**Case No: 2302385/2016**

# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs R Breiner

**Respondent:** Medway Community Healthcare

**Heard at:** Ashford

**On:** 3rd and 4th August 2017
and in chambers on 29th September 2017

**Before:** Employment Judge Pritchard
Mr G Anderson
Ms H Edwards

**Representation**
Claimant: In person
Respondent: Mr B Gray, counsel

# RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1 The Respondent did not discriminate against the Claimant because of something arising in consequence of her disability;

2 The Respondent did not indirectly discriminate against the Claimant in relation to her disability;

3 The Respondent did not discriminate against the Claimant by failing to make reasonable adjustments;

4 The Respondent did not harass the Claimant in relation to her disability.

Accordingly the Claimant's claims are dismissed.

# REASONS

1. The Claimant claimed: indirect disability discrimination, discrimination arising as a consequence of disability, harassment related to disability, and failure on the Respondent's part to make reasonable adjustments. The Respondent resisted the claim.

2. At a preliminary hearing held on 20 March 2017, the Respondent was ordered to pay a deposit as a condition of being permitted to maintain its position that the Claimant was not a disabled person for the purposes of the Equality Act 2010. The Respondent did not pay the deposit and was therefore not permitted to maintain its position in that regard.

3. The Tribunal heard evidence from the Claimant on her own behalf and from her witness: Louise Robbins (a former colleague of the Claimant) and Nickola Wood (a friend of the Claimant). The Claimant also put in evidence statements from Alison Edden (a friend and colleague) and D Hobdey (who stated that she was present when the Claimant's leg gave way at the Medway Hospital). Since these two witnesses did not give live evidence before the Tribunal, and their evidence could not be tested in cross examination, the Tribunal gave it limited weight. On the Respondent's behalf, the Tribunal heard evidence from: Joanna Godman (at relevant times Clinical Lead for the Integrated Discharge Team and the Claimant's line manager), Richard Jones (HR Advisor employed by Capsticks Solicitors), Joanna Cumes (present Clinical Lead for the Integrated Discharge Team), and Anna Ross (Team Lead in the Rapid Response Care Management Team). The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing, the parties made oral submissions supported by written submissions.

## Issues

4. The Respondent provided the Tribunal with a list of issues at the outset of the hearing with which the Claimant was in agreement. As the hearing proceeded, the Tribunal thought it necessary for the list of issues to be amended to better reflect the Claimant's pleaded case. The parties agreed to this course of action. The issues can be described as follows:

*Disability*

4.1. The Claimant contends that she was disabled, relying on the physical impairment of "a painful, injured left knee and over-extended patella". The Tribunal would have to consider whether the Claimant was a disabled person at material times.

*Indirect discrimination*

4.2. The provision, criterion or practice (PCP) complained of is "the requirement for employees to maintain a certain level of attendance at work so as to avoid absence monitoring and the possibility of a warning or disciplinary action".

4.3. The Respondent accepted that that is a PCP, and that the Respondent applies it both to the Claimant and to persons who do not share the Claimant's protected characteristic.

4.4. Did it put persons who have the same disability as the Claimant, namely the knee condition at paragraph 4.1 above, at a particular disadvantage compared with persons who do not have the disability?

4.5. Did it put the Claimant at that disadvantage?

4.6. If so, was the PCP a proportionate means of achieving a legitimate aim, namely:

4.6.1. Ensuring consistent attendance at work;

4.6.2. Protecting other members of staff from the impact of high absence; and/or

4.6.3. Ensuring the proper functioning of the Respondent's services?

*Discrimination arising in consequence*

4.7. The unfavourable treatment complained of is:

4.7.1. The written warning received by the Claimant on 20 May 2016;

4.7.2. The sickness absence management itself; and

4.7.3. Not upholding the Claimant's appeal against the written warning.

4.8. The Respondent conceded that the written warning and not upholding the Claimant's appeal amounted to unfavourable treatment but did not concede that the sickness absence management amounted to unfavourable treatment.

4.9. With regard to the written warning and not upholding the Claimant's appeal, the Respondent conceded that it was something arising in consequence of the Claimant's disability. With regard to the sickness absence management itself, the Tribunal would have to consider whether it was because of something arising in consequence of the Claimant's disability.

4.10. If so, was that treatment a proportionate means of achieving a legitimate aim, namely:

4.10.1. Ensuring consistent attendance at work;

4.10.2. Protecting other members of staff from the impact of high absence; and/or

4.10.3. Ensuring the proper functioning of the Respondent's services?

4.11. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was a disabled person as per paragraph 4.1 above?

*Duty to make reasonable adjustments*

4.12. The PCP complained of is "the requirement for employees to maintain a certain level of attendance at work in order to not be subject to the risk of the attendance management procedure".

4.13. Did this put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

4.14. Did the Respondent know, or could it reasonably have been expected to know:

4.14.1. That the Claimant had a disability; and

4.14.2. Was likely to be placed at the disadvantage referred to at paragraph 4.13 above?

4.15. The Claimant contends that the Respondent should have taken the following steps:

4.15.1. Postponing the absence management meeting on 6 November 2015;

4.15.2. Disregarding some or all of the Claimant's disability-related sickness absence from 29 December 2015 to 21 February 2016;

4.15.3. Modifying the attendance management procedure;

4.15.4. Giving the Claimant paid time off work to attend gym or aqua-therapy sessions during the day;

4.15.5. Amending the off-duty rota so that the Claimant was not on duty at the times she was meant to attend aqua-therapy sessions; and

4.15.6. Adhering to the Occupational Health assessment on 8 July 2016 that the Claimant's knee injury qualified as a disability.

4.16. Were such steps taken?

4.17. If they were not:

4.17.1. Would they have avoided the disadvantage?

4.17.2. Was it reasonable for the Respondent to take them?

*Harassment*

4.18. The conduct complained of is:

4.18.1. Insisting that the Claimant attend work while she was ill;

4.18.2. Arranging Occupational Health consultations for the Claimant while she was too ill to attend and which had to take place by telephone;

4.18.3. Conducting the absence review at a time when she was too ill to attend (the Claimant was referring to the meeting of 6 November 2015); and

4.18.4. Upholding the Claimant's written warning on appeal.

4.19. Did the conduct happen as alleged or at all?

4.20. Was it unwanted conduct?

4.21. Was it related to disability?

4.22. Did it have the effect of:

4.22.1. Violating her dignity?

4.22.2. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

4.22.3. The Tribunal must take into account:

4.22.3.1. The perception of the Claimant;

4.22.3.2. The other circumstances of the case;

4.22.3.3. Whether it is reasonable for the conduct to have that effect.

*Jurisdiction*

4.23. Does the Tribunal have jurisdiction to hear any claims other than that at paragraph 4.18.4 above? Specifically,

4.23.1. Are the other claims out of time?

4.23.2. If so, is it just and equitable to extend time?

*Liability hearing*

4.24. The Tribunal decided to consider liability only at the hearing. A further hearing would be listed to consider remedy in the event that all or any of the Claimant's claims were to succeed.

**Findings of fact**

5. The Respondent provides healthcare services within the NHS. The Claimant commenced employment with the Respondent on 4 August 2014 as an Assistant Practitioner working in the Integrated Discharge Team (IDT). Her role is, and was at material times, to assess and facilitate a safe discharge of patients from hospital. The Claimant's role is an active one and she is, and was at material times, required to walk considerable distances around the Medway hospital.

6. At relevant times, the IDT team comprised about 14 members of the Respondent's staff. The Tribunal accepts the Respondent's uncontested evidence that the absence of a team member placed pressure on the remaining members of the team and that during the Claimant's sickness absence referred to below various team members expressed concerns about the problems her absence was causing. The absence of a team member would place individual members under strain and risked having an adverse impact on the important frontline service provided by the Respondent.

7. The Claimant informed the Respondent at the commencement of her employment that she had a hearing impairment and that she had a problem with her left knee for which she was being seen by a surgical consultant. The evidence before the Tribunal suggested that the Claimant undertook her duties as described above without complaint.

8. The Respondent's sickness absence policy includes procedures for managing short-term and long-term sickness absence. The short-term absence management procedure is in four stages. The aspects of the policy relevant to this case are as follows:

    8.1. Stage one is triggered when an employee has been absent due to sickness on three occasions in a rolling six months and/or a total of 11 or more working days continual absence in a rolling six month period. This leads to an informal absence review meeting.

    8.2. Stage two is triggered when an employee has been absent due to sickness on a *further* three occasions in a rolling six months and/or a *further* total of 11 or more working days continual absence in a rolling six month period [emphasis added]. Stage two is also triggered if there is further concern from the manager or a breach of expectations at stage one. When stage two is triggered, it leads to a formal absence review meeting. The policy provides, among other things, that at the second stage:

        *Inform the employee that a written warning will be issued at this meeting and the warning will remain on their file. The employee should also be informed that their Annual Pay increment (where applicable) will also be delayed for 12 months. Also, their PDR will likely to be marked as "performance improvement required". The warning will only be disregarded for sickness absence management purposes after a sustained period of improved sickness for a 12 month period. Every case will be considered individually, with any mitigating circumstances considered before any warning or final decision to defer an increment is taken.*

It is not until stage four that consideration is given to termination of the employee's employment.

9. The long-term absence management procedure consists of five time frames linked to the date the long-term absence commenced (defined as any single continuous period of 28 days or longer). Such absence will give rise to long-term absence reviews.

10. The policy also includes the following:

> *Absence due to long term condition/disability – Equality Act 2010*
>
> *…*
>
> *Where an employee has been diagnosed with a condition that amounts to disability under the Equality Act 2010, their attendance will be monitored and managed using the trigger levels outlined in the management of short term intermittent sickness absence. The organisation will however be more sympathetic with the condition in accordance with the Act.*
>
> *Attending medical/dental/counselling/specialist appointments*
>
> *…*
>
> *Where an employee has health issue/s that amount to disability under the Equality Act 2010, they will still be asked to book regular appointments outside of their normal working hours or at the beginning or the end of the day. Where this cannot reasonably be achieved, the Manager and staff member should explore ways to arrange work patterns around regular appointments. If this is not possible, there will* ***not*** *be a requirement to make the hours up and this will constitute a reasonable adjustment. Staff and managers are expected, however, to discuss and agree a process which allows for this with the least possible disruption to the service*

11. The policy includes a mechanism whereby employees can appeal formal warnings and dismissals.

12. Under the Respondent's Flexible Working Policy:

> *Medical appointments*
>
> *In circumstances where frequent medical appointments may need to be attended, for example a specific course of treatments such as a long term medical condition, IVF or disability related treatment, a total of 12 paid hours will be authorised by the manager for each course of treatment/condition. The manager may ask staff to provide evidence of the appointments (appointment card/letter). Any additional time off over and above 12 hours will be annual leave or unpaid leave.*

13. The Claimant suffered an injury to her left knee as a result of a gymnastics accident when she was aged 15 years which left her with instability in the

joint. She underwent ligament release surgery in 2010 but it did not resolve the condition. In about October 2014, the Claimant wore a leg brace to help her mobilise and weight bear. Joanna Godman was aware that the Claimant wore the leg brace at work on a number of occasions. An MRI scan in 2015 disclosed an over-extended patella ligament.

14. In June 2015 the Claimant took two days' sickness leave absence suffering from gastrointestinal problems.

15. The Claimant was then off work from 2 October 2015 to 15 November 2015 having undergone surgery for genitourinary and gynaecological disorders. During the Claimant's absence from work following surgery, having been referred by Joanna Godman, the Claimant was assessed by an occupational health advisor of the Respondent's external occupational health provider. This assessment was carried out by telephone, as was the practice with this external provider. The occupational health advisor reported, among other things:

> *In my opinion the employee is likely to be disabled within the meaning of the disability provisions of the Equality Act 2010, though the Tribunal has the final say. This is due to an ongoing underlying medical condition not for her current sickness absence.*

The occupational health advisor did not explain the underlying medical condition to which she was referring (it might have related to the Claimant's knee condition but could have been referring to the Claimant's hearing impairment). A graded return to work was recommended.

16. On 6 November 2015, prior to her return to work, the Claimant attended both short-term and long-term sickness review meetings with Joanna Godman held under the Respondent's sickness absence policy. (The Tribunal thought it a curious feature of the case that the Claimant was required to attend both short-term and long-term review meetings which were held simultaneously. Joanna Godman told the Tribunal that she was of the same opinion but that she had been advised by the Respondent's HR advisors that both short-term and long-term review meetings should be held). At the review meetings it was agreed that the Claimant would return to work on the graded basis recommended by the occupational health advisor. This involved a gradual return to full working hours after five weeks, the removal of late shifts to ensure that no emergency department work would be undertaken during the graded return, and for a risk assessment to be completed. The Claimant was advised in writing that she should inform Joanna Godman or Sue Wanstall, Head of IDT, immediately should she feel she required any further support or extension of her graded return to work.

17. At an absence review meeting on 14 December 2015 the Claimant informed the Respondent that she was expecting to have knee surgery at the end of December 2015.

18. On 29 December 2015 the Claimant commenced sickness absence while she underwent knee reconstruction surgery. This consisted of having pins and cement placed to extend and support the ligaments of her knee. Her leg brace was removed six weeks after surgery and she underwent 14 weeks physiotherapy. The Claimant's orthopaedic surgeon reported, following the

Claimant's 6 week post-operative review, that the Claimant now had full extension and full flexion of the knee and that the patella was entirely stable. He recommended the use of an exercise bike and a cross-trainer and reassured the Claimant that she could return to walking.

19. In her disability impact statement, prepared after her operation and for the purposes of these proceedings, the Claimant set out the impact her knee impairment has on her ability to carry out day to day activities. This includes: difficulty getting in and out of the bath; pain when walking up steps; inability to kneel, bend or cross her legs which affects her ability to do housework; pain when carrying heavy items; inability to walk on uneven ground for long periods of time or uphill as it causes pain; inability to ride her bike or jog; and having to raise her leg when resting at home. However, when giving evidence the Claimant explained that the operative procedure was thought to be a permanent fix and that it was unlikely that she would need to undergo surgery on her knee again. She said that her knee was no longer painful and does not give way as it did before.

20. Prior to the Claimant's return to work following surgery on her knee, she underwent a telephone occupational health assessment on 18 February 2016 having been referred by Joanna Godman. The occupational health advisor recommended a phased return to work with reduced hours over four weeks and that the Claimant should refrain from manual handling or heavy lifting for six weeks. The occupational health advisor stated:

> *In my opinion, the employee is not likely to be covered by the disability provisions of the Equality Act 2010, though the Tribunal has the final say. My opinion is based on "Guidance on matters to be taken into account in determining questions relating to the definition of disability", HMSO.*

21. The Claimant returned to work on 22 February 2016. Joanna Godman held both short-term and long-term absence review meetings with the Claimant on 29 February 2016. Although strict application of the short-term absence management policy would mean that review in the Claimant's case would now be formal and held at stage two, the review was mistakenly carried out informally at stage one. As Joanna Godman told the Tribunal, this was a "fluke" and not by design.

22. Joanna Godman's letters to the Claimant following the review meetings record, among other things:

> *Short Term Stage 1 – Outcome of Informal Absence Review*
>
> *…*
>
> *You provided an update regarding your current health and you stated:*
>
> - *You are managing your graded return to work and feel the recommendations from Occupational Health that have been put in place are meeting your needs*
> - *You need to continue to increase your walking distance to improve muscle strength*

- *You need to attend physiotherapy Gym sessions and aqua therapy sessions as part of your prescribed recovery*

*…*

*Outcome*

*The following actions were identified:*

- *Graded return to work as per recommendations*
- *Myself or Sue Wanstall to be informed immediately should you require any further adjustments or an extension to the graded return*
- *Refrain from any manual handling or heavy lifting for 6 weeks – risk assessment in place*
- *Elevate limb when necessary to relieve any swelling*
- *Attend gym and aqua therapy sessions as prescribed – discussed difficulty in attendance due to timing of sessions being in the middle of the day. Agreed that the rota can be amended to meet your needs, and any time to be made up will be mutually agreed to ensure minimal disruption to your family commitments.*

*…*

*Next steps*

*Should you reach a trigger we will move to the second stage of the Sickness Absence Policy and Procedure*

The letter set out the further sickness absences which would trigger stage two of the procedure.

23. Occupational health assessed the Claimant by telephone on 16 March 2016. Among other things, the occupational health advisor reported:

*Rebecca has advised me that her recovery is going well she continues with her physiotherapy appointments and she has now been referred by a GYM for aqua therapy and strength building exercises and these will run over a twelve week period and she will have one appointment a week. As Rebecca has been referred by her GP in Sittingbourne, attending the appointments during work time may be difficult as the Gym is near her home and not work location. Rebecca is going to enquire if she could be referred to a gym nearer to work, to make it easier to attend. It is very important that Rebecca is given the time off to attend these necessary appointments.*

*…*

*In my opinion the employee is not likely to be covered by the disability provisions of the Equality Act 2010, though the Tribunal has the final say.*

24. The Claimant had a further telephone assessment by the occupational health advisor on 6 April 2016 who reported, among other things:

> *Rebecca has advised me that her recovery is going well she continues with her physiotherapy appointments and she has now been referred by a GYM for aqua therapy and strength building exercises and these will run over a twelve week period and she will have one appointment a week. Rebecca has today advised me that she is attending her appointments and makes up the time at work, as and when she can. Rebecca also said that she has noticed that her fitness has really improved and she is able to fulfil all of her normal work duties.*
>
> *…*
>
> *In my opinion, the employee is not likely to be covered by the disability provisions of the Equality Act 2010.*

25. On 22 April 2016, the Claimant was suffering from a migraine headache and took a day's sickness absence. At the Claimant's return to work interview the following day she recorded that the cause of her absence had been a head cold, having to wear hearing aids, and that the medication she had taken was out of date.

26. For reasons which remain unclear to the Tribunal, not least because the Claimant had not taken a further period of absence since the last stage one review such that it would trigger stage two, Joanna Godman was advised by human resources that it would be reasonable to carry out a formal short-term stage two absence review.

27. The short-term absence review meeting took place on 19 May 2016. Joanna Godman's letter to the Claimant recording what had been discussed at the meeting includes the following:

> *Current situation*
>
> *You were provided with your Sickness Absence History Report which we discussed in detail.*
>
> *You provided an update regarding your current health and you stated:*
>
> - *Elective surgery had been necessary and you felt you had been supported within the organisation to undergo these surgical interventions*
> - *All reasonable adjustments had been made on return from both elective sickness absence to ensure you had a controlled and safe return to the workplace*
> - *You advised me that you had not been attending all of your gym sessions as prescribed by your surgical therapy team through your own choice due to concerns about taking time away from the team*
> - *Your migraines are usually well controlled by medication and you have not had any other time off for this reason since employment commenced with the Integrated Discharge Team.*

*You mentioned that your migraines could be considered under the Equality Act and it was agreed that this would be acknowledged*

- *You are now in receipt of valid prescriptions for your migraine medication, and although there is a potential for further episodes you feel they can be managed with medication and maximising the amount of time spent in natural light*
- *You have a follow up appointment on 1st June for your hearing aids*
- *You did not feel there were any other adjustments that needed to be made for you to reduce your sickness absence levels*

*…*

*Outcome*

*The following actions were identified:*

- *Referral to Occupational Health for advice and guidance around migraine management*
- *Dates and times for all gym sessions to be provided within the next 5 days so that adjustments can be made to the staff rota to accommodate and for time to be made up*
- *Sanctions to be applied as follow:*
    1. *Formal written warning to be placed on personal file for 12 month period*
    2. *PDR to reflect need to improve attendance levels*
- *It was agreed that your annual pay increment would not be affected at this time*

28. By email dated 20 May 2016, the Claimant notified Joanna Godman of the dates of her physiotherapy appointments.

29. Joanna Godman made a referral to occupational health on 23 May 2016 setting out her concern that the Claimant had missed a couple of her weekly physiotherapy sessions due to the Claimant's concerns about taking time out of work and making up time. Joanna Godman set out details of the adjustments or provisions which had been put in place as follows:

> *Agreed on Becki's return to work for her to attend all physiotherapy and aquatherapy appointments. Unable to alter the times due to provider being in Swale – Becki agreed to make time up and I have advised this can be done in the best way to suit her family ie by adding the hours to one shift each week, or adding half an hour to her shifts throughout the week*
>
> *…*

30. The occupational health advisor's subsequent report following a telephone assessment on 25 May 2016 records, among other things:

> *Currently Rebecca she is working her contractual obligations without any issues. She is mobilising fairly well but has some difficulty going up*

*more than one flight of stairs. She feels no adjustments to her duties or workload is needed. She is still under the care of her General Practitioner and the Physiotherapy where she is having regular appointments and is fully engaged in her treatment process.*

*The aim is for her to have at least 80% function in her left knee and this would take time to reach this level*

*…*

*I would advise that the reason for ill health is permanent but with appropriate medical management, stable.*

*…*

*Rebecca is fit and able to fulfil all of her normal work duties without restrictions or modifications*

*…*

*In my opinion the employee is likely to be covered by the disability provisions of the Equality Act 2010, though the Tribunal has the final say.*

31. By letter dated 2 June 2016, the Claimant appealed against the imposition of the final warning. The thrust of the Claimant's appeal was that the Respondent had contravened the disability provisions of the Equality Act 2010, in particular in relation to her conditions which led to surgery in October 2015 and December 2015 and in relation to her migraines.

32. On 8 July 2016, the Claimant had a telephone assessment with the Respondent's occupational health advisor who reported, among other things:

*I telephoned Rebecca today and would advise from the information given to me by Rebecca that she has a long standing health condition Migraines*

*…*

*Knee problem*

*Rebecca tells me she underwent major knee reconstruction surgery in December 2015. She continues to attend physiotherapy to treat the knee and to address the muscle loss around the knee. Rebecca is expected to make an 80% recovery. We discussed the type of work Rebecca is expected to do and if any support is required at work. Rebecca assured me she is fit to carry out her full role and no support is required at work. I am unable to identify any further support required to support Rebecca at work.*

*…*

*In my opinion the employee is likely to be disabled within the meaning of the disability provisions of the Equality Act 2010.*

*…*

*I would advise Rebecca is likely to be covered by the act due to:*
*Reduced function in her left knee*
*Diagnosis migraine suffer* [sic]

33. The Claimant attended an appeal meeting on 11 July 2016 chaired by Sue Wanstall. Adrienne Meehan and Richard Jones (who participated in the decision making), also attended as external HR advisors. Joanna Godman attended to present the management case. The Claimant was accompanied. An admin services manager took notes.

34. The primary ground of the Claimant's appeal was that her illnesses causing the amount of time off should be covered by the disability provisions of the Equality Act 2010 and that it should not therefore be pursued through the normal policies and procedures. She also complained that she had a problem making up her hours lost when she attended physiotherapy and that the sickness absence policy stated that if she could not make up the hours then they should be foregone if agreed. The appeal panel declined to have regard to the most recent occupational health report relating to the Claimant.

35. By letter dated 13 July 2016, Sue Wanstall informed the Claimant that her appeal had not been successful. The reasons stated were as follows:

- *Your manager has followed the sickness absence policy guidance using discretion not to follow the stage 2 processes sooner*
- *There is evidence that reasonable adjustments to your working arrangements have been facilitated in order to help reduce any disadvantage that you would experience on return to work following all absences have been offered and accepted by yourself*
- *The last occupational health report dated 16 March 2016, which was prior to the meeting held on 19th May, advises that your health conditions relating to the absences are not likely to be covered by the disability provisions under the Equality Act*
- *You were offered flexible working options to accommodate any ongoing treatments. All staff are asked to arrange medical appointments outside of normal working hours. Where this is not possible you were asked to arrange appointments at the beginning of the day, making the time up. Where this was still not possible you and your manager amended your shift patterns around regular appointments*

36. The Claimant first contacted ACAS on 21 September 2016 who issued an early conciliation certificate on 21 October 2016 by email. The Claimant presented her ET1 claim form 14 November 2016.

**Applicable law**

<u>Time limits under the Equality Act 2010</u>

37. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of:

    37.1. the period of 3 months starting with the date of the act to which the complaint relates, or

    37.2. such other period as the Tribunal thinks just and equitable.

38. Under section 123(3)

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

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

39. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:

    39.1. when P does an act inconsistent with doing it; or

    39.2. if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

40. The time limit set out above is extended in accordance with the ACAS Early Conciliation provisions under 140B of the Equality Act 2010.

41. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the Court of Appeal held that when determining whether an act extended over a period of time (expressed in current legislation as conduct extending over a period) a Tribunal should focus on the substance of the complaints that an employer was responsible for an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably on the grounds of a protected characteristic. This will be distinct from a succession of unconnected or isolated specific acts for which time will begin to run from the date when each specific act was committed. One relevant but not conclusive factor is whether the same or different individuals were involved; see: Aziz v FDA 2010 EWCA Civ 304 CA.

42. A failure to make reasonable adjustments is an omission and time begins to run when an employer decides not to make the adjustment; see Humphries v Chevlar Packaging Limited EAT 0224/06. If an employer has not deliberately or consciously failed to comply with the duty to make reasonable adjustments, and the omission is due to lack of diligence or competence, in the absence of evidence as to when the omission was decided upon, there are two alternatives: (i) when did the person do an act inconsistent with doing the omitted act; or (ii) if the employer had been acting reasonably, when would it have made the reasonable adjustments? See: Kingston Upon Hull City Council v Matuszowicz 2009 ICR 1170.

43. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot

hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

44. In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered. See: Department of Constitutional Affairs v Jones [2008] IRLR 128 CA; Southwark London Borough Council v Afolabi 2003 ICR 800 CA.

45. As identified in Miller v Ministry of Justice UKEAT/003/004/15 at paragraph 12, there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.

46. Even if there is no good reason for the delay, it might still be just and equitable to extend time. See for example: Rathakrishnan v Pizza Express Restaurants Ltd UKEAT 0073/15.

47. Reasonable ignorance of time limits can be a relevant factor in deciding whether or not it is just and equitable to extend time. See: Director of Public Prosecutions v Marshall 1998 ICR 518 EAT. In such cases, the date from which a Claimant could have become aware of the right to present a worthwhile complaint is relevant.

Disability discrimination

48. Disability is a protected characteristic under section 4 if the Equality Act 2010.

49. Section 6 of the Equality Act 2010 provides that a person has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his ability to carry out day-to-day activities. Section 212 provides that substantial means more than minor or trivial. Under paragraph 2 of Schedule 1 of the Act the effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. Under paragraph 5, an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect. “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

50. When considering whether a Claimant is disabled within the meaning of the Equality Act 2010, the Tribunal must take into account the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) issued by the Secretary of State which appears to it to be relevant. Paragraph 16 of Appendix 1 provides:

> *Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without the treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (that is, the impairment has been cured).*

51. In Abadeh v British Telecommunications plc 2001 ICR 156 Mr Justice Nelson said this (referring to paragraph 6 of Schedule 1 of the Disability Discrimination Act 1995 which was in similar terms to paragraph 5 of Schedule 1 of the Equality Act 2010):

> 29. *In the case of Goodwin Mr Justice Morison when dealing with paragraph 6 of Schedule 1 said:-*
>
> > *"The Tribunal will wish to examine how the applicant's abilities had actually been affected at the material time, whilst on medication, and then to address their minds to the difficult question as to the effects which they think there would have been but for the medication: the deduced effects. The question is then whether the actual and deduced effect on the applicant's abilities to carry out normal day to day activities is clearly more than trivial."*
>
> *30. Where treatment has ceased the effects of that treatment should be taken into account in order to assess the disability. This is the case because paragraph 6 of Schedule 1 applies only to continuing medical treatment i.e. to measures that "are being taken" and not to concluded treatment where the effects of such treatment may be more readily ascertained.*
>
> *31. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, the medical treatment must be disregarded under paragraph 6 of Schedule 1. Where however the medical evidence satisfies the Tribunal that the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement, such permanent improvement should be taken into account as measures are no longer needed to treat or correct it once the permanent improvement has been established.*
>
> *32. The situation can be illustrated by two examples; first where physiotherapy has resulted in an improvement in movement which will facilitate ordinary walking without the use of a stick or a crutch but where further physiotherapy is still carrying on, the permanent improvement already achieved will be taken into account in assessing*

*the disability, whereas such residual stiffness as still requires continuing treatment, the outcome of which is not known, must be taken into account in assessing the disability without regard to that continuing treatment. If however the accepted prognosis is that such stiffness, albeit still seriously disabling, will be resolved with further physiotherapy, such recovery can be taken into account. Second, where depression is being treated by medication the final effects of which are not known or where there is a substantial risk of a relapse when the medication ceases the effects of the medication are to be ignored.*

52. In Richmond Adult Community College v McDougall 2008 ICR 431 the Court of Appeal held that the issue of how long an impairment is likely to last should be determined at the date of the discriminatory act and not the date of the Tribunal hearing.

53. Section 39(2) of the Equality Act 2010 provides, amongst other things, that an employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment.

54. Under section 109(1) of the Equality Act 2010, anything done by a person in the course of employment must be treated as also done by the employer.

*Duty to make reasonable adjustments*

55. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

56. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know, and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.

57. The Tribunal should identify (1) the PCP at issue (2) the identity of the persons who are not disabled with whom comparison is made, and (3) the nature and the extent of the disadvantage suffered by the employee. It is then important to identify the step and assess whether it is one which it was reasonable for the employer to have to take.

58. In Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 the employee was given a written warning under the employer's attendance management policy after she had taken 66 days absence, 62 of which related to her disability. The employer declined to withdraw the warning after consideration of the employee's grievance and appeal. Nor would the employer make adjustments to the policy in relation to future trigger points. The employee was not complaining about the policy itself; it allowed for adjustments where appropriate. Her complaint was the application of the policy in her particular circumstances. Among other things, the Court of Appeal held that if the particular form of disability means that the disabled person is no more likely to be absent than a non-disabled colleague, there is

no disadvantage arising out of the disability. But if the disability leads to disability-related absences which could not be the case with the able-bodied, then there is a substantial disadvantage suffered by that category of disabled employees. However, although the duty to make reasonable adjustments had been triggered, on the facts of the case it had been open to the Employment Tribunal to find that the proposed adjustments had not been reasonable adjustments for the employer to have made: it would not have been reasonable to expect the employer to write off an extended period of absence which was eight times longer than the trigger point in the policy.

59. In Bray v London Borough of Camden [2002] UKEAT the Employment Appeal Tribunal upheld the Employment Tribunal's ruling that disregarding the entire part of the employee's (considerable) disability-related sickness when applying its joint misconduct and incapability procedure would not have been a reasonable step for the employer to have to take: excluding the disability-related absences would generate enormous ill-feeling, a potential for unauthorised absences to grow, undermine the scope of the procedure, impose a financial impact on the employer and disrupt its activities in particular its ability to perform its statutory function. The Employment Appeal Tribunal agreed with the Employment Tribunal's conclusion that it is not a reasonable adjustment, as a matter of law, to ignore disability related absences when calculating sickness leave.

60. In Griffiths, Elias LJ agreed with the observations of HH Judge Richardson in General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43 and stated that there is an artificiality in arguing a case of dismissal or any other disciplinary sanction for poor attendance, treatment that has already arisen, in terms of the duty to make reasonable adjustments. The same artificiality does not apply, however, in relation to adjustments designed to look into the future, such as limiting the risk of future action being taken for absence from work.

*Discrimination arising from disability*

61. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

62. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

*Justification*

63. Paragraphs 4.28 to 4.32 of the Code of Practice on Employment (2011) provide guidance on what is a legitimate aim and what is proportionate. In particular, the aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test. Deciding whether, the means used to achieve the legitimate aim are proportionate involves a balancing exercise. A 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. The provision, criterion or practice does not have to be the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

64. The test for justification is objective.

65. Treatment can be justified as being a proportionate means of achieving a legitimate aim even if the decision maker did not consider justification at all or was careless, at fault, misinformed or misguided: see Swansea University v Williams [2015] ICR 1197 EAT.

66. Buchanan v the Commissioner of Police for the Metropolis [2016] IRLR 918 is authority for the proposition that it is the "treatment" of the Claimant which must be justified. It was held that there will be cases where the treatment is the direct result of applying a general rule or policy, in which case whether the treatment is justified will usually depend on whether the general rule or policy is justified. However, it will be rare for this to apply in disability cases concerned with attendance management because generally speaking such policies and procedures allow for a series of responses to individual circumstances and in such cases it is not sufficient to ask whether the underlying procedure is justified; rather, the Tribunal has to consider whether the treatment itself was justified.

67. In Carranza the Employment Appeal Tribunal considered the way in which section 15 would apply in circumstances in which a disabled employee was issued with a final written warning because of the employee's absence from work for 206 days over three years, mostly because of his disability. Judge David Richardson observed (at paragraph 47):

> *If the case had been put that way it would to my mind in any event be doomed to failure. It might have been established that the dismissal and the underlying written warning were "unfavourable treatment". But it was legitimate for an employer to aim for consistent attendance at work; and the carefully considered final written warning was plainly a proportionate means of achieving a legitimate aim*

68. In Bray the Employment Appeal Tribunal considered a case, brought under the Disability Discrimination Act 1995, in which the employee, a Senior Benefits Assessor, alleged that her employer had failed to make reasonable adjustments by failing to disregard the entire part of her (considerable) disability-related sickness when applying its joint misconduct and incapability procedure and that she had been subjected to less favourable treatment when issued with a final written warning. Under that legislation (but not under the present legislation) an employer could seek to show that any such failure and any less favourable treatment was justified. The Employment Appeal Tribunal held that the employer was justified in not making the adjustment.

*Indirect discrimination*

69. Section 19 of the Equality Act 2010 provides:

(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.

70. Elias LJ said in Griffiths:

> *… it is in practice hard to envisage circumstances where an employer who is held to have committed indirect disability discrimination will not also be committing discrimination arising out of disability, at least, where the employer has, or ought to have, knowledge that the employee is disabled. Both require the same proportionality analysis. Strictly in the case of indirect discrimination, it is the PCP which needs to be justified whereas in the case of discrimination arising out of disability it is the treatment, but in practice the treatment will flow from the application of the PCP. Accordingly, once the disparate impact is established, both forms of discrimination are likely to stand or fall together...*

71. Section 23 provides:

(1) On a comparison of cases for the purposes of section … 19 there must be no material difference between the circumstances relating to each case.

*Harassment*

72. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

72.1. A engages in unwanted conduct related to a protected characteristic in this case); and

72.2. the conduct has the purpose or effect of : -

72.2.1. violating B’s dignity, or

72.2.2. creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

73. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:

    73.1. the perception of B;

    73.2. the other circumstances of the case;

    73.3. whether it is reasonable for the conduct to have that effect.

74. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

75. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment: Third, was that conduct related to the Claimant's protected characteristic?

76. When considering whether conduct is related to a protected characteristic, the Employment Appeal Tribunal in Warby v Wunda Group plc UKEAT/0434/11 held that alleged discriminatory words must be considered in context. The Employment Appeal Tribunal upheld the decision of the Employment Tribunal which found that a manager had not harassed an employee when he accused her of lying in relation to her maternity because the accusation was the lying and the maternity was only the background.

*Burden of proof*

77. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

## Conclusion

### *Time limits*

78. Any of the Claimant's complaints of acts or omissions taking place before 22 June 2016 fall outside the primary time limit. However, the Tribunal concludes that the substance of the Claimant's complaints under each head of claim are that the Respondent was responsible for an ongoing situation or continuing state of affairs which culminated in the Respondent's failure to uphold her appeal against the final warning in July 2016. The complaints related to acts or omissions extending over a period and the Tribunal has jurisdiction to consider them.

***Disability***

79. Having regard to the Claimant's own evidence at the hearing, the Tribunal finds that the Claimant "gilded the lily" in her impact statement as to the difficulties her impairment has on her ability to carry out day to day activities. Nevertheless, the occupational health reports of 25 May 2016 and 8 July 2016 make it reasonably clear that the Claimant was expected to make an 80% recovery following surgery; the Tribunal concludes that the Claimant would therefore be left with a 20% residual impairment as a result of her knee condition. The Tribunal accepts the Claimant's evidence that she still has difficulty bending and walking with speed, particularly over uneven ground.

80. The Tribunal also concludes that but for the knee reconstruction surgery involving pins and cement the Claimant would suffer a more than trivial adverse effect on her ability to carry out normal day to day activities: her knee would continue to give way as it had done beforehand; this is supported by Louise Robbins' evidence that prior to surgery the Claimant's knee would often give way. This was undoubtedly a physical impairment which had a substantial and long-term adverse effect on the Claimant's ability to carry out day-to-day activities. The Tribunal concludes that the pins and cement are continuing treatment and therefore measures for the purposes of paragraph 5 of Schedule 1 of the Equality Act 2010. This is not a case to which the permanent improvement principle described in Abadeh applies.

81. The Tribunal is satisfied that the Claimant was a disabled person at material times.

***Failure to make reasonable adjustments***

82. It was agreed that the PCP complained of was "the requirement for employees to maintain a certain level of attendance at work in order to not be subject to the risk of the attendance management procedure". The Tribunal concludes, not least based upon the Claimant's own evidence, that following her recovery from surgery she was no more likely to be absent from work than a non-disabled person. However, by reason of her disability the Claimant was at relevant times more likely to be absent to undergo knee surgery and for post-operative recovery. The Claimant was therefore at a substantial disadvantage compared to non-disabled employees in that she was at greater risk of being subjected to the attendance management procedure and the warning which was imposed by reason of her absence at the time. Further, having had a written warning imposed, the Claimant remained at greater risk of cumulative sanctions than a non-disabled employee going forward.

83. There was insufficient evidence to suggest that the following steps proposed by the Claimant would have avoided that disadvantage, in particular:

    83.1. Postponing the absence management meeting on 6 November 2015. In any event, the absence management meeting of 6 November 2015 related to the Claimant's disability such that the duty to make reasonable adjustments in relation to this meeting arose.

    83.2. Giving the Claimant paid time off work to attend gym or aqua-therapy sessions during the day. Although the Tribunal is satisfied that the

Respondent ought reasonably to have known that the Claimant was complaining that the provisions of the Flexible Working Policy entitling an employee to a total of 12 hours paid leave when attending appointments for disability-related treatment had not been adhered to, not least because it formed the subject matter of the Claimant's appeal, there was no credible evidence to suggest that compliance would have avoided the PCP.

83.3. Amending the off-duty rota so that the Claimant was not on duty at the times she was meant to attend aqua-therapy sessions. In any event, the evidence suggests that Joanna Godman allowed some flexibility in allowing the Clamant to attend these sessions.

83.4. Adhering to the Occupational Health assessment on 8 July 2016 that the Claimant's knee injury qualified as a disability.

84. With regard to the remaining proposed steps, that the Respondent should have disregarded some or all of the Claimant's disability-related sickness absence from 29 December 2015 to 21 February 2016 and/or accordingly modified its attendance management procedure, the Tribunal concludes that they would not have been a reasonable steps for the Respondent to have taken in this case. Firstly, the warning was not imposed by reason of wholly disability-related absence. Secondly, the warning was simply a "flag" that attendance was unsatisfactory; it would not have been until later stages under the policy that dismissal would have been contemplated. Thirdly, the Respondent in any event made reasonable adjustments: it gave careful consideration to the imposition of the warning, as evidenced by the fact that the Claimant's annual pay increment was not deferred; and, whether by mistake or design, stage two was not immediately instigated. Fourthly, the Claimant had been absent for 62 days within a six month period which was not inconsiderable and amounted to more than one third of time off.

85. Having reached this conclusion, the Tribunal has no requirement to reach any conclusion as to whether or not the Respondent knew that Claimant was a disabled person and was likely to be placed at a disadvantage.

***Discrimination arising in consequence***

86. The absence management policy itself was not something arising in consequence of the Claimant's disability.

87. With regard to the written warning and not upholding the Claimant's appeal against the written warning, the Tribunal is satisfied that the Respondent had a legitimate aim in applying the absence management policy: to ensure consistent attendance at work; to protect other members of staff from the impact of high absence levels; and to ensure the proper delivery of the Respondent's frontline services within an NHS context. The warning was reasonably imposed in pursuance of the Respondent's policy as set out above. It was proportionate in the circumstances: the warning was not imposed by reason of wholly disability-related absence; the warning was simply a "flag" that attendance was unsatisfactory; it would not have been until later stages under the policy that dismissal would have been contemplated; the imposition of the warning was carefully considered at both the initial and the appeal stages; the Claimant had been absent for 62 days

within a six month period which was not inconsiderable and amounted to more than one third of time off.

88. The Respondent was justified in imposing the written warning and not upholding the Claimant's appeal.

***Indirect discrimination***

89. Without having to consider all the issues relating to this head of claim, the Tribunal reaches the conclusion that the requirement for employees to maintain a certain level of attendance at work so as to avoid absence monitoring and the possibility of a warning or disciplinary action was a provision, criterion or practice which was a proportionate means of achieving a legitimate aim. In this case, the Tribunal reaches its conclusion for the same reasons as it finds the Respondent was justified in relation to discrimination arising as a consequence of disability above.

***Harassment***

90. Considering the alleged acts of harassment complained of :

    90.1. There was no credible evidence to support the Claimant's allegation that the Respondent insisted that the Claimant must attend work while she was ill. This alleged act of harassment has not been established.

    90.2. The Tribunal accepts that it was the usual practice of the occupational health advisors to carry out consultations with sick employees by telephone. There was no credible evidence to suggest that it was the Respondent who required the consultations to be carried out by telephone or that the Claimant was too ill to speak on the telephone and participate in the assessment. This alleged act of harassment has not been established.

    90.3. The Claimant attended the sickness absence review on 6 November 2015. There was no credible evidence before the Tribunal to suggest that she was too ill to attend or that the meeting was held in her absence as pleaded. In any event, this meeting did not relate to the Claimant's disability-related absence: it followed absence following her recent surgery for genitourinary and gynaecological disorders.

    90.4. With regard to the Respondent upholding the warning on appeal, the Tribunal has had regard to the Claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The Tribunal concludes that harassment has not been established. In particular, it would not be reasonable for such an act on the Respondent's part to have such an effect.

***Final comments***

91. Although the Claimant has not succeeded in her claims as pleaded, the Tribunal wishes to note the following concerns which have arisen during its deliberation:

91.1. Whether the Respondent had adequate regard to its own policies: in particular the provision in its sickness absence policy at page 96 of the hearing bundle concerning attendance at disability-related medical appointments; and the flexible working policy at page 108(g) of the hearing bundle which provides 12 paid hours to attend frequent medical appointments;

91.2. Whether the Respondent's policies did in fact require both short-term and long-term absence reviews to take place; and

91.3. Whether it was in accordance with the absence management policy to hold a stage 2 meeting when, as it appears to the Tribunal, the one day's further absence had not triggered a further step.

92. It must not be thought that the Tribunal is making any recommendations with regard to its concerns. The Tribunal is simply noting its observations should they be of assistance to the parties going forward.

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Employment Judge Pritchard

Date 13th October 2017