EMPLOYMENT TRIBUNALS

Claimant: Ms E Taylor-Valles

Respondent: Her Majesty's Passport Office

Heard at: Manchester **On:** 24-28 May (with parties) and 9 and 16 July 2021 (in chambers)

Before: Employment Judge Slater
Mr I Taylor
Mr J King

REPRESENTATION:

Claimant: Ms S Johnson of Counsel
Respondent: Mr A Williams of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of failure to make reasonable adjustments in relation to the requirement to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions is not well founded.

2. The complaint of failure to make reasonable adjustments in relation to the respondent's car parking policy, requiring individuals to qualify for blue badge and/or to live in excess of 1-mile radius of the workplace in order to be considered for an on-site car parking space is well founded.

3. The complaint of discrimination arising from disability in relation to the refusal to recommend the claimant for a permanent role by Danielle Payne on 20/21 November 2018 is well founded.

4. The other complaints of discrimination arising from disability are not well founded.

5. The complaint of victimisation in relation to the refusal to recommend the claimant for a permanent role by Danielle Payne on 20/21 November 2018 is well founded.

6. The complaints of harassment are not well founded.

7. The statutory defence in section 109(4) Equality Act 2010 does not succeed.

8. The remedy hearing will take place on 2 September 2021.

REASONS

Claims and Issues

1. The claimant brought claims of disability discrimination under the Equality Act 2010. These were of a failure to make reasonable adjustments, discrimination arising from disability, victimisation and harassment. The issues were agreed at a preliminary hearing on 1 November 2019. The representatives agreed that these issues remained the issues to be determined by the Tribunal. The agreed List of Issues is annexed to these Reasons.

2. Ms Johnson clarified at the start of this hearing the period for which the failure to make reasonable adjustments was alleged to have taken place was, for both of the PCPs relied upon, from 27 July 2018 until the claimant's effective date of termination. She also clarified that the adjustments sought in relation to PCP1 were as follows:

(1) Discounting disability related absence as per the policy; not taking account of any disability related absence.

(2) Looking at absences as spells rather than days.

(3) Adjusting the policy to allow for more sickness absence; adjusting the triggers.

(4) Not issuing the claimant with a written warning.

(5) Not extending the claimant's probationary period.

(6) Not dismissing the claimant.

3. In relation to PCP2, Ms Johnson clarified that the adjustment was to allow the claimant to park, during winter time, on the work's car park, either nearer to the door or in a disabled bay without the need for a blue badge, and without the need to live more than a mile away.

4. Mr Williams was to take instructions on whether the respondent continued to rely on a reasonable steps defence, since the respondent's witnesses gave no evidence in their witness statements relevant to this. In closing submissions Mr Williams made submissions, with the respondent relying on this defence.

Summary

5. The claimant worked at the respondent's Passport Office in Liverpool between 5 March 2018 and 10 May 2019 as a Customer Services Agent, working in a call centre.

6. The respondent concedes that the claimant was disabled at relevant times by reason of asthma.

7. The claimant had a period of absence in June to July 2018, a substantial amount of which it is agreed was disability related absence. Following that absence, the claimant's six months' probationary period was extended and she was given a warning under the respondent's attendance management procedure. The claimant unsuccessfully appealed this. She brought grievances alleging discrimination. Her probationary period was further extended to allow the grievance to proceed. The grievance was unsuccessful.

8. The claimant appealed the grievance outcome. Before the outcome of the appeal, the claimant was dismissed, not being confirmed in post at the end of her extended probationary period. This was because of the claimant's absence record. In addition to the claimant's disability related absence, she had two periods of absence due to work related stress following submission of her grievances.

Evidence

9. The Tribunal heard from the claimant herself and from the following witnesses for the respondent:

- Danielle Payne, the claimant's team leader at the relevant time.
- Angela Nolan, the decision maker for the claimant's probation decision managing attendance hearing which resulted in the written warning and the first extension of her probationary period.
- June Shaw, the appeal manager, hearing the appeal against Angela Nolan's decision.
- Alison Gilligan, who conducted a probation hearing in January 2019 and extended the claimant's probationary period.
- Joanne Wilkes-Waterworth, appeal manager who heard the appeal against the outcome of the claimant's grievances.
- Andrew Bannon, the decision maker who conducted the probation hearing in April 2019 and decided to dismiss the claimant.
- Valerie Ward, the appeal manager who dismissed the appeal against Andrew Bannon's decision to dismiss the claimant.

10. The Tribunal had a bundle of 1,402 pages. A further three pages were added to this (pp 1403-1405), which were an unredacted version of pages 500.

11. The bundle of documents had largely been compiled from documents obtained by the claimant under a Subject Access Request. The copies of most of the documents in the bundle, therefore, contained many redactions, including in many cases the author and recipients of emails. The witnesses, in the course of evidence, identified some of the names which had been redacted. The redaction of names caused, in some cases, understandable errors on the part of the claimant in the identification of authors of relevant documents.

12. At the Judge's request, during the course of the hearing, Mr Williams made enquiries as to whether there were any notes of HR advice or emails confirming their advice which had not been disclosed by the respondent. After taking instructions, Mr Williams said he had been informed that there were no further notes to be disclosed.

Facts

13. We were referred to a number of different policies and guidance dealing with absence and employees on probationary periods.

14. The document "Probation. How to: Deal with unsatisfactory performance, attendance or conduct during probation" (beginning at p.48) contains the following particularly relevant sections:

> in paragraph 11: "a written warning may need to be considered if there is a failure to meet the required standards in performance, attendance or conduct, either in isolation or in combination, e.g.
>
> - sickness absence reaches three days or two spells of absence within the first six months (pro-rata where consideration trigger points have been extended after six months or reasonably adjusted) - there is no need for informal action to have been taken first;"
>
> in paragraph 12: "you should bear in mind that if the warning is issued, the warning will last for the longer of three months the length of the probation period remaining. This means that if a three-month warning runs beyond the end of the existing probation period, probation will need to be extended until at least the date of expiry of the warning (if you are below SEO you will need to ask an SEO or above to formally agree the extension - see the probation: procedure and guidance)."
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> In Annex B - considering the appropriate level of action for unsatisfactory performance, attendance or conduct, at paragraph 9: "the consideration trigger point for all probationers is three working days absence or two separate spells of absence within the first six months. The trigger points are prorated for part-time staff, for staff who work more than five days per week and for probationers who are serving a longer probation period due to a training requirement or an extension."
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> In paragraph 11 of Annex B: "if the probationer has reached a consideration trigger point you should arrange a separate formal hearing to consider a warning, unless an exception applies.

In paragraph 12 of Annex B: "there are six exceptions where sickness absence will automatically not count towards consideration trigger points (and you should not give a warning). These are:

- pregnancy related absence;
- qualified injury at work;
- disability and reasonable adjustments have **not yet** been considered or made;
- victim of violent crime;
- infertility treatment (maximum of three cycles);
- notifiable communicable disease."

Paragraphs 13 and 14 of Annex B deal with using discretion to decide not to give a warning in other instances of reasonable sickness absence. Paragraph 14 states: "you should consider the probationer's absence history, the efforts they have made to improve their own health/attendance and the likelihood of further sickness absence for the same reason. If you decide not to give a warning you must record your decision and explain your decision to the probationer, making clear that any further absences for the same or a different reason could result in a written warning and/dismissal."

Paragraph 15 of Annex B provides that, if formal action is considered appropriate, the required level will depend on the circumstances. An example given is: "sickness absence reaches three days or two spells of absence within the first six months (pro rata for part-time staff or where consideration trigger points have been increased after six months or reasonably adjusted) - consider a written warning." A further example is further sickness absence following a written warning where the guidance is to consider dismissal.

Paragraph 19 of Annex B includes: "it is important that you consider and make reasonable adjustments where the probationer has a disability (these may include reasonably adjusted trigger point, if appropriate) to enable them to attend work and carry out their role effectively."

15. The document "Probation: Procedure and Guidance" (beginning at p.64) contains the following particularly relevant provisions.

An end of probation review meeting must be held towards the end of the probation period, allowing enough time for a decision to be taken on confirmation of appointment before the end of probation. If the relevant manager is below SEO, they are to forward the probationer review form to a senior manager to consider whether the probationer's appointment should be confirmed. If a decision or recommendation is made to extend the probation period, the reasons for this must be set out in the probation review form. The senior manager should consider the probationer's overall performance, attendance and conduct when making the decision. Paragraph 20 provides that extensions of probation should be rare, but may be appropriate in

circumstances including: "where a written warning for unsatisfactory performance, attendance or conduct has been given and the life of the warning extends beyond the length of the current probation period."

In Annex A to that document, under the heading "special leave", it provides: "probationers are only entitled to special leave without pay to deal with short-term domestic emergencies, in respect of time off for dependents, or if mobilised or undertaking training as a reservist, in accordance with their statutory rights. Probationers should apply for such leave (see special leave guidance and reservist policy) in the same way as established employees."

Annex B to the document is headed "consideration trigger point during probation" and includes the following at paragraph 2: "the consideration trigger points for all probationers is three working days absence **or** two separate spells of absence within the first six months." It also provides that trigger points can be reasonably adjusted for disabled probationers. Paragraph 7 provides that when a trigger point is reached, the manager should follow the guidance in "how to: deal with unsatisfactory performance, attendance or conduct during probation." It states that consideration should be given to whether a written warning should be issued and that, if there are any further days/spells of absence after a written warning, it may be appropriate to consider dismissal.

Annex F to the document sets out "Dos and Don'ts". Included in the list of "Do" is: "take prompt action to address any problems that arise during probation - remember that problems with performance, attendance or conduct are considered cumulatively and termination of appointment can be considered at any time." Included in "Don't'" is: "wait until the end of probation or the next review meeting to tackle problems with performance, attendance or conduct or to make a recommendation not to confirm appointment."

16. The respondent's Attendance Management Procedure dated July 2014, which we understand to be the procedure applying to all employees, not just probationers, includes, at Annex G, the following:

"There are six exceptions where sickness absence will automatically not count towards consideration trigger points. (Discretion may be awarded in other cases, subject to evidence based decisions by line managers)."

The exception of potential relevance in this case is as follows: "member of staff is disabled, the absence is directly related to the disability and reasonable adjustments which would enable the employee to return to work have not been made."

Notes following the setting out of this exception include that the Equality Act 2010 does not require that all disability related absence is automatically discounted on every occasion; nor does it require an employer to retain someone indefinitely if they are frequently absent due to a disability. "This means that staff who are covered by the disability provisions of the Equality Act 2010 can be managed under the attendance management procedure for absences relating to the disability provided the manager can demonstrate that all appropriate reasonable adjustments have been made."

17. It appeared to us, from the evidence of the respondent's witnesses, that the respondent generally took a strict line in the application of its Attendance Management Procedure. For example, Danielle Payne gave evidence that she had been subject to attendance warnings.

18. The claimant began work with the respondent on 5 March 2018 as a Customer Services Agent PO3 grade. She was initially employed on a fixed term contract which was due to expire on 31 December 2018. The first six months of this contract was a probationary period which was due to end on 4 September 2018.

19. On being recruited, the claimant disclosed that she had asthma but she did not ask for any reasonable adjustments, not considering herself to be disabled and not considering herself to require any adjustments. At the time, the claimant's asthma was well controlled and she had not had a serious attack since childhood.

20. On 13 April 2018, the claimant had a review meeting at which her performance, attendance and conduct were recorded as being satisfactory. Comments on conduct were: "Elaine is particularly polite with other colleagues and with customers on the telephone call. I have witnessed her being patient and very helpful even during "difficult" calls."

21. On 23 April 2018, the claimant had one day's absence for sickness due to vomiting/diarrhoea.

22. On 23 May 2018, a letter to colleagues and others informed them that they would be offering permanent contracts to passport operations PO3 level staff currently employed on fixed term appointment contracts, pending clearance of the normal probation period. Had the claimant's employment been confirmed at the end of her probationary period, her employment would, therefore, have become permanent.

23. Danielle Payne became the claimant's line manager with effect from 4 June 2018.

24. The claimant was absent from work on 25 and 26 June 2018 because her daughter was ill with a viral infection. She asked on 25 June to take unpaid leave but was told by a manager she could not qualify for this because she had not been employed for one year (the manager having referred to the policy on unpaid parental leave) so she asked if she could take annual leave.

25. The claimant was then absent from work due to her own sickness for 22 days from 27 June 2018 until 26 July 2018. She initially reported flu type symptoms. A fit note dated 3 July 2018 signed her off work for one week due to acute respiratory infections. A further fit note on 11 July 2018 signed her off work for another week, this time due to asthma breathlessness. The final fit note dated 17 July 2018, for a further week ending on 24 July, signed her off due to asthma.

26. The respondent asserts that the first 10 days of absence were due to viral illness but concedes that the remainder of the absence was due to asthma.

27. On a keep in touch call with Danielle Payne on 5 July 2018, the claimant reported having bad headaches, dizziness and severe pain in her chest and back. Danielle Payne told the claimant that she did not have to wait until the fit note ran out

to return to work; if she was feeling better she could return to work at any time. Danielle Payne asked the claimant if there was anything she could do to help a return to work, or if there were any adjustments they could put in place to help her to return to work but the claimant said no, she just needed to get better. Danielle Payne informed the claimant that, as she was in her probationary period, she had now reached the trigger points on sickness absence in both occurrences and the number of days.

28. In another call on 11 July 2018, the claimant informed Danielle Payne that difficulty in breathing was affecting her asthma. She said she had been told she must be on complete bed rest and said she would not be returning to work in the next few days. Danielle Payne asked the claimant if she thought she was well enough to return to work and do alternative work instead and the claimant said no, she was too unwell and would not be returning. Again, Danielle Payne asked if there were any reasonable adjustments they could put in place to facilitate the claimant's return to work and the claimant said she just needed to rest and get better and get rid of the pain.

29. In a further call on 14 July 2018, the claimant reported suffering with chest and back pain and difficulty breathing. In error, Danielle Payne referred to the claimant's fit note as expiring on Monday 16 July, rather than Wednesday 18 July. She asked claimant if she thought she would be returning to the office on Monday 16 July. The claimant said it would be unlikely unless there was a dramatic improvement and she would be making a doctor's appointment as she still did not feel well enough to return to work. Danielle Payne said that she would be making an occupational health referral due to the considerable absence length and the fact that the claimant had an underlying condition of asthma with her current difficulties of struggling with breathing. The claimant agreed to the referral.

30. The claimant and Danielle Payne spoke again on 17 July 2018. The claimant said she was feeling better but her GP still was not happy with her chest pain and breathing difficulties and had signed her off for a further week. The claimant said her doctor thought that a severe allergic reaction to her dog had triggered the episode and had prescribed strong antihistamines. The claimant said she had had the dog for a long time. Danielle Payne reminded the claimant that, if she was feeling better, she could come back to work before her fit note expired. The claimant said that, although she felt better, she was still worried about the chest pain and would be following her GP's advice.

31. An occupational health report was produced following an assessment on 18 of July 2018(p.271). The summary read as follows:

> "in my clinical opinion Ms Taylor-Valles is temporarily unfit to resume work due to ongoing complications with her asthma following a viral infection and this may be the case for 4-6 weeks or until improvement which is sustainable is had. Ms Taylor-Valles is likely to require a short phased return support measure to enable her to resume normal role. I am hopeful that her prognosis will be good as this is the first significant issue with her asthma since childhood."

The occupational health advisor wrote that the claimant remained significantly affected by her asthma. They wrote:

> "Ms Taylor-Valles' asthma became destabilised after a considerably long trouble-free time, after catching a respiratory infection from her child, despite being treated with antibiotics her asthma did not respond. Ms Taylor-Valles sought further help from her GP and she is now on second course of steroids to try and bring her asthma under control…..
>
> "Normally Ms Taylor-Valles is able to manage her asthma well so this attack was a complete surprise, she does attend her asthma reviews regularly and no doubt the frequency of them will be increased for a short time until good order is restored once again."

They also wrote: "I am not aware of any other health problems and it is purely her asthma which is preventing a return to work. In my opinion she needs sustained improvement before return to work is advisable in order not to come down with a relapse."

The adviser expressed the view that the claimant was likely to be covered by the Equality Act 2010 in relation to her underlying asthma and advised that her case be managed against the respondent's relevant disability related policies and procedures.

The adviser concluded:

> "Ms Taylor-Valles has not had any issues with her asthma since childhood so the outlook with regard to reliable service and attendance at this time ought to be considered good. However there is always the possibility that she may have periods of absence if she is overwhelmed by respiratory infection as she is more susceptible than others not similarly affected due to her asthma.
>
> "On return to work I am of the opinion her performance ought not be affected as she should be fit enough to resume work on a phased return."

The adviser recommended a short phased return in hours when the claimant returned to work and support to allow her to attend appointments to keep her asthma under optimal control.

32. The claimant agreed in evidence that, during June and July 2018, she was unfit for work and there were no adjustments which the respondent could have made which would have enabled her to return to work earlier.

33. On 25 July 2018, Danielle Payne obtained HR advice in relation to the claimant. The advice was that, in accordance with the probation policy, a written warning could only be issued after a formal probation hearing had been held and that this meeting would need to be held by an HEO. HR advised that, if a warning was issued, the warning would last for the longer of three months or the length of the probation period remaining. HR suggested that, given the claimant's situation, her probation would need to be extended until at least the date of expiry of the warning.

34. The claimant and Danielle Payne agreed on the terms of a phased return to work and the claimant returned to work on 27 July 2018. Danielle Payne was not working on the day of the claimant's return to work, so the claimant had her return to work meeting with Danielle Payne's manager, Rebecca Kenny. On the form completed by Ms Kenny (p.307), the reason for absence was recorded as "asthma

attack - influenza in beginning triggered attack". In response to the question, whether the cause of absence was likely to affect future attendance, Ms Kenny wrote "yes, diagnosed asthmatic. Allergic to dogs." Rebecca Kenny informed the claimant that her level of absence had breached a consideration trigger point and that she would be called to a separate formal attendance meeting.

35. During her phased return to work, the claimant was also moved from phones to postal correspondence to support minimal talking and reduce potential strain on her throat. This was reconsidered, due to the claimant's asthma, the postal correspondence area being said to be a dusty environment, and the claimant was then trained to deal with email correspondence.

36. The claimant was required, by letter dated 30 July 2018 (p.308) to attend a hearing under the formal process for managing unsatisfactory performance, attendance or conduct under the probation policy and procedure on 9 August 2018. The meeting was to be chaired by Rebecca Kenny with Danielle Payne attending as a notetaker. The claimant was advised of her right to be accompanied by a work colleague or trade union representative. The letter informed the claimant that the matter to be discussed was concerns regarding her absences totalling 23 working days and two occurrences. She was informed that this may lead to a written warning and the extension of her probation period.

37. On 6 August 2018, Rebecca Kenny received advice from HR in relation to the hearing to come (p.327). Under case history, the advice recorded that the claimant's sickness absence beginning in June 2018, had started as a bug, which developed into a respiratory infection and problems with her asthma. Under points for consideration, HR noted that there were no recommendations, in the occupational health report, for management to consider other than a phased return to work and to allow the claimant to attend appointments. HR advised that, as the claimant's condition was likely to be afforded protection under the Equality Act, management were legally required to consider and implement adjustments if they were considered reasonable. They noted that the claimant had significantly breached the probation attendance trigger of three days in a six-month period. Two options were set out: issuing a probation written warning or deciding not to issue a probation written warning. In relation to the first option, HR advised that it should be accepted that part of the claimant's absence was related to a disability-related condition. However, they noted that there were no recommendations by occupational health for any adjustments or support that would have prevented or minimised the absence. They wrote:

> "High levels of sickness absence can be costly and disruptive to the business. Having to reallocate tasks or rearrange appointments at short notice can be time-consuming and is not always possible, meaning that productivity and customer service can suffer. Sickness absence can also put pressure on other employees who have to cover the workload.
>
> "Therefore the benefit of this action to the business would be that Ms Taylor-Valles's unsatisfactory attendance during probation is being managed in line with the HO probation procedures and ensures that she is reminded of the attendance standard expected encouraging her to work with you to find ways to improve her attendance and demonstrate that she is fully able to undertake her role."

In relation to the second option, HR wrote:

> "It may be appropriate to not issue the written warning if further information comes to light recommending reasonable adjustment that may have an impact on Ms Taylor-Valles absence record. Or if management consider that it is reasonable to allow this period of absence.
>
> "If reasonable adjustment have been considered, but the decision is made to not issue the Written Warning. This could set an unhelpful precedent within the team indicating that this level of absence can be tolerated especially during Ms Taylor-Valles probation period. Furthermore it may make managing Ms Taylor-Valles absence in future more difficult due to the potential expectation that would have been set. Although each case and individual circumstances must be treated on its own individual merits.
>
> "Deciding not to issue a Written Warning does not mean a period of sickness absence is removed from the sickness absence record or permanently discounted. Therefore, if you decide not to issue the warning in this instance, it is important that Ms Taylor-Valles is reminded that whilst you have decided not to give a warning on this occasion, if there are any further sickness absences for the same or a different reason, you may make a different decision."

38. The hearing scheduled for 9 August 2018 was postponed due to management sickness. The claimant was then on a period of leave. The meeting was ultimately rescheduled for 6 September 2018, to be conducted by Angela Nolan since Ms Kenny was about to start maternity leave and was unlikely to have enough time to finalise her decision before commencing maternity leave.

39. On 10 August 2018, the claimant emailed Rebecca Kenny (p.347). The claimant referred Ms Kenny to the exceptions to the trigger points in section 12 of the Probation Guidance: Attendance. She wrote: "as my asthma is a recognised disability and reasonable adjustments have not yet been considered or made, can you please confirm whether the probation hearing is still required and if so on what basis?" Ms Kenny, who was still, at that stage, expecting to conduct the hearing, replied (p.341), saying that the claimant would have the opportunity to discuss the point she raised regarding the probation guidance during the hearing. She wrote that, as the claimant had triggered on her amount of absence, she would be required to have a probation hearing regardless.

40. The claimant had a review meeting with Danielle Payne on 28 August 2018. Her performance was recorded as being satisfactory and Ms Payne commented that the quality of the claimant's emails was high. Her attendance was noted as being not satisfactory. There were no issues with the claimant's conduct; she was described as polite and professional.

41. The probation decision managing attendance hearing took place on 6 September 2018 chaired by Angela Nolan (p.406). Angela Nolan was an HEO who, at the time, was deputising for an SEO. Danielle Payne attended as a notetaker. Angela Nolan referred to the claimant's periods of absence, which were two spells of absence and 23 days of absence. She noted that the claimant had triggered on both two spells and the three days tolerance. Angela Nolan referred to the occupational

health report and noted that it made no recommendations for management to consider other than a phased return to work and to allow the claimant to attend appointments. She noted the further adjustment which had been made during the claimant's phased return of moving the claimant from phones onto emails. The claimant disagreed that her attendance was below the expected standard. She asserted that, under the Equality Act 2010, reasonable adjustments should have been put in place before her return to work and this was stated in respondent's own guidance. When asked if she had made her line manager aware of her asthma prior to her absence, the claimant said no, she should not have needed to; she mentioned it on induction and, as far as she was aware, management should be approaching her about it when they realise she was off with a disability. The claimant said that, as no increased trigger points had been given as a reasonable adjustment prior to her return, the meeting should not have taken place, or it should have been dealt with informally. Angela Nolan said that occupational health had not recommended increased trigger points and, even if they had been increased, normal office procedure was to increase by 25% tolerance or 50% tolerance, either of which would have been breached regardless with the length of the absences. The claimant referred to the six exceptions in the Home Office policy, referring to the exception where reasonable adjustments had not already been put in place. The claimant said that the reasonable adjustment of increased triggers and failing to adhere to the policy which should automatically not count towards trigger points should have been applied before her return to work. The claimant said she was not happy with the absence being considered as a non-disability sickness absence which triggered a formal meeting taking place; it should have been dealt with informally.

42. We accept the evidence of Angela Nolan that the claimant was quite loud and, what Ms Nolan described as, "aeriated" in the meeting. Ms Nolan considered her quite rude at times but chose not to react to it. In an interview as part of the investigation of the claimant's grievance, Angela Nolan described the claimant as "a little cross at times" (p.992), with her voice raised at some points, which Ms Nolan put down to the emotive subject. She described the claimant as showing a lack of respect at some parts of the interview. We accept that the claimant's conduct in this meeting was not a matter Angela Nolan took into account when deciding to issue a written warning. Based on the notes of the investigatory interview with Angela Nolan, we find that Danielle Payne, who was notetaker at the meeting on 6 September 2018, commented to Angela Nolan that she considered the claimant's tone and attitude at the meeting to be inappropriate. Danielle Payne did not, however, raise with the claimant any issue about her behaviour until a meeting on 19 November 2018.

43. The notes of the meeting were sent to the claimant. When returning the notes with some amendments, the claimant included a request for advice on how to request a car park pass. She wrote that, as winter was only round the corner, she was worried and anxious about having another asthma attack. She wrote that reducing her walk from the car to the office would help prevent further attacks triggered by the cold wind.

44. The respondent's building where the claimant worked had its own car parking spaces. Some of these were reserved for blue badge holders. The other spaces were available on a first-come first-served basis. There were not enough spaces for the number of people who wished to park. There were 225 spaces and 1100 people who worked on site. The claimant had been parking in residential streets nearby that

this could involve a walk of up to 10 minutes between her car and the building. In the oral evidence of June Shaw, it emerged that employees could also pay to park in secure parking at a cricket club which June Shaw described as being "across the road". We did not hear any evidence as to how long it would take to walk from the cricket club car park to the building. It was not put to the claimant in cross examination (the claimant having given evidence before June Shaw gave this evidence) that the claimant knew about this possible alternative and that using this would have been a suitable solution to reducing her walk from her car.

45. On 7 September 2018, Angela Nolan wrote to the claimant (p.399) that she would like to delay her decision-making until after a further occupational health report in order to seek an independent medical opinion on the claimant's adjustments, particularly in relation to consideration trigger points. The claimant replied the same day (p.398), writing that her main concern was that her disability was not exempt from warning, again asserting that the exception applied where disability and reasonable adjustments had not yet been considered or made. She wrote: "management failed to treat the absence as a disability as there were no reasonable adjustments in place during my absence. This should have been addressed once the OH report confirmed that my disability fell under the Equality Act 2010 thus resulting in the exception clause "not to count towards trigger points and you should not give a warning"".

46. A further referral to occupational health was made, although HR advice was that occupational health were unlikely to give any more advice about increasing trigger points as this was a management decision. HR noted that the claimant's initial sickness was not in relation to breathing difficulties, chest infection or asthma and suggested that this information could be taken into consideration.

47. A second occupational health report was produced on 25 September 2018 (p.453). This expressed the view that the claimant was fit to continue in her current role. It noted that the claimant reported triggers for her asthma including cold weather, viruses, stress and hayfever. The adviser again expressed the opinion that the claimant's condition was likely to satisfy the statutory definition of disability and advised that the case be managed against the respondent's relevant disability related policies and procedures. The report expressed the view that the claimant would be vulnerable to future sickness absence in relation to flareups in her condition, but said it was not possible to predict the frequency and duration of any possible future occurrences. They wrote: "if operationally feasible I would recommend that consideration is given to provide Mrs Taylor-Valles with an allocated on-site parking space to avoid prolonged walking in inclement weather which is likely to aggravate her symptoms." The report did not give any specific advice or recommendations about adjusting trigger points.

48. Following receipt of this advice, Angela Nolan decided to issue a written warning. Ms Nolan informed the claimant of this outcome in a letter dated 5 October 2018 (p.485). This letter included the following:

> "2. It is accepted that part of your absence was related to disability related condition, however, there were no recommendations by OH for any adjustments or support that would have prevented or minimised the absence other than recommending the business consider allowing medical appointments to take place if not arranged outside of working hours.

> "3. HMPO policy does not state exemption from the absence for a disability but what is deemed *reasonable for the business to support, e.g.* increasing consideration trigger points by 25%, 50% etc. Even with the recommendation of this potential increase, the business would not support this length of time (22 days)."

Angela Nolan wrote that, after considering all the information and evidence presented, she had decided to issue the claimant with a written warning and her attendance, conduct and performance would be closely monitored until the end of her probation period. She warned the claimant that failure to demonstrate satisfactory attendance, conduct and performance during this period could result in the termination of her employment. She informed the claimant that the warning would run until 4 December 2018 and her probation period would be extended until the date of the expiry of the warning as a minimum. She advised the claimant of her right to appeal against this decision.

49. Angela Nolan also wrote that she would speak to the claimant's line manager to investigate whether it was possible to provide the claimant with on-site parking in conjunction with the business area responsible for this.

50. In early October 2018, the claimant's husband became seriously ill and the claimant took some unpaid leave. There was correspondence between the claimant and Danielle Payne about the nature of the leave. Danielle Payne also obtained advice from HR about the entitlement to different types of special leave. We find, based on the emails we have seen, and Danielle Payne's evidence to us, that Danielle Payne made a genuine attempt to understand the position relating to leave. However, it appears to us that she misunderstood the advice given about availability of statutory leave to deal with short-term domestic emergencies, as opposed to types of leave provided for under the respondent's policies. Danielle Payne informed the claimant by email dated 9 October 2018 (p.494), that she was only entitled to a maximum of five days special leave in 12 months. She wrote that other days would have to be annual leave. She did not refer to statutory leave. The claimant replied on 10 October 2018 (p.496), suggesting, in polite terms, that there was no five-day limit on unpaid special leave and asking if Danielle Payne could look into this.

51. Danielle Payne wrote to her line manager on 11 October 2018 (p.500 and 1403). She wrote that, having poured over the special paid leave and unpaid special leave policies and cross-reference them with the probation guidance, together with the on-site HR lead, she thought the claimant was not eligible for either as she was currently still on probation, coupled with being on a live warning due to poor attendance. She made no mention of statutory leave. She wrote that she would be speaking to a complex caseworker that afternoon.

52. Danielle Payne's line manager responded on 11 October 2018 (p.500 and p.1403) writing: "No we need to play it by the book now it is sadly not going to work out I think but caseworker will be on our side. Document everything Elaine says and ask for caseworker to email all the advice she gives today. It's not looking good at all."

53. Although Danielle Payne's line manager had asked that the caseworker email all the advice she was to give that day, we were not shown any written advice from them. The tribunal asked the respondent to check, generally in relation to advice

from HR, whether there was any written advice which had not been disclosed but we were assured by their representative, after taking instructions, that there was no written advice that was not included in the bundle.

54. Danielle Payne emailed the claimant on 11 October 2018, writing that she had been seeking advice from HR. She informed the claimant that the limit for her special leave had been reached and the claimant would be required to use her annual leave.

55. On 14 October 2018, the claimant emailed Danielle Payne advised her that she would be taking unpaid leave on 15 and 16 October due to her husband being in hospital. She wrote that she had checked with HR and they had confirmed that she was able to take unpaid time off due to the exceptional circumstances and another manager had authorised this in the absence of Danielle Payne.

56. Danielle Payne received advice from an HR case manager on 15 October 2018 (p.512) about options for the claimant to have three days as annual leave, flexing (if available) or a mix, management having made the decision not to award the 3 days special unpaid leave. Alternatively, the days would be treated as absence without leave and could be considered a disciplinary matter.

57. Danielle Payne met with the claimant on 17 October 2018 (p.532). Danielle Payne told the claimant that she did not qualify for unpaid special leave as she had a live warning in place due to unsatisfactory attendance during probation. Danielle Payne told the claimant she would not take the unpaid leave which had been agreed in her absence off the claimant but no more would be granted. The claimant alleges that, during this meeting, Danielle Payne said to her: “we don’t recognise statutory rights”. Danielle Payne denies using these words but gave evidence that she might have said “we can talk about statutory rights, but we need to talk about the policy.” It is not necessary to decide whether the exact words alleged by the claimant were used by Danielle Payne; this does not go to any of the issues we need to decide. However, we find that the claimant understood from the conversation that the respondent, through Danielle Payne, was not acknowledging statutory rights and gained this understanding from Danielle Payne concentration on the respondent’s policies and lack of recognition that there may be additional statutory rights. The claimant has been consistent from an early stage following this meeting, in correspondence and further meetings, in asserting that these words were used by Danielle Payne.

58. We find that Danielle Payne found this meeting difficult and perceived the claimant as rude and confrontational. The claimant apologised to Danielle Payne at the end of the meeting and gave her a hug.

59. The claimant had been having a very difficult time with her husband’s illness and the concerns about her own job. We find that the claimant made her points forcefully and was emotional in this meeting. We consider it likely that Danielle Payne, a relatively junior manager, found managing the claimant difficult and it is likely that this made her less willing and able to disregard the claimant’s conduct in meetings in the way that it appears more senior managers were able to do. However, Danielle Payne did not raise any issue with the claimant about her behaviour until the meeting on 19 November 2018, just before she made her recommendation to senior managers not to confirm the claimant’s employment at the end of the extended probationary period.

60. Danielle Payne made enquiries about a parking space for the claimant. She received a reply from the deputy security liaison officer saying that an on-site parking space could be allocated temporarily, but for permanent access to disabled parking spaces, the claimant would need to be a blue badge holder. Danielle Payne asked if it would be possible for a general (non-disabled) parking space to be allocated to the claimant but was informed that, because the claimant lived within 1 mile from the office, she could only access parking by the disabled parking bays as a blue badge holder. Danielle Payne reported this to the claimant.

61. On 19 October 2018, the claimant appealed against the warning and probation extension. Her appeal included the assertion that the respondent should have discounted all disability-related absences because no reasonable adjustments had been made before her return to work. In an addendum to the grounds of appeal, the claimant also appealed against the refusal of car parking and having to take annual leave to look after her husband. She asserted that the car parking would be on the grounds of short-term medical reasons, to assist her over the autumn and winter months.

62. The appeal hearing took place on 2 November 2018, conducted by June Shaw (p.599). The claimant has alleged that June Shaw did not recommend her for a permanent role. She clarified, in her evidence, that her allegation was about June Shaw not allowing her appeal; had she allowed this, June Shaw could have put things right. June Shaw accepted in her evidence that, if she had allowed the appeal against the written warning, the extension of the claimant's probationary period would have been automatically rescinded.

63. The claimant argued, in the appeal, that her absence was disability related and that this absence should not have been included and that no reasonable adjustments had been put in place. June Shaw responded that, prior to this absence, there had been no reason for a reasonable adjustment to be considered. The claimant argued that she should have been given an increased trigger allowance as a reasonable adjustment. June Shaw advised that they would not accept a trigger point increase of 22 days.

64. June Shaw informed the claimant by letter dated 12 November 2018 that her appeal was unsuccessful (p.630). June Shaw accepted that the claimant's condition of asthma was likely to satisfy the statutory definition of disability under the Equality Act 2010. She noted that the absence of 22 days in June and July 2018 was due to an exacerbation of the claimant's asthma. She wrote that, as the claimant is on probation, attendance management action would be considered when a member of staff has any absences equating to 2 incidents or amounted to 3 working days. The claimant had two incidents and absences amounting to 23 days so formal action was considered appropriate. She wrote that: "although OH advice indicate your condition falls under the remit of the Equality Act 2010, it falls to the Department to determine what level of absence is "reasonable" to support." She wrote that:

> "In making the decision to issue you with a written warning and for your probation to be extended it was decided it was unreasonable to support your 2 absences amounting to 23 days. Other reasonable adjustments were put in place in order to support your return to work by way of offering, and you accepting, a phased return, alternative duties and time given to you to attend subsequent medical appointments."

65. June Shaw referred to the claimant's reference to the six exceptions where sickness absence would automatically not count towards consideration trigger points. She wrote that no request had been received from the Government Recruitment Service, following consideration of the health questionnaire the claimant would have completed, and, therefore, no OH referral was made at the time the claimant was recruited. She wrote:

> "We would not consider implementing reasonable adjustments at the time of your recruitment as there was no evidence on which to base these. Your employment started on 5 March 2018 and your asthma-related absence began on 27 June. Although the fit note dated 11 July 2018 is the first to mention asthma. During this time there is no evidence to indicate your asthma was causing concern and neither did you feel the need to raise any concerns with your line manager during this period regarding reasonable adjustments

66. June Shaw said she had made further enquiries with the business resilience and security team responsible for on-site parking and they had confirmed that, to be consistent with all staff, they were unable to offer a car parking space. However, they had suggested that the claimant may wish to apply for a blue badge.

67. June Shaw did not explain in her letter why the business had considered that it was unreasonable to support the claimant's absence. We also note that she does not explain her understanding of the automatic exception to which the claimant had referred.

68. On 19 November 2018, Danielle Payne had a probation review meeting with the claimant (p.661). Danielle Payne informed the claimant that she had no issues with her performance in terms of physical work; the quality of her work was fine. Danielle Payne referred to the concerns about the claimant's attendance. She also said that she had some concerns with the claimant's behaviours and general conduct. She said that the claimant was not coming across very well and was overly challenging managers and in general HMPO. When asked for a specific example, Danielle Payne referred to discussions about refusing to grant any more unpaid special leave and the claimant being very aggressive in challenging this. She also said the claimant was quite aggressive in the way she challenged the HEO (Angela Nolan) in her attendance review and the further appeal with the SEO and further challenging emails up to the grade 7. This was the first time Danielle Payne had raised such concerns with the claimant. We find that Danielle Payne did have genuine concerns about the claimant's behaviour. She considered that the claimant's behaviour in the meeting on 17 October 2018 had not been acceptable. She had also expressed a view to Angela Nolan, following the meeting on 6 September 2018 that the claimant's behaviour in that meeting was not appropriate. However, Danielle Payne had not raised an issue about the claimant's behaviour prior to this meeting on 19 November.

69. At paragraph 38 of her witness statement, Danielle Payne wrote that, in around October and November 2018, she received various complaints about the claimant's conduct from Angela Nolan, June Shaw, Joanna McGuigan, Ann Gaskill (their Grade 7 and head of area at the time) and three other employees. She wrote that, in particular, the claimant was being aggressive and confrontational in meetings and that she was difficult to talk to. From the notes we have seen that Danielle Payne made of conversations with the claimant, and from her evidence, we find that

Danielle Payne was a conscientious manager, seeking to understand and apply the respondent's policies correctly. If matters raised with Danielle Payne about the claimant had been serious, we would have expected Danielle Payne to have recorded these in writing. There are no notes recording the alleged complaints. There is a lack of detail about the allegations. We find that, if there were complaints of any substance, these would have been recorded by Danielle Payne and raised with the claimant at a stage earlier than 19 November 2018, in accordance with the guidance in the "Do's" in relation to probation (see paragraph 15) to "take prompt action to address any problems that arise during probation". We find that, if there were conversations about the claimant between the individuals named in paragraph 38 and Danielle Payne, these did not raise any serious concern about the claimant's behaviour at the time. It may be that Danielle Payne placed more significance on these conversations in hindsight, seeking to provide more justification for the concerns she raised with the claimant on 19 November 2018 and which was a significant reason for not recommending that the claimant's employment be confirmed at the end of the extended probationary period.

70. In a record of the review meeting on 19 November 2018 (p.666), Danielle Payne wrote that she had no issues with the claimant's performance in terms of physical work, the quality of the claimant's work was good. She wrote that she had some concerns with the "how" which was explained further under the conduct section. Danielle Payne referred to notes she had taken of the meeting on 19 November 2018 for further details of her concerns about the claimant's conduct (p.661).

71. Danielle Payne referred to a senior manager for consideration of dismissal. She wrote (p.670): "Elaine has demonstrated unsatisfactory attendance and does not consistently demonstrate required values and behaviours expected by HMPO as evidenced in many correspondence docs in her staff file, and aggressively over challenging her line manager and senior managers up to and including the G7."

72. Danielle Payne wrote, on 20 November 2018 (p.669): "In light of the nearly 9 months of Elaine's performance, I will be making a recommendation to not confirm her appointment in CSMT. Between Elaine's consistent issues with behaviours and attendance I would not be confident that these issues will not persist. Referring for SEO consideration."

73. Alison Gilligan, SEO, signed a form on 21 November 2018 to be sent to Shared Services stating the intention to take formal action.

74. Also, on 21 November 2018, the claimant contacted ACAS under the early conciliation procedure.

75. On 22 November 2018, the claimant sought to present a grievance by letter of that date to Danielle Payne (p.687). The letter set out a lengthy chronology containing complaints about Danielle Payne. This included that Danielle Payne had dismissed her statutory rights relating to leave and was "clearly agitated" by the claimant's knowledge of HR. The claimant stated that Danielle Payne had never raised any concerns about her behaviour until approximately two weeks until her extended probation was due to end. She alleged that the accusation of bad behaviour/conduct and the threat of dismissal was totally disingenuous and insincere. She wrote that she accepted she was confident and assertive but that she

was not aggressive or confrontational. She alleged failure to make reasonable adjustments and victimisation.

76. The claimant presented a further grievance on a grievance form on 26 November 2018 (p.726), alleging indirect discrimination, victimisation, bullying and harassment.

77. At the claimant's request, she was moved from Danielle Payne's department to another department after presenting her grievance.

78. The claimant was invited to a probationary review to take place on 30 November 2018.

79. The claimant began a period of sick leave on 28 November 2018, initially self-certifying with work-related stress and anxiety and then obtaining fit notes referring to "stress at work". She did not return to work until the New Year. The probation review was moved to 4 January 2019.

80. On or around 29 November 2018, HR prepared a case analysis submission in relation to the claimant's probation review (p.766). This noted that there were some contentions around the days for which the claimant was absent with asthma. This noted that the claimant had started formal external processes to bring a claim of disability discrimination against the respondent at an employment tribunal. In addition to absences for sickness, it noted that the claimant had had several days of special leave during her probation. The analysis referred to the claimant's statutory rights to have time off for dependents and that, according to employment legislation, this could only be taken to deal with unforeseen or emergency situations. They stated that it was unclear how many of these days were taken in line with this legislation. In relation to conduct, the analysis noted that no formal action had been taken but there were notes from 19 November 2018 where her manager admonished the claimant for her behaviour. HR wrote that:

> "if you decide that Ms Taylor-Valles has met the required standards of attendance, performance and conduct, then she should be confirmed in post and this will end all probationary procedures. It is important to consider what precedence [sic] will be set by this decision. Although there is a potential employment tribunal claim pending, it is important to note that according to internal procedures and interpretation of policy, the records state that Ms Taylor-Valles's absence is significantly more than is deemed acceptable for an employee in probation.
>
> "You may decide to disregard the conduct issues raised by Ms Taylor-Valles's line manager and make them of no consequence. It is advisable to gain Ms Taylor-Valles's perspective on the conduct issues raised by her line manager.
>
> "You may decide that as Ms Taylor-Valles has no performance challenges and has completed her tasks and fulfilled the job role to the expected standard, that this is enough to confirm her in post."

81. HR noted that the claimant had requested that proceedings be halted while her grievance was being resolved. HR advised that the probation review not be held up as a result of the grievance, the reason being that probation review evaluates

performance, conduct and attendance and was a broader spectrum than the grievance covered. They wrote:

> "If we choose to take heed to the grievance, then the absences caused by asthma, would be disregarded. If we disregard those absences, that means we would only focus on the absence from 27th of June to the 10th of July 2018. This totals 10 working days and is still in excess of the triggers prescribed by the policy. As of the date of this report (29th November 2018), Ms Taylor-Valles is off sick with stress. These days will further count for the purposes of calculating her total days off sick during her probationary period."

82. The claimant returned to work in January 2019 and moved to a new department under a new manager.

83. The claimant attended a probation hearing with Alison Gilligan on 4 January 2019. Alison Gilligan decided to defer the decision on whether to confirm the claimant in post until the outcome of the grievance in order to make an informed decision. The claimant's probation was extended for a further three months back-dated from 4 December, to expire on 3 March 2019.

84. The claimant presented her claim to the employment tribunal on 4 January 2019.

85. On 10 January 2019, the claimant had a grievance interview with Christine Simpson (p.899). Christine Simpson summarised the grievances as being:

- the claimant had had her probation period extended
- the claimant was the subject of discrimination arising from disability
- the respondent had failed to make reasonable adjustments
- the claimant had been victimised.

86. Christine Simpson interviewed others, including Danielle Payne and Angela Nolan. She prepared an investigation report into the grievances in March 2019 (p.1110). Her summary stated that the investigation had not shown any evidence that the claimant had been disadvantaged by any the actions carried out and had, in fact, been advantaged by some of the additional support provided.

87. A further occupational health report was obtained on 30 January 2019 (p.1335). In answer to questions posed in the referral, the adviser stated that the claimant's asthma was stabilised but may be subject to flareup in the future. They wrote that the recent absence was work-related. The claimant's work performance was not significantly affected by ill-health but she may have higher absence than the average employee due to her underlying respiratory condition. With regard to adjustments, they wrote that the respondent may wish to consider adjusting sickness triggers if deemed reasonable. Also, that they may wish to consider allocation of a parking space closer to the entrance. They wrote:

> "I cannot completely exclude further absence due to the nature of her underlying condition that may be subject to future flareup, however the frequency of this is impossible to predict.

> "Her health condition whilst it may lead to increased level of absence does not appear to impair her actual performance of her duties."

They wrote that she was fit to continue in her current post. With regard to parking, they wrote: "her asthma appears to be exercise induced, therefore, she finds excessive walking can exacerbate her symptoms."

88. On 1 February 2019, the claimant had a severe asthma attack while de-icing her car getting ready for work. She was absent for seven days. She returned to work on 11 February 2019.

89. The claimant's husband had an emergency appointment on 22 February 2019, for which the claimant took a day's unpaid leave.

90. The claimant went on sick leave again, beginning 11 March 2019 due to stress and remained on sick leave until her dismissal took effect on 10 May 2019.

91. The claimant had a grievance hearing with Joanne Wilkes-Waterworth on 13 March 2019 (p.1166). This adjourned for Ms Wilkes-Waterworth to take various actions then resumed on 29 March 2019 (p.1190).

92. Ms Wilkes-Waterworth gave her decision on 11 April 2019 that the grievance was not upheld. Her reasons (p.1241) included that, if consideration trigger point had been enhanced, they would have been exceeded with the absence in June and July 2018. She also wrote that the respondent had supported the claimant beyond the requirements of the probation policy.

93. The claimant appealed against the outcome of the grievance.

94. The probationary hearing took place on 26 April 2019, conducted by Andrew Bannon (p.1253). The claimant was accompanied by a union representative. The claimant expressed surprise that the hearing was going ahead before the outcome of the grievance appeal. Andrew Bannon said he was comfortable with the meeting going ahead and that, if the outcome changed after the appeal, it could be reviewed then. Andrew Bannon said he was considering the claimant's absences. He said this was not about her conduct but accepted the issue about her conduct was exacerbating the situation.

95. We find that Mr Bannon did not take into account the concerns raised by Danielle Payne about the claimant's conduct in making his decision.

96. Mr Bannon wrote to the claimant on 1 May 2019, informing her that he had concluded that her attendance was unacceptable and her employment was being terminated on the grounds that her attendance had rendered her unsuitable for continued employment (p.1277). He wrote that, at the time the hearing took place on 26 April, the claimant had incurred 98 days' absence since the start of her employment over five separate absences. 30 days absence could be attributed to her asthma and asthma-related sickness, which he noted the claimant felt should be disregarded under the provisions of the Equality Act 2010. He wrote that an employer cannot simply disregard an absence linked to a disability or underlying medical condition. He pointed out that a decision to delay the probation hearing had been taken until the result of the grievance hearing was known and wrote that he

believed this demonstrated that the managers involved in dealing with the claimant's case had been reasonable in considering her probationary period. He wrote:

> "In view of this, it has been decided to terminate your employment on the grounds that your attendance has rendered you unsuitable for continued employment. The total of 98 days sickness absence over a period of five separate absences is far in excess of published consideration trigger points during a probationary period and it is my genuine belief that the total amount of sickness absence days you have accrued is far in excess of what it is deemed reasonable for the business to support."

97. Andrew Bannon did not, in his letter, give any detail as to why the respondent could not support the claimant's level of absence. His witness statement gives generalised evidence that high levels of sickness absence can be costly and disruptive to the business; consistently arranging to reallocate work for sick employees means that productivity and customer service can suffer. He gave no evidence in his witness statement about the specific impact of the claimant's absence on the business area in which she worked. In cross examination, he confirmed that he had not made any enquiry about the level of business during the claimant's absence. He did not know whether they had to recruit as a result of the claimant's dismissal; he said they do not always backfill. In his experience, it takes 3 to 6 months to backfill a position.

98. The claimant's employment ended on 10 May 2019.

99. The claimant unsuccessfully appealed against her dismissal. The appeal was heard by Valerie Ward. Valerie Ward did not consider it necessary to defer her decision until after the outcome of the grievance appeal. The claimant was notified of the decision on 19 June 2019 (p.1292). Valerie Ward concluded that the procedures followed by Andrew Bannon were correct and an informed decision reached. The outcome letter included that the claimant had asked her to consider the fact that the absences due to stress would not have happened if the warning had not been issued to the claimant and her conduct had been challenged. She wrote: "I'm satisfied that the issue of a written warning was appropriate and although I acknowledge that this can be upsetting, the Department is required to follow its policies and procedures, and as such it was correct for the written warning to have been issued." She also wrote: "In relation to the conduct issue, as there was insufficient evidence to support the adverse conduct - the decision manager quite rightly did not use or take into account this in his consideration." Valerie Ward concluded that she was satisfied that the claimant's level of absence led to the dismissal decision which she considered to be reasonable.

100. The grievance appeal was also unsuccessful. The grievance appeal was heard by Graham Roberts. The claimant was notified of the decision on 31 July 2019 (p.1395). The outcome letter included Graham Roberts noting that the claimant had been advised to apply for a blue badge, which the claimant had now done. In relation to the recommendation made in the end of probation review dated 20 November 2018, Graham Roberts wrote:

> "I agree with you and do not consider it was appropriate for behaviours to be raised at this point and after the initial conversation where concerns were raised the day before. However, as pointed out in the outcome of the

probation hearing and appeal the intention to dismiss was based solely on attendance with behaviour issues being discounted by the decision maker."

101. Graham Roberts concluded that the actions taken by the respondent to manage her absence had been reasonable and proportionate and that the decision to dismiss on attendance grounds was taken in line with probation procedures. He considered that Danielle Payne had sought to act in the best interests of the claimant and respondent and he considered that her dealings with the claimant were appropriate and proportionate. He considered that the claimant's grievances had been fully and properly investigated.

102. On 5 June 2019, the claimant presented to the Tribunal amended particulars of claim which included alleged acts of discrimination up to May 2019. This amendment, which was not opposed by the respondent, was accepted at a preliminary hearing on 7 August 2019.

103. The respondent's witnesses did not include in their witness statements any evidence relevant to the statutory, or "reasonable steps", defence, which had been pleaded in the response. The bundle of documents included some guidance on making reasonable adjustments but did not include Equality and Diversity policies or any training material from the training relevant managers had undertaken. However, in answer to questions in cross examination, the witnesses gave some evidence about receiving training in equality and diversity policies. Danielle Payne said all grades were trained on equality and diversity policies. She said there was annual training, but could not remember when she last received training. She said this was online learning, run by Civil Services Learning.

Submissions

104. Both representatives prepared extensive written submissions and made relatively brief oral submissions. Since the written submissions can be read in their entirely, if required, we do not seek to summarise them, but deal with the principal arguments in our conclusions.

105. In oral submissions, Mr Williams invited the Tribunal to find that, viewed objectively, the claimant's conduct was inappropriate and Danielle Payne had genuine concerns about it. He submitted that the claimant's stress absences were plainly not caused by asthma, but arose in light of the claimant's perceptions about how she had been treated and her perception that it was unfair.

106. Mr Williams noted, in relation to PCP2, that the claimant had not had any sickness absence because of asthma attacks relating to arrangements for travelling to work. He noted that the claimant relied for disadvantage on an increased risk of sickness. In relation to PCP2, Mr Williams submitted that an increased risk of sickness does not amount to substantial disadvantage and adds nothing to PCP1: if the claimant had an asthma attack, whatever the trigger, the consequences would be swept up under PCP1.

107. Mr Williams submitted that, once Andrew Bannon was dealing with the probation hearing, the claimant had had substantial periods of absence, much of which was not related to disability. This was a clear case for him to deal with; not on the borderline.

108. In his reply to the claimant's submissions, Mr Williams submitted that the claimant had changed her case in closing submissions in relation to the allegation that June Shaw had refused to recommend the claimant for a permanent position; she changed it to refusing a permanent role by not allowing the appeal. Mr Williams suggested that the original formulation had been based on a misunderstanding of the document at page 685, the claimant thinking this had been signed by June Shaw whereas it had been signed by Alison Gilligan. Mr Williams submitted that it was not appropriate for the claimant to be allowed to change her case at this stage of proceedings.

109. In oral submissions, Ms Johnson submitted that the email dated 11 October 2018 (p.500), "we need to play it by the book now it is sadly not going to work out I think …" was telling of the mindset at the time. It suggested the writing was already on the wall for the claimant. Ms Johnson submitted that the allegations about the claimant mushroomed in retaliation to the claimant asking awkward questions about her treatment at work. Ms Johnson submitted that the allegations about the claimant's conduct were not made out. If her conduct was as serious as Danielle Payne made out, it ought to have been dealt with in a more formal manner. It was convenient that allegations were raised about the claimant's conduct when they were.

110. Ms Johnson accepted that the claimant had two periods of absence for work related stress but the claimant says this was directly caused by the respondent's treatment of her. The claimant did not become ill when her husband fell ill. There was nothing to corroborate the respondent's submission that the claimant's sickness absence for work-related stress was caused by anything other than what happened at work.

111. Ms Johnson submitted that the grievance was not correctly handled and was done in a discriminatory way. This contaminated the rest of the procedure and perpetuated the discrimination which had already occurred in relation to the claimant.

112. In relation to the claimant's dismissal, Ms Johnson submitted that the respondent had produced no evidence of the impact on the respondent's business of the claimant's sickness absence. There was no enquiry by any of the respondent's witnesses into those issues and the letters do not set out the impact. There is no information on the number of calls received, waiting time, who covered for the claimant during absence and potential costs to the business; there was a lacuna in the evidence to the Tribunal. Ms Johnson submitted that dismissing the claimant did not achieve the respondent's legitimate aims at all and would not have done so for a significant time.

113. Ms Johnson submitted that June Shaw, in dealing with the appeal, clearly had the ability to rescind the warning and extension to the probationary period. This would have confirmed the claimant as a permanent member of staff.

114. In answer to a question from the judge as to how the refusal by Danielle Payne to allow the claimant time off for dependants was because of something arising in consequence of disability, Ms Johnson submitted that Danielle Payne felt the claimant should not have been allowed special leave, paid or unpaid, because she was on a warning. This happened because of sickness absence which was disability-related.

The Law

115. Disability was conceded so it is not necessary for us to set out the provisions relating to the meaning of disability.

116. There were no differences between the parties as to interpretation of the relevant law to be applied. The parties referred us to a number of authorities in their written submissions, but it is not necessary for us to examine those authorities in detail, since the principles to be applied from the legislation and case law were not in dispute. We set out here the relevant legal provisions and the most relevant applicable principles to be taken from the authorities.

117. The provisions relating to the duty to make adjustments are included in section 20 of the Equality Act 2010 (EqA) and Schedule 8 to that Act. Schedule 8 imposes the duty on employers in relation to employees. Section 20(3) imposes a duty comprising:

> "A requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage."

118. Paragraph 20 of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

119. "Substantial" for these purposes means "more than minor or trivial": section 212(1) EqA.

120. Whether or not adjustments were reasonable in the circumstances is to be determined by the Tribunal objectively.

121. The Court of Appeal held in *Griffiths v Secretary of State for Work and Pensions [2015] EWCA 1265,* that an absence management policy was capable of placing a disabled employee at a substantial disadvantage and, therefore, the duty to make reasonable adjustments was engaged. An employer must consider whether the duty means it would be reasonable not to issue a warning or to adjust trigger points.

122. For an adjustment to be reasonable, it is sufficient that there is a prospect of it alleviating the disadvantage: *Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10*.

123. Section 15 EqA sets out the provisions about discrimination arising from disability, which are 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."

124. This requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? And, (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to find what, consciously or unconsciously, was the reason for any unfavourable treatment. The second is a question of objective fact in the light of the evidence. There may be more than one link in the chain of consequences. *Sheikholeslami v University of Edinburgh [2018] IRLR 1090 EAT.*

125. The "something" that causes the unfavourable treatment need not be the main or sole reason for the unfavourable treatment but it must have a significant (or more than trivial) influence on the unfavourable treatment to be an effective reason for, or cause, of it: *Pnaiser v NHS England [2016] IRLR 170 EAT.*

126. Section 26 EqA sets out the provisions about harassment. The relevant parts of this section for this case provide:

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

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

(b) The conduct has the purpose or effect of –

(i) violating B's dignity, or

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

……

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

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

127. Subsection (5) lists relevant protected characteristics which include disability.

128. Section 27 EqA sets out the provisions about victimisation. These state:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act."

129. Section 39 EqA makes discrimination arising from disability and victimisation unlawful in the employment field. Section 40 EqA makes harassment of employees by their employer unlawful.

130. Section 109 EqA provides that an employer will be liable for discriminatory acts done by its employees in the course of their employment. However, section 109(4) provides for a defence for the employer if they can show that they took all reasonable steps to prevent the employee from doing the act of discrimination or from doing anything of that description.

131. Section 136 EqA sets out provisions relating to the burden of proof. It provides:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

Conclusions

132. The respondent accepted that, at all relevant times, the claimant's impairment of asthma amounted to a disability within the meaning of section 6 EqA.

133. Although the list of issues included an issue as to the date by which the respondent had actual or constructive knowledge of the claimant's disability, in closing submissions, Mr Williams did not seek to argue that the respondent did not have actual or constructive knowledge of disability at all relevant times so it is not necessary for us to determine the precise date on which the respondent acquired this knowledge.

Complaints of failure to make reasonable adjustments

PCP1: requirement to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions.

134. The respondent accepts that it applied PCP1. The respondent has not conceded that the claimant was put at a substantial disadvantage due to the

application of this PCP. The respondent submitted that the claimant had not identified with any clarity the substantial disadvantage relied upon, but presumed the case was that the claimant is more likely to be subject to attendance management procedures as a result of having a higher statistical likelihood of sickness absence due to her asthma.

135. We conclude that the claimant was put at a substantial disadvantage due to the application of this PCP. As the occupational health reports make clear, the claimant's asthma could lead to more absence than would otherwise be the case. The disadvantage to the claimant of the requirement to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions is more than minor or trivial because of this likelihood of increased absence. The respondent did not argue that they did not have actual or constructive knowledge that the claimant was likely to be at that substantial disadvantage, at relevant times, compared with persons who are not disabled. We conclude that they had actual knowledge of disadvantage at the latest by the date of the first occupational health report, which was 18 July 2018.

136. We conclude, therefore, that the duty to make reasonable adjustments to alleviate disadvantage caused by this PCP arose.

137. We turn, therefore, to the reasonable adjustments which the claimant says should have been made. These were as follows:

a. Discounting disability related absence as per the policy; not taking account of any disability related absence.

b. Looking at absences as spells rather than days.

c. Adjusting the policy to allow for more sickness absence; adjusting the triggers.

d. Not issuing the claimant with a written warning.

e. Not extending the claimant's probationary period.

f. Not dismissing the claimant.

138. The first of these relates to the claimant's argument that the respondent's policy automatically required her disability-related sickness absence to be discounted because reasonable adjustments had not been made. The claimant was referring to the exception in paragraph 12 of Annex B we have set out at paragraph 14. The claimant persisted in this argument throughout the processes leading to her dismissal and the grievance process. From the notes of meetings and correspondence we have seen, we do not consider that the respondent ever properly explained to the claimant what they considered this part of their policies to mean and, therefore, why it did not apply to automatically discount her disability related sickness absence within the period June to July 2018. We have also not been shown any advice from HR as to the meaning of the policy. However, we agree with the respondent's submission as to the meaning of the exception. We consider that disability-related absences are only automatically discounted if: (1) there was a reasonable adjustment which ought to have been made at the time of the absence; **and** (2) that adjustment would have enabled the employee to return to work. This

appears to us to be the correct interpretation of the policy, having regard to the fuller explanation contained at Annex G to the respondent's Attendance Management Procedure dated July 2014. We have understood this to be taken from the procedure applying to all employees, not just probationers (see paragraph 16). We conclude that this exception, as it applies in the probation policy, must be intended to reflect the exception which applies in the general Attendance Management Procedure; it is unlikely that the exception would be more favourable to probationers than to employees who have successfully completed their probationary period.

139. We conclude that the automatic exception did not apply to the claimant in relation to her absence in June/July 2018. Leaving aside, for the moment, the issue as to how much of that leave was disability related, the claimant has accepted that there were no adjustments which could have been made in June or July 2018 which would have enabled her to return to work sooner. The automatic exception does not, therefore, apply.

140. We do not consider it would be a reasonable adjustment, in relation to PCP1, to not take account of any disability related absence as a general approach. This is not required by the Equality Act 2010. Whether it would be a reasonable adjustment to discount a particular disability related absence, or part of the disability related absence, when considering particular action, needs to be considered in the context of the particular decision being made and relevant circumstances at the time.

141. We turn next to the second suggested reasonable adjustment, which is that the respondent should have looked at absences as spells rather than days. We consider that this argument is misconceived. We consider the Attendance Management Policy to be quite clear in meaning that triggers for consideration of action are reached if **either** there are two spells of absence during the probationary period **or** an absence, or absences, totalling at least three days. The claimant had reached both trigger points long before the end of her June/July period of sickness absence. We do not consider that looking at absences as spells rather than days was a reasonable adjustment with a prospect of alleviating the disadvantage caused by the PCP.

142. The third suggested reasonable adjustment is adjusting the policy to allow for more sickness absence; adjusting the triggers. We understand this to be a suggestion that the trigger points should have been adjusted retrospectively, so that the claimant's absence in June/July 2018 would not have caused the claimant to hit the trigger point and she would not have been required to attend an attendance management meeting, and, therefore, not been at risk of being given a warning. We do not consider this would have been a reasonable adjustment. We do not consider it unreasonable that the respondent should have a meeting, following the claimant hitting the unadjusted trigger points, to consider what action, if any, was appropriate. They would then need to consider whether the duty to make reasonable adjustments meant they should not issue a warning and/or should adjust trigger points for the future.

143. The fourth suggested adjustment is not issuing the claimant with a written warning. We consider the respondent's submissions in relation to the giving of the warning (paragraphs 21-22) have confused the meeting under the probation, managing attendance policy, conducted by Angela Nolan on 6 September 2018, with a probation review meeting, which was not held until, initially, 4 January 2019 with

Alison Gilligan, and then on 26 April 2019 with Andrew Bannon. In conflating the attendance management meeting with the probation review meeting, the respondent has suggested that the respondent chose to remove the option of dismissal from consideration before the matter reached the meeting with Angela Nolan. In fact, in accordance with the respondent's policies on attendance management, a written warning was the highest sanction available at a first attendance management meeting (see paragraph 14). Further sickness absence following a written warning could lead to dismissal.

144. The claimant had had two periods of absence when Angela Nolan considered whether to give the claimant a warning. The first was not disability-related. The second, longer, period of absence in June/July 2018 was partly, but not wholly, disability-related. It is not possible for us to assess precisely how much of that 22 day absence was disability-related. The absence began with the claimant catching a virus from her daughter. We have no evidence to suggest that asthma made the claimant more susceptible to catching a virus. At the very least, 2 days' absence of the 22 day period was not disability related. It was not until the fit note issued on 11 July 2018 that asthma was mentioned. We consider it likely that the claimant's asthma contributed to the severity of her illness at some time earlier than 11 July 2018. The fit note dated 3 July 2018 mentions acute respiratory infection. We conclude that, at some point after 27 June and before 11 July 2018 at the latest, the illness became disability-related. We conclude that, even if the majority of the claimant's 22 day absence was disability-related and the respondent agreed not to take this into consideration, the respondent would have given the claimant a warning on the basis of the non disability-related absence. The respondent's strict approach to managing absence is evidenced in the evidence of the respondent's witnesses, some of whom had, themselves, been given warnings for absence in the past, and the emphasis in HR advice on concerns about setting precedents. If the claimant would have been given a warning for non disability-related absence, we do not consider that it would be a reasonable adjustment to not give her a warning. We conclude that this would not have been a reasonable adjustment.

145. The fifth suggested adjustment is not extending the claimant's probationary period. The first extension of the claimant's probationary period to the end of the period of the warning was a consequence of the warning being issued, in accordance with the respondent's policy (see paragraph 15). We consider it was reasonable to extend the probationary period in these circumstances, to give the claimant a longer period to demonstrate that she could achieve satisfactory attendance levels and, therefore, increase her prospects of her employment being confirmed at the end of the extended probationary period. Had the probationary period not been extended, contrary to the respondent's policy, and the probation review taken place before the end of the original probationary period (4 September 2019), it is highly likely that the claimant's employment would have been terminated at that point due to her absence record. The attendance management meeting would have taken place on 9 August 2018, before the end of the original probationary period, had Rebecca Kenny been available to deal with it on that date, as intended. We do not consider it would have been a reasonable adjustment to not make the first extension to the claimant's probationary period.

146. The further extension to the probationary period was because of the claimant's absence and then the decision of Alison Gilligan to defer a decision until the outcome of the grievance. Probation was then extended for a further three

months, backdated from 4 December 2018 with a new expiry date of 3 March 2019. We do not understand the claimant to be complaining about the later extension of her probationary period. However, if we are asked to consider this, we conclude that, in these circumstances, it would not have been a reasonable adjustment not to further extend the claimant's probationary period.

147. The final reasonable adjustment proposed is not dismissing the claimant. For reasons we set out below, we have concluded that the claimant's dismissal was not unlawful discrimination arising from disability. We concluded that dismissal was a proportionate means of achieving a legitimate aim. Given this conclusion, we do not consider that it would have been a reasonable adjustment not to dismiss the claimant. By the time Andrew Bannon was considering dismissal, the claimant had considerable additional absences. Even if the claimant is right that she would not have had her stress-related absences, had it not been for the respondent's actions, we do not consider that this would make it a reasonable adjustment not to dismiss her. The situation is analogous to the dismissal of someone rendered incapable of effective service due to a work-related injury. The origin of the injury will not, of itself, mean that an employer will be in breach of the duty to make reasonable adjustments or the provisions prohibiting discrimination arising from disability under the Equality Act if it does not retain that employee in work.

148. We conclude that the complaint of failure to make reasonable adjustments in relation to PCP1 is not well founded.

PCP2: the respondent's car parking policy, requiring individuals to qualify for blue badge and/or to live in excess of 1-mile radius of the workplace in order to be considered for an on-site car parking space

149. The claimant submitted that she was placed at a substantial disadvantage as a result of the heightened risk of sickness absence, due to prolonged walking in inclement weather.

150. The respondent has submitted that the claimant did not suffer any disadvantage because of this PCP; she worked through some winter months and did not have any absence because of asthma as a result of having to park on residential roads and walk up to 10 minutes to the building. However, based on the advice in the occupational health report that walking in the cold could exacerbate her asthma, we conclude that this PCP did have more than a minor or trivial adverse effect on the claimant. The respondent had knowledge of the substantial disadvantage due to the occupational health report. The duty to make reasonable adjustments, therefore, arose.

151. The respondent had more people wanting to park than spaces available and had to balance the requirements of various people, wanting to appear fair. The claimant was seeking a temporary, seasonal, adjustment of having a space near the entrance made available to her during the cold winter months. The enquiries various members of respondent's management made about parking for the claimant did not suggest to those responsible for allocation of parking that the respondent might have a duty to adjust its normal policies because of the claimant's disability. The respondent asserted its normal policy, not considering any adjustment to this. It appears to us that the respondent was more concerned about opening themselves up to other requests for parking, if they made an exception to the usual policies, then

ensuring they were complying with their duty to make reasonable adjustments. Given the respondent had control of its own parking spaces, we conclude it would have been reasonable to provide, on a temporary basis, a parking space to the claimant during winter months. It may have been a reasonable adjustment to provide this to the claimant whilst she applied for a blue badge. If the claimant obtained a blue badge, then she would be able to use the disabled parking bays in the respondent's car park. If she did not qualify for a blue badge, the respondent would then have to consider whether the duty to make reasonable adjustments would require them to provide her with a parking space on a seasonal basis, even though she did not qualify for a blue bade. Although the respondent suggested that the claimant apply for a blue badge, which she did eventually, it did not suggest that, whilst the application was pending, they would provide her with a parking space near the entrance.

152. We conclude that the complaint failure to make reasonable adjustments in relation to PCP2 is well-founded.

Complaints of discrimination arising from disability

Disciplinary action (a written warning) by Angela Nolan on 10 October 2018

153. The respondent accepts that this was unfavourable treatment.

154. The warning was given because of the claimant's absences. These absences arose, at least in part, because of disability. For unfavourable treatment to be because of something arising in consequence of disability, it is not necessary for the disability-related reason to be the only reason for the unfavourable treatment. It is enough that the disability related reason is a material reason for the treatment. We conclude, therefore, that the issue of the warning was because of something arising in consequence of disability.

155. We turn, therefore, to the issue of justification: was the issue of a written warning a proportionate means of achieving a legitimate aim? The legitimate aim relied on is the appropriate management of sickness absence. We accept that this was a legitimate aim. Whether the issue of the warning was a proportionate means of achieving this aim requires a balancing act between the reasonable needs of the employer and the discriminatory effect on the claimant of that warning.

156. We accept that the respondent has a reasonable need to appropriately manage sickness absence. HR advice set out some of the difficulties caused by absence. In order to try to appropriately manage sickness absence, the respondent has an absence management policy, with specific provisions relating to those on probationary periods. We accept that it is reasonable, generally, to manage absence by acting in accordance with this policy, whilst recognising the need, at times, to make reasonable adjustments to the operation of the policy for disadvantage caused by disability.

157. We concluded, when dealing with the complaint of failure to make reasonable adjustments in relation to PCP1, that the respondent would have issued the claimant with a written warning for her absences, even if the disability-related absences had been completely discounted. In these circumstances, we consider it was a proportionate means of achieving the aim of appropriately managing sickness

absence for Angela Nolan to issue the claimant with a written warning. We conclude that this complaint of discrimination arising from disability is not well-founded.

Extension of her probationary period by Angela Nolan on 10 October 2018

158. The respondent does not accept that this was unfavourable treatment, contrasting it with an alternative of dismissal. For the reasons we gave when dealing with the complaint of failure to make reasonable adjustments, we do not consider that dismissal was an option available at a first management attendance meeting. This was not a probation review meeting. However, the extension of the probationary period was an inevitable consequence of the issue of a written warning. It gave the claimant time to demonstrate satisfactory attendance before a decision was taken as to whether to confirm her employment or to dismiss her at the end of the probationary period. We do not consider that extending the probationary period in the circumstances was unfavourable treatment. Even if it was, we consider it was a proportionate means of achieving a legitimate aim, since it was an inevitable consequence of the written warning, which we considered was a proportionate reason achieving a legitimate aim.

Refusal to allow the claimant time off for dependants by Danielle Payne at a return to work interview on or around 12.10.18, contrary to her statutory right for unpaid time off and the respondent's policy for paid time off

159. We found that Danielle Payne misunderstood the advice she had been given in relation to the statutory right for time off for dependents. We conclude that it was because of her genuine understanding of rights to time off that she refused the claimant unpaid time off or paid time off, other than being able to take annual leave.

160. Ms Johnson submitted that the leave was refused because the claimant was on a written warning and, since the warning was disability-related, the refusal was because of something arising in consequence of disability. Although Danielle Payne did say to the claimant in the meeting on 17 October 2018 that that she did not qualify for unpaid special leave as she had a live warning in place due to unsatisfactory attendance during probation (see paragraph 56), it appears that this reason was an additional reason added after Danielle Payne had already told the claimant that she did not qualify for any more special leave because she had reached the limit (see paragraph 49). The warning does not, therefore, appear to us to be a material reason for refusing the special leave, despite what Danielle Payne said in the meeting.

161. We conclude that Danielle Payne's actions were not because of something arising in consequence of disability and this complaint is not well-founded. It is not necessary, therefore, for us to decide whether the claimant would have been entitled to take statutory leave for the time for which she sought leave and we do not do so.

Refusal to recommend the claimant for a permanent role by Danielle Payne and June Shaw on 20/21 November 2018

162. We agree with the respondent's submission that it appears that the complaint about June Shaw identified in this agreed list of issues is based on a misunderstanding as to the signatory on the probation - intention to take formal action form (p.685). The copy of the document in the bundle, as with so many of the

documents, had names redacted so it is easy to see how the claimant could have made this mistake. The claimant believed the signatory to be June Shaw. However, at this hearing, the respondent's evidence identified the signatory as being Alison Gilligan. The complaint in relation to June Shaw's actions, as identified in the list of issues, is, therefore, misconceived. The claimant in her evidence and Ms Johnson in her submissions sought to recast this issue, insofar as it related to June Shaw, as being about June Shaw's refusal to allow the appeal against the grievance. We agree with the respondent that it would not be fair to allow the claimant to recast this allegation at this late stage. The claimant always knew that June Shaw had conducted the appeal against the grievance. If she had wanted to complain of discrimination arising from disability in relation to the refusal to allow the appeal by June Shaw, she could have done so. We, therefore, find the complaint about refusal to recommend the claimant for a permanent role, insofar as it relates to June Shaw, to be not well-founded.

163. We go on to consider the remainder of the complaint, which is about Danielle Payne refusing to recommend the claimant for a permanent role. The respondent accepts that this was unfavourable treatment. The respondent submitted that there was no causal link between the claimant's disability and the unfavourable treatment, relying on submissions made relating to the complaint of victimisation. The respondent did not make any submissions relating to justification.

164. Danielle Payne made a recommendation that the claimant's employment should not be confirmed. She did this for two expressed reasons: the claimant's attendance record and concerns about the claimant's behaviour.

165. Considering first the expressed reason of the claimant's attendance record, we conclude that making a recommendation to dismiss based, in part, on the attendance record was because of something arising in consequence of the claimant's disability. We reach this conclusion for the same reasons we have given on this issue in relation to the complaint about the written warning.

166. We consider next the reason Danielle Payne gave about the claimant's behaviour. In making the recommendation, Danielle Payne wrote: "Elaine has demonstrated unsatisfactory attendance and does not consistently demonstrate required values and behaviours expected by HMPO as evidenced in many correspondence docs in her staff file, and aggressively over challenging her line manager and senior managers up to and including the G7" (p.670). We found that Danielle Payne had genuine concerns about the claimant's behaviour in the meeting in October 2018. In this meeting, the claimant was challenging what Danielle Payne was saying about entitlement to leave. There does not appear to be any causal link between the claimant's behaviour in that meeting and her disability. However, Danielle Payne's expressed concerns about the claimant's conduct go beyond the claimant's behaviour in that meeting. She asserts that the claimant does not demonstrate required values and behaviours expected by the respondent as evidenced in correspondence. We have not seen evidence of any inappropriate conduct by the claimant in correspondence. In much of the correspondence, the claimant is making points related to her disability, as to why she believed disability-related absences should be discounted in relation to managing her attendance. We conclude that the behaviour on the basis of which the recommendation was made was, in part, arising in consequence of the claimant's disability. The respondent has not persuaded us that the "how" of the correspondence was inappropriate, so we are

not persuaded that the recommendation was, in this respect, because of the way the claimant presented herself in correspondence, as opposed to the contents of what she was saying and challenge to the respondent's position.

167. We conclude that Danielle Payne's recommendation was, to a material extent, because of something arising in consequence of the claimant's disability for this reason.

168. We, therefore, go on to consider justification: was the refusal to recommend the claimant for a permanent role a proportionate means of achieving a legitimate aim? The only pleaded aim which could be applicable is the appropriate management of sickness absence.

169. At the time the recommendation was made, on 20 November 2018, the claimant had not had any periods of absence since her absence in June/July 2018. She had not had any periods of absence since the warning was issued. The absence in June/July 2018 was in large part disability related. The asthma attack was the first serious one the claimant had had childhood. The prognosis from the occupational health advisor was good, although they could not rule out the possibility of future flareups. The occupational health advice was that the claimant was fit for service. The claimant was performing well.

170. Whilst we accepted that Danielle Payne had genuine concerns about the claimant's behaviour, perceiving it to be inappropriate, her concerns were not sufficiently serious to raise the matter with the claimant prior to 19 November 2018. We conclude that Danielle Payne gave more emphasis to her concerns than was warranted on the basis of an objective assessment of the claimant's behaviour. This view is, perhaps, supported by the fact that, when it came to the probation review, Andrew Brannan took no account of the claimant's conduct. HR advice prior to the probation review had been that the claimant's comments should be sought about the allegations. This was not done. Also, Graham Roberts, in the appeal about the grievance, wrote that he did not consider it was appropriate for behaviours to be raised at "this point", referring to the recommendation made on 20 November 2018 (see paragraph 98). The respondent has not persuaded us that, viewed objectively, the claimant's behaviour was such as to warrant a refusal to recommend her for a permanent role.

171. We consider that the recommendation of the claimant's line manager would be given great weight in deciding whether the claimant's employment would be confirmed or terminated. The recommendation made by Danielle Payne was likely to lead to the end of the claimant's employment. The consequences for the claimant of the recommendation were, therefore, very serious. If Danielle Payne had not recommended dismissal then we consider it likely that the claimant's employment would have been confirmed at the end of her extended probationary period, on 4 December 2018.

172. We accept that the respondent had a reasonable need to manage attendance. However, they had already given the claimant a written warning. Had the claimant been confirmed in post, they would have been able to manage her attendance in accordance with normal management processes, had she had any further absences.

173. Carrying out the balancing exercise between the reasonable needs of the employer and the effects of the treatment on the claimant, we conclude that the respondent has failed to prove that refusing to recommend the claimant for a permanent role was a proportionate means of achieving a legitimate aim.

174. We conclude, therefore, that this complaint is well-founded.

Dismissal by A Bannon on 2 May 2019

175. The respondent concedes that this was unfavourable treatment.

176. The dismissal was because of the claimant's absences. Her first major absence, in June/July 2018 was, in large part, disability-related. By the time of her dismissal, she had had significant other absences for work-related stress. We conclude that this stress was at least in part due to the risk of losing her job and the associated processes and that was because of a recommendation which we have found to be discrimination arising from disability. We conclude that the absences for which the claimant was dismissed were at least in part because of something arising in consequence of the claimant's disability. This was a material part of the reason for her dismissal. This is sufficient to conclude, as we do, that the dismissal was because of something arising in consequence of disability.

177. We turn then to justification. The relevant legitimate aim is the appropriate management of sickness absence. By the time dismissal was considered by Mr Bannon, the claimant had had very substantial periods of sickness absence during her relatively short service. The situation had moved on from the time when the recommendation was made by Danielle Payne, at which time the claimant's absences had been considerably less and the prognosis from occupational health was good. Although the respondent's evidence as to the actual impact on the business of the claimant's absences has been somewhat lacking, we conclude that such substantial absences were likely to cause the business difficulties in terms of the impact on colleagues' workload and/or customer service levels. In these circumstances, we conclude that dismissal was a proportionate means of achieving the legitimate aim.

178. We conclude that this complaint is not well-founded.

<u>Victimisation</u>

179. The claimant relies on the matters set out at 12 (a) to (f) in the list of issues in the Annex to these reasons as protected acts. They are said to be protected acts because the claimant was making allegations that the respondent and/or its employees had acted in contravention of the Equality Act 2010.

180. The alleged detriment is the refusal by Ms Payne and Ms Shaw to recommend the claimant for a permanent position, by default recommending her dismissal. The respondent accepts that Ms Payne (but not Ms Shaw) did not recommend the claimant for a permanent position and that this was a detriment.

181. For the reasons given when dealing with the complaint of discrimination arising from disability about the refusal to recommend the claimant for a permanent position, we do not consider that the claimant can, at this late stage, recast her

allegation about Ms Shaw. We find the complaint to be not well-founded, insofar as it relates to Ms Shaw, since Ms Shaw was not involved in the recommendation.

182. Ms Payne's recommendation was made on 20 November 2018. Any alleged protected acts later than this date cannot, therefore, be the reason for the recommendation. The matters set out at 12(e) and 12 (f) are not, therefore, relevant protected acts.

183. At the attendance meeting of 6 September 2018, the claimant was asserting that reasonable adjustments should have been made before her return to work. We conclude the matter set out at 12(a) was a protected act.

184. We are not clear which email is referred to at 12(b). The claimant's submissions do not give a page reference for this email, unlike for other documents relied on. We have not been referred specifically to an email from the claimant to Ms Nolan dated 12 November 2018 which makes an allegation that the respondent was acting in contravention of the Equality Act 2010. We do not, therefore, conclude that there was a protected act on 12 November 2018.

185. In the appeals on 19 October 2018, the claimant was making allegations that the respondent had failed to make reasonable adjustments. We conclude that the matter set out at 12(c) was a protected act.

186. At the appeal hearing on 2 November 2018, the claimant was making allegations that the respondent had failed to make reasonable adjustments. We conclude that the matter set out at 12(d) was a protected act.

187. We have concluded, therefore, that the matters set out at 12(a), 12(c) and 12(d) were relevant protected acts. The claimant was making allegations that the respondent and/or its employees had acted in contravention of the Equality Act 2010.

188. In making her recommendation, Ms Payne referred expressly to correspondence from the claimant as evidencing inappropriate behaviour. Ms Payne did not identify specifically the correspondence relied on. However, we consider it likely that this included the correspondence referred to at 12(c). We found that the correspondence was not inappropriate. We have found that Ms Payne exaggerated her concerns about the claimant's behaviour. We draw an inference from the reference to the correspondence in the recommendation and the exaggeration of concerns, on the basis of which we could find that at least some of the protected acts were a material factor in Danielle Payne's decision to make the recommendation. The burden of proof passes to the respondent. The respondent has not satisfied us that the recommendation was, in no sense whatsoever, because of the protected act. We, therefore, conclude that the complaint of victimisation, insofar as it relates to the recommendation made by Danielle Payne, is well-founded.

Harassment

189. We have had difficulty in understanding how the claimant fits the allegations within the framework of harassment related to disability and Ms Johnson's submissions did not assist our understanding of the claimant's case on harassment.

190. We conclude that the conduct relied upon did not have the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for her at work. We, therefore, conclude that these complaints are not well-founded.

The reasonable steps defence

191. The respondent's witnesses gave no evidence in their witness statements relevant to this defence. We did not know until closing submissions that the respondent was still intending to rely on this pleaded defence. The only evidence we had emerged in cross examination of the respondent's witnesses. Danielle Payne's evidence was that she received annual diversity and equality training, but she was unable to say when she had last received this and she gave no evidence about its content. We do not consider this to be sufficient evidence on the basis of which we could find that the respondent took all reasonable steps to prevent Danielle Payne committing the acts of discrimination arising from disability and victimisation which we have found to have occurred, or to prevent her from doing anything of that description. We conclude that this defence is not made out. The respondent is, therefore, vicariously liable for the acts of discrimination committed by Danielle Payne.

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Employment Judge Slater

Date: 22 July 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

26 July 2021

FOR THE TRIBUNAL OFFICE

ANNEX
List of Issues

Conceded issues are in italic type

Disability

1. The respondent accepts that at all relevant times, the claimant's impairment of asthma amounted to a disability within the meaning of section 6 EA.

Knowledge of disability

2. By what date did the respondent have actual or constructive knowledge of the claimant's disability?

Failure to make reasonable adjustments (ss20 and 21 Equality Act 2010 (EA))

3. The claimant relies on 2 PCPs:

a. the requirement to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions ('PCP 1') and

b. the respondent's car parking policy, requiring individuals to qualify for blue badge and/or to live in excess of 1-mile radius of the workplace in order to be considered for an on-site car parking space ('PCP 2');

c. The respondent accepts that it applied both PCP1 and PCP2.

4. Did PCP 1 place the claimant at a substantial disadvantage compared to non-disabled employees due to her absence in June - July 2018?

5. Did PCP 2 place the claimant at a substantial disadvantage compared to non-disabled employees, namely a heightened risk of sickness absence due to prolonged walking in inclement weather?

6. If so, in either case, by what date did the respondent have actual or constructive knowledge that the claimant was likely to be at that substantial disadvantage compared with persons who are not disabled?

7. If so, in either case did the respondent take such steps as was reasonable in the circumstances for it to have to take to avoid that disadvantage?

Discrimination arising from disability (s. 15 EA)

8. The claimant relies on the following unfavourable treatment:

a. Disciplinary action (a written warning) by Angela Nolan on 10 October 2018,

b. Extension of her probationary period by Angela Nolan on 10 October 2018,

c. Refusal to allow the claimant time off for dependents by Danielle Payne at a return to work interview on or around 12.10.18, contrary to her statutory right for unpaid time off and the respondent's policy for paid time off.

d. Refusal to recommend the claimant for a permanent role by Danielle Payne and June Shaw on 20 /21 November 2018, and

e. Dismissal by A Bannon on 2 May 2019.

f. The respondent accepts that these amounted to unfavourable treatment, save for the extension of her probationary period. It is disputed that the respondent acted contrary to its policy or the claimant's statutory rights (8.3).

9. In each case, was the unfavourable treatment because of the claimant's absences?

10. If so, did those absences arise in consequence of her disability?

11. If so, was the treatment a proportionate means of achieving a legitimate aim, namely the appropriate management of sickness absence / fairness of arrangements for paid leave?

Victimisation (s.27 EA)

12. For the purposes of her victimisation claim, the protected act relied upon by the claimant is her allegation that the respondent and/or its employees had acted in contravention of the Equality Act 2010. The allegations were raised on the following occasions:

a. At the attendance meeting of 6th September 2018 re PCP/reasonable adjustment;

b. The claimant's email of 12th November 2018 to Ms. Nolan re PCP/reasonable adjustment;

c. The two appeals by 19th October 2018 re both PCPs/reasonable adjustments and victimisation;

d. Appeal hearing of 2nd November 2018 re both PCPs/reasonable adjustments and victimisation;

e. Two grievances of 22nd November 2018 re both PCPs/reasonable adjustments and victimisation;

f. Grievance of 22nd & 26th November 2018 re PCPs/reasonable adjustments and victimisation, the latter specifically in relation to Ms. Payne's conduct. The respondent accepts that this grievance amounted to a protected act for the purposes of s.27(2)(d) EA.

g. The alleged detriment is the refusal by Ms Payne and Ms Shaw to recommend the claimant for a permanent position, and by default recommending her dismissal. It is accepted that Ms Payne (but not Miss Shaw) did not recommend the claimant for a permanent position, and that this was a detriment.

13. Was the claimant subjected to the detriment because she had done the protected act(s)?

Harassment

14. The claimant alleges that the following amounted to unwanted conduct:

    a. The respondent's persistent failure/refusal to make the reasonable adjustments sought

    b. The victimisation suffered experienced

    c. The discrimination experienced arising from her disability

15. Were the alleged acts related to her disability?

16. Did such conduct have the purpose or reasonably, the effect, of violating the claimant's dignity and/or create an intimidating, hostile, degrading, humiliating or offensive environment?

Reasonable steps defence

17. Did the respondent take all reasonable steps to prevent acts of discrimination occurring?