Case No: V 2602509/2019

EMPLOYMENT TRIBUNALS

Claimant: Mrs S. Short

Respondent: Maximus UK Services Limited

Heard at: Nottingham **On:** Monday 21st, Wednesday 23rd September and Friday 25th September 2020

Before: Employment Judge Rachel Broughton sitting with non-legal members; Ms Andrews and Mrs Higgins

Appearances

For the Claimant: Mr Webster - counsel
For the Respondent: Mr Welsh - counsel

JUDGMENT

It is the judgement of the Tribunal that;

1. The claim that the respondent breached section 20 and 21 of the Equality Act 2010 in failing to make reasonable adjustments for the claimant, is well founded and succeeds.

2. The claim that the respondent discriminated against the claimant by terminating her employment because of something arising from her disability contrary to section 15 of the Equality At 2010, is well founded and succeeds.

3. The claim that the dismissal was an act of discrimination under section 39(2) (c) of the Equality Act 2010 is well founded and succeeds.

4. The case will be set down for a hearing to determine remedy.

REASONS

Background

(1) By a claim form presented to tribunal on the 9 September 2019, the claimant advanced claims of disability discrimination namely; discrimination arising from disability pursuant

to section 15 and a failure to make reasonable adjustments pursuant to 21 and 20 of the Equality Act 2010 (EqA). The claimant complains that the dismissal was an act of discrimination under section 39(2)(C) of the EqA.

(2) The claimant entered into early conciliation with the respondent on 11 July 2019. The period of Acas conciliation ended on 11 August 2019.

Issues

(3) The legal issues had been discussed and agreed at a preliminary hearing on 2 January 2020. At the time of that preliminary hearing the issue of whether the claimant was disabled due to the condition of polycystic kidneys was in dispute pending disclosure of the claimant's impact statement and medical records. The issue of disability was conceded prior to today's hearing and is no longer in dispute.

(4) The agreed legal issues for the Tribunal to determine are as follows:

EqA, section 15: discrimination arising from disability

(i) Did the Respondent treat the Claimant unfavourably by dismissing her following a decision made on the 12 April 2019, because of ***something arising*** *from her disability namely her ill health and related stress/anxiety in the period 26 March to 12 April 2019 and her hospital visits and absences?*

(ii) If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim, namely to meet it contractual obligations to DWP and its duty of care to customers?

(iii) Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

Reasonable adjustments: EqA, sections 20 & 21

(iv) Did the Respondent not know and could it not reasonably have been expected to know the Claimant was a disabled person at the relevant time?

(v) A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP(s):

i. Requirement to complete the training programme for health care professionals and pass the stage 4 approval process;
ii. Expectation to complete the stage 3 of the training in or about 8 days
iii. Successful completion of a minimum of 7 cases before proceeding to stage 4
iv. Employment conditional upon successful completion of the initial and update training.

(vi) Did any such PCPs put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

(vii) If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

(viii) If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:

i. Discount her disability related absences during the stage 3 of the training programme
ii. Extending stage 3 of the training and her employment

(ix) If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

Evidence

(5) The hearing was conducted remotely by video conference. The parties produced an agreed bundle which comprised 284 pages of documents. On the morning of the first day, the claimant produced a small number of additional documents. Those documents were included within the bundle, bringing the total number of pages to 288.

(6) The tribunal heard evidence from the claimant who relied on two witness statements; the first was the statement which had been prepared following the preliminary hearing and sets out the impact of her disability which is submitted into evidence, and a further statement dealing with issues of liability. The claimant was cross-examined.

(7) On behalf of the respondent the tribunal heard evidence from Mr Lee Kettlewell, Assessment Centre Manager for Derbyshire East who produced a witness statement and was cross-examined.

(8) The evidence was completed on the second day. During the afternoon of the second day, the tribunal heard oral submissions. The submissions of counsel for the respondent were supported by written submissions.

Adjustments for the hearing

(9) The claimant did not require any adjustments during the hearing other than breaks as and when required.

Witnesses

(10) We found the claimant to be a witness with a reasonable recollection of events, where she was uncertain of her recollection she was frank about that.

(11) With regards to the Mr Kettlewell as a witness of fact, during cross examination he conceded that his evidence was at times inaccurate on what the tribunal find to be fundamental factual issues. By way of example; he alleged in his evidence in chief that the claimant had been allowed to; "*re-do stage 3 training*" and; "*nearly completed two full stage 3 processes*", this however we find was plainly not the case and indeed he accepted in cross examination that this was a gross exaggeration. Such fundamental inaccuracies in his account of events meant that the tribunal did not consider Mr

Kettlewell to be a particularly reliable witness although we accept that in cross examination when presented with the inconsistencies in his account of events, he was invariably prepared to a concede the point and indeed, prepared to reflect on matters which he could have dealt with differently.

Findings of Fact

(12) The claimant commenced her employment with the Respondent on 21 February 2019 as a Registered Nurse Functional Assessor (Assessor).

(13) The respondent carries out independent health assessments to assess eligibility for state benefits of people who are out of work due to long-term illness, or as a result of disability or other health conditions. The respondent provides this service on behalf of the Department for Work and Pensions (DWP). The respondent was prior to 3 October 2019 called The Centre for Health and Disability Assessments Limited (CHDA).

(14) The claimant was required to undergo training and her continued employment and ability to work as an Assessor was contingent upon successful completion of that training during a probationary period. There are number of policy documents which set out the training programme for assessors to ensure they meet the required standard of competence to carry out the assessments, it involves 4 stages of training and evaluation.

Pre- Employment

(15) The claimant is a qualified nurse. She was interviewed for the role as an Assessor with the respondent, on 10 January 2019. The job was subject to a probationary period of six months and it is not in dispute that it was explained to the claimant that if she failed to pass the training programme there was a defined exit point at stage 3. The claimant's evidence was that as far as she was aware, there was a defined exit point at all four stages of the training process however what is material for the purposes of this case, is the consequences of a failure to pass stage 3.

Interview 10 January 2019

(16) During the claimant's interview on 10 January 2019 an interview checklist was completed (p.169/170). It is not in dispute that when being interviewed the claimant was asked if she had any special needs, requirements or adaptations that may need to be taken into consideration in order for the claimant to undertake the training or role. It is recorded within that interview checklist that the claimant made reference to neck and back problems and that Access to Work had in her last employment, provided her with a chair which she still had. The claimant also referred to sometimes requiring a raised desk. There is no mention within the form of the claimant's kidney condition which is the only disability we are concerned with for the purposes of this claim.

(17) Mr Kettlewell played no part in the interview process and we accept his undisputed evidence that he did not see the interview documents until these tribunal proceedings.

(18) The claimant was required to undertake the training Stage 1 and 2 in London and if she passed those stages, would be located at the Mansfield Centre (Centre)to complete her Stage 3 training. Her line manager at the Centre was Mr Kettlewell.

Equal Opportunities Form

(19) On the 30 January 2019 the claimant completed an Equal Opportunities Form (p.187). The claimant's evidence which we accept and which was not disputed, is that there was limited scope to put much information on this form about her conditions. The form was an on-line form comprising of checkboxes. The form records the claimant identifying herself as having a disability and the details of the disability are identified as; *Long term – Other Long-Term Condition. Mobility/Dexterity -Back/neck condition/injury and Long term - Chest/breathing problems*.

(20) With respect to the entry which reads; "*Other Long-Term Condition*", the claimant asserts that this was intended to be a reference to her kidney condition however no other information was entered onto the form.

(21) The claimant's evidence is that as at 30 January 2019, the kidney condition was not causing her problems in terms of symptoms and had not impacted on her previous employment.

(22) We accept the undisputed evidence of Mr Kettlewell that he did not see the Equal Opportunities Form prior to these tribunal proceedings, however the interview and Equal Opportunities Form are the respondent's own documents and it is not disputed were received by them.

Occupational Health Report

(23) The claimant was referred for an occupational health (OH) assessment. The OH report appears in the bundle dated 18 February 2019 (p.193-195). The assessment was undertaken on 12 February 2019.

(24) The covering letter from OH (p.193) states; "*as part of the routine employment process Mrs Short was required to complete a **health assessment questionnaire** which was initially reviewed by one of our occupational health nurses who on turn felt it would be helpful for Mrs Short to attend one of our clinics, so that we may assess her medical history in further detail*… "

(25) Mr Kettlewell was unclear whether all new recruits are sent for an OH assessment but ultimately accepted under cross examination that it appeared from this covering letter that the OH assessment had been arranged because of what the claimant had put on a Health Assessment Questionnaire. A copy of the Health Assessment Questionnaire completed by the claimant had not been disclosed by the respondent. The claimant gave no evidence about the questionnaire or what she had put in it. The relevance of this document to these proceedings therefore is limited to evidence regarding the extent that Mr Kettlewell's unawareness of it triggering the OH assessment, showed a distinct lack of understanding of the recruitment process involving new entrants with disabilities and a lack of his direct engagement in that process.

(26) The claimant's evidence which is not in dispute, is that she discussed her kidney condition at length with the Dr Robinson, Consultant Occupational Physician during that assessment, however no express reference to the kidney condition was made in the report, although it does refer expressly to asthma and a musculoskeletal condition.

(27) It is not in dispute that Mr Kettlewell did not discuss the report with OH at any stage and therefore he was not in a position to comment on what the claimant had or had not discussed with Dr Robinson.

OH Report - General Adjustments

(28) The OH report (p.193) refers to the following general adjustment;

*"… It is evident that she has a **number of medical conditions** which both individually and collectively would fulfil the criteria for disability under the remit of the Equality Act. In view of the applicability of disability legislation, it would be regarded as good practice for an employer to bear such disability in mind at all times when considering an* individual's ***performance at work*** *and also* ***any absence that*** *may be required in relation to such disability.* ***Indeed, managers will often consider a reduction of targets for performance and a relaxation of trigger points for any absence which may be required."*** *[our stress]*.

(29) Mr Kettlewell conceded in cross examination that he could accept now that the report in referring to a 'number of medical conditions' was suggesting adjustments that may potentially be relevant also to the claimant's kidney condition, to include an adjustment to attendance and also performance targets.

Specific adjustments

(30) Aside from the general adjustments, the OH report goes on to set out a number of specific adjustments that Dr Robinson put forward for consideration because she/he believed these would be helpful to the claimant, those particularly relevant to the disability for the purposes of this claim are;

i. The claimant needing to attend regular medical appointments, "*as a consequence of one **her medical conditions**…"* [our stress]. For reasons which are not clear, Dr Robinson fails to identify which specific medical condition this is a reference to.

ii. With reference to the claimant 's musculoskeletal condition "*in particular*", but "*also to a degree due to **other medical conditions**, she will have a variable susceptibility to **fatigue at** times and limitation of her mo*bility." [our stress]. Mr Kettlewell accepted in cross examination that as the paragraph refers to the musculoskeletal condition and then refers to medical conditions in the plural, it is clearly referring to the musculoskeletal condition, asthma plus something another condition.

(31) The claimant accepted that four specific adjustments recommended in the report were implemented mainly relating to her asthma and musculoskeletal problems but also allowing her attendance for medical appointments.

(32) We find however not only did the respondent, via OH, have knowledge from 12 February that her kidney condition qualified as a disability under the EqA, the OH report refers to variable susceptibility to fatigue as a symptom which we find relates to conditions including her kidney condition and thus the respondent had actual knowledge from this date that fatigue was a likely symptom of this type of condition

Disability

(33) The undisputed evidence of the claimant, as set out in her impact statement, is that her condition is an inherited kidney impairment which impairs the functioning of her kidneys and ultimately leads to kidney failure. The claimant takes blood pressure tablets (which during her employment with the respondent was Doxazosin) to keep her blood pressure low and reduce damage to her kidneys. Her condition is progressive and has been deteriorating over the years. A side effect of the condition is a high level of waste products in her blood and another symptom is tiredness and fatigue partly due to the high level of waste products in her blood and that could also impair concentration.

Training

(34) The claimant then began her training. The statement of particulars (p.139/141) confirms that her employment is subject to a probationary period of six months which can be extended in the event of underperformance and that the respondent may, at its discretion extend the probationary period for up to a further three months.

(35) There is also a separate Probationary Policy (p.69) which provides that an extension to a probation policy is only applied in exceptional circumstances which are stated to include (p.77) for reasons relating to a concern with the employee such as absence or due to constraints outside of their control e.g. severe illness requiring hospitalisation. The probationary period can be extended only once for up to a maximum period of 3 months.

(36) Details of the training course are set out in a document dated 22 November 2017 and headed; Registered Nurse New Entrant Revised WCA Training Course (Document 1) (p.82). The document was produced by the respondent.

(37) Document 1 provides that all healthcare professionals undertaking assessments must be registered practitioners and in addition, have undergone training in disability assessment, medicine and specific training in the relevant benefit areas (p.83). The training includes; theory training in a classroom setting, supervised practical training, and a demonstration of understanding as assessed by quality audit.

(38) Document 1 provides that (p.86) the overall aim of the training is to enable the person to understand how to complete a work capability assessment report to satisfactory standard.

(39) There are four stages to the approval process starting with classroom training (Stages 1 and 2), face to face functional assessments and observations/reflective practice (Stage 3) and then consolidation of learning through conducting further assessment sessions (Stage 4).

Stage 1 and 2

(40) The claimant's evidence is that she commenced her 18-day Stage 1 and 2 classroom training in London on 26 February 2019. Mr Kettlewell in his evidence in chief stated that her training in London took place between 4 March and 22 March 2019. There is an email in the bundle which refers to the dates of the claimant 's travel to the London test centre (p.285), it records her dates of rail travel starting from 25 February 2019. On being taken to this document, Mr Kettlewell accepted that the dates he had given "*may not be correct*". We therefore prefer the claimant's evidence on this point and find that her Stage 1 and 2 training started on 26 February 2019.

(41) The details of what is covered on each day is set out in Document 1. The evidence of Mr Kettlewell in cross-examination was that he imagined all the training is quite intensive and tiring and compared it to; "*like doing a degree all over again in a very short space of time"*. The document which is referred to as a training contract for employed new entrants (p.189) describes the course as; "*highly intensive and tiring course".*

(42) The claimant passed both Stages 1 and 2 without a requirement for any adjustments. Her undisputed evidence is that she found the training tiring however, her performance was clearly we find, not only acceptable but promising in terms of her prospects for successful completion of the full training programme. Mr Kettlewell's evidence was that the initial feedback from central training was "very positive" about the Claimant and that she passed her exams with very good grades; "*well above the minimum requirement".*

21 March 2019

(43) In a text message to Mr Kettlewell on 21 March 2019 the claimant informed him that she had two hospital appointments on 26th March and that; *"… I have another on 4 April.* ***I'll explain more face-to-face as I realise the OCC health letter did not explain my conditions."*** [our stress]

Stage 3

(44) The claimant returned from London to start the Stage 3 training which started on 25 March 2019. There is a text from Ms Towner on 25 March 2019 referring to not being there on the claimant's first day (p.208). The claimant describes a positive relationship with her line manager Lee Kettlewell and the Clinical Standard Lead, Ms Charlotte Towner.

(45) There is a separate document specifically dealing with Stage 3 headed; Local Stage 3 Process and Documentation" (Document 2) and is dated 1 November 2016. The document sets out how long the stage 3 training should last (p.57); "*Local stage 3 is scheduled for 8 days. It is* ***expected that most trainees*** *will successfully complete their training in this time"* [our stress]. Document 2 also deals with the number of assessments which must be undertaken, at page 9 (p.58); *"It will be the responsibility of the stage 3 mentor to decide when the trainee is ready for stage 4 training; it is* ***recommended*** *that a minimum of* ***seven*** *cases are completed by the trainee during live stage 3."* [our stress].

(46) The claimant understood that she was required to complete 7 assessments as part of the stage 3 training over an 8-day period. That this was the usual way the respondent's training policy is implemented and applied in practice is not in dispute and it was at the outset, applied in this way to the claimant.

(47) Mr Kettlewell accepted under cross examination that allowing a person to carry out the Stage 3 process twice, to have another full attempt to complete it was something that he could authorise, he agreed it was within his personal gift to allow it although he had not done so previously, albeit he was of the understanding that the respondent had 'probably' allowed this before. He also confirmed that it would cause no great difficulty to allow a full second attempt at Stage 3 and it would not impact on the respondent's relationship with DWP or put its customers at risk because during Stage 3 a mentor is present during assessments.

(48) Mr Kettlewell also accepted under cross examination that a minimum of 7 assessments was only recommended and that less than 7 acceptable assessments could be accepted. His evidence was that he would have been prepared as at the 12 April meeting, to look at accepting 5 acceptable assessments from the claimant or even 4 if Ms Towner was happy that the reports had been prepared to the appropriate standard.

(49) It is not in dispute between the parties that there are important reasons why new entrants must prove that they are competent to complete assessments and prepare the necessary reports to an appropriate standard. The impact on the individuals being assessed is that they may otherwise receive benefits they are not entitled to or not receive benefits they should. Two of the key areas the claimant accepted she had difficulty with was in identifying *descriptors*; a descriptor as explained by the claimant, describes the level of functionality of an individual. If functionality is not assessed correctly there may be a direct impact on the benefits the individual may be deemed entitled to. Assessors must also identify any *risks* that the individuals being assessed pose either to themselves or other people.

Meeting

(50) In evidence in chief (during supplemental questions), the claimant clarified that her evidence is that she first had contact with Mr Kettlewell during a telephone call on 13 February 2019. Her evidence was supported by an email sent to a colleague the following day (p.287). The claimant asked for a meeting and her evidence which we accept is that one of the things she wanted to discuss was the OH report.

(51) The claimant's evidence is that this meeting took place on the second day of her orientation at the Centre on 26 March 2019, after she completed the training in London. The claimant was particularly concerned to raise the effect cleaning chemicals may have on her asthma. The claimant had stated in her witness statement that she did not raise with Mr Kettlewell at that point issues regarding her kidney condition however at the outset of her evidence in chief (during supplemental questions), her evidence was that she had since recalled that there had been a discussion about renal appointments. Her evidence is that at this meeting, she produced the OH report, an occupational asthma plan put together with a previous employer, and her personal asthma plan.

(52) Mr Kettlewell's evidence is that a meeting took place much earlier, prior to the claimant completing her training in London, two weeks prior to her starting the Stage 1 training in London. Mr Kettlewell however was vague about when this meeting took place and conceded that perhaps his recollection of when the meeting took place was incorrect. The grounds of resistance refer to the meeting being held in January 2019 and Mr Kettlewell accepted he must have personally given this date which was then included within the response however he accepted that the January date could not be correct, the OH report was not produced until February 2019. Mr Kettlewell provided various dates when taken to various documents and ultimately, he remained uncertain of when it took place. Mr Kettlewell's evidence is that he made no record or note of the meeting.

(53) We find on a balance of probabilities that the meeting took place on 25th March 2019. The claimant sent Mr Kettlewell a text on 21 March 2019 informing him about 2 hospital appointments (p.211) the following Tuesday (i.e. on 26th March 2019). Within this text the claimant refers to not having said before about the appointments and explaining face to face because she realises the OH reports did not explain her conditions. This would seem to indicate that either when they first spoke this was prior to the 21 March and she did not explain about her kidney condition despite the pending hospital

appointments, or the first face to face meeting was after 21 March 2019. Neither the claimant nor Mr Kettlewell allege that there was more than one face to face induction meeting where they discussed the OH report and what adjustments she may require.

(54) We find on a balance of probabilities that there was an initial telephone call on the 13 February 2019 as supported by the documentary evidence, and that there was then a meeting (following the text on the 21 March 2019) where there was discussion about the renal appointments which she was due to attend. Counsel for the claimant put it Mr Kettlewell that although the claimant recalled this as happening on her second day it was more likely to be the first day, given she was at the hospital on 26 March. Mr Kettlewell accepted that this meeting was more likely to have taken place on the 25th March and further he accepted in cross examination that by that date he was clear that the claimant had a serious kidney condition. We find that he had by 25 March 2019 a copy of the OH report referring to the need for regular medical appointments, possible admission in the future due to "*one of her conditions*", to the OH advisor's view that the claimant had a number of medical conditions which collectively and individually would fulfil the criteria for disability under the Equality Act and had been told that the claimant had renal medical appointments due to a kidney condition. We find that Mr Kettlewell personally had actual if not constructive knowledge that the claimant had the disability namely the kidney condition, by this date.

(55) Mr Kettlewell's evidence is that at the time he understood the reference in the OH report to possible hospital admissions in the future to be a reference to her asthma and musculoskeletal problems. He conceded however that the OH report was not clear and in cross examination he accepted that it had been incumbent on him as the claimant's line manager to seek clarity what it meant; *"I should have dug deeper"* however he accepts he did not do so.

(56) The claimant's evidence which we accept, is that Mr Kettlewell did not seek any clarity from her about what other conditions Dr Robinson was referring to in the OH report and Mr Kettlewell does not allege that he sought any further information from the claimant or indeed from OH.

(57) In relation to paragraph 4 of the report and the reference to susceptibility to fatigue, Mr Kettlewell accepted that the report references more than one medical condition in addition to musculoskeletal condition, and therefore as the only other condition expressly mentioned was asthma, he accepted that this paragraph suggests that the claimant had a further condition which the respondent was being advised to bear in mind. He also accepted that fatigue would be an issue potentially in respect of all the medical conditions the claimant had, including the kidney condition.

26 March hospital appointment

(58) The claimant's evidence is that she worked on the morning of the 26 March and that in the afternoon, she had three hospital appointments on 26 March and that she was told by the surgeon to prepare for the next stage of treatment which would include putting a fistula in her arm in preparation for dialysis and a discussion about a possible transplant.

(59) Within the bundle is a report from Mr Nathan, Surgical Consultant (p.215) dictated on 26 March 2019. It refers to the claimant's polycystic kidney disease, her strong family history of kidney disease and her decision to opt to have haemodialysis. It refers to her feeling reasonably well and arranging for a fistula in preparation for dialysis,

arrangements for a preoperative assessment and organising surgery for insertion of the fistula.

(60) There is a text message to Mr Kettlewell from the claimant on 26 March 2019 17:08 (p.213) informing him of the outcome of those appointments; "*I'm just leaving the hospital now! I've seen the surgeon and signed consent for fistula (I'll be called the pre-op and then all with 4 - 5 days' notice). I've seen the renal team - updated records in new it system and signed up for another research project for rare renal disease. Then I've spent some time with a dietician as I don't process food in the same way and it upsets my blood levels…"*

(61) The content of this message is consistent with Mr Kettlewell now knowing, from the discussion on the 25 March, about her condition and what the hospital appointments were for.

(62) The claimant's evidence in cross examination was that by this stage there were no problems in terms of the physical symptoms from the disability but there was in terms of "*thinking about the impact of what the future would hold*". She referred to the renal surgeon discussing with her the need for surgery for the fistula, the side effects and of having to give consent to the surgery for the fistula on that day. The claimant's blood had showed a deterioration in her condition. The claimant's evidence in cross examination was that she did not raise at this stage any difficulty with her health due to the disability or due to anxiety and stress related to the disability however, her evidence was that she was raising with Ms Towner that she was tired from this early stage. Mr Kettlewell's evidence was that he could not recall any conversation where the claimant referenced feeling fatigued. The claimant referred to speaking regularly not with Mr Kettlewell but with Ms Towner and mentioning feeling tired

(63) We accept the claimant's evidence that she had an open dialogue with Ms Towner which is evident from their exchange of text messages. Ms Towner did not give evidence on behalf of the respondent and in the absence of any rebuttal from Ms Towner we accept the claimant's evidence that she was telling Ms Towner from an early stage about feeling tired. We can that she first referred in text messages to feeling tired on 1 March 2019 (p.196) and in the context of her absence on 1 April (see below). However, the claimant does not allege that she informed Ms Towner that she believed it may be linked to her disability.

(64) In the report from Dr Nichols Speciality Doctor Nephrologist following the claimant's consultation with him on the 26th March 2019, he notes (p.217); "despite *numerous personal stresses at the moment, including a recent house move, a new job and unwell relatives Suzanne is still appearing to cope… I understand she is to be seen again by the transplant team next week and if they are happy they will list for transplantation.*" The claimant's evidence is that Dr Nichols did not ask her about her mental health during his consultation, the focus was on her physical symptoms.

Absences 1, 2 and 3 April

(65) On the 1 April 2019 the claimant sent a text message to Ms Towner. The claimant was absent due to feeling unwell with what she initially thought may be IBS but then considered may be a stomach bug due to something she had eaten, in which she reports dropping to sleep and unsure of the reason (p.219)

"*…But have been dropping to sleep frequently despite sleeping fairly well so perhaps not the IBS. For me… I'm ok. Normally I deal with things with limited emotions but* ***sometimes too much at once***". [our stress]

(66) The claimant accepted under cross examination that she never suggested at this time that her ill-health during these few days may be due to her disability.

(67) There is however we find, a clear indication in the email of the 1 April, that the claimant was having some difficulty coping emotionally.

(68) The claimant felt better on the 2 April however she had had diarrhoea and sent a text to Ms Towner on 2 April 2019 to explain that she was going to have 48 hours off work "after the episodes" (p.220). We find that on a balance of probabilities, that the episode of sickness was the reason she decided not to attend work for the next 48 hours and this was the reason for not attending on the 2 April 2019, although as it happened her husband also fell ill that day and required hospital admission.

(69) On 3 April there was a text message from the claimant to Ms Towner indicating that the claimant was planning to come in to the Centre at lunchtime to speak to her and Mr Kettlewell.

(70) There is a further text message to Ms Towner on 3 April at 17:06 when the Claimant refers to her husband being on his way to hospital (p.229).

(71) The claimant could not recall whether she went into work on 3 April at lunchtime for a meeting and then returned home to take her husband to the doctors afterwards, she could not recall clearly what happened on the 3 April 2019.

(72) Mr Kettlewell had made a made an entry on the HR system (p.247) that the Claimant had been absent 1.5 days due to gastrointestinal infection. The entry has a start date of 1 April 2019 and an end date of 2 April 2019. The 0.5 refers to the half a day's absence on 1 April. We accept the claimant's undisputed evidence that she left work at 11am on 1 April however Mr Kettlewell explained that the respondent's time recording system does not record hours but only half days or full days of absence. There is no entry for 3 April 2019. Given the text confirming that she intended to come into the office at lunchtime on 3 April and her undisputed evidence that she attended a GP appointment at 2pm with her husband that same day, and her vagueness about whether she attended a lunchtime meeting at the Centre or not, we find on a balance of probabilities that she did attend at lunchtime and had a meeting with Mr Kettlewell and Ms Towner however she could not have been in work for more than 1 or 2 hours because she went with her husband to see his GP at 2pm.

(73) Although the claimant accepts at the time she did not raise with the respondent any link between this period of illness on the 1 and 2 April and her disability, the claimant's undisputed evidence as set out in her impact statement is that due to her disability she is more prone to sickness absence due to a lowered immune system at the end stage of the kidney impairment and her evidence now is that she believed it this illness was linked to her disability.

(74) Mr Kettlewell conceded in cross examination that it was possible that the problem with her kidneys may have had a bearing on her stomach problems over those few days. He also accepted the reference by the claimant on 3 of April to being "*shattered"* should

have started 'alarm bells ringing' in the context of his knowledge about the seriousness of her kidney condition but he accepted that he did "*not join that up with the kidney condition at the time."*

(75) While there is no direct medical evidence on this specific incident of sickness on 1 and 2 April, the claimant's evidence in her impact statement about her lowered immune system and progressive and deteriorating nature of her condition, was not disputed. While the claimant did not identify the connection at the time with her disability, she was also at this time operating on the understanding that her condition was stable. It would only be a matter of a week or so later however, on 10 April 2019 when she would be listed for a kidney transplant.

(76) Given the evidence in her impact statement about the effects of her disability including on her immune system and the fact that this sickness occurred during a period when her health was still deteriorating and she was shortly thereafter put on the list for a kidney transplant, although there is no medical evidence dealing specifically with this specific episode of ill health on the 1 April and 2 April 2019, we find on a balance of probabilities, on the available evidence, that this period of ill health which included diarrhoea and fatigue (she complains of dropping to sleep frequently despite sleeping well) were the outcome, symptom or effect of her disability. The claimant was, we accept from her evidence supported by the text message to Ms Towner, not only suffering with stomach problems including diarrhoea but feeling fatigued. Given the reference to fatigue in the OH report, the respondent via Ms Towner, had knowledge of the fatigue the claimant was experiencing and reasonable enquires would have elicited that this was likely to be a symptom of her disability.

(77) The respondent knew of the claimant's disability and if it had carried out a reasonable enquiry with the claimant and discussed the nature and impact of her condition in more detail and/or gone back to OH for clarity in its report and advice on her condition, it would have acquired knowledge of the symptoms and effects of a serious kidney condition including a lowered immune system and susceptibility to illness and that this absence was likely to be linked to her disability.

(78) On the 3 April the claimant felt better but tired, in part because she had attended hospital with her husband the previous evening but came into the office at lunch time and left that afternoon not because of a reason connected with her disability but due to her husband's ill health.

(79) The claimant was not required to attend a return to work interview with Mr Kettlewell even though this is a requirement of the absence to work policy. Had the respondent followed its own policy, which is particularly important with an employee with such a serious underlying medical condition, that may have alerted Mr Kettlewell further to the need for OH advice and guidance at this stage. That opportunity was missed.

Stress and Anxiety: early stages of Stage 3

(80) The claimant's evidence in cross-examination was that at the time that Ian Denham was her mentor, stress and anxiety were not the concern, her evidence was that; *"… Concerns with health and renal came after the appointment on 4 April… at that point the impact of the implications of 26 March blood results was starting to have an impact on me*". Although she referred to the implications of the blood results on the 26 March starting to impact on by the next morning, she accepted that during the initial period of her training on the 26th March to the 29th March, she did not report any health concerns

or stress and anxiety related to her kidneys, only tiredness.

(81) We find on the evidence, that during the initial period of her training, from 25th March to Friday 29th March 2019, although experiencing fatigue, she was not experiencing any significant degree of stress and anxiety relating to her disability.

Hospital appointment 4 April 2019

(82) It is not in dispute that the claimant attended the hospital on 4 April, she had been mistaken as to the date of her appointment which was not actually until the 10 April.

(83) The undisputed evidence of the claimant is that she broke down sobbing at the hospital on that date and that the receptionist sent for a nurse and that it took her a while to pull herself together. She describes feeling stressed because of the implications of having surgery; "I *was starting on 4 April with the impact of everything*".

(84) The claimant referred to day by day more things impacting on her, including concerns about major things such as the risk of a brain aneurysm which was a heightened risk because her birth father had died from an aneurysm. Her evidence is also that she was becoming more tired, her thoughts were becoming confused and at times she was not thinking clearly and felt "*stressed all the time and trying to hold it together".* The claimant's evidence was that she felt "*on the verge from 10 April, initially the 4th but particularly from 10 April".*

(85) The claimant sent a text to Ms Towner on the 4 April 2019 informing her about the missed appointment. It is not in dispute that her absence from work on this day was connected with her disability. Ms Towner responds acknowledging the stress this must have caused her (p.232).

HR Advice – 5th April 2019

(86) Mr Kettlewell sought the advice of Mr Lancaster, from People Manager, the respondents internal HR function (p.233). There is a record of Mr Lancaster's notes of their discussion on 5 April 2019. The note refers to Mr Kettlewell having concerns about the claimant's performance at Stage 3 and that she was currently on course to fail at the defined exit stage and that she has until 9 April 2019 to pass the stage. It refers to her having many conditions that may be covered by the Equality Act and that an OH referral has advised the respondent to consider adjusting "absence triggers". It refers to the claimant not referring herself to ill-health as a reason for not achieving the required standards.

(87) Mr Lancaster does not according to the record, recommend that Mr Kettlewell explore further with the claimant or OH whether her health is impacting on her performance. We find that what is being in effect said in that report is that the onus is on the claimant to raise any issues and specifically advises Mr Kettlewell to adjourn the meeting if the claimant raises any mitigating factors rather than directly suggests that Mr Kettlewell ask the claimant about her condition and its affects. Mr Lancaster is not recommending that the respondent take any steps to understand her disability and consider what reasonable adjustments the claimant may require. Mr Kettlewell confirmed that he did not provide HR with a copy of the OH report and had no explanation for omitting to do so.

(88) Within his witness statement Mr Kettlewell refers to his conversation with Mr Lancaster where he *"confirmed"* that; "*the issues with Suzanne did not relate to absence or her disabilities but to her performance" (*para 30). This statement is definitive and yet although he was prepared to make this statement to HR, Mr Kettlewell had not at any stage been in touch with OH or the own claimant's doctor to understand her condition and its affects.

(89) There is no evidence that Mr Kettlewell had directly asked the claimant whether her disability was impacting in any way on her ability to carry out the assessments to an acceptable level within the timeframe provided and we do not find on a balance of probabilities that he did so during this period. Mr Lancaster in his note does not record that Mr Kettlewell had informed him that he had directly asked the claimant, rather it refers to the claimant not making reference herself to her health.

Mentor

(90) The first mentor that the claimant was allocated was Mr Denham. The claimant had concerns with Mr Denham as her mentor. She complains that she was marked in all the entries on the draft report while she was making notes during the assessment online, before she had completed the review of the assessment with the client in the room. Her undisputed evidence is that she discussed her concerns with Ms Towner and that Ms Towner agreed that the claimant should be marked at the end at the end of the assessment.

(91) Mr Denham's opinion was that the claimant's reports did not meet the required standard, mainly because the claimant did not capture enough detail, used the wrong descriptors and failed to identify signs of customers who were a potential risk to themselves and others. The claimant does not dispute that she was made aware that she had not done well in her assessments with Mr Denham.

(92) Mr Kettlewell's evidence in chief was that *on around* 4 April 2019, he and Ms Towner had a conversation with the claimant who felt that the training had not gone well due to her relationship with Mr Denham. Mr Kettlewell's evidence is that he, Ms Towner and the claimant put the issues down to a difference in learning styles. Mr Kettlewell's evidence is that he asked Ms Towner to "***repeat** the training"* and that at the meeting on or around 4 April he explained to the claimant why she need to "*repeat the Stage 3 training".*

(93) The claimant was uncertain about the dates of the discussions where concerns over her completing Stage 3 were raised and the respondent had failed to minute them. However, it was put to her in cross examination that at a meeting on the 5th April, she was told that she was being given more time to complete her assessments and would be working with Ms Towner. Although the claimant was uncertain of the date, this date would appear to be consistent with her evidence that she understood that the Stage 3 training would end on 9 April. The date of the Friday 5 April would also appear to be consistent with the review meeting taking place on 12 April 2019, the day after the expiry of 4 clear working days from the 5 April (i.e. 8, to 11 April) and ties in with the 5 April date when Mr Kettlewell received advice from Mr Lancaster about how to manage the situation.

(94) The claimant's evidence which we accept and was not disputed, is that the first full day she worked with Ms Towner was Monday, 8 April 2019, the next clear working day after the date we find the meeting took place on Friday 5 April. This would give the claimant

4 clear days to carry out further assessments; 8 to the 11 before the next meeting on the 12 April 2019.

(95) We find that Mr Kettlewell accepted at the time that the claimant had legitimate concerns about the impact of her relationship with Mr Denham on the training that she had provided. Mr Kettlewell does not allege that the issues she raised were without substance and we infer from his decision to replace her mentor, that he considered that this would assist.

(96) Mr Kettlewell's evidence was that he had been surprised by the claimant's performance during Stage 3. He accepted under cross examination that he felt that something else "*could be going on*" although at the time he thought it was a mentor issue accepting retrospectively that it could have been stress and anxiety due to her kidney condition. The evidence of Mr Kettlewell was that he did not feel that it was obvious at the time that the claimant was stressed but in his words, he could; "*make room for that now*".

(97) Mr Kettlewell in his evidence states that he felt the claimant; *"had the potential to be a good functional nurse assessor "*. It was because of that that he thought the best course of action would be to allow her to "*redo Stage 3".* He also states that he was aware of the claimant's health conditions and the personal pressure she was facing and wanted to be satisfied that he had given her every opportunity to succeed in the training (paragraph 26 w/s).

(98) In its defence the respondent alleges that; (para 23) *"… The Respondent allowed the Claimant to* ***attempt stage 3 training a second time*** *due to various health and personal problems she had been facing"* [our stress]

(99) Mr Kettlewell in his evidence in chief (para 40) gave evidence that; "*I felt that giving [the claimant] a second opportunity to complete the Stage 3 training would help her to* ***overcome any issues arising out of any hospital visits, personal issues and issues with Ian****…"* and (para 43): "*I clarified that I felt the extension to the Stage 3 training mitigated any disruption which might have* ***been caused by her illness****".*

(100) We find that Mr Kettlewell therefore considered at the time, that the claimant's performance had been impaired not only because of the issues with her mentor and personal issues, but because of her illness and absences. We find that he clearly considered, after his discussions with Ms Towner, that a material consideration, and something which the extension may help to mitigate, was her illness and hospital visits.

(101) The claimant's evidence which we accept, is that she did not realise she was being given another chance to retake the Stage 3 process in full again. She understood only that she was being given some extra days and we find that this is what happened. Despite the evidence in chief of Mr Kettlewell and the allegations in the respondent's defence that she had two attempts at Stage 3 and 16 days of training at Stage 3, this is not what she was given.

Hospital Appointment: 10 April 2019

(102) The claimant was then absent at a hospital appointment on 10 April. It is not in dispute that this was connected to her disability. This was a renal transplant appointment.

(103) Mr Kettlewell could not recall the date but believed it was around 29 March 2019 when the claimant informed him that she was being placed on the transplant register for a kidney condition and that she would receive a couple of hours' notice if she needed to attend Sheffield hospital for a transplant. It is not in dispute that he had discussed with the claimant relocating to an assessment centre in Sheffield to be closer to the Sheffield hospital but that was discounted because it would mean increased travel time from her home address.

(104) The claimant's evidence is that she attended a renal transplant appointment on 10 April, her condition had deteriorated and she consented to having a kidney transplant operation. She states that when she returned to the Centre that day she informed Mr Kettlewell and Mr Towner that she was having a kidney transplant. However, the claimant's evidence is that this conversation took place after her appointment on the 10 April. The report from Dr Nichols (p.217) refers to the claimant on the 26 March being informed that she is to be seen by the transplant team the following week, and that they will then consider whether to be her on the list for a transplant with a fistula being prepared ready for dialysis. The email of the 4 April refers to the claimant having attended the hospital that day when her appointment was the following week with the transplant team. We therefore find that the claimant's account is to be preferred and that it was not until 10 April that she consented to a transplant and therefore the discussion about being placed on the transplant register and that she may only receive a couple of hours' notice of surgery, took place we find, on the 10 April.

(105) In re-examination the claimant described what she alleges had been discussed with Mr Kettlewell on 10 April, she explained how the process of the kidney transplant would work and that she would need a brain scan. She explained about the need to be at hospital within the hour if she was called the transplant surgery. She refers to Mr Kettlewell being shocked that he did not know how to react but he said support will be put in place and that she will be able to drop everything to go to the hospital. We accept her account of events which was not disputed

(106) We accept the claimant's undisputed evidence which is also set out in appeal letter, that on 10 April she was told that she was to have a head scan before she was listed for surgery as there was an extremely high risk of an aneurysm with her condition which may need to be repaired before she had a transplant.

Meeting: 10 April 2019 – extension

(107) The claimant accepted in cross examination that there was a further meeting with Mr Towner and Mr Kettlewell where her progress with Stage 3 was discussed. The claimant recalled when asked by the tribunal about the point at which the extension of time was granted, that there were two meetings but could not recall the dates although she accepted she knew from the first meeting and definitely knew from the 10 April about an extension of time.

(108) There are no minutes of that second meeting however, the claimant accepted she spoke to Mr Kettlewell and Ms Towner after her hospital appointment on 10 April. We find on a balance of probabilities, that the change in mentor and extension of time was discussed at the 5 April meeting and on 10 April, there was a further discussion about what assessments were left to complete.

(109) Mr Kettlewell's evidence is that by the 10 April meeting, the claimant had produced 10 reports, 2 were of the acceptable standard, leaving her with 3 reports she needed to provide to an acceptable standard. Mr Kettlewell accepted that all that happened on the 12 April was the review meeting which therefore left the claimant with only the 10 and 11 April to provide those assessment reports.

(110) Within the grounds of resistance paragraph 30 (p.32) it states that; "*During the probationary review meeting, Mr Kettlewell highlighted to the claimant that she had three reports remaining as part of the Second Stage 3 training process and that* ***three A grades*** *would be required in order to pass the Second Stage 3 training". [our stress.]*

(111) Mr Kettlewell's evidence in chief is that he informed the claimant in or around 10 April 2019, that she had 3 reports left to submit as part of her Stage 3 training and that all of those reports had to be an A grade for her to pass (para 33 w/s).

(112) It was put to Mr Kettlewell during cross examination that the policy (p.91/58) does not require Stage 3 assessments to be graded, they simply need to reach the acceptable standard. It is only at Stage 4 that there is a requirement that they reach a certain grade. Document 2 provides that (p.58); "***Following*** *Stage 3 the trainee will require a consecutive number of good quality reports (minimum of 4 grades and 1B grade) at audit unsupervised cases (Stage 4) before a request for Approval is considered."* [*our stress].* It was therefore put to Mr Kettlewell that he was holding the claimant to a higher standard by requiring her to get A grades in her assessment.

(113) Under cross-examination Mr Kettlewell explained that this was a mistake although he did not explain in what respect, he said he did not have an explanation but that the claimant would have been held to only an acceptable or unacceptable standard. This however was not his evidence initially in cross examination and he had no explanation why, if this was the case, he had referred to A grades in his statement and why this was also stated in the defence to the claim. Mr Kettlewell's evidence was an A grade, means a *"perfect*" assessment and conceded in cross examination that A to C grading only applies at Stage 4.

(114) The claimant accepted in cross examination when it was put to her, that she was told she needed to get A grades in 3 assessments.

(115) Counsel for the respondent in his written submissions (para 20) confirmed that the respondent's case is that the claimant was told that "if *she attained an A grade in each*" she could still pass. We therefore accept on a balance or probabilities that this was the standard which Mr Kettlewell had decided to apply to the claimant.

(116) Mr Kettlewell's evidence is that all the final 3 reports were scored as unacceptable. When asked by the tribunal to confirm how many reports overall were acceptable, his evidence was that 2 were acceptable but he could not recall if both of those acceptable assessments were with Ms Towner as her mentor or one of them. His recollection was that the claimant had completed a total of 9 assessments, with 5 of those under the supervision of Ms Towner and that he considered the claimant needed to have 5 in total which were acceptable, although his evidence was that a minimum of 4 may have been enough. The claimants evidence is she carried out 9 assessments in total, 7 up to 10 April and 2 between the 10 and 12 April.

(117) The claimant's undisputed evidence is that she fell ill on the last 2 days of the assessment period but still attended the Centre. Her evidence is that she passed the assessment on the 11 April but failed the one on the 12 April.

(118) There is reference within the minuted meeting on 12 April 2019 to the claimant; "*struggling with achieving overall quality of reports despite crib sheet. When spoke to CSL Wednesday case was good. following two cases wrong descriptor choices*" (p.236)". In the absence of the assessments and the evidence of Ms Towner, the only other evidence (other than that of the claimant and Mr Kettlewell) about how many assessments were carried out, is this reference within the minutes of this meeting to the reports. The claimant did not contend that the minutes were not accurate. We find on a balance of probabilities that the claimant did complete 3 assessment reports from 10 April to the 12 April, one on Wednesday 10 April which was acceptable and a further two between 10 and 12 April which were not. According to the notes of the 12 April meeting, the next acceptable assessment (which we accept was on the 10 April) was followed by **2** unacceptable ones.

(119) The claimant accepted in cross examination that she was asked by Mr Kettlewell on 10 April if she needed any adjustments however she did not identify anything. Her evidence which we accept, and was not disputed, is that she had only just been informed that her health had deteriorated to the extent that the next steps were "numbing", she was not sure of what was needed other than informing them that she may need to leave immediately if she received a call for a transplant.

(120) Mr Kettlewell did not give the claimant reasonable time we find, after learning about the transplant situation, to consider what adjustments may be required. He did not seek advice from her doctor or OH and nor did Mr Kettlebell discuss with the claimant obvious adjustments such as more time to complete the assessments. Mr Kettlewell allowed her some more time however he did not engage, we find in any discussion with her about how much time she felt she may require. Mr Kettlewell did not explain in his evidence why he elected to allow her a further 4 days rather than the full 8 further days which he had erroneously alleged in his statement, he had given her.

(121) Mr Kettlewell accepted that for a person to learn they need a kidney transplant and dialysis would be shocking, life changing news and that he would personally have found it shocking. It was put to Mr Kettlewell that it must have been obvious to him that the claimant would be stressed and anxious about her condition and the surgery. Mr Kettlewell agreed although he stated, "*he did not pick that up from her at the time*" but accepted that it would be stressful news.

(122) Mr Kettlewell accepted that when he found out about the seriousness of the claimant 's condition and kidney transplant that he should have gone back to the OH report and the adjustments recommended in it and further, that the claimant should have been referred back to OH. However, none of those obvious steps were taken.

(123) With regards to the Stage 3 policy (p.91), Mr Kettlewell accepted that he had always followed a policy of requiring a minimum of 7 case studies but when taken to the Stage 3 mentor checklist which sets out guidance for Stage 3 mentors he accepted that this document refers to a minimum of 5 live cases which must be assessed by the trainee (p.202). Mr Kettlewell accepted that 7 cases are a recommendation but not a requirement and indeed this is set out in Document 2 (p.58).

12 April Meeting

(124) Prior to meeting with the claimant on 12 April Mr Kettlewell sought advice again from Mr Lancaster of HR and this is recorded in a note that discussion (p.239). That note records that Mr Kettlewell had extended Stage 3 for 2 days due to the Claimant's illness; "*she has every opportunity to have all 8 days of stage 3"* and refers to asking Mr Kettlewell to call during an adjournment to discuss "*any mitigation raised".* It is remarkable that there is no mention of the claimant awaiting a kidney transplant in that advice note.

(125) Nowhere within this advice is there any discussion about exploring with the claimant what further adjustments may be required, what the impact of her health condition has been or whether there should be further advice sought from OH or her treating consultant.

(126) The claimant had not been given a second opportunity to do a full Stage 3 retraining, and Mr Kettlewell accepted that to allege, as the respondents had done in its defence to the claim, that she had been allowed to redo Stage 3 and had been given 16 days, was a gross exaggeration.

(127) The respondent's response (paragraph 25) alleges that; "*the decision to allow the Claimant to* ***redo her stage 3 training*** *was taken by Mr Kettlewell at local level. Mr Kettlewell wanted to ensure that the Claimant 's failure to pass stage 3 was* ***not linked to a health*** *or due to poor standards of training*." [our stress]

(128) Mr Kettlewell accepted under cross examination that the respondent could have allowed the Claimant a full of the stage 3 training and that it would have caused no great difficulty to do so. He accepted that it would have had no impact on their contractual relationship with the DWP and that it would not have put any customers at risk to have done so.

(129) The claimant informed the respondent at this meeting that she felt that things had been better since she had been provided with the support from Ms Towner, she felt there had been an improvement but that her training had been "*disjointed*" due to hospital appointments. Mr Kettlewell does not specifically ask the claimant if there are any adjustments that she needs because of her health but asks; "*is there anything I need to consider when making this decision?"* (p.236).

(130) Mr Kettlewell also accepted that an adjustment that he could have made at the time was to reduce the number of assessments that the claimant needed to complete and that another adjustment that he could have made would have been to allow her more days in which to complete the assessments however he accepted that he did not give any consideration to other adjustments at the 12 April meeting.

(131) In cross examination the claimant agreed with the notes of the meeting and that at the time of the meeting she did not know what to say, she did not ask for any adjustments, she referred to knowing that her condition was impacting on her but she did know how, of feeling "numb" about what was happening and that it was difficult to describe the impact on her personally and work.

(132) The notes reflect a very brief meeting. Other than the Claimant referring to hospital appointments there is no express reference to her disability, no discussion about the

impact of that disability including possible fatigue and stress and anxiety n her performance and as Mr Kettlewell accepted, he did not consider whether he should have referred the matter back to OH for further advice.

(133) There is a short adjournment of only 15 minutes. During the adjournment Mr Kettlewell contacts Mr Lancaster again (p.240). The record of their discussion refers to 8 out of 9 of the claimant's cases completed were not of the required standard, however that was not correct, she had completed 2 to the required standard. Mr Lancaster also refers to Mr Kettlewell having acknowledged her illness but that the extension of time mitigated it. The extension of time however covered a period when the claimant was coming to terms with being on the transplant list and there is no mention in this note of the developments in her condition and the need for a kidney transplant.

(134) The Claimant following the adjournment states; "*realise a lot going on, has not been dealt with"* (p.238). Mr Kettlewell did not seek any clarity from the claimant regarding this statement. He did not ask her what she was saying had not been dealt with.

(135) Mr Kettlewell then informed the claimant that 2 out of the assessment she completed were acceptable and she would not be signed off Stage 3. The claimant was informed that her employment was being terminated.

(136) We find that the absence on the 1 and 2 April were on balance of probabilities linked to her disability, which would mean that the total days of Stage 3 training were 9 days. However, even if those dates of 1 and 2 April are not excluded as disability related periods of illness and are counted as training days, that would still equate to a total of only 11 days of training during the period 25 March to 11 April 2019 (deducting the hospital attendances on 26 March, 4 and 10 April). This is only 3 more days more than the usual 8 training days. The claimant certainly did not therefore have the benefit of "*two goes*" at the Stage 3 training and 16 days of training.

(137) Further in terms of the second attempt at the training with the support of Ms Towner as her mentor, due to the hospital attendance on the 10th April, she did not have 4 clear extra days, she had 3 days during a period when we find she was under considerable stress and anxiety (8,9,11 April).

(138) When asked by the tribunal how much more time the claimant felt she would have required, her evidence was that she did not know. That question we find had never been asked by the respondent and no advice had been sought from OH or her treating medical practitioners.

(139) When it was put to Mr Kettlewell in cross examination, he accepted that the respondent did not need to dismiss the claimant when it did in order to comply with its duties to DWP or to its customers.

Dismissal

(140) The claimant was dismissed because she did not meet the performance standards required to pass Stage 3 of the training and specifically she had not submitted the required number of acceptable reports. Mr Kettlewell confirmed that 4 acceptable reports may have been sufficient, she had produced 2 but the last 2 were not acceptable.

(141) The letter of termination (p.241) confirmed the reason for dismissal was because the claimant had not been able to reach the "*minimum standards required*".

(142) The claimant's performance during the Stage 3 training, we find on a balance of probabilities, was adversely affected by her health issues during this period and by the interruption caused by the absences and hospital appointments which the claimant complained made the training process 'disjointed'. Even discounting the absence on the 1 and 2 April, the hospital attendances, the fatigue and the stress and anxiety we find on a balance of probabilities, impacted adversely and to a substantial extent on her performance during the Stage 3 training process. The respondent by the date of the review meeting on the 12 April 2019, already had actual or constructive knowledge that the claimant was likely to be placed at a substantial disadvantage by the PCPs in terms of the impact of her disability related; health, absence and hospital appointments on her performance. Hence the respondent had made some adjustments, but we find that these were not sufficient to remove the disadvantage and as Mr Kettlewell conceded, he could have allowed her more time, and the respondent did not have to dismiss when it did.

Appeal

(143) The Claimant submitted a letter of appeal to David Quin Area Manager for Nottingham. It is not in dispute that the email address she sent the letter to was incorrect. Mr Kettlewell's evidence was that he had checked for the purposes of these proceedings, with Mr Quin who had told him that he had not received the email. We find on the balance of probabilities that Mr Quin had not been received the email. However, the undisputed evidence of the claimant is that she also posted the letter. The letter itself refers to it also being sent by post. Mr Kettlewell could provide no explanation and confirmed that he had not checked with Mr Quinn whether he had received the letter by post. Mr Kettlewell accepted that there is unlikely to be many people within the respondent organisation with that surname. We find on a balance of probabilities that it had been received by post but not actioned. However, the claimant raises no claim with regards to the fact the appeal was not dealt and there was no application to amend to include such a complaint. It is however concerning particularly for an organisation involved with the rights of disabled people, that the appeal was not even acknowledged let alone investigated.

(144) The appeal letter states that at the feedback meeting the claimant had raised that the Stage 3 process had been 'disjointed' and every time she entered the assessment centre she felt she was starting from the beginning and she felt overwhelmed with everything. The letter refers to problems with her mentor and various personal issues also having an impact including her husband's health and her father's but she clearly states that she recognises she had not been working at her best and referenced in that regard her "*disabilities, the impact physically and mentally and psychologically of the past 10 days of training*",

Respondent's submissions

(145) The respondent submitted written reasons and his oral submissions spoke to those submissions and I set out those submissions in summary here.

(146) It is submitted that the overwhelming and decisive basis for the claimant's poor performance is set out in the claimant's letter of appeal and it is asserted that this is her

relationship with Mr Denham, her father and husband's ill health and unrelated sickness absences.

(147) Counsel refers to the claimant's evidence to the tribunal that the stress of the hospital visits weighed heavily on her *from her visit on 4 April 2019* however, it is asserted that by that time the claimant had already failed a significant number of her assessments, including failing to include relevant indicators. It is submitted that the claimant's kidney condition had little if any bearing on the performance in that; the claimant accepted that as of 26 March she had no problematic symptoms and a hospital report records that she felt "reasonably well and working" and that she was still appearing to cope. The claimant did not raise that her kidney condition had a bearing on her performance. To the extent that the claim was disadvantaged by hospital visits, this was offset by the respondent allowing the claimant additional time in which to take a Stage 3 assessment.

Section 20-22 Reasonable adjustments claim

(148) Counsel referred to **Jennings v Barts and the London NHS trust [2011] All ER (D)73** where the EAT held that an employer will be taken to have the requisite knowledge provided it is aware of the impairments and its consequences.

(149) Reference was made to **Tarbuck v Sainsbury's supermarkets Ltd [2006] IRLR 664;** the duty to make reasonable adjustments does not include a duty to carry out consultation or risk assessment.

(150) It is submitted that it cannot be a reasonable adjustment to further extend the Stage 3 training in these circumstances and counsel referred to 7 reasons for this;

i. The hospital visits are the only absences which relate to her disability and those dates did not count as Centre days relevant to the Stage 3 assessment
ii. The Stage 3 training was extended from 8 to 10 days or 15 days if the hospital visits and the absences are included
iii. The claimant failed 8 out of 9 assessments taken which is a considerable shortfall
iv. This included failing case studies between 25 March 2019 and 4 April 2019. 4 April being the date the claimant first cites stress arising out of her kidney condition and thus this suggests the reason the claimant was failing was not due to her disability.
v. The claimant showed no signs of improvement at the date of dismissal even with an extended period, change of trainer and the benefit of a crib sheet designed for her
vi. It is highly unlikely further extension could have made any difference and no change in performance was foreseeable. Claimant in evidence that she was not sure "how long I would have needed". An infinite period cannot be reasonable.
vii. The claimant's failures were substantial and serious failures because they missed indicators and failed to identify risk factors.

Section 15: Discrimination arising from

(151) Counsel referred to **Basildon and Thurrock NHS foundation Trust v Weerasinghe [2016] ICR 305**: and **City of York Council v Grosset [2018] EWCA Civ 1105**(dealt with below)*"*

(152) Counsel submits that there is insufficient evidence to show 1) The claimant's poor performance in the Stage 3 assessment arose in consequence of her ill health

stress/anxiety and 2) it is submitted that sickness absences are not connected to her condition at all for the following six reasons (summarised)*;*

i. Claimant's condition was in her words stable at the end of March 2019 and hospital reports recorded that she was reasonably well and working. On the claimant's evidence under cross-examination over stress and anxiety first manifested in April 2019. By this point the claimant already failed all the case studies suggesting something else was the play.

ii. In her appeal letter the claimant explains difficulties with her first mentor, personal issues and unrelated sickness absences.

iii. What the claimant said the time was the main reason for performance was her relationship with Mr Denham.

iv. The absences were completely unrelated to the kidney condition; 1) 1st April 2019 was due to a bug and the claimant attributed this to something she had eaten) 2) 2nd April 2019 counsel alleges was caused entirely by her husband being taken ill 3) the half day on 3 April 2019 was taken to attend her husband's GP and then hospital

v. There is no evidence to support a finding that the bug which caused the claimant to be absent on 1 April 2019 was anyway caused by a dip in the claimant's immune system which was first raised in the claimant's pleading.

vi. There are multiple factors, unrelated to the disability and therefore is not possible to attribute the disability as a causal factor connected to a performance; ***Pnaiser v NHS England & Anor UKEAT/0137/15/LA; City of York Council v Grosset [2018] EWCA Civ 1105****.*

Justification

(153) The respondent contends that if there has been discrimination pursuant to section 15 the termination was a proportionate means of achieving a legitimate aim. The respondent contends that the respondent's legitimate aim was to; meet its contractual obligations to the DWF and service duty of care to the customers which includes;

a) Ensuring that people are entitled to benefits receive them

b) Ensuring individuals are not put at risk of harm

c) Delivering the service in accordance with its contractual obligations to the DWP, which will given the nature of the entitlement being assessed, means delivering the service in a non-discriminatory manner.

(154) Counsel argues that the legitimate aim in this case is unusual because it is itself an aim to serve fundamental rights and equality. He argues that the right to disability benefits equates to a right to property as defined in the ECHR, Article 1, Protocol 1: **Belane Nagy v Hungary ECHR (application no.53080/13).**

(155) Counsel also refers to the United Kingdom have been committed to the UN Convention on the Rights of Persons with Disabilities which it signed on 30 March 2007 and ratified on 8 June 2009 and therefore recognises the *entitlement to management of disability benefits as a fundamental right.*

(156) It is submitted that because the legitimate aim itself serves fundamental rights and equality it is not necessary or desirable to go on to consider proportionality: **Ladele v London Borough of Islington [2009] EWCA Civ 1357.**

(157) In any event, counsel argues the measure requiring suitably qualified and trained disability benefits assessors is clearly a proportionate means of achieving the legitimate aim; no lesser measure has been suggested and would have sufficed, alternative means were explored and tried and tested and this included extending the time, the claimant thought she was improving and her belief in her own improvement was itself a reason for the respondent to consider that they were out of options because she did not recognise the task before her, the respondent followed a process which included meetings and discussions and guidance.

(158) It is submitted that if the tribunal considers proportionality can be assessed notwithstanding the nature of the legitimate aim, failures in the process will be heavily outweighed by the fact that the aim sort to provide fundamental rights: **Eweida and Others v United Kingdom [2013] IRLR 231.**

Claimant's submissions

(159) Counsel for the claimant made oral submissions and in summary they were as follows;

(160) With respect to knowledge Mr Kettlewell conceded it had knowledge of the disability from 29 March however counsel argues that on the strength of concessions during cross examination the respondent had actual knowledge as at 26 March 2019, the start of the material period.

(161) It is argued that the respondent had constructive knowledge long before and counsel refers to the equal opportunities form which was completed by the claimant and indicated that there was another condition and that is no answer for the respondent that Mr Kettlewell personally did not receive it.

(162) Counsel refers however to the OH report and that on a careful reading of it, is clear there is another disability beyond asthma and musculoskeletal. The claimant informed Dr Roberts of her kidney condition although Dr Roberts did not did not include it within the report. Mr Kettlewell accepted he did not make enquiries of the OH report and there are no notes of the meeting that the claimant had with occupational health.

(163) Counsel accepts that the appeal went to the wrong email address however the letter also refers to been sent by post and that Mr Quinn remains in the business.

Section 15: discrimination arising from.

(164) Counsel submits the respondent dismissed the claimant because of absence which had led to the Stage 3 training being disjointed, and illness, stress and anxiety. There need only be a more than trivial reason.

(165) Counsel referred to absences unarguably relating to hospital visits on 26 March, 4 and 10 of April which Mr Kettlewell accepted, were connected to a disability.

(166) It is argued that the respondent has continually failed to stand back and ask how the news of a kidney transplant operation would have impacted on the claimant in terms of stress.

(167) With respect to the absences in the 1, 2 and 3 of April counsel refers to the claimant's evidence that her kidney condition impaired her immune system. The respondent argues there is no medical evidence to link this period of absence with her kidney

condition which is correct however counsel submits that it is highly likely her immune system was impaired although it does not he accepts, inextricably follow that the absences on the 1, 2 or 3 of April are connected.

Legitimate aim

(168) Counsel accepts that legitimate aim is a relatively low threshold however he does not accept that the legitimate aim proposed by counsel for the respondent is a fair characterisation of the respondent's pleading in that there is no reference to the legitimate aim being to serve fundamental rights and equality and to disability benefits equating to a right to property within the pleaded case.

(169) On this point counsel for the respondent argued that this was not a pleading point it was a legal component of what is already pleaded. There was no application to amend required.

Proportionate Means

(170) It is argued on behalf of the claimant that the tribunal cannot conceivably find that it was proportionate for the respondent to take the action it did. If the claimant stayed on Stage 3 for longer it would have created no risk.

Section 20 & 21: Reasonable adjustments

(171) It is argued that the respondent has expressly accepted that the PCPs were applied to the claimant.

(172) There was an expectation that the Stage 3 training would be completed within 8 days, and those without the claimant's disability would be less likely to experience the stress that the claimant was subjected to during the period of training and thus more non-disabled people will be able to complete the training within that time.

(173) The regards to knowledge; counsel submits that the respondent accepted that it was aware that she would require a kidney transplant and it was evident what that would involve. The OH report advised about fatigue and it was clear from the way the report is worded this did not relate to the other conditions that have been referred to in the report.

(174) At the hearing on 12 April 2019 where she was dismissed, counsel refers to the fact that the claimant referred to there been a "lot going on, has not been dealt with" and one of those things was the disability.

(175) In terms of the adjustments; counsel referred to Mr Kettlewell accepting 7 acceptable reports was standard practice and when referring to HR for advice on 5 April, a copy of the OH report recommending adjusting performance targets was not provided. Further, Mr Kettlewell held the claimant to a higher standard by requiring her assessments to be at grade A standard when that is not actually required.

(176) Counsel argues that it would have been reasonable to allow the claimant a full further Stage 3 period of training, uninterrupted and allow her to provide five assessments at an acceptable standard. The disability must have played a part in her difficulties she experienced with completing the assessment and that he argues is all that the claimant is required to establish.

(177) The tribunal is invited to find that the respondent must have received the letter. There is no specific allegation regarding the failure to deal with the appeal however the respondent raises the content of the appeal letter as evidence of a lack of causal connection between the disability and the problems with performance however the claimant's counsel argues, it makes clear within that appeal letter that she is raising her disability as one of the factors which meant she did not pass the training.

(178) The tribunal raised with counsel for the claimant whether he required further time to consider the arguments raised by respondent's counsel as to legitimate aim in relation to the arguments that proportionate means does not need to be considered, he indicated that he would however this was vehemently opposed by counsel for the respondent who argued that that would wrong be in law to allow the claimant a further opportunity to make submissions and that this is not a new issue but a consequence of the legitimate aim as pleaded. The tribunal informed the parties that it would consider the matter further and whether it felt further submissions on this point would assist it. Having considered the legal basis for this submission, the tribunal did not consider further submissions were required.

Legal Principles

Section 15: something arising from disability

(179) The starting point is the statutory definition itself which provides as follows;

(1) A person (A) discriminates against a disabled person (B) if-
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

(180) Section 15 does not require the disabled person to show that her treatment was less favourable than that experienced by a comparator.

(181) The Explanatory Notes to the EqA provide that the aim of this section is to establish 'an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment' (para 70).

(182) Section 15 (2) requires that the putative discriminator has the requisite knowledge of the disability.

Unfavourable Treatment

(183) The Equality and Human Rights Commission's (EHRC) Code of Practice on Employment provides that unfavourable treatment means that the disabled person 'must have been put at a disadvantage' (see para 5.7). It goes on to provide at para 5.7 that often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable and gives the example of a person dismissed from their employment.

(184) The EHRC Employment Code: It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it'

Because of something arising in consequence of disability

(185) There must be something that led to the unfavourable treatment and this 'something' must have a *connection* to the claimant's disability.

(186) The EHRC Employment Code states that the consequences of a disability 'include anything which is the *result, effect or outcome* of a disabled person's disability' (para 5.9).

(187) ***T-Systems Ltd v Lewis EAT 0042/15***:'something arising in consequence of the disability' should be given its ordinary and natural meaning.

(188) In ***Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT***, Mr Justice Langstaff, the then President of the EAT; there is a need to identify two separate causative steps. The first is that the disability had the consequence of 'something'; the second is that the claimant was treated unfavourably because of that 'something' and it it does not matter in which order the tribunal approaches these two steps.

(189) In ***Pnaiser v NHS England and anor 2016 IRLR 170, EAT***, Mrs Justice Simler considered the authorities, and summarised the proper approach to establishing causation which we have considered and applied in this case..

(190) ***Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT.***A section 15 claim could succeed where the disability had; "*a significant influence on the unfavourable treatment, or a cause which was not the main or the sole cause..*".

(191) In ***Charlesworth v Dransfields Engineering Services Ltd EAT 0197/16*** Mrs Justice Simler, President of the EAT observed that while the words 'arising in consequence of' in a section 15 claim may give some scope for a wider causal connection than the words 'because of' in the context of a direct discrimination complaint, the difference, if any, will in most cases be small. She rejected the claimant's argument that a connection less than an operative cause or influence is sufficient to satisfy the causation test. A *'significant' influence is required, not a mere influence.*

Employer's knowledge of causal link.

(192) In ***City of York Council v Grosset 2018 ICR 1492, CA***, Lord Justice Sales, giving the leading judgment, noted that the question of whether the 'something' for section 15 purposes arises in consequence of the employee's disability is an objective matter. In Sales LJ's view, it is not possible to read into section 15 a further requirement that the employer must have been aware of the link when choosing to subject the employee to the unfavourable treatment in question.

(193) In ***Pnaiser v NHS England and anor 2016 IRLR 170, EAT*:** The causal link between the something that causes unfavourable treatment and the disability may include more than one link and it will be a question of fact to be 'robustly assessed in each case whether something can properly be said to arise in consequence of disability'.

(194) ***Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT***: "*The tribunal had failed to ask itself the critical question of whether, on the objective facts, the appellant's absence or her refusal to return had arisen in "consequence of" her disability. Instead, it had applied a causation test that was too strict. It described the critical question as whether the appellant's refusal to return to her previous role was "because of her disability or because of some other reason". However, that was not a binary question: both reasons might be in play"*

(195) **ECHR Code:** As the OH adviser is acting as the employer's agent, it is not a defence for the employer to claim that they did not know about the worker's disability. This is because the information gained by the adviser on the employer's behalf is attributed to the employer.

Burden of proof.

(196) Section 136 EqA provides as follows

(2) If there are facts from which the court could decide, in the absence of any other explanation*, that a person (A) contravene the provisions concerned, the court hold told the contravention occurred.*

(3) But subsection 2 does not apply if A shows that A did not contravene the provision.

(197) ***Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 1005 ICR 931, CA***. The tribunal should adopt a two-stage approach; the first stage requires a claim to prove facts from which inferences could be drawn that the respondent treated the claimant less favourably on the protected ground assuming no adequate explanation for the treatment. When the burden of proof has shifted onto the respondent it is for the respondent to provide an adequate explanation for the treatment.

(198) If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either: that the reason or reasons for the unfavourable treatment was not in fact the *'something'* that is relied upon as arising in consequence of the claimant's disability, or that the treatment, was justified as a proportionate means of achieving a legitimate aim.

Justification

(199) An allegation of section 15 discrimination arising from disability will only succeed if the employer is unable to show that the unfavourable treatment to which the claimant has been subjected is a proportionate means of achieving a legitimate aim.

Objective justification

(200) An employer is a defence to treatment found to be discriminatory under section 15 if the employer can show that the treatment was a proportionate means of achieving a legitimate aim; section 15 (1) (b).

(201) The EHRC Employment Code sets out guidance on objective justification; the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration

Legitimate aim

(202) **Pulham v Barking and Dagenham London Borough Council [2010] IRLR 184:** it was open to an employer in principle to justify the incorporation of an element of pay protection into the adjustments necessary to conform to a new law, notwithstanding that it would involve a degree of continuing discrimination.

(203) **Cherfi v G4S Security Services Ltd [2011] EqLR 825:** case of indirect discrimination where it was held the treatment was justified where penalties could be imposed under the respondent's contract with the client.

(204) The ECHR Employment Code: the health, welfare and safety of individuals may qualify as a legitimate aim provided that risks are clearly specified and supported by evidence (4.28).

Proportionality

(205) The ECHR Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (para 4.31).

(206) The EAT in ***Hensman v Ministry of Defence UKEAT/0067/14/DM*, *[2014] EqLR 670*** applied the justification test as described **in *Hardy and Hansons Plc v Lax [2005] ICR 1565, CA*** and Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

(207) ***Department for Work and Pensions v Boyers EAT 0282/19*.** The EAT held that in the tribunal's consideration of proportionality, it had impermissibly focused on the process which led the employer to dismiss, rather than engaging in an objective assessment, balancing the needs of the employer, as represented by the legitimate aims pursued, against the discriminatory effect of the decision to dismiss.

(208) A failure to consider whether a lesser measure could have achieved the employer's legitimate aim may mean that the tribunal fails to take a relevant factor into account in the proportionality exercise : ***Ali v Torrosian and ors (t/a Bedford Hill Family Practice) EAT 0029/18*.**

(209) In ***Bolton St Catherine's Academy v O'Brien EAT 0051/15*** His Honour Judge Serota QC held that there is no rule that justification in the context of a section 15 claim as to be limited to what was consciously and contemporaneously taken into account in the decision-making process.

Failure to make reasonable adjustments in context of section 15 claim.

(210) The EHRC Employment Code states: 'If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified' — para 5.21.

(211) ***Dominique v Toll Global Forwarding Ltd EAT 0308/13*** The EAT commented that it was difficult to envisage how a disadvantage that could have been prevented by a reasonable adjustment that had not been made could, in reality, be justified.

Exception?

(212) The respondent asserts that its legitimate aim was one which seeks to serve fundamental rights and equality and thus it is not necessary or desirable to consider proportionality at all and relies on **Ladele v London Borough of Islington [2009] EWCA Civ 1357.**

(213) The respondent asserts that the aim of meeting its contractual obligations to DWP and its duty of care to customers, involves assessing entitlement to disability benefit and that right is a right to property which is a fundamental right thus the aim of protecting those rights does not engage a consideration of proportionality.

(214) The tribunal were referred briefly to the case of **Belane Nagy v Hungary ECHR (application no. 53080/13)** in its written submissions but without any analysis of how its applied to this case **.** The tribunal notes however that this was a case before the ECHR where the applicant was granted a disability pension, which was withdrawn after her degree of disability was re-assessed at a lower level using a different methodology. The Court endorsed the Constitutional Court's view that allowances acquired by *compulsory contributions* to the social security scheme could partly be seen as *"purchased rights*". The disability pension/allowance was thus an assertable right to a welfare benefit recognised under the domestic law to which Article 1 of Protocol No. 1 was applicable: "*That **recognised legitimate expectation** and the proprietary interests generated by the legislation of a Contracting State in force at the time **of becoming eligible** could not be considered extinguished by the fact that, under a new methodology, the applicant's disability had been significantly scored down without any material change in her condition*".

(215) Mr Welsh also referred in support of his submission that the legitimate aim involved fundamental rights and equality, to the UN Convention on the Rights of Person with Disabilities (CRPD). The CRPD is an international human rights treaty adopted in 2006 which the UK signed in 2007 by which it agreed to protected and promote the human rights of disabled people.

(216) Although counsel did not direct the tribunal to any particular part of the CRPD and nor did counsel make submissions on the legal status of the CRPD, it is the case that the Convention is not legally binding in domestic law but is given effect through the

existing and developing legislation, policies and programmes that deliver the Government's vision of equality such as the Equality Act 2010. Of itself the CRPD does not create fundamental rights. The CRPD includes a number of Articles.

(217) The tribunal notes that Article 28 does deal with adequate standards of living and social protection. Article 28 refers to the States Parties recognising the rights of persons with disabilities to social protection and to the enjoyment of that right without discrimination and Article 28 (2) (c) to refers to assistance from the state with disability related expenses and financial assistance.

(218) The tribunal also notes that the CRPD at Article 27 equally recognises the right of persons with disabilities to work on an equal basis with others, and the prohibition to discrimination on matters including continuance of employment under Article 27 (1) (a).

(219) The CRPD does not of itself however give rise to any fundamental rights to disability benefits or otherwise to equal treatment.

(220) The Ladele case counsel referred to is one of a number of indirect religious discrimination cases which have considered the conflict that arises between different protected rights.

(221) The leading case is ***Ladele v London Borough of Islington (Liberty intervening) 2010 ICR 532, CA*****,** which was later the subject of an application to the European Court of Human Rights (ECtHR). The claimant was a registrar, threatened with dismissal when she refused to conduct civil partnership services because of her Christian belief that same-sex unions were contrary to God's law. The Court of Appeal held that the Council did not indirectly discriminate by insisting that all registrars must carry out marriages and civil partnerships.

(222) The Court of Appeal held that there was no doubt but that the employer's policy decision to designate all their registrars' civil partnership registrars, and then to require all registrars to perform civil partnerships put a person such as Ms Ladele, who believed that civil partnerships were contrary to the will of God, "at a disadvantage when compared with other persons".

(223) The Court of Appeal accepted that the EAT had correctly identified the legitimate aim was to provide a service which was not merely one which was effective in terms of practicality and efficiency, but was also one which complied with their overarching policy of being "an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others".

(224) It was argued for Ms Ladele that the EAT was nonetheless wrong to overturn the ET's conclusion that the requirement that Ms Ladele perform civil partnership functions,

when she did not wish to do so for *bona fide* religious reasons, was a disproportionate means of achieving that aim.

(225) The then Master of the Rolls Lord Justice Dyson delivered judgement;

*"49. …as the EAT said in paragraph 111 of Elias J's judgment, "[o]nce it is accepted that that the aim of providing the service on a non-discriminatory basis was legitimate – and in truth it was bound to be – then … it must follow that [Islington] were entitled to require all registrars to perform the full range of services." As the EAT went on to point out, permitting Ms Ladele to refuse to perform civil partnerships "**would necessarily undermine the council's clear commitment to"** what the EAT described as "their non-discriminatory objectives which [they] thought it important to espouse both to their staff and to the wider community".[our stress]*

51. Mr Dingemans argues that is not good enough, as, if Islington's aim was only achievable by disproportionate means, then it should not be justifiable, as "[t]o conclude otherwise would be to licence disproportionality" – per Maurice Kay LJ in GMB v Allen [2008] EWCA Civ 810, [2008] ICR 1407 , paragraph 33. ***Accordingly, it is said, proportionality of means still ought to have been considered. In a case such as the present, it seems to me that argument might well be characterised as invoking the tail to wag the dog:*** *the aim of the Dignity for All policy was of general, indeed overarching, policy significance to Islington, and it also had fundamental human rights, equality and diversity implications, whereas the effect on Ms Ladele of implementing the policy did not impinge on her religious beliefs: she remained free to hold those beliefs, and free to worship as she wished.*

52. … Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; ***and Islington's requirement in no way prevented her from worshipping as she wished*** *[our stress]*

(226) In both Ladele and ***McFarlane v Relate Avon Ltd 2010 ICR 507, EAT*** there existed alternative ways of providing a full range of services to members of the public while at the same time accommodating the religious views of the claimants. However, the Court of Appeal and the EAT refused to engage in a balancing exercise between the competing rights of different protected groups.

(227) The EAT's view in ***McFarlane*** was that questions concerning the practicability of accommodating the claimant's beliefs were irrelevant. The employment tribunal had reasoned that the key question was whether the employer could legitimately refuse to accommodate views that contradicted its fundamental principles. In this situation, detailed evaluations of the possible alternatives open to the employer were out of place: the question was whether the employer was entitled to treat the issue **as one of principle**, in which case compromise was inappropriate. [our stress]

(228) This suggests that employers are not required to accommodate an employee's religious beliefs where they conflict with aims that are fundamental to the ethos of the organisation ie it is one of principle where compromise is not appropriate. If that is correct, it appears to operate as an exception to the general rule that considering ways of avoiding or mitigating the discriminatory impact of the relevant PCP on the claimant is relevant to the issue of proportionality.

(229) ***Eweida British Airways Plc [2010] EWCA Civ 80*, *[2010] IRLR 322*, *[2010] ICR 890***): The EAT and the Court of Appeal also dismissed her claims and when considering the proportionality of the steps taken by BA to enforce its uniform code, agreed that the aim of the code was legitimate, namely to communicate a certain image of the company and to promote recognition of its brand and staff.

(230) Claims including those of Ms Eweida and Ms Ladele and McFarlane were considered by the ECHR under, amongst other things, Article 9, which protects freedom of religion, and/or Article 14. The ECHR upheld Ms Eweida's complaint only. It held that given the importance in a democratic society of freedom of religion, the ECHR considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate. With regard to Ms Eweida, the ECHD determined that the UK had failed sufficiently to protect her right to manifest her religion in breach of Article 9:

"…Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrated that the earlier prohibition was not of crucial ***importance. Therefore, in circumstances where there was no evidence of any real encroachment on the interests of others, the domestic authorities had failed sufficiently to protect her right to manifest her religion****, in breach of the positive obligation under Article 9.".*

Reasonable Adjustments claims: section 20/21

(231) The starting point is the relevant statutory provisions and section 20 sets out the duty to make adjustments. We are concerned in this case concerned only with the application of the provision, criterion or practice under section 20 (3). Provision provides as follows;

"(1) Where this act imposes a duty to make reasonable adjustments on the person, this section, section 21 and 22 and the applicable Schedule apply; of those purposes, person on whom the duties imposed is referred to as A.

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion on or practice of A's puts a disabled person at a substantial disadvantage in relation to 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.

Section 21 deals with the failure to comply;

"*(1) A failure to comply with the first, second or third requirement is a failure to comply with the 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."

Provision, Criterion or Practice (PCP)

(232) The EHRC Employment Code states that the term should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.

Substantial disadvantage

(233) Section 212(1) EqA states that 'substantial' means 'more than minor or trivial.

(234) ***Environment Agency v Rowan 2008 ICR 218, EAT*** :tribunal must consider the nature and extent of the disadvantage in order to ascertain whether the duty applies and what adjustments would be reasonable.

(235) The EHRC Employment Code provides that; "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular [PCP] or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly — and unlike direct or indirect discrimination — under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's" — para 6.16.

(236) ***Sheikholeslami v University of Edinburgh 2018 /IRLR 1090 EAT***; "*52. …It was not necessary for the Claimant to satisfy the Tribunal that someone who did not have a disability but whose circumstances were otherwise the same as hers would have been treated differently since a like-for-like comparison is not required in a reasonable adjustments claim… if the PCP bites more harshly on the disabled employee, putting that employee at a substantial disadvantage compared to the non-disabled, that is sufficient".*

Employer's Knowledge

(237) Schedule 8 Part 3 section 20 EqA;

(1) "A is not subject to a duty to make reasonable adjustments if a does not know, could not reasonably be expected to know-

*(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and **is likely** to be placed at the disadvantage referred to in the first, second or third requirement"*

(238) The employer will only come under the duty to make reasonable adjustments if it knows not just that the relevant person is disabled but also that his or her disability is *likely* to put him or her at a substantial disadvantage in comparison with non-disabled persons. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge::***Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT and Wilcox v Birmingham CAB Services Ltd EAT 0293/10***

(239) The EHRC Employment Code provides that employers must 'do all they can reasonably be expected to do**'** to find out whether a Claimant has a disability. It also

provides that knowledge of a disability by an agent of an employer, such as OH is to be imputed to the employer.

Reasonableness of the adjustments

(240) The EHRC at provides examples of adjustments it may be reasonable to make and they include at para 6.32 modifying procedures for testing or assessment.

(241) It is unlikely to be reasonable for an employer have to make an adjustment that involves little benefit to the disabled employee. However, a measure which on its own may be ineffective could nevertheless be one of several adjustments when taken together, remove or reduce the disadvantage; **Shaw and co-Solicitors the Atkins EAT 0224/08**

(242) In ***Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10*** **th**e EAT made clear that *there does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one.* ***It is sufficient for the tribunal to find that there would have been a prospect*** *of it being alleviated*.

(243) EAT in ***Noor v Foreign and Commonwealth Office 2011 ICR 695, EAT***, where His Honour Judge Richardson observed: 'Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective.'

(244) Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA*****,** where Lord Justice Elias remarked: 'So far as efficacy is concerned, 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.'

(245) ***South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley EAT 0341/15*** the EAT elaborated further on the test of effectiveness. Mr Justice Mitting observed: '[T]he current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show that the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment.

(246) ***Noor v Foreign and Commonwealth Office*** His Honour Judge Richardson observed*: '…to eliminate the practical difficulty and embarrassment which the provision, criterion or practice has caused and create a level playing field for the disabled person in interview. If a reasonable adjustment should have been made for this purpose it is not fatal to the disabled person's case that he or she would still not have obtained the job.*'

(247) And in ***South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billinsgley*** the EAT held that the tribunal was entitled on the evidence to find that had the suggested adjustments been made there was a chance that the Claimant would have avoided the unfavourable treatment of performance review and dismissal to which she was eventually subjected

Burden of proof

(248) The burden of proof is set out at section 136 (2) and (3) EqA.

Conclusions

Knowledge

(249) We find that the respondent through its OH advisor had knowledge of the claimant's disability by the date of the claimant's interview with OH on 12 February 2019 when as set out in our findings, she discussed her condition with OH.

(250) We further find that Mr Kettlewell personally had actual or at least constructive knowledge that the claimant had a serious kidney condition amounting to a disability by 25 March 2019. A careful reading of the OH report which referred to the claimant having a number of conditions which qualify as disabilities under the EqA, should have alerted Mr Kettlewell to the fact that the claimant had other disabilities not expressly referred to in the report. On receiving direct from the claimant information about renal appointments at the hospital and on discussing her kidney condition with her at the meeting on the 25 April in accordance in accordance with our findings, Mr Kettlewell could reasonably have been expected to know she had the disability. Any lack of actual knowledge was a consequence of a failure to make reasonable enquiries at the time which would have included further enquiries of the claimant and/or of OH and/or of her doctor. Therefore, regardless of the knowledge acquired through OH, the respondent had knowledge by the 25 March 2019 of the disability via Mr Kettlewell

(251) We can make no findings on what was contained in the health assessment questionnaire which predated the OH interview. The claimant could not recollect what was in the questionnaire, Mr Kettlewell did not see it and a copy of it was not disclosed.

Section 15: something arising from disability

Unfavourable treatment

(252) The claimant was dismissed by the respondent and the dismissal amounts to unfavourable treatment. The respondent does not seek to argue otherwise.

(253) The reason for the dismissal was the claimant's failure to complete Stage 3 of the assessment process. The claimant did not produce 5 (or 4) reports to an acceptable standard. She had produced 2 to an acceptable standard, one on 10 April and one

another at some stage prior to that, although it is not possible to make a finding as to the date when that first acceptable report had been produced.

(254) Although Mr Kettlewell formed the view on the 12 April that there was a lack of sufficient progress, he does not address at the hearing (or in his evidence) whether the claimant had completed 2 acceptable reports following the change of mentor which would have been over a short period of only 3 days (ie from 8 April to the 11 April excluding the hospital attendance on the 10 April). If the 2 acceptable reports had been prepared within that 3 -day period, that would equate to 2 acceptable reports being 50% of what Mr Kettlewell stated in evidence he may have considered sufficient for her to pass Stage 3, completed over a period which is less than 50% of the normal 8 day training period.

(255) It is not alleged that there was any other reason for the decision to dismiss. The failure to reach the acceptable leave of performance was the cause.

Something that arises in consequence of the claimant's disability

(256) The claimant claims that there were a number of results or effects or outcomes of her disability and that these were;

- Hospital visits and absences
- Her health and stress and anxiety in the period 26 March to 12 April 2019

(257) We shall address each of these in turn;

Hospital Attendances and Absences

(258) We find that the claimant's disability meant that she was required to attend hospital for treatment. Those attendances were a result or outcome of her disability. We find that the hospital visits on the 26 March 2019 and 4 April and 10 April 2019 arose in consequence of the claimant 's disability.

Absences; 1, 2 and 3 April

(259) As set out in out in our findings, we have found on a balance of probabilities, that the claimant's ill health including stomach problems and diarrhoea on the 1 April and her resulting absence on 2 April 2019 were a consequence of her disability.

(260) On the 3 April the claimant felt better but tired, in part because she had attended hospital with her husband but came into the office at lunch time, she left we find that afternoon not because of a reason connected with her disability but due to her husband's ill health. We therefore do not find that the absence on the 3 April was in consequence of her disability.

Health generally during the period 26 March to 12 April 2019

(261) We conclude as set out in our findings, that an effect or outcome of the claimant's disability, was that throughout her Stage 3 training she was suffering with increasing fatigue.

(262) The respondent did not seek further guidance from OH health at any point or from her GP, even when the claimant informed them was she awaiting a kidney transplant, and thus we have reached our conclusions largely on the limited medical evidence and the claimant's account of her fatigue which we accept. The respondent could have called Ms Towner to give evidence on what the claimant was telling her about her health and in particular her fatigue during this period, but elected not to do so.

(263) The claimant's undisputed evidence in her impact statement is that partly due to high levels of waste in her blood, a symptom of her disability is tiredness and fatigue. We have made findings that the claimant was reporting to Ms Towner throughout this period that she was feeling fatigued through informal discussions with her. There is limited documentation in this case, however on 1 April 2019 the Claimant refers to having gone home from work because she developed what she described as an upset stomach and within that same message state refers to; "*…dropping to sleep frequently despite sleeping fairly well so perhaps not the IBS."*

(264) Dr Nichols in his report on the 26 March had referred to the claimant as "still appearing to cope" however, her evidence which we accept, is that he did not focus on her mental/emotional health. The OH report however, as set out in our findings, identified a "susceptibility" to fatigue at times, as a symptom of her disability.

Stress and anxiety

(265) As set out in our findings, the claimant's own evidence is that prior to 4 April 2019 she considered her condition to be stable and that concerns with her health became significant from 4 April when she broke down at the hospital. We accept her evidence that she was then finding it more difficult to cope. Her health was deteriorating and we accept her evidence than she was feeling more and more tired.

(266) The claimant was then told on 10 April, that she would be put on the list for a kidney transplant.

(267) The claimant's undisputed evidence is that she felt on the verge of not coping from 10 April, that she initially felt this on the 4th but "*particularly on 10 April".*

(268) The claimant as set out in our findings, was experiencing significant stress and anxiety we find from 4th April which increased from 10 April when she faced the possibility of a transplant in the near future . That stress and anxiety we find as a fact and on a balance of probabilities, would have affected her performance at work even if she was not acknowledging the impact at the time.

(269) Mr Kettlewell accepted in cross-examination that she may well have found being informed that she had to have a kidney transplant and dialysis extremely stressful.

(270) There were other stresses in the claimant 's life, her husband had his own health issues, as did her father however we find that at least a significant element of her stress and

anxiety from 4th April, was as a consequence of her own very serious health concerns including the anxiety about the risk of an aneurism given her family history.

(271) The claimant 's evidence was that at the meeting on 12 April which led to her dismissal, she felt numb about what was happening to her. The claimant referred to being kept awake at night about the impact of the operation and having to have a needle fitted for dialysis.

Was the unfavourable treatment *because* of the something that arises?

(272) We must then go on to consider whether the *something arising* that we find arises from the claimant's disability namely; the hospital attendances, absences and the stress and anxiety which we have found were effects, symptoms or outcomes of the disability, caused the unacceptable performance which in turn caused the dismissal. The claimant was not dismissed because of her hospital absences but the issue is whether there is a causal link with the reason for dismissal ie the quality of the assessments produced, and the factors we have identified as arising from her disability. As held in **Pnaiser,** the causal link may include more than one link.

(273) The initial period of 8 days of training (25 to 3 April) was seriously interrupted with at least 3 absences due to sickness and a hospital visit. Further, as we have found, the claimant was experiencing fatigue during this period which she was reporting to Ms Towner.

(274) We do not accept that the claimant did not raise in her appeal letter that her disability had had a bearing on her performance, she clearly refers to her disabilities, and the impact physically and mentally and psychologically of the 10 days at the Centre as well as the 'personal toil' of events she describes.

(275) Mr Kettlewell himself at the time considered that as a result not only of the issue with her mentor but the disruption caused by her absences and medical appointments, she required an extension of time. Mr Kettlewell was in discussion with Ms Towner and was the claimant's line manager, he was the experienced manager on the 'ground' and his evidence as set out in our findings was that he felt an extension to the training should be made to mitigate any disruption caused by her illness and absences, that was his observation and view of the situation at the time.

(276) The claimant's illnesses and hospital visits during this early stage of the process, prior to the extension were not the only reason for her not producing sufficient acceptable reports, but we find as a matter of fact and on a balance of probabilities, have found that they were a significant cause of her less than acceptable performance.

(277) The claimant was then granted an extension of time. As set out in our findings, it was not however the full second Stage 3 training which Mr Kettlewell alleged she was given. Mr Kettlewell accepted that it had been a *gross exaggeration* on his part to say that it was.

(278) The claimant was out of the Centre on 4 April when she broke down at the hospital. On 10 April she was at another hospital appointment again and told that she was now being put on the transplant list and on 12 April she was dismissed.

(279) The claimant was, as set out in our findings, from h April experiencing significant stress and anxiety due to her disability which was exacerbated from the 10 April 2019. She was told she would have 4 clear days as an extension, she started that process on the 8 April, but was not only absent on the 10 April she was also during this period suffering with disability related stress and anxiety. As she had to attend the hospital on the 10 she only had 3 clear days in the Centre, not the 4 she had been told she would have. The claimant had managed despite that interruption and upheaval, to complete a satisfactory report on the 10 April during a difficult and stressful period.

(280) Based on the primary facts as we have set them out in our findings and on a balance of probabilities, we find that a significant influence on her performance during this later period of 4 to 11 April, was her disability related ill health, absences and stress and anxiety.

(281) The absence of any referral to OH health during this period means that the tribunal has limited medical evidence however, we have made findings of fact on the evidence available to us. On a balance or probabilities these factors arising in consequence of her disability, were a significant influence on her performance. They were not the only influence, she had personal worries with her father and husband's health, but as held in **Sheikholeslami** the question is not binary, and we find these factors arising out of her disability were a significant cause of her underperformance and the causal link between the something arising and the reason for her dismissal is established.

(282) We do not accept the respondent's submission that the effects of her disability, were offset by the additional time because her health including her psychological health we find had deteriorated during this period. This is not a situation where her health had improved and she had been given more time, her health had not improved, quite the opposite and her training continued to be interrupted.

(283) Even if (which we do not find to be the case), the absences on the 1 and 2 April were not connected with her disability and the performances issues during the first part of the Stage 3 training (pre-extension) were due primarily to problems with her mentor (in addition to other personal issues), we find that those concerns with her mentor were considered to be legitimate hence the change of mentor. The claimant was given some further time in which to carry out some further assessments however she was not able to achieve a sufficient number of assessments to an acceptable standard, and we find she could not do so within that limited period of extension, because of *something arising from her disability* namely the disability related hospital appointments, stress and anxiety and fatigue.

Justification

(284) The respondent's legitimate aim is to meet its contractual obligations to DWP and its duty of care to its customers.

(285) The evidence of Mr Kettlewell that DWP require certain performance levels in the respondent's performance of its obligations to DWP which are managed through service level agreements, was not disputed by the claimant. That is a legal aim, it is not discriminatory and it represents a real and objective consideration.

(286) The respondent's aim we find therefore was a legitimate one and there was no real challenge to this from the claimant.

(287) However, the claimant does not accept that the legitimate aim pleaded includes serving fundamental rights and equality.

(288) We find that that what is being argued by the respondent is not however a separate aim but as the respondent contends, it is the nature or consequence of the pleaded aim; that in delivering its aim of meeting its contractual obligations that involves serving the fundamental rights of others and doing so in a manner which does not discriminate.

(289) However, as set out the Legal Principles section (above), the UN Convention on the Rights of Persons with Disabilities does not give rise in itself to any enforceable rights and counsel did not argue expressly that it does. It is in effect a Treaty which sets out commitments to securing certain rights through other means such as domestic legislation including the Equality Act 2010 and it is therefore those vehicles for implementing those rights which would require consideration, not the UN Convention of itself,

(290) In terms of a right to property as defined the ECHR Article1, and its application to those whose entitlements are being assessed by the respondent such that the delivery of that service amounts to serving a right to property and hence a fundamental right; we are not satisfied that the rights at play in this case are comparable. There was no evidence presented to this tribunal as to the nature of the rights of the customers being served by the respondent in this case. Mr Kettlewell's evidence was that the respondent provides assessments for those looking to obtain disability benefits, however he did not explain what type of disability benefits.

(291) We accept there is ECHR authority (**Belane Nagy v Hungary ECHR (application no. 53080/13)** for the proposition that entitlement to certain benefits i.e. those acquired by compulsory contributions to the social security scheme as in that case, are a proprietary interest and assertable right as held by the ECHR. However, the respondent gave no evidence to the tribunal about the nature of the benefits which the customers of the respondent are being assessed for and whether they are acquired by compulsory contributions to the social security scheme. The respondent did not address this in its evidence and Mr Welsh did not deal with this in his submissions or explain if they are not, on what grounds the respondent asserts that they should be treated in the same manner as the entitlement of the claimant in Belane.

(292) Further, the claims the respondent are assessing arguably do not become a right in any event, until the assessment is made and the individual is assessed to have met the necessary criteria. Can there be a proprietary interest in advance of a recognised legitimate expectation before becoming eligible? In the Belane case, the individual was entitled and receiving benefits but was scored down when the assessment criteria changed and thus had a legitimate expectation. Mr Welsh did not argue that the customers have a legitimate expectation in the case before this tribunal, or a right prior to assessment of eligibility. Hid submission was that their entitlement to benefit was a right to property however we do not see how there can be a right to the benefit prior to the assessment stage.

(293) With respect to the reference to the UN Convention on the Rights of Person with Disabilities (CRPD), as set out in the section on the Legal Principles (above), as we

have already noted, the CRPD does not of itself give rise to any fundamental rights to disability benefits or otherwise to equal treatment.

(294) However, even if it could be argued that the customers had fundamental rights which were served by the legitimate aim of the respondent meeting its duty of care and/or contractual obligations, we consider that this case is in any event distinguishable from the line of case authorities including Ladele element.

(295) The training policy sets out recommendations about how many assessments should be completed and within what time frame. There was scope to change the time frame and the number of assessments and indeed Mr Kettlewell did amend the time frame and admitted it was within his gift to do so further without therefore his giving rise to any breach of its obligations or any alleged rights the respondent was serving.

(296) The claimant is not arguing that she should not be required to reach an acceptable standard of performance. She is not therefore asserting rights which encroach on the interests of the customers or of DWP.

(297) The impact on the claimant of implementing the policy of completion of Stage 3 within the recommended 8 days and recommended number of assessments, would in circumstances where she cannot meet those requirements due to her own disability, potentially impinge on her own fundamental rights under the Equality Act 2010 which she could not, as it relates to her rights in connection with employment, exercise outside of the workplace.

(298) This is not a situation where there is a *principle* underlying the aim which is in conflict with the rights the claimant is seeking to assert. The claimant's case is not that an exception should have been made for her such that she should not have been required to reach the required level of competence, her case is that adjustments should have been made to enable her to do so or at least, give her a better chance of doing so. Mr Kettlewell admitted that the respondent could have extended the period of training, required less than the recommended number of assessments and that the respondent did not have to dismiss the claimant when it did. Mr Kettlewell's evidence was not that the adjustments sought would have undermined any fundamental rights the respondent was serving.

(299) We do not therefore consider that the facts of this case are comparable to those in Ladele and the line of authorities which are concerned with a principle of equality of treatment which is in conflict with the rights of the employee.

(300) We have therefore gone on to consider whether the dismissal of the claimant was a proportionate means of achieving its aims.

(301) We are required to carry out a balancing act between the respondent's need to serve its legitimate aims and the discriminatory effect of the legitimate aim on the claimant.

(302) The respondent has not adduced any evidence about the adverse impact of the claimant having more time to complete the Stage 3 training or modifying the number of acceptable assessment. Mr Kettlewell admitted that to continue her training and give her more time would not have put the customers at risk because her assessments would continue to be monitored. The respondent gave no evidence about any financial or other impact the respondent would suffer as a consequence of making the pleaded

adjustments and delaying the date of termination.

(303) Mr Kettlewell did not allege that there were any financial or administrative reasons why the adjustments could not be accommodated, indeed the only issue the respondent raised was whether accommodating more training would be effective or not. However, not only did the respondent not consult in any meaningful way with the claimant about further training on the 12 April 2019 or indeed at any time prior to that, it failed to seek any advice or guidance from her treating doctors or OH, despite the previous involvement of OH.

(304) We find that less discriminatory measures could have been adopted, namely the claimant could have been given more time and support to complete the Stage 3 training. The impact on the claimant was considerable. Mr Kettlewell did not allege that to allow more training and allow her to redo Stage 3 complete would have any adverse impact on its legitimate aims. Indeed, allowing her a full further Stage 3 training is what the respondent alleged it had done, which was we find and Mr Kettlewell accepted, not what had actually happened.

(305) Counsel for the respondent argues that the respondent had already gone as far as it reasonably could, however that is patently not the case. On the respondent's own case it was prepared to provide her with the chance to do the entire Stage 3 process again and its defence to the claim was put on the basis that it had done that.

(306) It is clear from our findings of fact that the respondent failed to consider in any meaningful way the claimant's disability. It failed to take reasonable and obvious measures to seek medical advice and guidance about the prognosis and impact of the claimant's condition and what adjustments could be made to support her and assist her to reach the required standard. When Mr Kettlewell sought advice from the respondent's own HR advisor, he did not provide him with the OH report and there was not recorded discussion about the fact that the claimant's condition was to serious that she required a kidney transplant and no recommendation that directed Mr Kettlewell to make reasonable enquiries about the potential impact on her training.

(307) The claimant we find, had completed 2 acceptable assessments. Mr Kettlebell accepted that 4 may have been accepted as sufficient, the claimant had therefore potentially successfully completed 50% of the required assessments during a short period of training and during a period which had been interrupted by ill health and absences. The claimant had performed well in her earlier training during Stage 1 and 2 and Mr Kettlewell had clearly had confidence that she would make a good Assessor.

(308) The dismissal of the claimant on the 12 April 2019 was not a proportionate means of achieving the respondent's legitimate aims, there were other less discriminatory means it could have employed, namely implement the suggested amendments to the training programme, however it did not engage with the alternatives.

(309) We therefore find that the respondent treated the claimant less favourably because of something arising in consequence of her disability and the respondent cannot show that the treatment is a proportionate means of achieving a legitimate aim. The claim brought under section 15 of the Equality Act 2010 is well founded and succeeds.

Reasonable adjustments: section 20 /21

(310) The respondent within it response expressly conceded that the PCP's as pleaded were applied to the claimant. Counsel for the respondent did not therefore address the issue of the application of the PCPs in his submissions

(311) As set out in our findings however, the respondent has a training policy which provides for a 4 Stage training process with Stage 3 to be completed within a recommended period of 8 days and that it is expected most trainees will complete their training in this time. Document 2 also sets out the policy on how many assessments are undertaken and recommends a minimum of 7 cases. That is the training policy and/or practice which it is not disputed, was applied to the claimant.

Substantial disadvantage

(312) We have set out in our findings and above in relation to the section 15 claim, our conclusions regarding the effects and outcome of the claimant's disability and the extent to which we find that it impacted on her health, attendances and performance during the periods in question.

(313) We find that the application of the PCPs, put the claimant at a substantial disadvantage in that, because of the absences which we have found were connected to her disability, the medical appointments and the health issues and stress and anxiety she suffered, she was not able to complete the training to an acceptable standard within the recommended period of 8 days nor indeed during the shortly extended period to the date of dismissal. Although some adjustment was made to the time and a short extension granted, it did not prevent her employment being terminated.

(314) A substantial disadvantage is one which is more than minor or trivial. We find that the disadvantages separately and taken together, were certainly more than trivial or minor. The claimant's performance we find on a balance of probabilities, was adversely affected by her health issues during this period and by the interruption caused by the absences and hospital appointments which the claimant complained made the training process 'disjointed'.

Comparator

(315) The fact that disabled and non-disabled employees are treated equally in terms of the requirements under the training programme and could both be subject to the same sanction i.e. not passing the training and being dismissed for not providing the required number of acceptable reports within the recommended timescale, does not eliminate the disadvantage. The PCP will have we find, a more substantial effect on disabled employees then on non-disabled colleagues where an employee's disability leads to disability related hospital attendances, sickness absences, fatigue and/or stress and anxiety that would not be suffered by the able-bodied.

(316) The purpose of the comparison with people who are not disabled is to establish whether it is *because of disability* that a particular PCP disadvantages the disabled person in question.

(317) The effects of the claimant's disability as set out in our findings, we find on a balance of probabilities, interrupted her training and impaired her performance. Other employees undertaking the training, who were not disabled would not have been disadvantaged in the same by the requirements of the training policy/practice i.e. by the PCPs.

Knowledge of disadvantage

(318) The respondent had knowledge from the 12 February 2019 and Mr Kettlewell personally had actual or constructive knowledge, at the latest from the 25th March 2019, that the claimant was disabled with a serious kidney condition.

(319) The respondent knew that the claimant was taking time out for hospital appointments. Mr Kettlewell accepted the appointment on 26 March and the 4 and 10 April 2019 were related to the claimant's disability, he accepted that he knew that at the time. He therefore knew or could reasonably have been expected to know that the claimant's disability was impacting on her training time at the Centre at least to this extent and thus had knowledge or constructive knowledge that the PCPs were putting the claimant at a substantial disadvantage.

(320) In terms of stress and anxiety; Mr Kettlewell also conceded that it would have been stressful for anyone to find out they needed a kidney transplant and therefore whether he engaged in any real consideration of what the claimant was experiencing at the time, the respondent could reasonably be expected to have known that she was suffering from significant stress and anxiety and that this was likely to place her at a further substantial disadvantage by the application of the PCPs. We find that the respondent knew this from 10 April at the latest when the claimant reported to the respondent that she required a kidney transplant, Mr Kettlewell conceded that such news would be extremely stressful. If the respondent did not have actual knowledge, it had constructive knowledge no later than this date, that the PCPs were likely put her at a substantial disadvantage due to the stress and anxiety arising from her disability, in terms of the impact on her performance.

(321) Mr Kettlewell's own evidence however is that he decided to allow the claimant more time to complete the training to mitigate any disruption which may have been caused by her illness. Thus he was acknowledging his awareness that there was likely to be a disadvantage to the claimant arising from the illness when he spoke to the claimant. His evidence is that he discussed with the claimant repeating Stage 3 training at a meeting on or around the 4 April, which we find on a balance of probabilities took place on 5 April 2019. We find that on the respondent's own case, Mr Kettlewell had knowledge that her ill health was causing problems and we find that he therefore had actual or constructive knowledge that her health was likely to cause significant disadvantage, at the latest by the 5 April 2019.

(322) In terms of the absences on the 1 and 2 April, we find that the respondent did not have actual knowledge that those were linked to her disability at the time however, the respondent knew of the claimant's disability and had it carried out a reasonable enquiry with the claimant and discussed the nature and impact of her condition in more detail and/or gone back to OH for clarity in its report and advice on her condition, we find that the respondent would then have acquired knowledge of the symptoms and effects of a serious kidney condition including a lowered immune system and susceptibility to illness. We consider that the respondent therefore had constructive knowledge that the PCPs were likely to place the claimant at a substantial disadvantage by the 1 and 2 April 2019.

(323) We also find that the respondent had actual knowledge of the fatigue her condition can cause by the date of the OH assessment on the 12 February 2019. The OH report arising from the assessment confirms that the kidney condition (which we find the report

is referring to) can cause variable susceptibility to fatigue. Further, we accept that the claimant was reporting that she was tired directly to Ms Towner regularly and that even if we had not found that the respondent had actual knowledge by 12 February, in the alternative the latest the respondent had constructive knowledge was by the 1 April when the claimant reported that she had been dropping to sleep frequently despite sleeping fairly well week. Given the reference to fatigue in the OH report, the respondent in any event via Ms Towner, had constructive knowledge of the fatigue the claimant was experiencing and reasonable enquires would have elicited that this was a symptom of her disability prior to the 12 April.

(324) The respondent certainly by the date of the review meeting on the 12 April 2019 therefore had actual or constructive knowledge of the substantial disadvantages the PCPs were likely to cause the claimant as a consequence of the disability.

Reasonable Adjustment

(325) The respondent made an adjustment in terms of allowing the claimant some extra days training. However, the respondent accepts that the claimant was absent for disability related hospital visits on 3 days, which reduces the training days during that period to 11 (i.e. from the 25 March to 11 April). If the 1 and 2 April are also discounted, that leaves 9 days, 1 day more than the recommended 8 days. Even if the 1 and 2 April were counted as training days, the claimant was still only given 3 extras days of training.

(326) The respondent alleged in its defence and it was Mr Kettlewell's evidence in chief, that he decided that to mitigate the impact of her illness and personal pressures, he would allow the claimant to *redo* the full Stage 3 process, which would equate to **16 days** of training. This adjustment which we find, the respondent considered to be reasonable and which it said it had made, was not made.

(327) Counsel for the respondent argues that there was no duty to make the adjustments suggested by the claimant, namely discounting her disability related absences and /or extending the Stage 3 process because it was highly unlikely that it would have made any difference.

(328) However, the claimant we find, had completed 2 acceptable assessments and the policy only required acceptable assessments i.e. not A grades. The respondent was applying to her in the latter stages a requirement for assessment at an A grade rather than merely acceptable, therefore it is unclear how far from acceptable the later assessments were. Neither the tribunal nor the claimant had the benefit of reviewing the assessment documentation during this hearing and therefore we could make no findings on what the scores were and how far from acceptable they were, that would require a degree of speculation which it would not be appropriate to engage in. In any event we do not consider it necessary to determine this point because whatever the score, the claimant does not contend that the last two assessments met the required standard of acceptable.

(329) Mr Kettlewell accepted in cross examination that he could have accepted 4 satisfactory assessments to pass the claimant. She had completed two assessments to a satisfactory standard including one on the 10 April when we find, she was suffering with significant stress and anxiety. With more time, we find that there was a prospect, perhaps even a good prospect that she would have passed two more assessments at the appropriate standard i.e. at an acceptable level.

(330) Mr Kettlewell had considered her a good candidate who had performed well in the training at Stages 1 and 2. Further, the respondent does not assert that making the adjustments would have caused it any difficulties, ii would not put its customers at risk, and it does not assert that it would have given rise to any unreasonable administrative or financial burden or indeed cause any difficulties for any other employees. The respondent did not assert other than effectiveness, any reason why the adjustment could not have been made.

(331) To modify testing and assessments is an obvious step and one which is identified in the ECHR Employment Code.

(332) The claimant was given a few extra days which fell immediately after being told she would be put on the transplant list and when she describes feeling "numb". Mr Kettlewell accepted such news would be shocking. We do not find however that this short extension of 4 days (which as it happened with her hospital attendance on the 10, was 3 days) was sufficient. The extension did not remove the obligation on the respondent to take further reasonable steps to avoid the substantial disadvantage caused by the application of the PCPs, namely to discount her disability related absences (caused by her hospital attendance and ill health) and extend the Stage 3 training.

(333) It is argued that the Claimant had failed assessments between 25 March 2019 and 4 April 2019, the period before she first cited experiencing stress arising from her disability and the tribunal are invited to accept that this suggests that the reason the claimant was failing was not caused by her disability.

(334) In terms of that first period of Stage 3, the claimant raised concerns about her mentor and we find that those concerns were accepted as legitimate concerns by Mr Kettlewell and Ms Towner, hence why Mr Kettlewell not only gave the claimant an extension of time but changed her trainer. We accept the claimant's evidence that Ms Towner had agreed with her about how the assessments should be supervised. We are therefore not convinced by the argument that because she had difficulties with her first mentor it follows that the difficulties that she was experienced during that period were not also significantly influenced by her disability; including hospital attendances, absences and fatigue and that her performance was therefore not caused by her disability such that no adjustments for her disability would be effective to improve her performance.

(335) In any event, the claimant's health we find deteriorated after the 4 April, and therefore even if (which we do not find to be the case) the difficulties pre-4 April were solely related to her mentor at the time, that does not negate the obligation to make reasonable adjustments later in the process, when she now had the benefit of another trainer she did not take issue with, but when her health deteriorated and she began suffering significantly with stress and anxiety, increased fatigue and required further hospital appointments. It was not the respondent's case that the claimant's concerns about her mentor were unjustified.

(336) Mr Kettlewell's evidence is that there was no improvement in her performance as at the 12 April. The claimant does not accept that there was no improvement and indeed she did complete an acceptable report we find on the 10 April however she accepts that she did not complete the other case studies to an acceptable standard. However, as Ms Towner carried out the assessments and did not given evidence and the respondent has not produced the assessments, it is unclear how they were assessed and to what extent they fell short of the required standard, which should have been 'acceptable' and not a grade A 'perfect' report.

(337) Further the evidence of Mr Kettlewell was that he was surprised by her performance during Stage 3 and accepted that he thought there must be 'something else going on' i.e. another reason other than her capability for performance. She had performed so well in her previous training stages.

(338) At the 12 April meeting, the claimant raised how disjointed her training had been however it was clear from the notes of the meeting that Mr Kettlewell did not explore that with her at that meeting.

(339) The Claimant did not confirm how long she felt she would have required to complete Stage 3 however it is sufficient for the tribunal to find that there would have been a prospect of the disadvantage being alleviated by the reasonable adjustment. It is for an employee to identify in broad terms the adjustment they consider would assist them. The respondent failed to take obvious steps to seek guidance, perhaps from the claimant's doctor, the claimant herself and/or OH which may well have provided it with guidance on what adjustment to the period of training would help to alleviate the disadvantage.

(340) There is a degree of uncertainty in this case over whether extending the Stage 3 process would have enabled the Claimant to produce sufficient assessments to a competent standard however, that is a matter for this tribunal to weigh up when assessing the question of reasonableness. If an adjustment has a small prospect of success but is very costly or there are other negatives consequences for the employer, when assessing reasonableness, a tribunal may determine that it would not be a reasonable adjustment to make.

(341) We consider however Mr Kettlewell's evidence on this point; that it would not present any problem either in the respondent's contractual relationship with DWP or in terms of risk to customers, to extend the assessment period. Mr Kettlewell evidence was that he could also have passed the claimant with 4 acceptable assessments had they been of sufficient standard, which would have required her therefore to complete potentially only another 2 assessments within an extended period. Mr Kettlewell cited no difficulties in extending the Stage 3 training. He mentioned no factors for the tribunal to weigh against the prospect of the adjustments removing or alleviating the disadvantage and creating a level playing field for the claimant.

(342) We find that it would have been a reasonable to have made the adjustments proposed by the claimant including discounting all her periods of disability related absence but in particular extending the Stage 3 training to allow a full 'redo' of Stage 3 process. We find that this would have given the claimant a prospect of completing Stage 3.

(343) In the circumstances the claim that the respondent failed to make reasonable adjustments is well founded and succeeds.

(344) The claim that the dismissal was an act of discrimination under section 39(2) (c) of the Equality Act 2010 is well founded and succeeds.

Remedy

(345) The claims succeed and the case will be set down for a remedy hearing.

Employment Judge Rachel Broughton

Signed: 17 December 2020

Sent to the parties on:

21/12/2020…….

For the Tribunal: