EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104071/2022

Final Hearing held at Dundee on 16 to 19 January and 1, 2 and 6 March 2023

Employment Judge A Kemp
Tribunal Member W Canning
Tribunal Member R Martin

Mrs Paramjeet Kalsi	**Claimant** **Represented by:** **Mr S Swan** **Solicitor**
The Scottish Ministers	**Respondent** **Represented by:** **Ms M Armstrong** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The majority Judgment of the Tribunal is that the claim under section 21 of the Equality Act 2010 does not succeed;**

2. **The unanimous Judgment of the Tribunal is that the claims under sections 15 and 19 of the said Act do not succeed, and**

3. **The claims are accordingly dismissed.**

REASONS

Introduction

1. This was the Final Hearing into claims of discrimination on the ground of disability under sections 15, 19 and 20/21 of the Equality Act 2010 ("the 2010 Act"). The claimant produced a Schedule of Loss, which sought an award of a little under £15,000.

2. The respondent accepted that it had dismissed the claimant, and that the claimant was a disabled person under the 2010 Act. It also accepted that it had knowledge of that status at all material times. It argued that there had been no unlawful discrimination.

3. There had been a Preliminary Hearing in the case on 23 September 2022 after which the Tribunal granted Orders in relation to the present hearing.

4. The hearing had initially been fixed for four days, but that was not sufficient to conclude the evidence, and two additional days were arranged for 1 and 2 March 2023. The Tribunal received written submissions, and heard from agents orally thereafter, on 6 March 2023.

5. The claimant was represented by Mr Swan and the respondent by Ms Armstrong. The Tribunal was grateful to both of them for the most helpful, professional, and considerate manner in which they conducted the hearing. It was also grateful to them for producing the documentation for the Tribunal, which included a List of Issues. Mr Swan provisionally raised an issue under Rule 50 shortly before the commencement of the hearing, but it was not pursued. The written submissions both solicitors produced had clearly involved considerable time and thought.

Issues

6. The following is the agreed List of Issues referred to, with some slight amendments made by the Judge:

Jurisdiction

1. Are any of the claims presented outwith the jurisdiction of the Tribunal under section 123 of the Equality Act 2010 ("the Act")? [this matter was later not insisted on by the respondent]

Discrimination arising from a disability

2. Was the claimant dismissed because of something arising in consequence of the claimant's disability?

3. Can the respondent show that the dismissal of the claimant was a proportionate means of achieving a legitimate aim within the meaning of section 15(1)(b) of the Act?

Indirect discrimination

4. Did the respondent apply a provision, criterion or practice ("PCP") of its probation policy – and in particular the requirement to achieve effective performance – to the claimant under section 19 of the Act?

5. If so, does this PCP place those with the claimant's disability at a particular disadvantage?

6. Did the PCP place the claimant at that disadvantage?

7. If so, is the application of the PCP a proportionate means of achieving a legitimate aim under section 19(2)(d) of the Act?

Reasonable adjustments

8. Did the said PCP place the claimant at a substantial disadvantage in comparison to those who are not disabled under section 20 of the Act?

9. If so, did the respondents not take such steps as it was reasonable to have taken to avoid the disadvantage, under sections 20 and 21 of the 2010 Act? The claimant relies on the Claim Form, letter of appeal dated 14 April 2022 and her Agenda form, and in particular alleges that the following adjustments should have been made:

    a) Consistency of support to the claimant

    b) One to one support [later clarified as indicating face to face support]

c) Providing the claimant with assistive technology (later withdrawn by the claimant) or

d) Extending further the probationary period by a period of at least three months from the dismissal.

[The claimant in submission also sought to rely on other adjustments, or variants of those above, and combinations of them, as addressed below]

Remedy

10. In the event that any of the claimant's claims are successful to what remedy is the claimant entitled, and in that regard:

a) What financial loss has the claimant suffered?

b) What level of compensation should be award for Injury to Feelings? `

c) Should there be any reduction to the award of compensation?

Evidence

7. The parties had prepared a single Inventory of Documents extending to over 300 pages. Most but not all of the documents were spoken to in evidence. Evidence was given orally by the claimant herself, and for the respondent by Mr Paul Treanor her line manager, Ms Ailsa Travers a People Partner or Specialist (who provided HR assistance to the claimant and respondent), Ms Laura Fleming also a People Partner or Specialist (who dismissed the claimant) and Ms Linda Pollock, Interim Director, Healthcare Quality and Improvement Directorate of the respondent (who heard the appeal). The evidence was explored extensively. The facts noted below focus on that which was relevant to the issues before the Tribunal, although the Tribunal considered all of the evidence led before it.

Facts

8. The Tribunal found the following facts to have been established from the evidence led before it:

Parties

9. The claimant is Mrs Paramjeet Kalsi. Her date of birth is 21 December 1960.

10. The respondent is the Scottish Ministers. The respondent is the body responsible for Social Security Scotland, which is an Agency operated by the Scottish Government.

11. The claimant was a disabled person under the Equality Act 2010 at all material times, which the respondent knew at all material times. She had suffered two strokes, as a result of which she has had symptoms of fatigue, and difficulties with memory, and processing and retention of information. She also suffered from anxiety and depression. Fatigue, anxiety or depression exacerbated the difficulties she had with memory, and processing and retention of information.

Contract and policies

12. The claimant applied for a role as Client Adviser with the respondent, in the Social Security Scotland Agency, in April 2020. She informed them that she was a disabled person. She was initially placed on a reserve list, and was contacted in around February 2021 to ask if she wished to proceed with the role. She confirmed that she did. She received a conditional offer of permanent employment on 27 February 2021. The respondent prepared a form with indications of her requirements as a part of the recruitment exercise.

13. The claimant commenced employment with the respondent as a Client Adviser on 4 April 2021. There was a contract of employment between the parties, which was undated. She commenced on the basis of the normal working week for the respondent of 37 hours, over five working days.

14. The claimant's employment was subject to an initial period of probation of nine months. The respondent operated a Probation Policy. It included that

> "Managers and employees must agree performance objectives at the outset of the probationary period….

> Your attendance and performance will be monitored. If you fail to meet the required standards attendance management and less than effective performance procedures will apply…..
>
> You will have appraisal meetings with your manager, who will complete two reports on you during your probationary period."

15. The respondent also had a performance and probation policy. It provided for an interim probation performance appraisal at four months and a final probation performance appraisal at nine months. They were to be held by managers.

16. If performance at probation was considered to be inadequate, the probationary period could either be extended, or brought to an end by dismissal.

17. The claimant initially underwent a period of training of around five weeks, with a single trainer. She passed the tests, by way of Questionnaire, after that, and commenced the operational aspect of her employment.

Claimant's Role

18. The primary role of Client Adviser was to process applications for benefits managed by the respondent, being Best Start Foods (BSF), Best Start Grant (BSG), and Scottish Child Payments (SCP). The BSF was a voucher for food for those pregnant and who had children up to the age of three, at £4.50 per week in value. The BSG had three elements, a grant of £640 for a first child, an early learning grant of £257 for children aged 2 – 3½, and a school age grant of £267 for children up to school age. The SCP was paid if the client was in receipt of stated benefits, such as Universal Credit or Tax Credits, and was £25 per week for each child up to the age of 16. The claimant worked on two of these benefits.

19. The process was undertaken using a computerised system. Applications were dealt with by about 20 teams each of about 10 Client Advisers in the Dundee office of the respondent, and were handled in chronological order. The Client Adviser accessed the next application on the system, and undertook a series of checks in relation to it. That included matters such as the identity of the claimant, eligibility for the benefit, having

responsibility for the child, and verification of banking details for payment. The Client Adviser would either approve or reject the application having done so.

20. The process included that there would then be checks of the work of a Client Adviser by a Team Support Officer or Team Manager. If an application had been processed by a Client Adviser inadequately it would be rejected, and returned to the Client Adviser to be remedied. The normal performance of a Client Adviser was an error rate of about 2%, although an error rate of about 5% was considered acceptable in general terms. The average number of cases assessed by a full-time Client Adviser was about 20 – 25 per week, such that in practice about one case per fortnight was rejected.

21. If a case was rejected that then involved time both for the manager carrying out the checks, and then for a Client Adviser in remedying the issue. The remedy may involve further work by the Client Adviser including contacting the claimant of the benefit for more information. If a case was rejected that caused delay to the decision on the application, which in turn delayed receipt of benefits by those entitled to them. If there were delays that was liable to increase calls made to the Agency from applicants seeking to ascertain the position with their application. Those calls were taken by Client Advisers, and reduced the time available to process applications accordingly. Many of those applying for benefits were in receipt of Universal Credit or other UK benefits, and were in straightened financial circumstances as a result. Many of those doing so were vulnerable people. The benefits managed by the respondent included those for young children.

22. Initially the claimant worked under a team managed by Jennifer Lamont, Team Manager.

23. The claimant made some mistakes in processing applications and discussed that with Ms Lamont on 8 September 2021, and Ms Lamont explained that she should “get it checked over”. In October 2021 the claimant moved to the team managed by Paul Treanor, Team Manager, when Ms Lamont started in a new role. He had a handover from

Ms Lamont. The claimant found it more difficult than others to work with a new manager in light of the difficulties in processing and retention of information.

Occupational Health report and Occupational Therapist advice.

24. During recruitment of the claimant occupational health recommendations were made, on a date not given in evidence, that included extra time to read, process and complete tasks, clear and concise written and verbal instructions, and extra time when learning new tasks. An occupational health report was instructed by the respondent after the claimant had commenced employment. It was received from Mr Ian Dunkley, Senior Occupational Health Adviser, and was dated 27 July 2021. It referred to obtaining specialist advice. Ms Travers sought to secure such specialist advice through the respondent's provider, Optima, but they were not able to provide that advice and rejected her request for that.

25. The claimant had on a date not given in evidence contacted Ms Shona Kerr, an Occupational Therapist employed by NHS Tayside as a Vocational Rehabilitation Specialist. Ms Kerr thereafter contacted the respondent, and the respondent agreed to engage with her in the absence of advice from its provider. Ms Kerr was informed by Ms Travers that a request that she watch the claimant undertaking processing of a case was not possible to grant due to confidentiality and data processing obligations, by email from Ms Travers on 28 September 2021. Ms Kerr was however in early October 2021 able to observe the claimant using a training programme essentially replicating the work processes undertaken up to the point of the document being submitted for approval. Ms Kerr emailed Ms Travers on 8 October 2021 to state that she had struggled to get a feel for the different tasks or steps that the claimant took when doing so. Ms Kerr provided a workplace assessment report dated 8 October 2021, which recommended a specific point of contact at the respondent, short breaks, process guides, and not working overtime unless asked.

26. The claimant was invited to complete a Workplace Passport as part of consideration of adjustments for her disability. Ms Travers confirmed in an email dated 17 November 2021 that it was her (the claimant's)

responsibility to do so. The claimant struggled with that, and in due course Ms Travers assisted her in its completion.

27. Ms Kerr gave further advice on the claimant's circumstances and adjustments that could be made for her. That included an email to Mr Treanor dated 31 December 2021 which stated:

> "The reasonable adjustments recommended are a mixture of organisational and equipment needs as follows
>
> - **Second computer monitor……..**
> - **Desk…….**
> - **Systems organisation** – Face to face support (Covid permitting) – we all have different learning styles and the lack of human contact for Pam I think has been challenging for her. If face to face sessions are permitted, it would help Pam to have a designated team member to sit down with her and talk her through the best way of organising her sticky notes and management file. She has been saving information into both but struggles to find items as she has struggled to do this in a systematic way. Having someone to work out a system that supports Pam's needs and being able to help her develop these would be of great benefit
> - **Shadowing for live cases** – again this would be covid permitting but, if possible, I think Pam would find it helpful if she had somebody who would watch her carrying out a live case and then go over this with her afterwards. This would need to be 3 or 4 times is possible."

28. Mr Treanor responded to Ms Kerr on 18 January 2022 to suggest that the system organisation and shadowing suggestions had been provided previously, the last time on 1 December by Ms Alina Tregowan. Ms Kerr replied on 28 January 2022 with further commentary with regard to the suggestions, particularly with regard to her suggestion of shadowing, and a suggestion of a one hour Teams session with the claimant. Mr Treanor forwarded that message to Ms Travers the same day, saying that he was fine with the suggestion Ms Kerr had made.

29. Ms Kerr also spoke with the claimant's line managers and Ms Travers, and exchanged emails with them on a number of occasions in the period from September 2021. There was an attempt to arrange a further meeting including the claimant, Ms Kerr, Ms Travers and Mr Treanor, but that did not take place in the period before the claimant was absent, or after she later returned to work.

Adjustments made for claimant

30. The respondent carried out the following adjustments for the claimant:

(i) in about June 2021 the claimant's duties were reduced with removal of telephony, and meetings arranged with her manager Jennifer Lamont. Support from Ms Travers commenced

(ii) in about July 2021 the claimant's hours were reduced from 37 to 25 per week, worked Mondays to Fridays 8am to 1pm

(iii) in about September 2021 she was taken into the office for in person training and support, which included a period of six weeks working with and alongside Ms Ann-Marie McGowan, the precise dates of which were not given in evidence, during which time Ms McGowan undertook much of the work that the claimant was to perform

(iv) on various dates the provision by the respondent of written guides and checklists for the processes the claimant was to undertake, which latterly broke down the work into between about 32 and about 35 individual steps

(v) in about October 2021 at the suggestion of Ms Kerr the claimant was able to take micro breaks between processing activities. She was also allowed to have short breaks after completing an application, and an unpaid break of 30 minutes per day, although those were not often taken by the claimant. There was also an offer of a further period of consolidating training of two weeks made to the claimant in or around October 2021, which the claimant did not wish to take up

(vi) her new manager Mr Treanor arranged meetings with her, held generally fortnightly not monthly as was normal, to discuss her performance and suggest ways to improve it, with the first of those on

25 October 2021. He suggested turning off notifications during Teams meetings to reduce distractions, and after further discussion with Ms Kerr an unpaid 30 minute break was introduced in about November 2021

(vii) a period of time, not given in evidence, with another employee named Jacqui providing support, in the office

(viii) Ms Ailsa Travers assisted the claimant in the completion of a Workplace Adjustment Passport in around November 2021

(ix) on 1 December 2021 Ms Alina Tregowan, a Team Support Officer, watched the claimant undertake the processing of an application, and then prepared a new guide with simplification of the earlier guides in the form of a checklist of steps to assist the claimant in processing applications. Mr Treanor arranged the provision of Colin Henderson, an experienced Client Advisor, to be available as a 'buddy' to answer the claimant's questions or queries on her joining Mr Treanor's team as and when she wished to seek his assistance. She did so from time to time but found his accent not easy to understand.

(x) the extension of the claimant's probationary period by three months by letter dated 23 December 2021

(xi) the provision in around January 2022 of a larger desk, and an additional monitor, although the claimant did not seek to use the desk, which she did not unpack, and the monitor initially was not supplied with correct leads, and that was latterly provided by the claimant herself.

(xii) after the claimant had been absent (for unrelated reasons) in the period 25 February to 15 March 2022 the claimant was not returned to processing applications [although the respondent did not include that in its list of adjustments made for the claimant].

Probation reviews

31. The claimant underwent a Probationary Review meeting with Ms Lamont after four months under the Probation Policy, and her performance was noted to be partially effective in a report dated 17 August 2021, which also stated "I confirm that in line with the probation guidance there are no

concerns regarding this colleague's performance, attendance or conduct during this period."

32. Mr Treanor held a series of meetings with the claimant to review her performance when under his management. Minutes of those meetings, held on 25 October 2021, 5 November 2021, 19 November 2021, 3 December 2021, 14 January 2022 and 28 January 2022 are reasonably accurate records of the same.

33. At the meeting on 19 November 2021 Mr Treanor went through the rejections the claimant had had for the period from 5 November 2021. Of the 20 submitted, eight had been rejected which was a rate of 40%. The reasons for them were discussed, being qualifying benefit evidence, responsibility evidence, integrated case evidence, and for bank details verification. Some applications had more than one reason. Mr Treanor provided details of what had been done incorrectly, and what to do to correct it, as well as how to do the role correctly in future. He also raised the number of requests for support she had made in writing in a Team chat, but stopped the meeting when she became distressed.

34. The claimant and Mr Treanor also met with the claimant's trade union representative Mr Magnus Hughson on 22 November 2021 and the note of the same is a reasonably accurate record of it. The claimant had asked for the meeting as she had been surprised by the remarks as to the level of errors and the percentage involved

35. On 1 December 2021 Ms Alina Tregowan observed the claimant processing an application. Ms Tregowan advised Mr Treanor that the claimant was confident in doing so. She looked at the three guides the claimant was using and provided a consolidated and simplified version to use, as well as a checklist.

36. At the meeting on 3 December 2021 a similar review to that earlier with Mr Treanor took place. The claimant had submitted 12 cases in the prior two weeks, of which four had been returned, meaning a 33% error or rejection rate. It was noted that bank details were a particular issue, and if that was resolved the rate of rejection in that period would reduce to 8%. It was further noted that in the two weeks preceding that period the

rejection rate had been 40%, but details of the number of cases considered, and number rejected, were not provided.

37. A Workplace Adjustment Passport was completed by the claimant with assistance from Ms Travers on 15 December 2021.

38. A probation review meeting was held between the claimant, her trade union representative, Mr Treanor and Ms Ailsa Travers People Advice and Support Partner of the respondent on 21 December 2021. A minute of that meeting is a reasonably accurate record of it. The outcome was communicated to the claimant by letter dated 23 December 2021, and was to extend the period of probation by three months and that the probationary period would conclude on 7 April 2022. It also stated

> "Your line manager explained that the Scottish Government look for a success rate of 98% meaning that errors should be as low as 2%. However your line manager believes that is unrealistic and would find it appropriate and reasonable for you to meet an error rate of below 10%. You confirmed that this expectation was understood."

39. The claimant was on annual leave thereafter until early January 2022. There was a further review meeting with Mr Treanor and the claimant on 14 January 2022. It was similar to the two earlier such meetings. The claimant had submitted 28 cases in the period from 27 November 2021 to 7 January 2022, of which 13 had been returned, a rejection rate of 46%.

40. A further meeting between the claimant and Mr Treanor took place on 28 January 2022. In the period 10 – 21 January 2022 there had been 18 cases submitted and 6 returned, a rejection rate of 33%. Three related to bank identity check, one regarding an integrated case and one for residency. The issues were discussed in relation to the reasons for rejection.

41. On 31 January 2022 Mr Treanor reported to Ms Travers that the claimant's rejection rate had not improved but was "slipping backwards". No figures for the number of cases and rejections were given. No figures were provided for the period from 22 January 2022 to 24 February 2022 during which the claimant continued to process cases.

42. The claimant was absent from work for the period 25 February 2022 to 15 March 2022. Ms Travers kept in touch with her regularly during that period.

43. On 7 March 2022 the claimant wrote to Ms Travers with a document setting out her thoughts and feelings. It referred to her asking for a mentor "so they can perhaps figure out where I am going wrong as my manager can't seem to explain this to me." Ms Travers did not share that document with any colleague.

44. The claimant was invited to a meeting by letter sent by email on 15 March 2022.

45. The claimant returned to work on 16 March 2022. She did not then or thereafter perform any processing work, by agreement with the respondent, as confirmed in an email to the claimant of 16 March 2022 from Ms Travers. Ms Travers attempted to arrange an informal meeting with the claimant and Ms Kerr, but it did not proceed, on one occasion as the claimant lost power, and otherwise as a date could not be found.

46. A probation review meeting took place on 24 March 2022 by Teams, which included the claimant's trade union representative. The note of the meeting is a reasonably accurate record of it. The representative Ms Giffin stated that the claimant sought a permanent person dedicated to helping the claimant until she was more confident and could do the job herself.

Dismissal

47. A probation review meeting was held between the claimant and Ms Laura Fleming of the respondent on 24 March 2022. The claimant attended with her trade union representative. A minute of that meeting is a reasonably accurate record of it.

48. The claimant was dismissed by letter dated 5 April 2022, emailed to her that day. It outlined the support the respondent considered had been provided to the claimant, and the position she had taken during the meeting. It stated that

> "My decision to dismiss is based on the fact that despite extensive support, your performance still remains below the expected standard. The impact of such a high rejection rate on clients has the potential to cause serious delay to their claims. I considered the possibility that the adjustments would allow your performance to improve, but I believe the agency has put in all reasonable adjustments possible. I considered taking no further action, but as performance remains a concern and has for several months this did not feel appropriate. I considered an extension to probation but your probation has already been extended on the 23rd of December for 3 months and performance has not improved so I do not believe there would be a benefit to a further extension."

The dismissal was effective on that date, with five weeks' notice paid in lieu. She had the right of appeal.

Appeal

49. The claimant appealed the decision by email dated 14 April 2022. The appeal was heard by Ms Linda Pollock of the respondent on 11 May 2022. A minute of that meeting is a reasonably accurate record of it. The appeal was refused by letter dated 25 May 2022. Ms Pollock concluded that any further adjustments would not be effective in securing performance at the required level, and that the cost of having someone sit with the claimant to watch her undergoing cases, advise her of mistakes and correct them, would not be reasonable to incur as it did not have a limit in time.

Other matters

50. When employed by the respondent the claimant had net weekly pay of £272.40 and gross weekly pay of £317.93. The respondent made pension contributions of £16.78 per week. The cost to the respondent of employing someone in the claimant's position having regard to additional expenses such as for employer's National Insurance Contributions and other matters is reasonably estimated at £408.60 per week. The claimant sought new employment after her dismissal by searching for positions online. She was successful in doing so on 7 September 2022 when she commenced a new position in which the pay was greater than that with the respondent. The

claimant was upset and distressed by the dismissal, and what she considered to be the lack of support from the respondent prior to it. She believed that there was a lack of understanding of the difficulties she had as a disabled person, all of which added to her distress.

51. The claimant commenced Early Conciliation on 9 June 2022.

52. The Certificate for Early Conciliation was dated 28 June 2022.

53. The Claim Form was presented on 22 July 2022.

Claimant's submission

54. The following is a very basic summary of the detailed written submissions made, which were supplemented orally in response to that from the respondent. Detailed findings in fact were suggested, with the suggestion that the claimant's evidence should be accepted. It was submitted that the claimant's case of a failure by the respondent to make reasonable adjustments under sections 20 and 21 should be accepted. That was her primary argument. The written submission expanded on the proposed adjustments, setting out a series of the same which were suggested both individually and in combination. It was argued that they would be or could be effective in avoiding the disadvantage the claimant suffered from the application of the PCP. It was also contended that there had been breaches of sections 15 and 19 of the 2010 Act, and in each case the argument was that the respondent had not established the defence of a proportionate means of achieving a legitimate aim.

Respondent's submission

55. The following is again a very basic summary of the detailed written submissions made, which were supplemented orally. The respondent argued that it was not in breach of any of the duties under the Act. The respondent contended that any of the adjustments proposed would not have made an effective difference, that the claimant had not met the appropriate standard for a lengthy period despite a series of adjustments made for her, and that the respondent's evidence should be accepted. The respondent had met any onus on it on each of the statutory provisions relied upon.

Law

(i) Statute

56. Section 4 of the Equality Act 2010 ("the Act") provides that disability is a protected characteristic. The Act re-enacts large parts of the predecessor statute, the Disability Discrimination Act 1995, but there are some changes.

57. Section 15 of the Act provides as follows:

> "**15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

58. Section 19 of the Act provides

> **"19 Indirect discrimination**
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if —
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

disability;….":

59. Section 20 of the Act provides as follows:

"20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

60. Section 21 of the Act provides:

"21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…."

61. Section 39 of the Act provides:

"**39 Employees and applicants**

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

……."

62. Section 123 of the Act provides

> "**123 Time limits**
>
> (1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable…….
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it."

63. Section 136 of the Act provides:

> "**136 Burden of proof**
>
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

64. Section 212 of the Act states:

> "**212 General Interpretation**
>
> In this Act - …….
>
> 'substantial' means more than minor or trivial".

65. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC***. Its terms include Article 5 as to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

66. The Directives referred to are retained law under the European Union Withdrawal Act 2018.

(ii) Case law

(i) Discrimination arising from disability

Something arising

67. The EAT held in ***Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893*** that the requirement for knowledge under section.15 was not that the putative discriminator knew that something arose in consequence of the disability; once the discriminator knew of the disability, and objectively the something which caused the unfavourable treatment arose in consequence of the disability, the terms of the section were satisfied. That "something" did not need to be the sole or principal cause of the treatment, but required to be at least an effective cause, or have a significant Influence on, the treatment.

68. The process applicable under a section 15 claim was explained by the EAT in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305***:

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words 'because of something', and therefore has to identify 'something' – and second upon the fact that that 'something' must be 'something arising in consequence of B's disability', which constitutes a second causative (consequential) link. These are two separate stages."

69. In ***City of York Council v Grosset [2018] IRLR 746***, Lord Justice Sales held that

> "it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant 'something' arose in consequence of B's disability".

70. The EAT held in ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** *that:*

> "the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision 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 determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

71. In ***iForce Ltd v Wood UKEAT/0167/18*** the EAT held that there could be a series of links but required that there was some connection between the something and the disability.

72. In ***Dunn v Secretary of State for Justice [2019] IRLR 298*** the Court of Appeal held that "it is a condition of liability for disability discrimination under s 15 that the claimant should have been treated in the manner complained of because the 'something' which arises in consequence of that disability". This will typically involve establishing that the disability or relevant related factor operated on the mind of the putative discriminator, as part of his conscious or unconscious mental processes. This is not, in this context, the same as examining 'motive'.

73. In ***Robinson v Department of Work and Pensions [2020] EWCA Civ 859***, ***[2020] IRLR 884*** the Court of Appeal held it is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably – the unfavourable treatment must be because of the something which arises out of the disability.

Unfavourable treatment

74. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882*** the Court of Appeal did not disturb the EAT's

analysis, in that case, that the word “unfavourable” was to be contrasted with less favourable, the former implying no comparison, the latter requiring it. That was undisturbed by the Supreme Court when it later considered the case. The Equality and Human Rights Commission Code of Practice on Employment states at paragraph 5.7 that the phrase means that the disabled person “must have been put at a disadvantage.” Reference to the measurement against an objective sense of that which is adverse as compared to that which is beneficial was made in ***T-System Ltd v Lewis UKEAT/0042/15.***

Justification

75. There is a potential defence of objective justification under section 15(1)(b) of the Act. In ***Hardys & Hansons plc v Lax [2005] IRLR 726****,* heard in the Court of Appeal, it was held that the test of justification, which is essentially the same for the section 19 claim addressed below, under the statutory provisions then in force which are referred to below in more detail, requires the employer to show that a provision, criterion or practice is justified objectively notwithstanding its discriminatory effect. The EAT in ***Hensman v Ministry of Defence UKEAT/0067/14*** applied the test set out in that case to a claim of discrimination under section 15 of the 2010 Act. It held that when assessing proportionality, while an employment tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

76. As stated expressly in the EAT judgment in ***City of York Council v Grosset UKEAT/0015/16*** the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's ‘workplace practices and business considerations’ firmly at the centre of its reasoning, the tribunal was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the tribunal. The Court of Appeal upheld this reasoning (the citation for which is above).

77. In ***Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918*** the claimant was dismissed for unsatisfactory performance after eight

months of absence. He had been in a serious motorcycle accident whilst responding to an emergency call, and developed post-traumatic stress disorder which had prevented a return to work. The respondent accepted that the officer had been treated unfavourably because of something arising from his disability – namely his absence – but relied on the application of the Police Performance Regulations by way of justification. The EAT held that the Tribunal had erred in accepting justification on the basis that the police force's general procedure had been justified. The EAT drew a distinction between cases where A's treatment of B is the direct result of applying a general rule or policy, to cases where a policy permits a number of responses to an individual's circumstances. In the former the issue will be whether the general rule or policy is justified. In the latter, it is the particular treatment which must be examined to consider whether it is a proportionate means of achieving a legitimate aim.

78. In the case of ***Browne v Commissioner of Police of the Metropolis UKEAT/0278/17*** the EAT held, in brief summary, that the employment tribunal were entitled to find that the individual treatment of the claimant was justified because the employer had given the claimant an opportunity to make representations asking for an extension of sick pay but had not accepted them.

(ii) Indirect discrimination

79. Lady Hale in the Supreme Court gave the following general guidance in ***R (On the application of E) v Governing Body of JFS [2010] IRLR 136***

> "Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."

The same principle applies for other protected characteristics, one of which is disability.

Provision, criterion or practice

80. The provision, criterion or practice (PCP) applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In ***Hampson v Department of Education and Science*** **[*1989] ICR 179*** it was held that any test or yardstick applied by the employer was included in the definition. Guidance on what was a PCP was given in ***Essop v Home Office [2017] IRLR 558.***

81. In ***Ishola v Transport for London [2020] IRLR 368*** Lady Justice Simler considered the context of the words PCP and concluded as follows**:**

> "In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

Disproportionate impact

82. The PCP must create a disproportionate impact on, in this case disabled persons. The wording of section 19 does not necessarily require statistical proof. As Baroness Hale put it in ***Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601*** the change in the Act over the predecessor provisions

> "was intended to do away with the need for statistical comparison where no statistics might exist… Now all that is needed is a

particular disadvantage when compared with other people who do not share the characteristic in question".

83. In ***Essop v Home Office [2017] IRLR 558*** the Supreme Court made the following comments:

> "A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various … They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men…."

84. In the case of ***Cumming v British Airways plc UKEAT/0337/19*** that quotation was referred to in relation to sufficiency of evidence as follows:

> "there may be an argument that Lady Hale's general proposition was sufficient to establish the case along with the statistics relating to the whole of the crew or that in any event there was no reason to think that the proportion of men in the crew with childcare responsibilities differed materially from the proportion of females with such responsibilities".

85. In addition to group disadvantage there must also be disadvantage to the claimant herself.

Justification

86. The test in section 19 derives from an equal pay case ***Bilka Kaufhas GmbH v Weber von Hartz [1987] ICR 110,*** which had been applied to discrimination cases under predecessor provisions of the 2010 Act in ***Hampson v Department of Education and Science [1989] ICR 179.*** It was decided at Court of Appeal level and although later appealed to the House of Lords the issue of justification was not addressed. It is for the employer to establish the defence on the balance of probabilities. In ***MacCulloch v ICI [2008] IRLR 846*** the EAT set out four principles, later approved by the Court of Appeal in ***Lockwood v DWP [2013] IRLR 941***, as follows:

(i) The means to achieve the aim must correspond to a real need for the organisation

(ii) They must be appropriate with a view to achieving the objective

(iii) They must be reasonably necessary to achieve that end

(iv) The Tribunal is to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and make its own assessment of whether the former outweigh the latter.

87. In applying the test of reasonable necessity there may be more than one option which would constitute a proportionate means of achieving the legitimate aim in question - ***Health and Safety Executive v Cadman [2005] ICR 1546.***

88. In ***Chief Constable v Homer 2012 ICR 704*** Baroness Hale emphasised that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She referred to authority from the European Court of Justice which required to be taken into account when addressing the statutory test.

89. The EAT held in ***Land Registry v Houghton and others UKEAT/0149/14*** that the Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant. That was explained further in ***City of Oxford Bus Services Ltd v Harvey UKEAT/0171/18*** as follows

> "proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment……an employer is not required to prove there was no other way of achieving its objectives (***Hardys & Hansons place v Lax [2005] IRLR 726***). On the other hand, the test is something more than the range of reasonable responses (again see ***Hardys***)."

(iii) Reasonable adjustments

General

90. Guidance on a claim as to reasonable adjustments was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, and in ***Newham Sixth Form College v Saunders [2014] EWCA Civ 734,*** and ***Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220*** both at the Court of Appeal. The reasonableness of a step for these purposes is assessed objectively, as confirmed in ***Smith v Churchill***. The need to focus on the practical result of the step proposed was referred to in ***Ashton***. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.***

91. The Court in ***Saunders*** stated that:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

92. The duty may involve treating disabled persons more favourably than those who are not – ***Redcar v Lonsdale UKEAT/0090/12.*** The duty to make reasonable adjustments does not however extend to a duty to carry out any kind of assessment of what adjustments ought reasonably to be made. A failure to carry out such an assessment may nevertheless be of evidential significance. In ***Project Management Institute v Latif [2007] IRLR 579*** the EAT stated that

> "… a failure to carry out a proper assessment, although it is not a breach of the duty of reasonable adjustment in its own right, may well result in a respondent failing to make adjustments which he ought reasonably to make. A respondent, be it an employer or qualifying body, cannot rely on that omission as a shield to justify a failure to make a reasonable adjustment which a proper assessment would have identified."

93. The EHRC Code is guidance, and not something that requires slavishly to be followed. In relation to the Code applicable to the predecessor

provision, in ***Environment Agency v Humphreys EAT/24/1999*** it was held that a failure to treat the Code as a checklist will not invalidate a tribunal's decision; it is the statute that takes precedence.

Adjustments

94. The EAT stressed the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them in ***Newcastle City Council v Spires UKEAT/0034/10.*** The adjustment proposed can nevertheless be one contended for, for the first time, before the Tribunal, as was the case in ***The Home Office (UK Visas and Immigration) v Kuranchie UKEAT/0202/16.*** Information of which the employer was unaware at the time of a decision might be taken into account by a tribunal, even if it emerges for the first time at a hearing – ***HM Land Registry v Wakefield [2009] All ER (D) 205.***

95. An employer may take into account wider implications of the proposed adjustment for the work and other employees: ***Weaver v Chief Constable of Lincolnshire Police [2008] All ER (D) 291.***

96. In ***Griffiths v Secretary of State for Work and Pensions*****,** ***[2016] IRLR 216*** the Court of Appeal held that the word “step” is to be given a wide interpretation generally, but that if a step is not likely to protect employment it is not likely to be a reasonable one to require

97. In ***Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 644*****,** on the predecessor provisions of the 1995 Act, it was held that conducting a risk assessment is not itself a step that should reasonably be taken because it would not in itself affect the underlying problem; however, it was later held that case should not be applied too strictly and if such a risk assessment would go further and produce a recommended course of action, that may constitute such a step: ***Watkins v HSBC Bank Ltd [2018] IRLR 1015***

Chance of success

98. One factor to consider is whether or not a proposed adjustment would avoid the disadvantage. It is not essential for the claimant to prove that it

would certainly, or in probability, have done so. It may be sufficient that there is a chance that the adjustment would be successful in doing so (***South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley UKEAT/0341/15***). In ***Griffiths v Secretary of State for Work and Pensions [2017] I.C.R. 160*** the EAT held that uncertainty of outcome was one of the factors to weigh up when assessing the question of reasonableness.

99. In cases under the predecessor provision it had been held that what was required was a reasonable prospect of preventing the disadvantage in question, not merely that it would give the employee an opportunity of avoiding it, and it was only if there was such a reasonable prospect that the tribunal should consider if it was reasonable to expect the employer to have provided it: ***Romec Ltd v Rudham UKEAT/0069/07*****;** ***Royal Bank of Scotland v Ashton [2011] ICR 632, Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075,*** and ***London Underground v O'Sullivan UKEAT/0355/13***. As ***Ashton*** has been held to apply to the 2010 Act (see above) we consider that the test of having a reasonable prospect of preventing disadvantage remains, but that that is less than probability.

100. In ***Noor v Foreign & Commonwealth Office UKEAT/0470/10***, the EAT clarified that an adjustment might be reasonable even if it does not remove all the disabled employee's disadvantage. Deciding whether a particular adjustment would overcome the disadvantage in question might require the employer to consider a package of adjustments, since achieving the objective of one adjustment may depend on other adjustments being made: ***Shaw & Co Solicitors v Atkins UKEAT/0224/08***

(iv) Burden of proof

101. There is a two-stage process in applying the burden of proof provisions in discrimination cases, arising in relation to whether the decisions challenged were "because of" the disability, but which may be relevant to the issue of whether the respondent applied a PCP to the claimant for the reasonable adjustments claim, as explained in the authorities of ***Igen v Wong [2005] IRLR*** 258, and ***Madarassy v Nomura International Plc***

[2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

102. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved the guidance from those authorities. The application of the burden of proof is not as clear in a reasonable adjustments' claim, in particular, as in a claim of direct discrimination. In ***Project Management Institute v Latif [2007] IRLR 579***, Mr Justice Elias, as he then was, gave guidance of the specification required of the steps relied upon, and that what was required was evidence of an apparently reasonable adjustment which may then lead to the burden of proof shifting to the respondent. ***Jennings v Barts and the London NHS Trust UKEAT/0056/12*** however held that ***Latif*** did not require the application of the concept of shifting burdens of proof, which 'in this context' added 'unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided' as to whether the adjustment contended for would have been a reasonable one. It is not easy to reconcile these two decisions of the EAT, and it is a point addressed further below.

(v) The EHRC Code

103. The Tribunal also considered, as it is required to, the terms of the Equality and Human Rights Commission Code of Practice on Employment, the following provisions in particular, but not exhaustively:

> **Provision, criterion or practice**
>
> "4. 5:
>
> "The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria,

conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision…….

What is proportionate?

4.30

Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts.

4.31

Although not defined by the Act, the term 'proportionate' is taken from EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

4.32

The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Cost can only be taken into account as part of the employer's justification for the provision, criterion or practice if there are other good reasons for adopting it.

Example: A food manufacturer has a rule that beards are forbidden for people working on the factory floor. Unless it can be objectively justified, this rule may amount to indirect religion or belief discrimination against the Sikh and Muslim workers in the factory. If the aim of the rule is to meet food hygiene or health and safety requirements, this would be legitimate. However, the employer

would need to show that the ban on beards is a proportionate means of achieving this aim. When considering whether the policy is justified, the Employment Tribunal is likely to examine closely the reasons given by the employer as to why they cannot fulfil the same food hygiene or health and safety obligations by less discriminatory means, for example by providing a beard mask or snood……

Discrimination arising out of disability

[Provisions are found in Chapter 5, which on justification refers to the provisions in Chapter 4, some of which are quoted above]

Reasonable adjustments

6.2

The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled.

6.3

The duty to make reasonable adjustments applies to employers of all sizes, but the question of what is reasonable may vary according to the circumstances of the employer……..

6.23

The duty to take reasonable steps requires employers to take such steps as it is reasonable to have to take in all the circumstances of the case, in order to make adjustments. The Act does not specify any factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of the individual case.

6.24

There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so,

the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable…..

6.28

The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

a. whether taking any particular steps would be effective in preventing the substantial disadvantage;
b. the practicability of the step;
c. the financial and other costs of making the adjustment and the extent of any disruption caused;
d. the extent of the employer's financial or other resources;
e. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
f. the type and size of the employer.

6.29

Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case……

6.33

[Provides a list of examples of steps it might be reasonable for an employer to take, including in relation to allocating some of the duties to another worker, and providing training, mentoring supervision or support.]"

Observations on the evidence

104. The Tribunal considered that all of the witnesses were seeking to give honest evidence. The factual issues between them focused on matters of reliability. The **claimant** gave straightforward evidence. It is clear that she suffers from memory problems as a result of the strokes, which we took into account. She appeared to have a concern that she would not be retained by the respondent in her role from a relatively early stage in her employment by them, and thought that the respondent was not genuine in

its attempts to retain her. We did not agree. It was clear to us that the respondent had made many attempts to do so, and that they were genuine ones. There was no intention to dismiss the claimant until after the meeting with Ms Fleming had taken place. The claimant had found articulating the disadvantage from which she suffered difficult, as was recorded at various points in the documentation before us, although she did set out her position in those documents. She felt that others, including Ms Kerr the occupational therapist, did not fully understand her position. She did not tender medical evidence beyond a report and emails from Ms Kerr, a point which we refer to further below. **Mr Treanor** was clear and candid in his evidence, and accepted many of the points put to him in cross examination. He maintained his general opinion that all reasonable steps had been attempted to retain the claimant in her role. **Ms Travers** was equally clear and candid in her evidence. When it was put to her that she had not genuinely attempted to keep the claimant in her role she became distressed, and it was clear to us from that, and her other evidence, that she had done a great deal genuinely to seek to retain the claimant. It was less clear what the extent of her knowledge of the full extent of the law of disability discrimination was, and of note was that she had not consulted the EHRC Code of Practice at all during the issues that arose. **Ms Fleming** gave strong and detailed evidence. We were satisfied that she was generally reliable in what she said. She was clear in her mind that the decision she had taken was the appropriate one, and we address that further below. She also had a very limited knowledge of the terms of the EHRC Code of Practice, and had not considered its terms in detail when taking her decision, but we considered that she had been careful in considering the matters before her, as evidenced by the detailed letter of dismissal she had prepared. She articulated before us the disadvantage she understood the claimant to have suffered from the application of the PCP. The factors that led to her decision did we consider fall within the Code, which is guidance. We considered that she had attempted to be sympathetic to the claimant's circumstances when making arrangements for the hearing, and had conferred with colleagues afterwards as a form of sounding board to assess whether there was anything that had not been considered but should be. That all indicated the care she took before reaching a decision, in our view. **Ms Pollock** heard the appeal against

dismissal, and we were satisfied that she gave evidence that was reliable. She considered the appeal on an independent basis. She was, we considered, an impressive witness who addressed matters directly with us. She also did not know the detail of the Code, nor had it been mentioned to her by HR, but the factors which bore on her decision were her view that proposed adjustments would not have been effective, and the cost of doing so, both of which similarly fall within the factors identified in the Code.

105. There are other points that are appropriate to make in relation to the evidence. Prior to Ms Pollock's evidence being heard a point was raised with agents with regard to the detail of the error rate for the claimant in the period from 22 January 2022 to 24 February 2022. Ms Armstrong referred to an entry in the audit document which was dated 31 January 2022 and noted that the line manager, Mr Treanor, was concerned that performance was slipping backwards, but no details on that were given in the document, and it did not address the position after that date. The respondent sought to investigate the issue and it was reported to us that Mr Treanor had no records of the error rate for the period from 22 January 2022 to 24 February 2022. The evidence was not as complete as it might have been in other respects. Firstly, there was only one occupational health report, and that not in the context of consideration of dismissal. Secondly that one report referred to seeking specialist advice, and although assistance was obtained from Ms Kerr, she is an Occupational Therapist, whose work is in the field of rehabilitation, and no advice was sought by the respondent from either an occupational health physician or a consultant in the discipline of the kind of injury sustained by the claimant. Thirdly, Ms Kerr herself did not give evidence before us. All we had therefore was her emails, and some hearsay evidence from the claimant. Fourthly, there was no medical evidence tendered on behalf of the claimant (although as Mr Swan was to his great credit appearing *pro bono* that was both understandable, and not intended as a criticism). That all meant that there was no evidence directly establishing precisely what the effects of the claimant's condition were, the extent of them, or whether the suggestions Ms Kerr latterly made in December 2021 and January 2022 were likely to have been sufficiently successful to lead, either alone or in

combination with other adjustments, to the claimant giving a level of service sought by the respondent. We required to make our own assessment on that from the evidence that was led before us, which in respect of oral evidence was that of the claimant, Ms Fleming, and Ms Pollock, supported to an extent by the other respondent witnesses.

Discussion

106. This case was not an easy one to decide. The parties each have arguments in their favour. There was little in dispute between them that was purely factual: the dispute focused on the application of law to the facts. The Tribunal reached a majority decision on the claim for reasonable adjustments under the provisions of sections 20 and 21, but otherwise it was a unanimous one.

107. An issue of jurisdiction was raised initially but not pursued by the respondent in submission. We considered the point ourselves and were satisfied from the evidence before us that the claims were fully within our jurisdiction.

(i) Discrimination arising from a disability

Was the dismissal something arising out of disability?

108. The Tribunal had no difficulty in holding that the claimant's performance, which was not that sought by the respondent of an error rate of less than 10%, which led to her dismissal, was something arising out of her disability. It was the consequence of the brain injury acquired in the strokes that led to the difficulties with processing and retaining information that lay at the heart of her rate of errors in undertaking case work. Those errors continued, and were the reason for the probationary period firstly being extended, and then ended by the dismissal. Dismissal is self-evidently unfavourable treatment and that was not disputed.

Can the respondent show that the dismissal of the claimant was a proportionate means of achieving a legitimate aim within the meaning of section 15(1)(b) of the 2010 Act?

109. The Tribunal considered that the respondent had established objective justification so as to make out the defence under section 15(2). The aim contended for was having the claimant perform the role effectively so as to deliver the service provided by the respondent adequately. It was accepted that this was a legitimate aim. The focus was on the issue of proportionality.

110. Addressing the matters raised in ***McCulloch*** we considered that:

(i) The means to achieve the aim did correspond to a real need for the respondent's organisation; that takes into account the various steps taken by the respondent to assist the claimant reach the level of performance required. It was in the context of applications for benefits by those who included people in receipt of State Benefits such as Universal Credit, and in difficult financial and other circumstances. Those making claims included those with young children. The efficient processing of those claims so as to deliver the service adequately was a real need for the respondent.

(ii) The means were we considered appropriate with a view to achieving the objective; in that there were several of them attempted over a lengthy period, the detail of which we comment on below, and leading to the final meeting with Ms Fleming.

(iii) They were reasonably necessary to achieve that end, as the Tribunal did not identify another less discriminatory method of achieving the aim, (on which we comment more fully in relation to the claim for reasonable adjustments below, such that we can be more succinct in respect of this claim) and

(iv) Weighing the reasonable needs of the undertaking against the discriminatory effect of the measure on the claimant we considered that the former outweigh the latter. That is partly as the respondent is managing a public service, with public funds. If there are delays in the management of applications that causes difficulty for applicants, some if not many of whom are vulnerable. There is a need to provide as effective a service as is reasonably achievable. Even a short delay could cause such claimants real hardship. It is also partly as, from the commentary below on reasonable adjustments, the majority did not consider that there was any such adjustment that could have

been made to avoid the disadvantage, and the minority member did not consider that the adjustment referred to would have had more than a very small, if any, prospect of being successful in doing so. In those circumstances it appeared to the Tribunal that the reasonable needs of the respondent were greater than the discriminatory effect on the claimant.

111. The Tribunal unanimously considered that the defence under section 15(2) had been established by the respondent. It therefore dismissed the claim under the section.

(ii) Indirect discrimination

Did the respondent apply a provision, criterion or practice ("PCP") of its probation policy – and in particular the requirement to achieve effective performance – to the claimant?

112. The Tribunal considered that it was clear that the respondent did apply such a PCP. In general terms that was to require effective performance from the claimant. That was made more specific in the letter to her of 23 December 2021, in which a requirement for under 10% for rejections was stipulated. That was more generous than for Client Advisers more widely, where the rate was under 2%, and where a rate of 5% would be the tolerance allowed, albeit not as a formal target. We were satisfied that requiring effective performance met the test for a PCP explained in the case law above.

If so, does this PCP place those with the claimant's disability at a particular disadvantage?

113. The Tribunal considered that there was insufficient evidence to establish that it did. There was in our assessment no direct evidence led by the claimant on this point. On that basis, the claim cannot succeed. We did however then proceed on the basis, contrary to our finding, that those with her disability, including in particular a lesser ability to process and retain information, were more likely to have less effective performance, and more likely not to meet the PCP accordingly, to assess the issue lest we were wrong on that.

Did the PCP place the claimant at that disadvantage?

114. The Tribunal was satisfied that it did. That was in effect accepted in the letter of dismissal. It was supported by the evidence we heard.

If so, is the application of the PCP a proportionate means of achieving a legitimate aim?

115. The aim was in our view legitimate, in that it was to secure effective performance, which was specified as an error rate of less than 10%. Having employees perform effectively was not disputed as being a legitimate aim. It was the issue of proportionality that our focus was on. In that regard we again applied the test, and came to the same conclusion as in respect of the section 15 claim. Our conclusions were broadly the same as above, in that –

(i) The means to achieve the aim must correspond to a real need for the organisation, which we considered it did. Effective performance of the role was a real need where the context was processing applications for benefits, set out more fully above and below.

(ii) They must be appropriate with a view to achieving the objective, which we considered was established. If there is less than effective performance that cannot be managed successfully those applying for benefits will not receive a decision, or the benefits themselves when due, as promptly as is reasonably practicable. The delay can cause hardship, again as set out more fully below.

(iii) They must be reasonably necessary to achieve that end, which we considered was the case. Even if the adjustments proposed had been attempted dismissal in our unanimous view would not have been averted, for the reasons we again address more fully below.

(iv) We weighed the reasonable needs of the respondent against the discriminatory effect on the claimant. Our assessment is that the balance in this regard favours the respondent, primarily for the same reasons as given for the section 15 claim but also as the conclusion we reached was that the dismissal would have followed in any event, even if additional adjustments had been attempted, for reasons set out more fully above and below.

116. In conclusion our unanimous view is that, if the respondent required to prove the defence of objective justification, it had done so.

(iii) Reasonable adjustments

Did the respondent operate a provision, criterion or practice ("PCP") which put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who do not have her disability? In this regard the claimant relies on the PCP of requiring effective performance, specified as a rejection rate not exceeding 10%.

117. The claim under sections 20 and 21 (the breach of duty arises under section 21) was the claimant's primary argument, for understandable reasons. The duty to make reasonable adjustments has been described as the cornerstone of the Act in so far as disabled persons are concerned. There was no serious dispute that the said PCP had been applied in this regard, and that it caused the claimant substantial disadvantage, which was her dismissal. The "target" of 10% as a maximum error rate, which was a measure of effective performance, was set out in the letter dated 23 December 2021. It was applied to the claimant thereafter, including at the stage of the decision to dismiss, and the appeal. The Tribunal considered that this had been established. There was less in the way of evidence of the comparison with persons who do not have the disability, but the Tribunal accepted that that had been established. The general performance rate on errors was about 2%, and the informal target was normally 5%. The error rate for the claimant for periods where figures were provided was between 33% and 46%, such that the error rate was materially higher. The claimant had union representation at the meeting that led to dismissal, and the details of what may be described as ineffective performance by the claimant against such metrics was not challenged. The disadvantage that the claimant suffered from, in summary, was that she had difficulty in processing and retaining information as a consequence of her acquired brain injury, exacerbated when fatigued or under stress, such that she could not meet the PCP.

If so, did the respondent take such steps as it was reasonable to have taken to avoid the disadvantage, in accordance with section 20 of the 2010 Act?

118. In this regard, our decision was not unanimous. The majority view, comprising the Employment Judge and one member, was that there were no steps which it was reasonable for the respondent to have taken to avoid the disadvantage. The minority view was that there was, being to extend probation for three months during which someone would shadow the claimant, as referred to in more detail below.

119. There was however unanimity in a number of respects. We did not consider that the point of consistency of support was satisfied in the evidence. What the claimant had sought was one person throughout her period of operation after training to give her assistance and support. We were not satisfied that that was a reasonable adjustment in the period up to 31 December 2021, and then to dismissal. It was somewhat vague, and for periods the claimant did have one person providing support, such as Ms McGowan for six weeks, and Mr Henderson for a period of some months latterly. Mr Treanor was her manager for a material period latterly, and there was a consistency of support from Ms Travers. That a number of people were involved in her training and support, was entirely normal and understandable, and Ms Pollock gave convincing evidence that we accepted that it was not practicable to have one person do all of the same. In his written submission Mr Swan proposed that an informal performance review meeting should have taken place, including Ms Kerr. We did not consider that that fell within the reasonable steps definition and was more akin to the point of seeking specialist medical evidence we address below.

120. Other suggestions were made which we did not consider met the statutory test– (a) having someone check the claimant's work before submission, but that was in effect replicating the checks that were carried out anyway, (b) allocating bank detail verification to another employee, but that was not we considered practicable, and although there was one meeting where that was the major source of error there were others where different sources of error were identified, and we did not consider that focusing on only one two week period was appropriate in that regard. In short we did not consider that the bank detail verification issue was of such significance as that alone would have made a material difference; (c) providing further training on such verification, which we did not consider would be effective for the same reason, but we also noted that the claimant was offered a

period of consolidation training which she rejected (d) having a mentor, but this was we considered little different to the "shadow" referred to below. Ms Pollock explained that the term meant someone who would offer advice on career progression. What the claimant appeared to suggest was more akin to what the respondent referred to as a "buddy", being someone to whom she could turn to seek advice on an ad hoc basis, but that was provided to her latterly by Mr Henderson; (e) extra training for managers, but this would not lead to any adjustment directly for the claimant, such that it does not fall within the statutory terms in this regard. We do however comment on that below. Some of the proposed adjustments were either repetitions or variants of the above. The possibility of (f) redeployment that was in the written submission was latterly withdrawn by Mr Swan.

121. What remained in our view was a combination of providing someone to shadow the claimant for a period to watch her carry out the assessments, comment on them as she did so, correct any errors, and advise her more generally, for an initial period, and then to have a further period where the claimant worked alone, but with the ability to call on that person for support as and when required. The claimant's preference was for the initial shadowing period to be in person, which failing remotely. The matter is addressed further below. We consider that, although unusual, it assists to set out the minority opinion first, then that of the majority.

Minority opinion

122. In the judgment of the minority, although the respondent did take many steps to seek to assist the claimant, over a reasonably lengthy period, it was a reasonable step to have attempted the "shadowing" that Ms Kerr, the one expert consulted, recommended but with a modification. That adjustment was within the overall reference to one-to-one support that the claimant contended for, but required to be more specific, as it would not be reasonable to require such a shadow for a period that ended with the claimant being confident to conduct the cases alone, which was one without any clear limit in time. Doing so for three or four cases, over two weeks or so, was however too short a time to give the claimant a reasonable opportunity, in the member's opinion. An extension of three

months to the probationary period was considered by the member to be reasonable given the statutory test and all the circumstances, as firstly Ms Kerr being an Occupational Therapist was best placed of those who were involved to make a recommendation, secondly she maintained it despite Mr Treanor's suggestion that it had already been tried in their email exchanges in January 2022, thirdly it was not clear from the evidence that precisely what she recommended had been tried as Mr Treanor alleged, and that whilst there had been shadowing to an extent it was not someone watching at least three or four live cases undertaken by the claimant and then commenting to her on what had been done right and wrong, and how to correct the parts that were wrong, and fourthly as although a three month extension had been granted, in view of holidays over Christmas and New Year, a period of absence, and on return the claimant not undertaking assessment of cases only very approximately a half of the actual period of that extension had been utilised.

123. The minority member considered that in light of all the circumstances including the size and resources of the respondent, the limited cost of such an adjustment, and the view of it being practicable without undue disruption, that it would have been a reasonable step to have attempted the shadow working either in person, or remotely if that was not possible, for an initial period of about 4 – 6 weeks, then to have a secondary period of about 4 weeks of the claimant working alone, subject to being able to contact the person as a "buddy" to respond to queries she raised, and then to assess the claimant's performance when working alone in that secondary period. The member considered that the prospect of success of such an extension was very low indeed, almost nil, but that it was reasonable to allow the claimant such an opportunity as the first extension had not given her the full intended period.

Majority opinion

124. The majority concluded that in all the circumstances there was no step that should reasonably have been taken by the respondent to avoid the disadvantage under the statutory provision. In doing so, it considered matters both on the basis that the onus had shifted to the respondent in that regard, under ***Latif***, and separately that it was a matter of considering

all of the evidence under ***Jennings***. In each respect, it concluded that the respondent's arguments should essentially be accepted. The majority assessed the list of factors quoted above from the Code to assist its determination. Taking each in turn:

a. whether taking any particular steps would be effective in preventing the substantial disadvantage;

125. The majority considered that there was no realistic chance of the adjustments proposed, either individually or in any combination, being effective in the sense of leading to the claimant being able to perform at a level with an error rate of under 10%. That is not intended as criticism of the claimant herself. She was clearly well motivated, and hard-working. From the evidence before us however, which included the evidence from the claimant herself, she did not have the ability to process and retain sufficient of the procedures required of the role to perform it effectively. There are a number of reasons for that conclusion.

126. Firstly, although the detail of what Ms Kerr proposed had not exactly been attempted before, something close to it had been. That included six weeks with Ms McGowan in person. It included a day with Alina Tregowan. These were not exhaustive as examples but are the most obvious ones. Secondly, Ms Kerr did not give evidence. All that we had was emails from her. It was far from clear that she was seeking to make recommendations on the basis of the statutory test, although the email of 31 December 2021 did refer to reasonable adjustments. Neither that email nor the one on 28 January 2022 commented on the chance of success of the adjustments proposed. But even if one accepts that she was applying the statutory test, her advice was to have the shadow with the claimant for three or four cases. That is not what the claimant herself gave evidence about, or sought in written documentation. She wished that to be for what amounts, in effect to an indefinite period, as it was for an inspecific criterion of when she felt confident to do the cases alone. No one could say when that would be, including the claimant. There was accordingly a substantial inconsistency between the emails from Ms Kerr and the claimant's position. Thirdly the errors made by the claimant were in the context of a low volume of cases. The normal volume of cases for a full-time Client

Adviser was of the order of 20 to 25 per week. The claimant was undertaking on average less than 8 per week, with that average allowing for a period of holidays over Christmas and New Year. The claimant worked 25 hours per week not 37, such that an equivalent average for her against the same rate was of the order of 14-15 cases per week. She was also not undertaking incoming calls which other Client Advisers did. The claimant's error rates appeared to be at or about a level of 33%, or higher, for a material period of time. Fourthly we did not consider that the claimant's evidence to the effect that the adjustments proposed might have worked sufficiently was reliable. That is because we had concerns over other aspects of reliability such as the comments about the respondent not making genuine efforts to make adjustments referred to above, changes in her position on some points of detail, and changes in what she herself sought by way of adjustments. On the other hand we regarded the evidence from Ms Fleming and Ms Pollock that adjustments would not have been effective as reliable, and we accepted that evidence.

127. The majority did take into account the lack of detail from 24 January 2022, but the claimant in her own evidence did not suggest that there had been a significant improvement so as to be better than 33%. She had union representation at the meeting with Ms Fleming, and the point was not addressed directly at it. We also took into account the lack of detailed expert opinion sought by the respondent. It may well have been better had the respondent sought an opinion from an Occupational Health Physician, and either in conjunction with that or separately from the claimant's treating Consultant, to inform them in detail on what disadvantages the claimant suffered (a point we return to below). They did not do so, and had only a limited report from a Senior Occupational Health Advisor. We noted that Ms Travers did wish to obtain a second report, but the provider was not able itself to assist in that regard it appeared. But whilst obtaining such expert opinion may inform the adjustments it is not itself a reasonable adjustment under the Act, unless it would lead to an adjustment as referred to in authority. We did not have any evidence from a GP, consultant, or Occupational Health Physician, nor did we have GP records or other evidence, on which to base such a conclusion. We are not able to speculate on that, and from the evidence we heard we considered that

if such a report had been sought it would not have led to any adjustment being recommended that would have had a material effect on the claimant's performance.

128. Taking all that was led before us, the majority concluded that there was no realistic chance of the proposed adjustments being effective. We considered that although it is not necessary that the chance be one of more than 50% to be a factor to take into account, our view was that the lower the chance, the less weight there was to be given to it, and here the chance was so low, if not nil, that the weight to give it in favour of the claimant was very little indeed. If the test of a reasonable prospect of avoiding the disadvantage in question was applied, the claimant did not meet that.

b. the practicability of the step;

129. The majority considered that there were practical issues with regard to the step proposed, which it addresses further in the following paragraph.

c. the financial and other costs of making the adjustment and the extent of any disruption caused;

130. It would have taken at the very least two weeks of time for one person to provide the shadowing referred to by Ms Kerr, and more likely four or six, having regard to the claimant's evidence and the minority comments above. That means that that person would not be doing other work, and that has a cost of the order of £1,000 - £2,000. It is anticipated that ad hoc support would not have added materially to that. That is relatively moderate in all the circumstances. The time taken for the performance to be assessed would have been, on the basis of the minority view, an extension of three months, which is relatively short. If Ms Kerr's view was accepted it would be shorter still. But there is more to the issue than that, as the claimant sought, and would certainly in our view have required, ad hoc support thereafter, beyond what Ms Kerr recommended, and her own assessment was that the support of the shadow either in person or remotely but for the initial period when the claimant would not be working alone should continue for as long as the claimant needed it until she felt confident to do the work alone. The cost of what the claimant sought could

therefore not be given in evidence, as it was not possible to quantify. There were other costs, and what we considered to be disruption. Firstly someone would have to be found to agree to act as the shadow. That would have involved being with the claimant, either in person or remotely, for her working week of 25 hours, watching her do the work, commenting on it, correcting it when necessary, and giving advice both then and latterly ad hoc. If the minority view is accepted, that would be for a period of 4 - 6 weeks for 25 hours per week, and then for about four weeks ad hoc. The person would require to have a good working knowledge of the processes to do so, and a new recruit would not have that. An existing member of staff would have to be found to do so. It would be far from easy to arrange such a facility in our view, as it would be disruptive to the person concerned who would not be doing the work he or she was undertaking. The claimant's evidence was that she found Covid remote working extremely difficult, such that she wished that to be in person. Whilst working in the office, or on a hybrid basis, became competent after 31 January 2022 the evidence before us was that the respondent retained most of the home working arrangements in 2022 at least until the appeal hearing. It was we considered very likely that what the claimant sought of in person shadowing was not practicable for the respondent. In person shadowing was therefore likely to be difficult to arrange at best, and disruptive to whoever did so.

131. Such an arrangement of a shadow was, we concluded, also likely to involve greater time being spent in processing applications, both when the shadow was there with the claimant either in person or remotely, and after that initial period when the shadow performed more as a buddy when the claimant worked on cases herself. Delay would we considered be disruptive both to the respondent, but also more particularly to those who had applied for such benefits. Even short delays could cause hardship to them, as many of those in such a situation were liable to be vulnerable people, or those with young children, for whom such benefits could make a real difference. That that may not have involved many claimants was not of comfort to those claimants, who were liable to experience delays in their applications. The extent of that disruption was we considered not insubstantial.

d. the extent of the employer's financial or other resources;

132. The Scottish Ministers represent the Scottish Government, and their resources are therefore obviously substantial, but we take into account that public funds must be used carefully and appropriately, such that the resources are finite and require to be managed appropriately and responsibly even if the total budget available is a huge one. The claimant's proposal would involve unquantifiable cost, for an indefinite period. If it was retained as the minority proposed the cost and time would be finite, however, and not unduly high.

e. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work)

133. We did not consider that there were any such resources obviously available to the respondent. As it is in effect the Scottish Government it did not use the Access to Work scheme, but made its own provision. This was not therefore a factor either way in this case.

f. the type and size of the employer.

134. For the same reasons as above, the respondent is a substantial public body, but with finite resources based upon public funds.

Other matters

135. The majority also took into account all the circumstances. We mention those considered to be most significant. The first was that the case as pled was far more simple (being for three steps) than that set out in the submission, and the submission had a huge number of possible combinations of what were in reality about eight adjustments put forward, rather than a clear indication of what was suggested were the combination of reasonable steps. The second was that there were two potential arrangements for shadowing put forward, one by the claimant that did not have any clear finite end, and one by Ms Kerr that was for three or four instances of cases being assessed. Neither had support from the other, for example the claimant did not consider that Ms Kerr properly understood matters and she did not consider that three or four such instances would be effective. The creation of a form of middle way, of four

to six weeks of shadowing, four weeks of the claimant working alone and assessment of that during a three month probation extension, was not put forward by the claimant herself, or by Ms Kerr (who as stated did not give evidence) and the majority did not consider that doing so fell within the principle in ***Spires***. Even if it did, however, the majority considered that it had no realistic chance of success. There was no reasonable prospect of avoiding the disadvantage. The third is that the claimant was working on reduced hours, but doing materially less casework in volume than other Client Advisers, as explained in paragraph 126. The fourth is that we did not have evidence before us that we considered reliable that if there had been some form of expert opinion taken by the respondent that would have led to a recommended course of action. We could not engage in what would be pure speculation on that matter.

136. In our assessment we also took account of the fact that mentoring, which we take to include the form of shadowing referred to, is mentioned specifically in the Code as a potential step to take, although its meaning may not be entirely clear, that something of that nature had taken place before, in that the respondent did provide a "buddy" system in general terms to employees who required it, and did so for the claimant, and that the respondent had offered two weeks of consolidation, being additional training, which the claimant had not taken up. She had similarly not unpacked the desk provided to her. We also considered the context that the respondent did seek genuinely to preserve the claimant's employment, and had made many adjustments to seek to do so over a period of many months. It was surprising that the respondent had not admitted in its pleadings that the claimant was a disabled person, that concession being made latterly, but that did not in our view indicate any lack of genuineness in its attempts to find adjustments to avoid the disadvantage from the PCP.

Conclusion

137. The assessment of the majority was that the chance of success of the proposed adjustment of a shadow, either for an indefinite period as proposed by the claimant or as proposed by Ms Kerr, and for completeness as proposed by the minority member, was in practical terms nil, and that that told very heavily at the least against it being a reasonable

step. That it had a financial cost, but more significantly a disruptive effect on others especially the person acting as the shadow, and had the likelihood of causing hardship to those whose claims the claimant processed, made that not a reasonable adjustment when assessed objectively in all the circumstances, in our view. That was the case even with other adjustments as well, the obvious one being to extend probation. The other proposed adjustments pivoted around the issue of shadowing, such that if that shadow was not a reasonable step the other proposed adjustments were not reasonable ones, either individually or collectively in any form of combination. Putting it simply, there was no point to such adjustments (save to extend time) if the shadow arrangement would not be reasonable. Extending time alone without that being able to achieve effective performance was not, we considered, within the statute.

138. The majority view was that the respondent had established that the proposed adjustments were not reasonable ones under the statutory test, if the onus had shifted to it under ***Latif***, and the proposed adjustments were not reasonable if it was a case of assessing the evidence heard under ***Jennings***. The majority view therefore was that that claim fell to be dismissed.

Did the respondent fail to make the adjustments reasonably required?

139. This issue does not now arise. Nor does the issue of any remedy.

Conclusion

140. For the reasons given above, the Claim must be dismissed. That is despite the fact that all of the Tribunal considered the claimant to be a most pleasant, enthusiastic, and hard-working person. The nature of the injury she sustained from the strokes meant that, from the evidence we heard, she was not in a position to be able to carry out the role.

141. The Tribunal also wishes to state that the decision should not be taken as indicating that the respondent had handled matters fully in accordance with best practice. Best practice is not the test, but there were matters that the Tribunal were surprised about, and took into account in its deliberations. The first is that none of the witnesses had considered in

detail the terms of the EHRC Code of Practice to which we have referred. None of the witnesses had a detailed knowledge of its terms, and some had no knowledge of it at all. For employees of the respondent, who have had training on discrimination issues, that is a concern. The Code is written in plain English and has helpful commentary and examples which make the terms of the Act easier to apply in practice. The Tribunal suggests that the respondent consider whether to amend its training, and the guidance given to managers or those deciding such issues, with care.

142. Secondly the respondent did not seek detailed advice on disadvantage in what was obviously not a simple case from either an Occupational Health Physician or a consultant. That is a step all three members of the Tribunal considered would at the least have been helpful.

143. Thirdly, evidence of exactly what the claimant's performance had been in the period up to 24 February 2022 could have been collated at the time, and then presented to the claimant, perhaps at the review meeting in March 2022, or the hearing with Ms Fleming, such that it would then have been before the Tribunal.

144. These were all issues that the Tribunal did not consider changed the conclusions above.

Employment Judge: **A Kemp**
Date of Judgment: **22 March 2023**
Date sent to parties: **24 March 2023**