flexi-credit to the Claimant, instead expecting her to make up the flexi deficit.*

This is dealt with at subparagraphs (viii) and (xii) above.

(xiv) *Moved the Claimant to another workload which she was not familiar with in December 2016.*

Again this is not particularised but the Tribunal assumes that it refers to the claimant being moved to Caseworker Voluntary Contributions. The claimant's evidence was that she had 'flexed' without objection several times in the past and that her issue was with being moved on to Scheme Reconciliation work or onto a workload that might be flexed onto that workload. She did not suggest in evidence that moving to Caseworker Voluntary Contributions was a move to which she objected, which created issues in light of her disability or otherwise disadvantaged her. Indeed, the email from Mr Moody records, "she feels that the current Caseworker work (Vol Conts) is more suitable giving consideration to her condition".

Thus, the Tribunal is not satisfied that the claimant has discharged the initial burden of proof upon her to show the alleged failure upon which she relies in this respect or, therefore, that there was a step that might have had the prospect of avoiding disadvantage that resulted from the PCP.

As such, the Tribunal rejects the contention that the respondent failed in its duty to provide reasonable adjustments in this respect.

(xv) *Repeatedly suggested demotion to the claimant*.

It is right that from time to time Mr Falcus raised that an option to address the claimant's concerns was that she should move from her AA role to an AO role. This occurred during the meetings on 17 November 2015 (136) and 9 November 2016 (albeit, as explained above, recorded in the notes of the meeting of 8 November 2016 (173)); on the second occasion in the context of the claimant having said that she wanted to work on a data entry workload, which was administrative in nature.

The Tribunal accepts that moving to an AO role was an option but was not an option that would have needed to be raised if the respondent's managers had addressed appropriately the claimant's disability. That said, the Tribunal is not satisfied that Mr Falcus simply raising this option can be categorised as being a failure to make reasonable adjustments.

Thus, the Tribunal is not satisfied that the claimant has discharged the initial burden of proof upon her to show the nature of the adjustment that would at least have had the prospect of avoiding the disadvantage.

It follows that the Tribunal rejects the contention that in this respect the respondent failed in its duty to provide reasonable adjustments.

(xvi) *Delayed providing the notes of 8th November 2016 meeting to the Claimant.*

The Tribunal accepts that there was such a delay. The typed-up version of the notes was sent by Mrs Roen to Mr Falcus on 13 November 2016 (172) but he did not send them to the claimant until 4 January 2017, which was after she had requested them.

While that delay was unacceptable, the Tribunal is not satisfied that the claimant has discharged the initial burden of proof upon her to show the nature of the adjustment that would at least have had the prospect of avoiding the disadvantage. Further, the Tribunal is not satisfied that the respondent not providing the notes in a timely fashion can be categorised as being a failure to make reasonable adjustments not least as it does not relate to the substantial disadvantage identified above.

It follows that the Tribunal rejects the contention that in this respect the respondent failed in its duty to provide reasonable adjustments.

(xvii) *Provided and then defended inaccurate minutes of the meeting of 8th November 2016, which changed the basis of the NI score and included matters which had not been discussed.*

The Tribunal has accepted that the minutes provided to the claimant by Mr Falcus on 4 January 2017 were indeed inaccurate not least because they included matters that had been discussed, not at that meeting on 8 November but at the meeting on the following day.

Once more that is unacceptable and the effect on the claimant was significant in that, having raised this issue with Mrs Roen, she collapsed at work and had to be taken to hospital by ambulance. Further, the Tribunal is satisfied that the claimant has discharged the initial burden of proof upon her to show the nature of the adjustment that would at least have had the prospect of avoiding the disadvantage (i.e. the provision of accurate notes). It is also satisfied that the respondent has failed to discharge the burden upon it to show that it would not have been reasonable in all the circumstances to take this step. The Tribunal is satisfied, therefore, (subject to the time point below) that in not doing so the respondent failed in its duty to make a reasonable adjustment.

(xviii) *Failed to accompany the Claimant to hospital on 4 January 2017, to inform the Claimant's husband and/or to check on her well-being.*

As recorded above, the Tribunal has found that the first two of these matters accorded with what the claimant had said to Mrs Roen and that, in any event, a colleague had informed the claimant's husband. Also, contrary to the claimant's assertion, Mr Falcus did check on her well-being by sending her his text the day after she had collapsed. The Tribunal considers, however, that even recognising the modern means of communication in today's society, for Mr Falcus to act when he did and in the particular way that he did was not appropriate.

More particularly, while it is right that the claimant is now identifying the nature of the adjustment she considers should have been made, the Tribunal is satisfied that in all the circumstances, especially given what the claimant made clear to Mrs Roen, the respondent has shown that it would not have been reasonable in all the circumstances to take these steps which, in any event, do not relate to the substantial disadvantage identified above.

Thus the Tribunal rejects the contention that in this respect the respondent failed in its duty to provide reasonable adjustments.

(xix) *Failed to complete and ACC1 in relation to 4th January 2017 incident.*

The ACC1 form clearly states that Part A (giving details of what happened) is to be, "Normally completed by the person involved in the incident". This is what the claimant had done when she had completed such a form herself in respect of the incident on 8 November 2016. The investigating manager is then required to complete Part B. The Tribunal accept the submission made on behalf of the claimant that the word "Normally" is used but is not satisfied that the circumstances relating to the incident on 4 January 2017 were outside that classification of "Normally" and, therefore, is not satisfied that Mrs Roen was wrong to send form to the claimant.

That being so, while the claimant is again now identifying what should have occurred regarding the completion of this form, the Tribunal is satisfied that the respondent has shown that Mrs Roen's actions in this regard do not constitute a failure to take a step that might potentially have avoided the disadvantage.

It follows that the Tribunal rejects the contention that in this respect the respondent failed in its duty to provide reasonable adjustments.

(xx) *Offered a return to work doing the work which had caused the Claimant issues in February 2017.*

The Tribunal is at a loss to understand why such an offer was made. By this stage it was abundantly clear that it was the Scheme Reconciliation workload that was causing such difficulty for the claimant with regard to her health. The claimant had previously made this clear to the respondent's managers and immediately repeated this to Mrs Roen when she telephoned the claimant on 3 February to give her this information that it was that work that was having a detrimental effect on her physical and mental health. As found above, this point was reiterated by Mr Kane in his emails to Mrs Roen of 7 and 9 February (246 and 249) and again by the claimant on 9 February 2017. (249).

For reasons similar to those recorded at points (vi) and (vii) above, the Tribunal is satisfied that the claimant has discharged the initial burden of proof upon her to identify the proposed step that she contends would have had some prospect of avoiding the disadvantage: i.e. to put arrangements in place such that the claimant could return to a workload other than Scheme Reconciliation and without the potential for her to be flexed onto that workload. It is further satisfied that that would have been a reasonable step and, therefore, that the respondent has failed to discharge the burden upon it to show that it would not have been reasonable in all the circumstances to take this step. The Tribunal is satisfied, therefore, (subject to the time point considered below) that the respondent failed in its duty to make a reasonable adjustment in this respect.

(xxi) *Failed to arrange mediation with an external manager.*

This was raised in the OH report of 22 February 2017. The respondent did not make such an arrangement and the Tribunal does not accept the submission made on its behalf that Ms Ayre, one of the claimant's more senior managers, visiting the claimant in her home was equivalent to mediation by an external manager. The Tribunal is satisfied that mediation with an external manager might have borne fruit (as did the involvement of Mr Hunt although he was not an external manager either) given that one of the central aspects of the claimant's concerns was her relationship with and lack of trust for her immediate managers.

Thus, the claimant has identified the nature of the adjustment that might have avoided the disadvantage and the Tribunal is satisfied that it would have been a reasonable step to put such mediation arrangements in place and, therefore, that the respondent has failed to discharge the burden upon it to

show that it would not have been reasonable in all the circumstances to take this step. The Tribunal is satisfied, therefore, (subject to the time point considered below) that the respondent failed in its duty to make a reasonable adjustment to enable this to happen.

(xxii) *Failed to update E-HR in relation to the Claimant's absence resulting in her overpayment.*

This is factually accurate and the Tribunal is satisfied that the claimant has set out what she expected to be done but it is not satisfied that she has shown the nature of the adjustment contended for; more particularly, that this was a step that might have had some prospect of avoiding the disadvantage caused to her by the PCP or that the respondent's managers failing to update E-HR constitutes a failure to make reasonable adjustments.

(xxiii) *Misspelt the Claimant's name on 7th March 2017 minutes.*

The above point applies equally: this is factually accurate and the Tribunal is satisfied that the claimant has set out her complaint but it is not satisfied that she has shown the nature of the adjustment contended for; more particularly, that this was a step (i.e correctly spelling her name) that might have had some prospect of avoiding the disadvantage caused to her by the PCP or that the claimant's managers failing to spell her name correctly constitutes a failure to make a reasonable adjustment.

(xxiv) *Failed to copy emails and notes to the Claimant's trade union as requested.*

Once more, the above point applies equally: this is factually accurate and the Tribunal is satisfied that the claimant has set out what she required but it is not satisfied that she has shown the nature of the adjustment contended for; more particularly, that this was a step that might have had some prospect of avoiding the disadvantage caused to her by the PCP or that the claimant's managers failing to copy emails and notes to the claimant's trade union representatives constitutes a failure to make a reasonable adjustment.

(xxv) *Unexpectedly and unjustifiably awarded the Claimant an NI/Needs Development grade at the end of year.*

This is touched upon at point (iv) above and is similar to point (ix) above. The Tribunal is satisfied that the end of year award was unexpected but by this time the claimant was off work making it difficult if not impossible to undertake any preliminaries prior to Mrs Roen telephoning the claimant on 18 May 2017. Additionally, given the claimant's absence and her prior performance, the Tribunal is not satisfied that the award was not justified.

That being so, although the Tribunal is satisfied that the claimant has shown the nature of the step contended for (i.e. an appropriate performance review award and discussions with her prior to the formal award), but, for the reasons set out more fully above, the Tribunal is satisfied that the respondent has shown that Mrs Roen's actions in this regard do not constitute a failure to make a reasonable adjustment.

The Tribunal therefore rejects the contention that in this respect the respondent failed in its duty to provide reasonable adjustments.

(xxvi) *Failed to properly deal with IHR.*

The Tribunal's findings of fact on this issue are set out in some detail above. As decision maker, Mr Hunt was satisfied that a consideration of IHR was a precondition to a referral to him. That was not only his opinion but was the advice that he had sought and obtained from HR. Also in this connection, Mrs Roen agreed that the respondent's Attendance Management Policy had been breached in this respect. This is the evidence on behalf of the respondent and it is not for the Tribunal to question that. We do record, however, that an objective reading of that Policy of the respondent (445-446) does not support the suggestion that a consideration of IHR is always to be such a precondition.

This issue was first raised by the claimant at the meeting on 17 November 2015 (136) but she also commented that she did not think that she would receive it and it does not appear to have been pursued thereafter until Mr Hunt's intervention. The Tribunal is satisfied that the reason for that is, as recorded above, that until Mr Hunt was appointed as decision maker the genuine intention of the claimant and Mrs Roen (and indeed other managers) was to get the claimant back to work. Furthermore, there was no medical evidence that the claimant would not be able to return to work at some time if the identified issues were resolved. In these circumstances it is understandable why IHR was not considered and it could have caused offence to the claimant if she felt that she was being pushed in that direction.

Of relevance in this regard is the decision of the Employment Appeal Tribunal in Tameside Hospital NHS Foundation Trust v Mylott EAT 0352/09 in which it was held that the duty to make reasonable adjustments does not extend "to enable a disabled employee who is no longer able to do the work (or any available alternative) to leave the employment on favourable terms". The EAT said that the concept of an adjustment involves a step or steps that make it possible for the employee to remain in employment, and does not incorporate compensation for being unable to do so. The principles arising from that decision apply in this case; IHR is a means by which an employee's employment can be brought to an end whereas the focus of all parties throughout (until the claimant's resignation, which came as something of a surprise) was upon her employment continuing.

Thus, the claimant has identified what she required but the Tribunal is not satisfied that she has shown the nature of the adjustment contended for; more particularly, that this was a step that might have had some prospect of avoiding the disadvantage caused to her by the PCP or that the claimant's managers not dealing properly with IHR constitutes a failure to make a reasonable adjustment.

(xxvii) *Misinformed Mr Hunt as to what discussions had taken place regarding IHR so as to mean that he told Claimant he thought it had been discussed.*

As explained in our findings of fact, the Tribunal is in no doubt that Mr Hunt was misinformed in relation to whether or not IHR had been discussed. Mrs Roen's response on 5 July was unequivocal, "During this sick absence Ill Health Retirement has not been brought up" (360). Mr Moody answered on 10 July, however, "I think we can be confident that ill health retirement has been considered and discussed" (365) to which Ms Ayre added, "I would agree." (365). The Tribunal has recorded above that it considers Mr Moody's response to have been deliberately worded to satisfy Mr Hunt in order that he could proceed with his decision-making function. Furthermore, that it did not accept Mr Moody's oral evidence that he had discussed IHR with Ms Ayre and Mrs Roen.

That is clearly inappropriate and unacceptable and the claimant has identified her concern. The Tribunal is not satisfied, however, that she has shown the nature of the adjustment contended for; more particularly, that this was a step that might have had some prospect of avoiding the disadvantage caused to her by the PCP or that Mr Moody and Ms Ayre to have misinformed Mr Hunt in this way constitutes a failure to make a reasonable adjustment.

Claims in time?

33. In line with its approach set out above, the Tribunal next turns to consider which of the acts or omissions relating to any of the reasonable steps (as found above) occurred within the initial time period of three months set out in section 123(1)(a) of the 2010 Act.

34. Relevant law in this regard includes that a failure to make a reasonable adjustment is an omission not an act: Matuszowicz v Kingston upon Hull City Council [2009] IRLR 288 (CA). Time runs from when the respondent decided not to make the adjustment or might reasonably have been expected to make the adjustment: (Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24), and section 123(4) applies:

"*In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*

(a) when P does an act inconsistent with doing it, or

(b) *if he does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it*."

35. As to continuing acts of discrimination, the respondent's representative relied upon the decision in Barclays Bank plc v Kapur [1991] ICR 208, HL, where the House of Lords drew a distinction between a continuing act and an act that has continuing consequences, and submitted that where there is no regime, rule, practice of principle in operation an act that affects an employee will not be treated as continuing. The focus in that case, however, is upon whether an employer operates a discriminatory regime and, in the decision in Commissioner of the Metropolitan Police v Hendricks [2003] ICR 530, the Court Appeal made it clear that it was inappropriate for a tribunal to take too literal an approach to the question of what amounts to continuing acts by focusing upon whether the concepts of policy, rule, scheme, regime or practice fits the facts of a particular

case and that they were just examples of when an act extends over a period. It was held that when considering whether there is conduct extending over a period, the focus should be on whether there was an ongoing situation or a continuing discriminatory state of affairs. This approach in Hendricks has been approved in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA (where it was held that the correct approach is to look at the substance of the complaints and determine whether they can be said to be part of one continuing act on the part of the employer) and Aziz v FDA [2010] EWCA Civ 304, CA.

36. In this connection the Tribunal has considered not only whether individual steps or omissions occurred in that initial time period but also whether any of the complaints that the claimant has presented (where the Tribunal has found a potential failure to make reasonable adjustments) relate to "conduct extending over a period", which, in accordance with section 123(3)(a) on the 2010 Act, would fall "to be treated as done at the end of the period".

37. The claimant submits that only three of the 27 reasonable adjustments claims are in time: namely, the failure to refer to an external mediator and the two failures in respect of IHR referred to, respectively, at sub-paragraphs (xxi), (xxvi) and (xxvii) above; and the Tribunal infers that that concession relates not only to single acts of alleged failure but includes also continuing acts of alleged failure. Of these three, as recorded above, the Tribunal has found a potential failure to make reasonable adjustments only in relation to the reference to the external mediator and not in relation to the two IHR matters.

38. That complaint regarding the reference to an external mediator is based, however, upon a suggestion contained in the OH report of 22 February 2017. As discussed above, time runs from when the respondent decided not to make the adjustment or might reasonably have been expected to make the adjustment: . In this case the Tribunal is satisfied that the respondent might reasonably have been expected to make arrangements to involve an external mediator within no more than two months of the date of the OH report; say, the end of April 2017 at the latest. That being so, the claimant's complaint in this respect was not, therefore presented 'in time' and, accordingly, the Tribunal does not have jurisdiction to consider it.

39. As indicated above, the claimant's representative has only asserted that three of the reasonable adjustment claims are 'in time'. Even without that concession, the Tribunal is satisfied that although there were cases of continuing failure on the part of the respondent's management, the actual or assumed 'end date' of all but one occurred more than three months before the claimant presented her claim to the employment tribunal.

40. The exception is that referred to at sub-paragraph 32(vii) above given that the claimant continuously sought a move to another team to achieve both a different workload and different line management. That continued up to and including her meeting with Mr Hunt as decision maker on 1 June 2017 and continued to be a topic discussed at their subsequent meeting on 4 August 2017. In this respect alone, therefore, the Tribunal is satisfied that there was an ongoing situation or a continuing discriminatory state of affairs (Hendricks) up to that later date and, therefore, the claimant's complaint in this respect is 'in time'. Additionally, even if

there had only been the discussion in this respect at the meeting on 1 June 2017, the adjustment contended for by the claimant amounts to an omission on the part of the respondent and it is common ground between the parties that in cases of omission time runs from when the respondent decided not to make the adjustment or might reasonably have been expected to make the adjustment: Virdi. In this case, the Tribunal is satisfied that the respondent might reasonably have been expected to take this step, say, two weeks after the meeting on 1 June 2017 and, given that the claimant had been seeking such a move since October 2016 it could have taken even longer. Even accepting that minimum of two weeks produces a date 15 June 2017; three months thereafter being 14 September 2017. The claimant sought Early Conciliation on 17 August and that came to an end on 17 September 2017. A month thereafter is 16 October 2017 and the claimant's claim form was presented on 13 October 2017. On this analysis too, therefore, this particular complaint was presented 'in time'.

41. If the Tribunal's conclusion that this complaint is 'in time' were to have been to the contrary, we would have found (for the same reasons as our set out when this point is considered below) that, in accordance with section 123(1)(b) of the 2010 Act, for the claimant to present her complaint of disability discrimination to the Employment Tribunal on 13 October 2017 was to do so within "such other period as the employment tribunal thinks just and equitable".

42. Turning to the question of extending the initial three-month time limit, there is no presumption that a tribunal should exercise its discretion to do so, quite the reverse: Robertson v Bexley Community Centre T/a Leisure Link [2003] IRLR 434. The question for the Tribunal is whether, in accordance with section 123(1)(b) of the 2010 Act, a complaint has been presented within "such other period as the employment tribunal thinks just and equitable". The law does not require exceptional circumstances; it requires that an extension of time should be just and equitable: Parthan v South London Islamic Centre EAT 0312/13.

43. In considering whether a claim has been brought in a period which is just and equitable it was suggested in British Coal v Keeble [1997] IRLR 336 that tribunals would be assisted by the factors mentioned in section 33 of the Limitation Act 1980, which deals with the exercise of discretion by the courts in personal injury cases. This requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:

    (i) the length of and reasons for the delay;

    (ii) the extent to which the cogency of the evidence is likely to be affected by the delay;

    (iii) the extent to which the party sued had cooperated with any requests for information;

    (iv) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and

    (v) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

44. This is reflected in the multi-factorial approach commended in Rathakrishnan v Pizza Express [2016] IRLR 278. In this connection the Tribunal is satisfied as follows:

    (i) there has been no prejudice to the respondent by any delay;

    (ii) this is especially so given that there is considerable overlap between the complaints of discrimination and that of unfair dismissal and, therefore, common issues have had to be addressed in any event and the effect on the cogency of the evidence will be the same or neutral;

    (iii) conversely, the prejudice to the claimant in not granting an extension of time would be significant;

    (iv) the focus of the claimant until her resignation was to remain in employment and the fact that she engaged with the decision maker process conducted by Mr Hunt (and asked him to make enquiries about the possibility of IHR) should not be held against her;

    (v) in pursuit of continuing her employment the claimant had attempted to raise a grievance in March 2017, which was rejected (wrongly in the opinion of the Tribunal) by the respondent;

    (vi) the claimant was seriously ill at this time, her evidence to that effect being supported by her medical certificates but, more importantly, by correspondence from her GP and Clinical Psychologist.

45. Applying these findings and others made above in the context of the case law the Tribunal is satisfied that, in accordance with section 123(1)(b) of the 2010 Act, for the claimant to present her complaint of disability discrimination to the Employment Tribunal on 13 October 2017 was to do so within "such other period as the employment tribunal thinks just and equitable".

46. Before moving on from the question of reasonable adjustments, it might assist if the Tribunal were to set out in tabular form a summary of its findings in respect of this aspect of the claimant's claim and in so doing incorporate our findings in respect of stage(iv) of the approach that we have adopted as set out above.

Step relied upon by the claimant - paragraph 72 of ET1	**Potential failure to make reasonable adjustment**	**In or out of the initial time period - and 'end date'**	**Just and equitable to extend time**	**Failure to make reasonable adjustment found**
72.1 - (32(i) above)	Yes	Out - end January 2017	Yes	Yes
72.2 - (32(ii) above)	No	Out - end May 2017	N/a	N/a

72.3 - (32(iii) above)	No	Out – end May 2017	N/a	N/a
72.4 - (32(iv) above)	No	Out – end May 2017	N/a	N/a
72.5 - (32(v) above)	No	Out – end May 2017	N/a	N/a
72.6 - (32(vi) above)	Yes	Out – say, mid-November 2016	Yes	Yes
72.7 - (32(vii) above)	Yes	In – ongoing situation	N/a	Yes
72.8 - (32(viii) above)	Yes	Out – end February 2017	Yes	Yes
72.9 - (32(ix) above)	Yes	Out – end October 2016	Yes	Yes
72.10 - (32(x) above)	No	Out – October late 2016	N/a	N/a
72.11 - (32(xi) above)	Yes	Out – end late 2016	Yes	Yes
72.12 - (32(xii) above)	Yes	Out – end December 2016	Yes	Yes
72.13 - (32(xiii) above)	Yes	Out – end February 2017	Yes	Yes
72.14 - (32(xiv) above)	No	Out – end December 2016	N/a	N/a
72.15 - (32(xv) above)	No	Out – end November 2016	N/a	N/a
72.16 - (32(xvi) above)	No	Out – end January 2017	N/a	N/a
72.17 - (32(xvii) above)	Yes	Out – end January 2017	Yes	Yes
72.18 - (32(xviii) above)	No	Out – end January 2017	N/a	N/a

72.19 - (32(xix) above)	No	Out – end Jan/Feb 2017	N/a	N/a
72.20 - (32(xx) above)	Yes	Out – end February 2017	Yes	Yes
72.21 - (32(xxi) above)	Yes	Out – end say March/April 2017	Yes	Yes
72.22 - (32(xxii) above)	No	Out – end January 2017	N/a	N/a
72.23 - (32(xxiii) above)	No	Out – end March 2017	N/a	N/a
72.24 - (32(xxiv) above)	No	Out – end, latest, March 2017	N/a	N/a
72.25 - (32(xxv) above)	No	Out – end, latest, May 2017	N/a	N/a
72.26 - (32(xxvi) above)	No	Out – end, latest, 10 July 2017	N/a	N/a
72.27 - (32(xxvii) above)	No	Out – 10 July 2017	N/a	N/a

Discrimination arising from disability

47. Moving on to the complaints made by the claimant in reliance upon section 15 of the 2010 Act, the accepted disability of the claimant is cardiomyopathy. In addition, the Tribunal has found that it is satisfied that the CFS from which the claimant suffered is caused by the cardiomyopathy and that this is compounded by the medication she takes for the cardiomyopathy, and that the stress and anxiety from which the claimant suffers are products of her disability, which therefore comprise aspect of that disability.

48. In connection with this aspect of the claimant's claims, the Tribunal adopted the approach as set out in Pnaiser v NHS England and another [2016] IRLR 170 which, so far as is relevant to this case, is as follows:

> "(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, …. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. …..

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. …..

(f) This stage of causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

49. In this regard the Tribunal also reminds itself that "unfavourable" does not equate to a detriment or less favourable treatment but to an objective sense of that which is adverse as compared to that which is a benefit: Trustees of Swansea University Pension and Assurance Scheme v Williams [2018] ICR 233. Thus, the 'test' is an objective one requiring the Tribunal to make its own assessment. In addition, the concept of "something arising in consequence of" disability entails a looser connection than strict causation and may involve more than one link in a chain of consequences: Sheikholeslami v University of Edinburgh [2018] UKEATS/014/17.

50. Further, that the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. It is for an employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases unfair dismissal: Hardys & Hansons plc v Lax [2005] IRLR 726.

51. With regard to this aspect of her claims the claimant first relies upon two instances of unfavourable treatment: first, the flexi-deficit and, secondly, the incorrect payment of the claimant's salary.

52. In respect of the flexi deficit, the claimant explains in her claim form (ET1) that this "accrued due to time that she had to take off in relation to her disability when the respondent failed to deal with a cry for help in October 2016", which in light of the claimant's oral evidence the Tribunal takes to be a reference to her email of 25 October 2016. She continues that the respondent treated her "unfavourably in relation to that deficit in requiring her to 'pay it back' by working additional hours, in failing to award a flexi credit, in referring to it as flexi abuse which could be gross misconduct and in failing to ever confirm that the matter was closed".

53. To an extent, Tribunal has addressed this point in relation to reasonable adjustments (viii) and (xii) above. In the opinion of both Mr Moody and Mr Falcus, the flexi-deficit had arisen because the claimant had gone home when she felt that she could no longer remain at work and she could have either remained at work doing different tasks or, if she really was too ill to be at work, she could have taken sick leave. As Mr Moody stated in oral evidence, "she should not get up and walk out" and that all employees had an obligation to work within the flexi parameters, and he could not "see why a disabled person should be exempt", commenting that to award a flexi-credit would be contrary to his obligation to be respectful to taxpayers' money. Despite Mr Moody directing at the time, presumably for these reasons, that the award of a flexi-credit to the claimant so as to accommodate her having to take time off work was not an option (see his email of 21 December -196), the oral evidence of Mr Falcus, which is borne out by the respondent's policy at page 539, was that such an award of a flexi-credit would have been possible. The Tribunal is so satisfied. It follows that if a flexi-credit had been awarded there would have been no requirement put upon the claimant to pay back the deficit.

54. In these circumstances, the Tribunal considers it to have been singularly inappropriate for Mr Falcus to advise the claimant on 6 December 2016, which he confirmed in writing (192), that her not remaining within the flexi tolerances amounted to "flexi-abuse" and that a failure on her part to comply with remedying the situation "can be considered gross misconduct and will result in formal action".

55. In connection with this complaint, addressing the above points in the approach in Pnaiser and using the notation used in that approach above:

    (a) The Tribunal is first satisfied that the claimant was treated unfavourably by the failure to award her a flexi-credit, by requiring her to make up the deficit, by referring to that deficit as flexi-abuse and warning her that a failure to remedy the situation could amount to formal action for gross misconduct and, therefore, that the people by whom she was treated unfavourably are primarily Mr Moody and Mr Falcus and, to a lesser extent, Mrs Roen.

    (b) The reason for that treatment was the claimant becoming unwell as a result of the work that she was doing at the time (especially having to concentrate on spreadsheets), which had caused her to become fatigued, tired and lethargic (167) due to her disability to which the respondent's managers had failed adequately to respond and, by going home as a

result, she had gone outside the permitted parameters of the respondents flexi-scheme.

(d) The Tribunal is therefore satisfied that the reason for the unfavourable treatment was something arising in consequence of the claimant's disability (i.e. her cardiomyopathy and the CFS, stress and anxiety arising from and forming part of that principal impairment): see Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN.

56. As to the incorrect payment of the claimant's salary, the claimant explains in her claim form that this relates to her pay from January 2017 where she had used up her sick pay allowance due to her disability, "The Respondent then sought and in due course claimed that pay from the Claimant's final pay packet".

57. In this regard, the respondent accepts that the claimant was overpaid and that the overpayment was recovered from her final pay packet but submits that this did not arise in consequence of the claimant's disability but was due to its administrative error in failing to inform its HR Department that the claimant had commenced sick leave in January 2017.

58. In connection with this complaint, addressing the above points in Pnaiser and using the above notation:

(a) The Tribunal is first satisfied that the claimant was treated unfavourably in that she was overpaid as a result of the respondent's managers failing to update the HR system to the effect that the claimant had commenced sick leave in January 2017 with the result that she was overpaid and money was later deducted from her final pay, and, therefore, the people by whom she was treated unfavourably are primarily Mr Falcus and Mrs Roen.

(b) The reason for that treatment was the claimant going on sick leave due to her disability.

(d) The Tribunal is therefore satisfied that the reason for the unfavourable treatment (i.e. the overpayment being deducted from the claimant's final salary) was, once more, something arising in consequence of her disability (i.e. her cardiomyopathy and the CFS, stress and anxiety arising from and forming part of that principal impairment): see Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN.

59. The claimant also asserts, more generally, that her dismissal resulted from the conduct of the respondent's managers towards her, which was inextricably linked to her disability and the respondent's failure to deal with it.

60. In written submissions the respondent's representative states that a possible explanation for the errors and oversights made by the respondent as follows:

> "a number of avoidable errors were made by the managers involved but that, although clumsily and sometimes insensitively and even patronisingly, the overall aim was to keep C in work. Clearly, there were errors on R's behalf. Things could and should have been done differently

> on occasion. All of the witnesses, accepted that, with the benefit of hindsight, they would have done things sometimes."

61. That concession is rightly made. As found above, the Tribunal is satisfied that the respondent's managers made errors and that things could and should have been done differently. While the managers might accept that to be the case only with the benefit of hindsight, the fact is that the claimant was living through the conduct of those managers towards her in 'real-time'. The conduct was happening then and she, as a disabled person with the implications that her disability had for her, was trying and ultimately failed to cope with that conduct. Notwithstanding the above, the Tribunal does not accept the suggestions on the part of the claimant that there was a conspiracy on the part of the respondent's managers to "get rid" of the claimant.

62. The Tribunal rejects the submission on behalf of the respondent that, "If R did dismiss C by breaching the implied term of trust and confidence, its conduct did not arise in consequence of C's disability but in consequence of C's anxiety, which was the reason that she was off work from January 2017 and was the reason why Keith Hunt was appointed to conduct an attendance management process." As found above, the Tribunal is satisfied that the stress and anxiety from which the claimant suffered were products of her disability, which therefore comprised aspects of that disability.

63. In this regard the Tribunal also brings into account the decision of the Court of Appeal in Griffiths where, at paragraph 26, it is stated as follows:

> "An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment – say allowing him to work part-time – will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified."

64. Thus, in connection with this complaint, and once more addressing the above points in Pnaiser and using the above notation:

(a) The Tribunal is first satisfied that the claimant was treated unfavourably in that (for the reasons addressed more fully below) the conduct of the respondent's managers towards her, which we accept was linked to her disability, led to her terminating her contract of employment in circumstances in which she was entitled to terminate it without notice (i.e. led to her constructive dismissal) and, therefore, the people by whom she was treated unfavourably are those managers; primarily Mr Moody, Mr Falcus , Ms Ayre and Mrs Roen.

(b) The reason for that treatment was the claimant going on sick leave, which was caused by her disability.

(d) The Tribunal is therefore satisfied that the reason for the unfavourable treatment (i.e. the conduct of the respondent's managers towards her) was, once more, something arising in consequence of her disability (i.e. her cardiomyopathy and the CFS, stress and anxiety arising from and forming part of that principal impairment): see Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN

Justification

65. In respect of the above three elements (the flexi-deficit, the overpayment of salary and the dismissal) it is submitted on behalf of the respondent, without more, "R says that its conduct was a proportionate means of achieving a legitimate aim". The Tribunal does not agree.

66. In this connection, the Tribunal has had regard to the guidance contained in the EHRC Code of Practice. The aim pursued should be legal, not discriminatory and must represent a real, objective consideration, which can include reasonable business needs and economic efficiency. To be proportionate, it should be "an 'appropriate and necessary' means of achieving a legitimate aim" which should not be achievable "by less discriminatory means". Finally, as to the meaning of "disadvantage", "It is enough that the worker can reasonably say that they would have preferred to be treated differently."

67. A further point of relevance from the EHRC Code of Practice is that it is stated at paragraph 5.21, "If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it would be very difficult for them to show that the treatment was objectively justified"; this reflecting an aspect of the quotation taken from the decision in Griffiths above. This provision in the Code is of obvious relevance in this case given that the Tribunal has already found that this flexi-deficit situation could have been remedied by the respondent's managers in allowing the claimant more flexibility. Specifically, that it would have been a reasonable step to award the claimant a flexi-credit in the circumstances so as to have remedied the situation of flexi-imbalance in this or other ways in line with the respondent's policy (539) and as confirmed in oral evidence by Mr Falcus. Thus, it would have been achievable "by less discriminatory means".

68. At paragraph 4.26 of the EHRC Code of Practice it is stated that "it is up to the employer to produce evidence to support their assertion". Thus, it is for the respondent to establish that "treatment is a proportionate means of achieving a legitimate aim". In this case, on the facts as found above and in the absence of any meaningful submissions to the contrary, the Tribunal is satisfied that it has not discharged that burden in respect of any of the three elements above.

69. In light of this finding, the Tribunal is satisfied that the claimant's complaint that the respondent discriminated against her by treating her unfavourably because of something arising in consequence of her disability as described in Section 15 of the 2010 Act, and discriminated against her contrary to Section 39 of the 2010 Act by dismissing her and subjecting her to other detriment is well-founded.

Unfair dismissal

70. Finally, there is the complaint of unfair dismissal. In this case the first question is whether there was a dismissal at all. As mentioned above, the claimant relied upon section 95(1)(c) of the 1996 Act that she had resigned in circumstances where she was entitled to do so by reason of the respondent's conduct. That is commonly referred to as constructive dismissal.

71. It is well-established by the decision of the Court of Appeal in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 that to satisfy the Tribunal that she was indeed dismissed rather than simply resigned, the claimant has to establish four particular points as follows:

    71.1 The respondent acted (or failed to act) in a way that amounted to a breach of the contract of employment between the respondent and the claimant.

    71.2 If so, that breach went to the heart of the employment relationship so as to amount to a fundamental or repudiatory breach of that contract.

    71.3 If so, the claimant resigned in response to that breach.

    71.4 If so, the claimant resigned timeously and did not remain in employment thus waiving the breach and affirming the contract.

72. To establish the required breach of contract, the claimant relies on a breach, not of an express term of her contract of employment but of the term implied into all contracts of employment that the parties will show trust and confidence, the one to the other: an obligation not without reasonable and proper cause to act in a way which is likely to seriously damage or destroy the relationship of trust and confidence existing between employer and employee.

73. The Tribunal first addresses the first of the above considerations as to whether the respondent acted in a way that amounted to a breach of the claimant's contract of employment. There are numerous findings above by reference to which the Tribunal is satisfied that there was such a breach. These do not need to be restated at this stage and obviously include the following:

    73.1 The general point made several times throughout these Reasons, for example under the heading "*Disability*" above, that at crucial times the respondent's managers did not to pay sufficient regard to the impairment from which the claimant was suffering and its effect upon her as a disabled person.

    73.2 Each of the matters in respect of which we have already found that the respondent failed to make reasonable adjustments.

    73.3 The two specific matters (the flexi-deficit and the overpayment of salary) in respect of which we have found that the respondent discriminated against the claimant because of something arising in consequence of her disability.

74. In addition, among further findings that there was such a breach the following are amongst the more significant:

74.1 Mr Falcus placing the claimant in an invidious position by altering and indeed falsifying her flexi-sheets so that they did not accurately reflect her working hours. Even though the Tribunal has found that Mr Falcus believed that in amending the flexi-sheets he was acting with good intentions, in this regard the EHRC Code of Practice is instructive in providing, "Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."

74.2 Mr Falcus delaying unreasonably in sending the claimant the notes of their meeting on 8 November 2016 and, when he did so, providing notes that were inaccurate not least because they included matters that had been discussed not at that meeting but at the meeting on 9 November 2016.

74.3 The respondent's managers not seeking to check on the claimant's well-being either by contacting her or the hospital after she had been taken there, as an emergency, on 4 January 2017 until the following day and, when Mr Falcus did then contact the claimant, he did so by text message, which form of contact and its content the Tribunal considers to have been inappropriate in the circumstances.

74.4 Mr Falcus and then Mrs Roen failing to update E-HR that ultimately led to the claimant being overpaid and, therefore, that overpayment being deducted from the final payment of her salary.

74.5 The failure of the respondent's managers (at least in the later stages) to interact with the claimant giving due attention to her as an individual: examples include misspelling her name on the notes of the meeting held on 7 March 2017 and, of perhaps greater significance, sending to the claimant the form ACC1 that had already been completed in some detail in respect of "C" (228).

74.6 A similar but different point is that the respondent's managers had failed to send copies of their correspondence with the claimant to her trade union representatives as a matter of course as the claimant had requested, and even without such requests, given the involvement of those representatives particularly at the later stages, would have accorded with good industrial relations practice.

74.7 Ms Ayre refusing to accept and take appropriate steps in relation to the grievance raised by the claimant.

74.8 Mr Hunt (perhaps innocently given the misleading assurance provided to him by Mr Moody and Ms Ayre) advising the claimant that her managers had said that IHR had been discussed with her, when she knew that it had not.

75. Turning to address the second of the above considerations, arising from the decision in Western Excavating (ECC) Limited, the Tribunal has found that the respondent discriminated unlawfully against the claimant by failing to make a number of reasonable adjustments and by discriminating against the claimant because of something arising in consequence of her disability. It is clear that these matters struck at the heart of the employment relationship so as to amount to a fundamental or repudiatory breach of that contract; and there are the additional matters set out immediately above. The context of the respondent's managers conduct towards the claimant is, of course, that she had 10 years' service for the respondent and, despite having been diagnosed in the serious heart condition in 2008, she had managed that condition and its implication and continued in her employment. In all these circumstances, the Tribunal is satisfied that the claimant lost trust and confidence in her managers (as Mr Hunt acknowledged) and, therefore, in the respondent as her employer as a result. Although accepting that a breach of the implied term of mutual trust and confidence only arises where a respondent does not have reasonable and proper cause for its conduct we have concluded that the respondent was in breach of its statutory duties in these respects and we do not find that it had reasonable and proper cause for its conduct.

76. The third of the above considerations is whether the claimant resigned in response to the breach. In this case, the claimant relies upon 'the last straw' of Mr Hunt telling her at their meeting on 4 August 2017 that her managers had said that IHR had been discussed with her, which she considered to be a lie and which led her to realise that the managers who had not conducted themselves appropriately towards her in the past were still able to have an effect on her employment to the extent that she could not have trust and confidence in the respondent sufficient to enable her to return to work on the basis of the fresh start proposed by Mr Hunt. As the claimant put it in evidence this, "pushed me over the edge because I knew it had not been discussed, so they were still lying – it was not a fresh start", and she clarified that this had affected her quite badly after the meeting with Mr Hunt on 4 August.

77. A potential difficulty for the claimant in this respect is that in her letter of resignation (390) the claimant first made the general points detailed above that she felt that "because of the treatment I have received since May 2016 until May 2017" from her managers it made it untenable for her to return then set out a number of detailed points concluding that she felt she had "been unfairly treated all because I have a heart condition that affects my attendance". Nowhere does she mention in that letter the above issues of her managers having lied to Mr Hunt and her not having trust and confidence in them or the respondent upon which she now relies as the 'last straw'.

78. The claimant's answer to that difficulty was that the substance of her resignation letter was taken from a list of bullet points that she had compiled in June 2017 (hence the reference to "since May 2016 until May 2017" and not to the meeting on 4 August) and at the time that she came to submit her resignation she was simply too ill to update it and asked her husband to 'cut and paste' it into her resignation letter as she was even too ill to do that herself.

79. The claimant's assessment of her mental health at this stage is borne out in the findings made above some of which bear repeating in summary here. The claimant had seen her GP on 15 August 2017 as her mood had become significantly lower, she was continuously tearful, not sleeping and felt so wound up that she was struggling to even manage day-to-day tasks. The claimant's health at this time (and previously) is referred to in the letter from her GP of 9 October 2017. "She remained tearful and anxious on any contemplation about work or contact with work and as such avoided any decision making until at one point she was so stressed and low that she quit rather than put with the ongoing concern stress" (429). Then, on 17 August, the claimant saw her psychologist when she completely broke down and realised that she had no trust and confidence in any of the respondent's managers after what they had subjected her to; they had reduced her to a shadow of her former self, unable to think rationally or go about any normal day-to-day activities and she felt that she was on the verge of having a mental breakdown and simply could not bear the thought of having to deal with this anymore. It was then that she decided to resign, which she did.

80. The Tribunal was urged by the respondent's representative to limit its consideration in this respect to interpreting the letter of resignation alone, to which the principles of contract law must apply, and not to attempt to discern what was in the claimant's mind when she wrote the letter because objective interpretation of the letter that is what matters. Although there might be some strength in that submission to an extent, the Tribunal considers that the letter is merely one aspect of the evidence (albeit an important aspect given its contemporaneity) that it should consider in determining the question of whether the claimant resigned in response to the breach and that it must also bring into account the claimant's oral evidence in that respect, some of which is summarised above. Additionally, in the claimant's email to Mr Hunt of 17 August 2017 (391) she stated, "I need to put an end to this as it is seriously affecting my health". The Tribunal is satisfied that the claimant's reference to "this" is a reference to the conduct of the respondent's managers towards her (not least culminating in them misleading Mr Hunt), which the Tribunal is satisfied for the reasons set out above had continued up to and including that date of 17 August 2017: i.e. the date of the claimant's resignation.

81. Adopting that more holistic approach to the assessment of the evidence in this case, the Tribunal is satisfied that the act on the part of the respondent that caused or triggered her resignation was, indeed, 'the last straw' of Mr Hunt telling her that her managers had said that they had discussed IHR with her leading her to realise that she could not have trust and confidence in the respondent. It was this that "pushed me over the edge because I knew it had not been discussed, so they were still lying – it was not a fresh start".

82. The Tribunal is further satisfied, given that this 'last straw' arose from two senior managers of the respondent misinforming Mr Hunt as to whether the IHR issue had been discussed with the claimant, that this was "by itself a repudiatory breach of contract": Kaur v Leeds Teaching Hospitals NHS Trust [2018] 833. If, however, the Tribunal had found to the contrary that it was not by itself a repudiatory breach it is satisfied that it was "nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively,

amounted to a (repudiatory) breach of the implied term of trust and confidence": Kaur. Further, that it was far from being "entirely innocuous" so as not to contribute to the breach of the implied term of trust and confidence as the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the respondent: Omilaju v Waltham Forest London Borough Council [2005] ICR 197.

83. Finally in this regard, the fairly simple question for the Tribunal is what the claimant resigned in response to. Given the above findings, the Tribunal is satisfied that the claimant's resignation was in response to the breach as set out above: namely either her managers misinforming Mr Hunt about IHR being itself a repudiatory breach or that nevertheless being a part of a course of conduct that cumulatively amounted to a breach.

84. There remains, therefore, the final consideration of whether the claimant resigned timeously and did not remain in employment thus waiving the breach and affirming the contract.

85. As to the earlier stages of this matter the Tribunal does not consider that the claimant remaining in employment, engaging as she did with the decision maker process and seeking to raise a grievance to correct matters by way of the respondent's internal processes indicates that she had waived the breaches and affirmed the contract of employment.

86. More importantly, it is clear from the decision of the Court of Appeal in Kaur that the question to be asked in this connection is whether the claimant affirmed the contract after the most recent act on the part of the respondent which caused her resignation. That most recent act occurred during the claimant's meeting with Mr Hunt on 4 August 2017 after which she had limited contact with any of the respondent's managers (being emails with Mr Hunt considered below) and, 13 days later on 17 August 2017, she resigned. The Tribunal is satisfied that the claimant did not affirm her contract of employment within that period of 13 days.

87. In this regard the respondent's representative submitted that by remaining in employment until 17 August 2017 the claimant waived any breach alleged against the respondent. Addressing the above point in Kaur she sought to rely upon the exchange of emails between the claimant and Mr Hunt as to whether she wished to apply for IHR, which took place after the meeting on 4 August, and in particular, the claimant's email of 11 August 2017 (384A) in which she asked, if he "could please request the advice to see if an application has a chance of succeeding that would be appreciated". The representative submitted that in making this enquiry the claimant was seeking a benefit under the contract of employment and that amounted to affirmation. The Tribunal does not agree; it is satisfied that the claimant was not at that stage seeking a benefit. She was not making an application but was making a general enquiry, which did not constitute an affirmation of the contract of employment on her part.

88. The respondent's representative also submitted that the IHR matter was not in the claimant's mind when she resigned, "on that day she had been to her psychiatrist and her health was in a very serious state: she felt that she could not go on and was at her wits end, which was due to her health at the time." The

Tribunal is satisfied, however, that that submission conceals the very point that the reason that the claimant's health was as it was and she felt as she did was Mr Hunt revealing to her at their meeting on 4 August 2017 what she considered to be a lie that her managers had said that IHR had been discussed with her, that they were still able to have an effect on her employment and, importantly, that she could not have trust and confidence in the respondent that could enable her to return to work. To repeat the above quotation this, "pushed me over the edge because I knew it had not been discussed, so they were still lying – it was not a fresh start", and that this had affected her quite badly after the meeting with Mr Hunt.

89. In summary and conclusion of this aspect, therefore, in all the circumstances, therefore, adopting the four-stage approach in Western Excavating (ECC) Limited set out above in light of the other precedents referred to, the Tribunal is satisfied that the claimant did resign from her employment with the respondent in circumstances where she was entitled to do so without notice by reason of the respondent's conduct: i.e. that she was dismissed.

90. The remaining question is, therefore, whether that dismissal was fair or unfair. In the formal Response submitted on behalf of the respondent (ET3) it is stated that if "it is determined that the Claimant was dismissed, it is asserted that it was on the grounds of capability; with the dismissal being fair, following an appropriate procedure by the Respondent". Although in the skeleton argument of the respondent's representative this point is mentioned fleetingly to the extent that the questions for the Tribunal are set out by reference to the decision in Buckland v Bournemouth University [2010] EWCA Civ 121, it was not pursued in oral submissions.

91. Be that as it may, it is clear from section 98(1) of the 1996 Act that in determining whether the dismissal of an employee is fair it is for the employer to show the reason for the dismissal. The Tribunal is not satisfied on the evidence before it that the respondent has demonstrated what was its reason for dismissing the claimant. Having failed to do so, it follows that the dismissal of the claimant was unfair.

92. Even if it were to be the case that the reason related to the claimant's capability, for reasons similar to those upon which the finding of dismissal is made, the Tribunal is not satisfied, applying the considerations in section 98(4) of the 1996 Act (there being no burden of proof on either party) that taking account of all the circumstances (including the size and administrative resources of the respondent's undertaking) and considering the principles of equity and the substantial merits of this case, it acted reasonably in treating the reason of capability as a sufficient reason for dismissing the claimant. In this regard, the Tribunal is satisfied for the reasons set out above that at least in the later stages of her employment the claimant's absence from work was attributable to the attitude and conduct of the respondent's managers towards her and while it accepts that this would not have precluded the respondent from effecting a fair dismissal, it is a relevant consideration in relation to which the respondent would have been expected "to go the extra mile", which the Tribunal is not satisfied it did in this case: McAdie v Royal Bank of Scotland [2007] IRLR 895 CA.

93. In all the circumstances, therefore, the Tribunal is satisfied, first, that the claimant was dismissed by the respondent in that she terminated her contract of employment in circumstances in which she was entitled to terminate it without notice by reason of the respondent's conduct (pursuant to section 95(1)(c) of the Employment Rights Act 1996) and, secondly, that that dismissal was an unfair dismissal by reference to sections 94 and 98 of that Act.

94. This case will now be listed for a one-day hearing to determine remedy. If the parties consider that this time allocation is too great or to little they must inform the Tribunal forthwith.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 18 JANUARY 2019

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