EMPLOYMENT TRIBUNALS

Claimant: Ms K Payne

Respondent: Rotherham, Doncaster and South Humber NHS Foundation Trust

HELD AT: Manchester **ON:** 24-28 April 2017

BEFORE: Employment Judge Horne

Members: Mr S Stott
Ms J K Williamson

REPRESENTATION:

Claimant: Mr J Jenkins, counsel
Respondent: Ms H Patterson, counsel

Judgment was sent to the parties on 9 May 2017. Written reasons were requested on 5 May 2017. Accordingly the following reasons are provided:

REASONS

Complaints and issues

1. By a claim form presented on 4 April 2016, the claimant brought the following complaints:
   1.1. Unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA");
   1.2. Failure to make adjustments, contrary to sections 20, 21 and 39 of the Equality Act 2010 ("EqA");
   1.3. Discrimination arising from disability, contrary to sections 15 and 39 of EqA; and
   1.4. Failure to pay holiday pay, contrary to the Working Time Regulations 1998.
2. The holiday pay claim was dismissed on withdrawal on 2 February 2017.

3. With regard to the remaining complaints, the issues in the case were well set out in the Schedule to a Case Management Order prepared by Employment Judge Burton following a preliminary hearing on 24 May 2016. As the final hearing progressed, the parties agreed various refinements to those issues. We set out below what we understood to be the outstanding issues for determination by the close of final submissions.

Duty to make adjustments

4. It was common ground that at all relevant times the claimant was a disabled person by reason of post-natal depression and that the respondent knew of her disability.

5. The duty to make adjustments was said to have arisen in two ways.

6. The first, was based on the alleged provision, criterion or practice (PCP1) of requiring the claimant to perform her substantive role. We had to determine:

   6.1. Whether PCP1 existed;

   6.2. Whether PCP1 put the claimant at a substantial disadvantage when compared with persons who were not disabled; and

   6.3. Whether it was reasonable for the respondent to have to make the following four adjustments:

      (a) [a claimed adjustment that was withdrawn]

      (b) Change in management structure to ensure that the claimant was no longer managed by Karen Lynas;

      (c) Temporary working from home arrangements to reduce the stress levels that the claimant was experiencing in her substantive role;

      (d) Awaiting the final outcome of the grievance before taking any decision to dismiss the claimant; and

      (e) "The respondent should have simultaneously explored any possibility of suitable alternative employment" from April 2015 onwards.

   6.4. Whether the alleged failure to make adjustments was part of an act extending over a period ending with a date such that the claim was presented within the time limit; and

   6.5. If not, whether the time limit should be extended.

7. The second limb of the adjustments complaint was based on PCP2 – a requirement to work under the management of Karen Lynas.

8. The tribunal had to decide the same issues in relation to PCP2 as for PCP1.

Discrimination arising from disability

9. It was undisputed that the respondent had treated the claimant unfavourably by dismissing her. The claimant and respondent each advanced a positive case (respectively under this complaint and the complaint of unfair dismissal) that the reason for the claimant's dismissal was her long-term sickness absence and the respondent's belief in the poor prospect of a return to work. Both parties agreed that the claimant's absence, and poor prospect of return, had arisen in consequence of her disability.

10. A further area of common ground was that the claimant's dismissal was a means of achieving the undisputedly legitimate aim of ensuring an efficient business and to avoid the adverse effect of long-term sickness absence. What the tribunal had to decide was whether the dismissal was proportionate to that aim.

Unfair dismissal

11. There being no dispute as to the reason for the claimant's dismissal, and that it related to the claimant's capability, we had to decide whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant.

12. Whilst we did not wish to be deflected from the statutory language of the test, we bore in mind four questions identified by Employment Judge Burton to help guide us to the right answer. These were:

    12.1. Did the respondent fail to carry out sufficient investigation by failing to obtain up-to-date medical information?

    12.2. Should the respondent have awaited the outcome of the claimant's grievance before dismissing her?

    12.3. Was dismissal within the band of reasonable responses?

    12.4. Was the dismissal discriminatory?

13. By agreement, we also had the task of deciding an issue related to remedy in the event that the dismissal was found to be unfair. Had the respondent acted fairly, would, or might, the claimant have been dismissed in any event? In the commonly-used jargon, this question is known as "the *Polkey* issue".

Evidence

14. We read documents in a large bundle which we marked "CR1". In keeping with the warning which we gave to the parties, we did not read every single document in the bundle. Rather, we concentrated on those documents to which our attention was drawn in the witness statements and orally during the course of the hearing. On the second day of the hearing, we indicated that we had read the first volume of the bundle and the second half (up to the dividing tab) of the second bundle. We also assured the parties that we had read those policies and procedures that the parties had invited us to read. The parties were warned not to assume that we had read any other part of the bundle.

15. We heard submissions from both counsel and we read written submissions from counsel for the respondent. This is a good opportunity for us to commend the approach of both counsel in this case. We were particularly impressed by their focus on the issues, their cooperation with each other and with the Tribunal and the measured questioning from both counsel in cross examination, particularly the sensitivity they showed towards witnesses for whom special adjustments needed to be made.

16. We will record briefly our impressions of the witnesses who gave evidence to us:

    16.1.1. Rosie Johnson – Her evidence was largely uncontroversial: that is to say that there did not appear to be much challenge to her version of what had actually occurred. There was a dispute about her interpretation of the grievance procedure and the bullying and harassment policies and

their comparison with the ACAS Code, but that did not cause us to doubt her evidence as to what had actually happened and when.

16.1.2. Ms Maloney we found to be a straightforward and impressive witness. We were able to accept her evidence about the various roles which are now being argued as suitable alternative employment.

16.1.3. Mr Currie – we found his answers to relatively straightforward questions were often difficult to follow, sometimes to the point of appearing to us to be evasive. We found it difficult to accept his evidence about the reason why he had used the phrase "the Academy will rebuff", especially when he could equally have used the phrase "your line manager will rebuff". His explanation was that he did not know which manager the claimant had been referring to when she complained of feeling intimidated. He must have known that the claimant was referring mainly to Ms Lynas.

16.1.4. Mr McEwan we found to be a straightforward and honest witness. We did not agree with the advice that he was given, particularly on the interpretation of the redeployment policy, but that did not cause us to doubt his honesty.

16.1.5. We accepted that Mr Hancock was trying to give his evidence to the best of his recollection. His evidence about the relevance of the grievance was not impressive. When it came to re-deployment, we thought he was genuinely trying to follow the advice that had been given to him. We happened to disagree with the advice, but accepted that Mr Hancock was trying to follow it in good faith.

16.1.6. We took Mrs Wileman to be an honest witness. We disagreed with her initial evidence about the interpretation of the policies, but again this did not cause us to doubt her honesty.

16.1.7. Mr Ion was, in our view, doing his best to tell us what he remembered about various meetings that he had attended. His recollection, however, appeared to differ from the claimant's more contemporaneous accounts. We thought that the most likely explanation for that was the lack of contemporaneous notes of his own and the passage of time.

16.1.8. That leaves us with the claimant herself. We thought she was doing her best to assist us too. She struggled at times to remember events clearly. She freely accepted that she had been muddled at times. We believe that her evidence about her thought processes at the time of relevant evidence had been clouded by the passage of time and possibly by a change in her circumstances. An example that featured prominently in this case is whether she was prepared to return to work at the Academy. We found that her evidence that she gave to us was inconsistent with what she was repeatedly telling the respondent.

Facts

17. The claimant was employed to work in the NHS Leadership Academy ("the Academy") from 29 October 2012 until 3 February 2016. Her role title began as

Band 8c Senior Programme Lead – Partner Liaison and she initially reported to Ms Deb Chafer.

18. Before embarking on a management career, the claimant was a Registered Midwife and Registered General Nurse. Both professions were regulated by the Nursing and Midwifery Council (NMC). She stepped out of clinical practice and her registration ceased in approximately 2005.

19. The Academy was founded in January 2012 in the wake of the Francis Report into the well-known failings in Mid-Staffordshire. Initially it had approximately 5 employees. The number has since expanded to about 75. By NHS standards, it is a small organisation.

20. From its creation until 1 April 2016, the Academy was funded exclusively by NHS England ("NHSE"). After that date, budgetary responsibility for the Academy transferred to Health Education England ("HEE").

21. In tandem with the funding responsibility was a "hosting" arrangement, whereby all employees working within the Academy (except the Managing Director) were notionally employed by a host NHS Trust. Until 1 October 2014, the host Trust was University Hospitals of South Manchester NHS Foundation Trust ("UHSM"). Since then, the Academy has been hosted by the respondent, a large acute Trust with very considerable resources. The claimant's employment transferred to the respondent along with her Academy colleagues on 1 October 2014.

22. Along with the claimant's employment there transferred a number of UHSM policies and procedures. One of these was a Redeployment Policy.

23. The Redeployment Policy was intended to apply to employees seeking redeployment for reasons of ill health and organisational change. Its rubric included the following:

    23.1. Paragraph 5.1 defined "suitable alternative employment" as "employment which is broadly equivalent in terms of skills, experience and terms and conditions of employment". It went on to state, "All efforts will be made to identify equivalent vacant posts where possible…"

    23.2. Paragraph 5.2 required UHSM to consider redeployment to posts of lower bands.

    23.3. The assessment of whether a post was suitable, according to paragraph 5.3, was to be "made by the manager with a HR Manager/Advisor and Occupational Health advice in consultation with the employee."

    23.4. Paragraph 7.1 stated that UHSM would "seek redeployment opportunities within a three month time frame from the date of the meeting arranged by the line manager". In cases of attendance management, the relevant "meeting", according to paragraph 7.3, would be the meeting that was in line with the attendance management policy.

    23.5. Paragraph 7.3 required that the redeployment process be explained to the employee at the meeting. The employee had a right to be accompanied by a staff side representative or colleague at all stages of the process (paragraph 7.3). Prior to that meeting, the employee was required to complete a prescribed skills interest sheet and provide a copy to their line manager. That information was to be recorded on a centrally-held database

to ensure that suitable vacancies were identified prior to a post being advertised.

23.6. If a match was found between a suitable post and a candidate seeking redeployment, paragraph 7.10 provided for an "informal discussion" between the candidate and recruiting manager. The purpose was to explore the candidates skills and abilities, to assess whether they met the essential criteria for the role, and to identify any training needs.

23.7. By paragraph 9.1, "…if at the end of the three month period, a post has not been identified, a meeting will be arranged to inform the employee and UHSM may regrettably have to terminate the contract of employment in accordance with the relevant policy." Somewhat at odds with that passage, in our view, paragraph 9.4 provided that "Contractual notice will be issued where appropriate and run concurrent with the redeployment process."

24. Another legacy of UHSM was an Attendance Management Policy. Within the scope of the policy were long-term sickness absences. These were defined (paragraph 10.1) as "continued absence in excess of four working weeks". Here are some of its relevant provisions:

24.1. Paragraph 10.7 stated that, "Managers… must ensure communication is maintained via informal contact and monthly health review meetings during the period of sickness absence."

24.2. Paragraph 10.9 read, "Upon receipt of the Occupational Health report a final review meeting should be arranged with the employee … to discuss the options available… These outcomes may include:

…

- The employee is unfit to return to their substantive post with reasonable adjustments but is capable of doing other work. They will be considered for suitable alternative post(s) … in line with UHSM's Redeployment Policy.
- The employee is unable to return to their substantive post and an alternative post has not been found within three months from the date agreed that redeployment opportunities will be sought. The employee's contract will be terminated on the grounds of incapability due to ill health with appropriate notice."

24.3. By paragraph 10.10, "A meeting must be arranged if an employee is unable to return to work to issue notice of termination of contract on the grounds of the incapability due to ill health…"

24.4. Where the employee was disabled, paragraph 10.11 placed on UHSM and the manager the responsibility of making adjustments wherever possible or to seek reasonable alternative employment which would overcome the effects of the disability.

25. The claimant went on maternity leave on 3 February 2013, returning in November 2013.

26. By the time of the claimant's return, the Academy's senior management structure was as follows:

26.1. The Managing Director was Mr Jan Sobieraj.

26.2. Reporting to Mr Sobieraj, and responsible for the "Delivery" arm of the Academy, was Ms Karen Lynas, Deputy Managing Director.

26.3. Ms Lynas had three direct reports: Head of Professional Development, Head of Practice and Head of Operations.

27. The claimant was offered, and accepted, the Head of Operations role. This meant that she was reporting directly to Ms Lynas instead of Ms Chafer.

28. Following her return to work, the claimant was deeply uneasy about what she believed to be a lack of clarity in relation to her role. In late February 2014, she was given a new job description which did little to address her concerns. She mistakenly shared a sensitive document with colleagues, leading to a meeting on 18 March 2014 with Ms Lynas. The claimant felt harshly treated at that meeting. We have not found it necessary to decide whether Ms Lynas' conduct at that meeting was appropriate or not.

29. In March 2014, the claimant was diagnosed with post-natal depression. She began a period of sick leave on 31 March 2014 and did not return until 11 July 2014.

30. During her absence, the claimant attended three appointments with Ms Beverley Norman, Occupational Health Nurse, who sent a report to Ms Lynas following each appointment. The final report recommended a phased return to work. The recommendation was implemented and the claimant returned.

31. On 28 August 2014, the claimant attended a meeting with Mr Sobieraj. She later referred to this meeting as a "whistleblowing" meeting, although no separate claim is brought in this regard. During the meeting, the claimant raised concerns about alleged financial irregularities.

32. On 9 October 2014, the claimant went back on sick leave. Apart from a couple of days' working from home in April 2015, the claimant never returned to work.

33. On 23 October 2014 the claimant attended a meeting with Ms Lynas. The claimant later described this meeting as the "final straw". We do not have to decide what happened at that meeting. There was a discussion of a 360 degree feedback process. Afterwards, the claimant e-mailed Ms Lynas, objecting to Ms Lynas' choice of feedback facilitator, expressing concerns that Ms Lynas was "bringing up performance issues I am not aware of" and stating, "I feel you want me out."

34. On 17 November 2014 the claimant attended an appointment with Ms Norman of Occupational Health. Following the appointment, Ms Norman wrote to Ms Lynas the same day. Her letter contained the following paragraph:

> "As you will be aware, Karen returns to work in July, following a long-term episode of sickness/absence, as a result of an episode of post-natal depression. She identified in the weeks following her return to work she began to experience a significant increase in her stress levels, attributing this to her perception of multiple stressors within the workplace, reporting a lack of clarity regarding the expectations of her role, as expressed in my OH report dated 22/5/12, informing me she has 'no real job description' in addition to which she reports feeling 'intimidated' by line management."

35. A follow up appointment resulted in a further letter dated 8 December 2014. Whilst the claimant had taken some positive steps towards recovery, her depressive symptoms remained severe and she remained unfit to return to work.

36. Because of the claimant's reported feelings of intimidation by line management expressed in the 17 November 2014 letter, a decision was taken that Ms Lynas would no longer manage the claimant's ill health absence. Management of that process was taken over by Mr Byron Currie, Head of HR and Organisational Development.

37. By a letter dated 11 December 2014, the claimant was invited to a sickness absence meeting that took place on 17 December 2014. The claimant was accompanied by her representative, Mr Vince Ion. Mr Byron Currie was supported by Ms Jane Hart, HR adviser. There is some disagreement about precisely what occurred at this meeting. What is clear is that there was some discussion about the claimant's feelings of intimidation. The claimant was reluctant to go into the details. It was, however, clear that the main problem existed in the claimant's relationship with Ms Lynas. There was a discussion, initiated by Mr Currie, about the possibility of the claimant being offered a secondment so that she could work for a time outside the organisation. Neither the claimant nor Mr Currie raised the possibility of the claimant being redeployed within either the Academy or the respondent.

38. Following the meeting, Mr Currie wrote to the claimant with a summary of his version of what had occurred. The letter contained a paragraph dealing with the claimant's concerns about intimidation by Ms Lynas. That paragraph contained the following passage:

> "Your views on the way you believe you have been managed can lead to a conclusion that a formal complaint may be forthcoming from you. You are of course able to submit such a complaint if you wish to. However, I did stress that the Academy would rebuff any such complaint and in my view, once such complaints are formalised and going through process it does not generally help to overcome any existing difficulties or develop working relationships due to the often emotive nature of such complaints and processes."

39. Mr Currie now accepts that his use of the phrase "the Academy would rebuff any such complaint" was unfortunate. It gave the impression that any formal complaint raised by the claimant would be resisted, not just by Ms Lynas, but by the organisation as a whole. Mr Currie's explanation is that he did not know about whom the claimant was complaining. He therefore used the word "Academy" to denote all of the senior managers about whom the claimant might complain. We did not accept this explanation. Mr Currie could quite easily have used the phrase "the managers concerned". In any event it was obvious to him that the claimant had been referring to Ms Lynas, even if it was possible that she was also referring to others.

40. The claimant replied to Mr Currie's letter the following day. As well as setting Mr Currie straight about his perception that the claimant might make a formal complaint, the claimant engaged with the suggestion of a paid secondment. She

asked for clarification about whether such a secondment was being offered or not. She did not in her letter make any request for redeployment.

41. The claimant attended two further Occupational Health appointments on 7 January 2015 and 5 February 2015. At the latter consultation:

    41.1. The claimant expressed a preference to meet only with Mr Currie.

    41.2. The claimant identified one of the barriers for return to work as being the requirement for her to return to her substantive post. She indicated that she would prefer to explore the possibility of a secondment to another area of work as a means of supporting her return.

    41.3. The claimant repeated her wish to return to work in an area other than her substantive post. Her perception at that time was that she could not be "assured of her safety" within the substantive workplace.

42. A further sickness absence review meeting took place on 25 February 2015. The claimant told Mr Currie that, although her health had improved, she did not have a planned timescale of returning to work. In her view, at that time, she could not return to the Academy. This led to something of a stalemate. Mr Currie's position was that the claimant would need to return to her substantive role at the Academy before a secondment could be arranged. The claimant did not want to return to the Academy.

43. There was then a discussion about who the claimant's line manager would be if she was to return to her substantive role. Mr Currie informed the claimant that she would be managed by Mr Mike Chitty, the band 9 Head of Delivery. Mr Chitty was new to the organisation and Mr Currie believed that he would help to allay the claimant's concerns that she had expressed about her "line management".

44. When this suggestion was put to the claimant, she replied that it was "an organisational thing". Mr Ion expanded on the theme by saying that, whilst it was a positive thing to have a new line manager, "it was the culture of the organisation, not just [the claimant's] previous line manager but others in the organisation". He went on to reiterate the preference of a secondment over a return to the claimant's substantive role. Mr Currie was supportive of a secondment but warned that the Academy would not fund it. The Academy would, however, be able to release her to a host organisation.

45. Within hours of the meeting, the claimant emailed Mr Ion with an account of her thoughts and feelings about what had just occurred. Her email expressed the "strong view" that the claimant could not return to the Academy "for my health and safety". The claimant felt discouraged from raising a formal grievance because of Mr Currie's remarks in his letter of 17 December 2014. By this time, Mr Currie had assured the claimant that any grievance that she raised would be independently reviewed, but the claimant had already lost confidence in a "congruent and due process". The claimant did not think that a change of line manager was enough to enable her to return to work. As she put it, "however lovely he may be, he is still line managed by [Ms Lynas] and this is a culture of compliance, scapegoating etc.".

46. The claimant saw Ms Norman once again on 4 March 2015. Again, the claimant told Ms Norman that she would prefer to return to work on a secondment rather than returning to her substantive post. The major barrier for a successful and sustained return to work was, in the claimant's view, the requirement to return to work to her substantive post. Ms Norman recommended that the claimant return to work over a phased return period lasting 2-4 weeks starting in about four weeks' time. She also recommended a prompt meeting to discuss the claimant's work related concerns.

47. The claimant and Mr Currie met again on 19 March 2015, each with their usual companions. The purpose of the meeting was to discuss arrangements for the claimant's return to work. One of the topics discussed was whether the claimant could work from home during her phased return period. Mr Currie told the claimant that Ms Lynas did not want the claimant to work from home because she was keen for the claimant to be in the workplace, to reintegrate into the organisation and get a full understanding of her role. The claimant said that she would find this significantly difficult. In her view, the respondent was pushing her too far to ask her to come into the office.

48. The claimant agreed that it would be beneficial for a meeting to be held on the claimant's return to work. They could not, however, agree on who should meet with the claimant. It was the claimant's preference to meet with Mr Chitty. Mr Currie explained that Mr Chitty had not yet taken over Leadership Delivery Partners (which was the claimant's primary area of responsibility) and that he was working part-time until April. (In fact, responsibility for local delivery partners was not due to transfer to Mr Chitty until September 2015).

49. On 19 March 2015, Mr Currie wrote to the claimant to summarise the main points of the meeting. He reiterated that it would be unlikely that the claimant would be supported to work from home during her phased return period. He did, however, recommend that the initial return to work meeting should take place with Mr Chitty and not Ms Lynas.

50. The following day, 20 March 2015, Mr Currie expressed a complete u-turn on the issue of who should conduct the initial meeting with the claimant. He had spoken to Ms Lynas and been informed that Leadership Development Partners were undergoing rapid change. It was therefore Ms Lynas' view that she ought to conduct the initial meeting and not Mr Chitty.

51. Over the next few days emails passed to and fro in an attempt to arrange a suitable date for the initial return to work meeting. Eventually it was arranged for 9 April 2015.

52. The claimant took annual leave from 30 March 2015 until 6 April 2015. On 7 and 8 April 2015 she worked from home with the blessing of Mr Currie. On 8 April 2015, however, the claimant wrote to Mr Sobieraj confirming her intention to raise a formal grievance. The following day she recommenced sick leave and never returned to work.

53. Mr Sobieraj acknowledged the claimant's grievance letter and offered to meet with her to discuss her concerns. He followed up his request with a further letter

dated 17 April 2015. The claimant replied on 20 April 2015 that she would need to consult with her General Practitioner before she could meet with him. Four days later she informed Mr Sobieraj that her GP had signed her off for another four weeks and that she would get back to him about her concerns when she was well enough.

54. On 7 May 2015 the claimant attended another Occupational Health review with Ms Norman. It was not, however, until 11 June 2015 that Ms Norman was able to provide a substantive report. This was because the claimant withheld consent for the report to be disclosed for a period of time whilst she was awaiting sight of her General Practitioner report. Ms Norman's report quoted extensively from the claimant's General Practitioner. On the question of whether the claimant would be fit to return to work within the next three months, the General Practitioner advised:

> "It is extremely difficult for me to comment accurately on her prognosis. As you are well aware with mental health conditions this can be very variable. However, I would think that it is unlikely that Karen would return within three months to her current work circumstances as her mental health problems very much surround her working environment and her perceived support in this situation. In fact I think it unlikely that Karen can return to her exact same job without a change in circumstances or support.
>
> For example, each time we have tried to return to work Karen has felt she has not received the support she has needed for her mental health problems and anxiety and for example in March/April 2015 has been unable to walk through the doors."

55. Ms Norman made a number of recommendations. One was for "further managerial discussions" with the claimant in an effort to address perceived issues within the workplace. Another recommendation was for consideration to be given to the claimant being redeployed to a different role, at least in the short term, in an effort to facilitate a return to work. This was the first indication from Occupational Health that it was appropriate to redeploy the claimant to a different role within the Academy or the respondent's wider organisation. Until then the only suggestion from either the claimant or her managers was that efforts be made to find a temporary secondment outside the organisation altogether.

56. On 28 May 2015 the claimant provided full details of her formal grievance. She complained of bullying and harassment by Ms Lynas. She summarised this behaviour with nine bullet points. Her grievance also raised complaints about the conduct of Mr Currie. She asked to be advised whether she should include Mr Curie in her complaint of harassment. In general terms, the claimant stated that she had a "grievance about the failure of others in the Leadership Academy to protect me from [Ms Lynas' harassment] and in their actions to further undermine me and cause me enormous distress". She specifically mentioned the Managing Director, Mr Sobieraj, as having reneged on assurances that he would consider her concerns.

57. The handling of the grievance process was administered by Ms Rosie Johnson, Director of Workforce and Organisational Development. Ms Johnson formally

acknowledged the grievance by a letter dated 10 June 2015. Ms Johnson spoke to the claimant by telephone to discuss how to take the grievance forward. It was agreed that the investigation itself would be carried out by Ms June Goodson-Moore, an external Human Resources consultant.

58. On 8 July 2015 the claimant attended an investigation meeting to discuss her grievance. Over July and August 2015 Ms Goodson-Moore carried out investigation interviews with a number of witnesses. The records of these interviews ran to some 113 pages.

59. A further meeting took place on 12 August 2015 to discuss the claimant's continuing sickness absence. The meeting was chaired by Mr Martin McEwan, Head of Communications and Engagement. The claimant was accompanied by her friend, Mr Ion. The claimant presented a copy of her current GP fit note declaring her unfit to work until 7 December 2015. There was a discussion of the reasons for the claimant commencing her sick leave in April of that year. The claimant confirmed that "just walking through the doors into the office" was too difficult for her to do. She added that she felt unsupported regarding her return to work because a meeting to discuss her return could not be agreed.

60. The conversation moved onto the Occupational Health recommendation of redeployment to a different role. Mrs Lorna Barlow, HR adviser, explained to the claimant that unfortunately neither the Academy not the wider respondent had any current vacancies; nor did they expect that there would be any at the claimant's grade that would be suitable for her in the foreseeable future. Permanent redeployment was not therefore considered to be a realistic option. The meeting went on to discuss temporary redeployment. The claimant was informed that it might be possible for her to be temporarily redeployed for two weeks during a phased return to work with a view to her moving back into her substantive post following this period. This option was, however, dependent on the claimant being able to return in the "imminent future". The claimant was told that it was not possible for the line management structure to change. Mr McEwan warned the claimant that if she was not well enough to return to work in the imminent future, he would recommend that a meeting be held to consider her contract of employment due to ill health capability.

61. By letter dated 13 August 2015, Mr McEwan summarised the main points of the meeting. The claimant replied on 19 August 2015. Amongst other things, the letter pressed her case for permanent redeployment and for the ill health capability process to be put on hold pending the resolution of her grievance.

62. On 20 August 2015, Mr McEwan replied. He invited the claimant to confirm that she would be fit to return to work by 21 August 2015, failing which a meeting would take place on 21 September 2015 to consider terminating her contract of employment. His letter engaged with the ongoing issue of who the claimant's line manager should be were she to return to work. It was his position that the Academy would consider accommodating a temporary change of line manager for a limited period. No precise timescale was mentioned. One proposed line manager was Mr Chitty. It was pointed out to the claimant that Mr Chitty would himself be in the line management of Ms Lynas.

63. The correspondence between the claimant and Mr McEwan continued. Over the ensuing four weeks, each sent the other three letters. Little progress was made in overcoming the claimant's barriers to returning to work. The claimant was, however, invited to submit her CV with a view to encouraging other organisations to employ the claimant on secondment. As well as the written correspondence between the claimant and Mr McEwan, there was at least one telephone call which took place on 26 August 2015.

64. On 28 August 2015 the claimant emailed Ms Johnson chasing the progress of her grievance. Ms Johnson replied on 1 September 2015. She sought to assure the claimant that Ms Goodson-Moore was proceeding with the investigation as quickly as possible. She did point out, however, that the investigation was protracted because of the complex nature of the case, the number of allegations and the number of individuals about whom they were made, and because of the annual l eave commitments of grievance subjects and witnesses. Her email went on to feed back to the claimant a conversation that Ms Johnson had had with Mr McEwan regarding the claimant's return to work. Ms Johnson passed on an offer of a supported return to work, line managed by Mr Chitty, on an interim basis until the investigation was completed and the next steps were known.

65. On 3 September 2015 Ms Goodson-Moore met again with the claimant to discuss her grievance. She anticipated being able to deliver her report later than month.

66. By 21 September 2015, the claimant was still absent from work without any indication of when she would be ready to return. In accordance with the warning given to her by Mr McEwan, the claimant was invited to a meeting scheduled for 1 October 2015 to consider the future of her employment. Enclosed with the letter was the management statement of case. This document set out in fine detail the history of the claimant's absences and attempts to secure her return to work. It also mentioned efforts to redeploy the claimant. According to the management case, the claimant had only been informed of advertised vacancies.

67. A separate letter was sent by Ms Goodson-Moore to the claimant on the same day. The letter requested further information with regard to her grievance. The claimant replied asking for further time so that she could concentrate on her forthcoming capability meeting. The claimant's request refers to an exchange of correspondence between herself and Ms Johnson lasting until 30 September 2015. On 30 September 2015 Ms Goodson-Moore completed three draft investigation reports into the claimant’s grievance.

68. The claimant's final capability meeting took place on 1 October 2015 as scheduled. Mr Martin Hancock, Associate Director, chaired the meeting with Human Resources support from Ms K Wileman, Human Resource Manager. The management case was presented by Mr McEwan assisted by Ms Lorna Barlow. The claimant was accompanied by Mr Ion.

69. At this meeting:

    69.1. The claimant stated that she would be able to do a job but not at the Academy.

69.2. Mr McEwan confirmed that the claimant's CV had been sent to partner organisations on 30 September 2015 and had also been sent to contacts at NHS England and Health Education England. No secondment opportunity had been identified.

69.3. There was a lengthy discussion of the way in which the claimant's sickness absence had been handled and the lack of management contact. It was the claimant's belief that the Academy had a conspiracy against her.

69.4. The claimant suggested that she may be able to return to work after the grievance had been heard if she felt it was a safe environment. Following a break, Mr Hancock explored this possibility in more detail. He asked her whether she would be able to return to work following the conclusion of her grievance regardless of the outcome. The claimant replied that she felt that it was unfair to ask whether she would be able to return to work following the grievance being raised. She stated that her aspiration was to return to work and she would be willing to do so if serious consideration was given to making reasonable adjustments. Mr Ion commented that once the grievance was concluded, the claimant would be in a better place emotionally and practically to consider a return to work. Later in the meeting, the claimant said that if the grievance and work related stress were taken out of the way she would be able to return to work. Mr Ion went on to state that the grievance was adding to her stress level and whatever the outcome the claimant would then be able to move on with support from her GP. He commented that it would be easier for her to return to work if it was not within the Academy. Trying to put a date on when this would happen would be difficult and would depend on the duration of the grievance. The claimant added that she may consider returning to the Academy if she could have six months outside of the Academy, which she would consider as reasonable to enable her to return to work.

69.5. Mr Hancock asked what would happen if the grievance was not upheld. Mr Ion responded that that was a difficult question and that he would not advise the claimant to answer. He merely stated that once the grievance was out of the way the claimant would be able to consider how she felt. A little later in the meeting, however, Mr Ion said that if the outcome of the grievance was “no case to answer”, it would be unlikely that the claimant would be able to return. If the grievance was upheld, the organisation would have to put a plan together to support the claimant.

69.6. The claimant specifically raised the subject of redeployment. She reminded Mr Hancock that the policy referred to a three month Redeployment Period which had not yet started.

70. Following the meeting, Mr Hancock set about gathering his thoughts. He did not believe that “a key issue”, preventing the claimant's return to work, was her relationship with Ms Lynas. As we later discuss, it is hard to see how Mr Hancock could sensibly have arrived at that conclusion. Whilst it may be true that the claimant had complained about Mr Sobieraj and Mr Currie in addition to Ms Lynas, one look at the claimant's grievance would have been enough to convince any reasonable reader that the claimant's main issue was with Ms Lynas.

71. Mr Hancock did not think it was necessary to investigate why the claimant was on sick leave. As we later conclude, this opinion was unsustainable. In order to ascertain the prospect of the claimant returning, he first had to identify the barriers. Those barriers were likely to be very closely linked with the reasons why the claimant had gone off sick in the first place.

72. Having taken advice, Mr Hancock believed that it was significant that the claimant, by this stage, had been absent almost continuously for 12 months. It was his belief that absences of up to 12 months were considered "legitimate" and that on the expiry of that period a meeting should be held to consider termination of employment. There was nothing in the policy that provided for the 12 month period to have that effect or indeed any relevance to the question of whether employment should be terminated.

73. By the time Mr Hancock came to take his decision, the three draft investigation reports into the claimant's grievance had been completed. All that remained was for the claimant to check the notes of interviews and for the grievance subjects to be consulted. It was nevertheless Mr Hancock's belief that his decision on termination should not await the outcome of the grievance.

74. Having considered the poor prospect of returning to work within the Academy, the lack of secondment opportunity, and the history of the claimant's absence to date, Mr Hancock decided that the claimant's employment should be terminated.

75. There remained an inconvenient obstacle to termination. The Attendance Management Policy and the Redeployment Policy required the respondent to consider the claimant for suitable alternative posts over a three month period. Mr Hancock took advice about whether this requirement had been met. He understood the claimant's position to be that the Redeployment Period had not yet commenced. The management case, as Mr Hancock understood it, was that the Redeployment Period had in fact commenced at some time prior to 12 August 2015. Acting on advice, Mr Hancock took the view that the Redeployment Period should be treated as having commenced on 12 August 2015. This was the date of the review meeting at which the claimant had been informed that there were no current vacancies. The logic of this advice drove Mr Hancock to the position that the Redeployment Period would not end until 11 November 2015. Despite the fact that, at the time of making his decision, there were still four weeks to go until the end of the Redeployment Period, Mr Hancock was advised to give notice of termination immediately but extend the period of notice so that it notionally ran from 11 November 2015 and expired on 3 February 2016.

76. Mr Hancock's decision was communicated to the claimant by a letter dated 14 October 2015. The letter explained the basis of Mr Hancock's decision in some detail. On the question of redeployment, the letter stated (with our emphasis):

> "I can also confirm that the redeployment process will continue during your paid period of notice and would ask that you return the redeployment pro forma as soon as possible…Until we receive this pro forma and in consideration of the suggestion from Mr Ion I will ask Mrs Wileman to make you aware of any suitable alternative positions from Band 8A to 8C…for your consideration. If you express an interest in any vacant posts **this could only**

be offered to you and the notice withdrawn if you are certified as fit for work."

77. When the claimant learned that she was being dismissed, she was very upset. In her words, the news was "devastating".

78. By 14 October 2015, the respondent had stopped paying the claimant. Her entitlement to sick pay had been exhausted. She did, however, have the benefit of some income protection provided by an insurance policy. If this case proceeds to a remedy hearing, we will have to make further findings about the insurance benefits to which she was entitled.

79. On 15 October 2015, Mr Hancock forwarded template forms to the claimant to enable her to be placed on the Redeployment Register.

80. On 19 October 2015, Ms Wileman asked colleagues across the respondent to alert her to any vacancies at Bands 8A to 8C so that the claimant could be redeployed. The same day, Ms Wileman informed the claimant of a vacancy for the position of Business Development Manager. The claimant expressed an interest and forwarded her CV. The next morning Ms Wileman emailed the claimant to outline her understanding of how the redeployment process would be followed. For each role in which the claimant expressed an interest, the claimant would be given a "preferential interview…to test out knowledge, skills and suitability for the post". Unfortunately, later that day, Ms Wileman was informed that recruitment to the Business Development Manager post had been put on hold. The reason for the freeze was nothing to do with the claimant, but because the respondent was going through a transformation process linked to the reconfiguration of clinical services. The claimant was informed of the bad news as soon as Ms Wileman heard it.

81. Overlapping with this correspondence was an exchange of emails taking place between the claimant and Ms Wileman on 20 and 21 October 2015 in relation to a further redeployment opportunity. This was a Band 8B Senior Programme Lead role. The position had already been advertised and interviews were due to be held on 22 October 2015. The proposed role would be based at the Academy under the line management of Mr Chris Lake, Head of Professional Development. It was explained to the claimant that the preferential interview would be for the purpose of confirming that the claimant met the essential criteria.

82. The claimant replied during the evening of 21 October 2015, the day before the interviews had been scheduled. She declined the role. She gave two reasons. First, she reminded Ms Wileman that she could not work at the Academy "due to the work related stress and without any assurances about my safety and a safe system of work within the Academy". Second, she expressed her suspicion that preferred candidates would already have been identified. Ms Wileman replied first thing the next morning. She sought to reassure the claimant that any concerns that she had regarding her safety within the role could have been discussed at the preferential interview.

83. Rewinding slightly to the previous day, on 21 October 2015, Ms Wileman forwarded to the claimant details of a further vacant role. This was a Band 8A Clinical Manager role requiring active professional registration. It will be remembered that the claimant had previously been a Registered General Nurse. The respondent operated a programme of re-skilling of clinical staff. From time to time employees had the opportunity to attend a re-registration course which would last for a minimum of three months. It was theoretically possible for an unregistered member of staff to hold a clinical role while they were completing their registration training. The clinical aspects of that role, however, would have to be supervised or carried out by a registered colleague.

84. The claimant reviewed the details of the Clinical Manager role and replied to Ms Wileman on 22 October 2015. She asked Ms Wileman if active professional registration was an essential criterion for the role. Her email expressed the view that if registration was essential, she would not fit the minimum specification for the role as she had not been in clinical practice for some time. Ms Wileman confirmed that current NMC registration was required. She added: “For future reference I will discard any vacant posts that require NMC registration as not being suitable”. The claimant did not seek to dissuade Ms Wileman from this course of action.

85. On 26 October 2015, the claimant emailed her completed Redeployment Form to Mr Hancock, Associate Director for NHS Executive Search. The claimant’s covering email stated, “I am providing this to comply with the policy and procedure only”. We find this remark to be revealing. The claimant was going through the motions of engaging with the redeployment policy but was not seriously interested in taking an alternative role at that time.

86. The Redeployment Form itself consisted of a small table divided into headings. The claimant briefly described the sort of role to which she was looking to be redeployed. She stated that she wanted a “job of equivalence” and there would have to be a safe place of work. Under the heading of “Qualifications”, the claimant stated that she had no longer active registration of a Registered General Nurse and Registered Midwife. Under the heading, “Training Needs”, the claimant simply stated “? Return to practice”.

87. The same day, Ms Johnson emailed the claimant to chase up her comments on the interview notes. At this stage this was the only remaining action required before the draft reports could be finalised. The claimant's omission to provide her comments up to that point was partly explained by her having been involved in an accident on 15 October 2015 in which she was injured. Correspondence passed between the claimant, Ms Goodson-Moore and Ms Johnson over the next few days. The claimant sent five emails attaching more than 44 new documents. Ms Goodson-Moore took the view that these documents needed to be assessed for the purpose of the investigation. Owing to pre-arranged leave commitments, Ms Goodson-Moore could not review the documents in November.

88. By a letter dated 30 October 2015, the claimant appealed against her dismissal. Amongst the claimant's many grounds of appeal were:

28.1 The respondent's failure to delay the dismissal decision until the conclusion of the grievance process; and

28.2 That the respondent had dismissed her before the expiry of the Redeployment Period and without suitable efforts having been made to redeploy her.

89. By November 2015, management of the claimant's sickness absence during her notice period had been taken over by Ms Susan Maloney, Interim Head of Human Resources at the Academy. Ms Maloney met with the claimant on 18 November 2015. The claimant was asked what adjustments could be made to enable the claimant to return to work. The claimant replied that at present she could not envisage working within the Academy building as she did not think it was a safe place for her. She did not think that she could work for the Academy at a remote location as this would necessitate contact with other members of staff who were the subject of her outstanding grievance. Her preferred option was to work outside of the Academy for a period of time to regain her confidence. She said that she would continue to apply for jobs and had become aware of some possible secondment opportunities.

90. On 26 November 2015 Ms Goodson-Moore sent Ms Johnson three updated versions of her investigation report. These took account of the claimant's new documents.

91. A further meeting took place between Ms Maloney and the claimant on 8 December 2015. The claimant was encouraged to access support arranged for psychometric tests via the executive search team. The option of secondment was discussed. Ms Maloney had contacted Health Education England to discuss possible opportunities.

92. On 16 December 2015 the claimant had a telephone consultation with Ms Norman of Occupational Health. Consent to Ms Norman's report being disclosed to management was provided by the claimant on 4 January 2016. During the conversation, the claimant reported modest improvement since the previous consultation of 11 June 2015. She was looking forward to returning to "work" and "productivity". Sadly, however, the claimant also indicated that she would not feel safe returning to her substantive post at the Academy. A further barrier to her returning to her substantive post could be the outcome of the formal grievance. Ms Norman's recommendation remained that the claimant should be redeployed to a different role and that she could then return to work on a phased basis.

93. By a letter dated 18 December 2015, the claimant was invited to an appeal meeting to be heard by a sub-committee of the Board of Directors. The date scheduled for the meeting was 19 January 2016.

94. On 21 December 2015, the claimant attended a feedback meeting to discuss her grievance. During the meeting, the claimant raised many concerns about what she regarded as errors in the reports. The level of detail to which they descended was such that the task of reviewing the reports was only half done by the time the meeting ended. The following day, the claimant emailed Ms Johnson outlining some of her concerns. She made two proposals. The first was that Ms Goodson-

Moore should incorporate the claimant's comments into her existing reports by way of tracked changes. The second was that over the holiday period the claimant should have the opportunity to review the remainder of the reports and provide further comments.

95. Ms Johnson replied on 23 December 2015. She asked the claimant to set a date by which she would provide all further information. As she put it, "there comes a point where we must draw a line on information gathering". The same day, Ms Johnson forwarded the draft reports back to Ms Goodson-Moore incorporating the claimant's observations. The claimant confirmed that she would reply in the New Year.

96. On 4 January 2016, the claimant confirmed that she did not consider the investigation to be concluded and that she had additional information which would require the reports to be redrafted. In response to this communication, Ms Johnson emailed the claimant proposing a further meeting to discuss the investigation. That meeting ultimately took place on 8 February 2016.

97. The claimant's appeal meeting proceeded as planned on 19 January 2016. It was chaired by Mr Paul Wilkin, Director Finance and Deputy Chief Executive. Two Non-executive Directors made up the remainder of the panel. The claimant attended accompanied by Mr Ion. The management case was presented by Mr Hancock supported by Ms Wileman. The meeting lasted approximately 2½ hours. Each side presented their own written case. Mr Wilkin asked appropriate questions of both Mr Hancock and the claimant. He explored the three alternative roles that had been proposed to the claimant. Mr Ion expressed the claimant's wish to return to work as soon as she could. The claimant's position was, however, still that she would find it "difficult emotionally to walk through the door".

98. Although the meeting finished at 12.30pm, the panel did not reach a decision until 3.30pm. A letter was then sent to the claimant setting out the panel's decision and their reasons for it. The letter ran to 21 pages. It engaged with each of the claimant's grounds of appeal in some detail. The overall decision was that the decision to dismiss should stand.

99. Dealing with the claimant's ground of appeal based on breach of procedure in dismissing her before the end of the Redeployment Period, the letter had this to say:

> "[The claimant] has been provided with information on vacancies that would be considered as suitable redeployment based on her banding level that have been advertised since 12 August 2015. It is therefore refuted that this process has been prejudicial."

100. This paragraph of the letter betrayed a mistaken belief on Mr Wilkin's part that the Redeployment Period had started on 12 August 2015.

101. Although the appeal panel gave considerable attention to the claimant's grounds of appeal, they did not consider afresh the entire decision of whether the claimant's employment should be terminated.

102. The letter engaged with the claimant's criticism that the decision to dismiss should have awaited the grievance outcome. It was the panel's belief that the claimant could not provide any indication that the outcome of the grievance would have any impact on her ability to work within the leadership Academy. It was therefore right that the separate grievance investigation and the dismissal process should be allowed to proceed independently.

103. On 3 February 2016, the claimant's notice period expired and she ceased to be an employee of the respondent.

104. During the course of the Tribunal proceedings, the respondent has disclosed details of a number of vacant roles arising during the period 16 April 2015 to 3 February 2016. 14 roles were identified by the claimant as being potentially suitable. The Tribunal bundle contained the claimant's written contentions for why she could have been offered the roles together with the respondent's case as to why the roles were not suitable. This list of roles became the focus of oral evidence. Counsel for the claimant put to Ms Maloney that certain roles within this list would have been suitable. Other roles in the list were not specifically mentioned in cross examination. Part-way through cross examination of the claimant, the Employment Judge indicated that the Tribunal would focus on those roles within the list that had been the subject of cross examination of the respondent's witnesses. Neither party suggested that the Tribunal should take any different approach.

105. Here are the roles in the list on which we concentrated:

105.1. The role of Clinical Manager in the Children Specialist Community Service is item 4 in the list. This is the role about which the claimant and Ms Wileman corresponded on 21 and 22 October 2015. The claimant described herself as not meeting the essential requirement for the role because it required active professional registration. She did not ask to re-train or for the role to be put on hold or for her to be allowed to undertake the non clinical aspects of the role while she underwent "on the job" registration training.

105.2. Item number 5 was the Business Development Manager role which was put on hold on 20 October 2015.

105.3. The sixth item in the list was the role of Deputy Director of Nursing. The creation of this vacancy was approved on 26 November 2015 and made subject to an "expressions of interest" exercise. It required the role holder to be a Registered Nurse.

105.4. The role of Area Clinical Manager (item 7) was approved on 3 December 2015 and "expressions of interest" were sought on 4 December 2015. The role holder was required to be a first level Registered General Nurse.

105.5. Item 8 was the role of Clinical Manager, approved on 10 December 2015. It required the post holder to be a Registered General Nurse.

105.6. The role of Service Manager for Learning Disabilities (item 10) was advertised on 24 December 2015. It was a requirement of the role that the holder have a current nursing registration.

105.7. Item 12 was the role of Business Development Manager in the Drugs and Alcohol Service. It was approved on 14 January 2016. This role was ring fenced for staff who were at risk within the Drugs and Alcohol Service. It was not advertised. Staff whose jobs were at risk due to organisational change within the service were given priority over staff who were at risk for other reasons, for example ill health. The order of priority was set by the respondent's own Organisational Change Policy. This was different from the redeployment policy which the respondent had inherited from UHSM when the Academy had transferred to the respondent.

105.8. Item 13 was the role of Service Manager in the Drugs and Alcohol Service. Like item 12, this role was approved on 14 January 2016 and was ring fenced within the relevant service. It also required a specialist professional qualification and considerable experience in the field of substance misuse. The claimant did not have such experience.

106. In a separate exercise, the claimant has identified four roles from a list of vacancies advertised on NHS Jobs. It is her case that these roles could have been offered to her as an alternative to dismissal. Here are our views in relation to those roles:

106.1. Head of Inclusion and System Leadership. This role was advertised on NHS Jobs on 14 October 2015. It was a role at Band 9 which is two grades higher than the claimant's substantive role. The claimant herself did not think that it was likely to be appropriate for her to return to such a senior role from a period of ill health. The claimant in any event did not have the experience required to be the Academy's expert on diversity, inclusion and systems. This was a role based in the Academy which would have required the claimant to work closely with Ms Lynas. There is no way that the claimant would have returned to such a role.

106.2. Business Manager. This role was advertised on NHS Jobs on 29 January 2016. It was graded at Band 6. If the claimant had taken this role it would have involved a significant drop in pay of 47%. This was not a "job of equivalence" as the claimant had stipulated in her Redeployment Form.

106.3. Senior Lead: Internal and System Engagement. This role was based in the Academy. The role specification required the post holder to work across various teams. Contact with Ms Lynas would have been unavoidable. It was a specialist communications role supporting the Head of Marketing. It was Ms Maloney's opinion that the claimant would not have met the essential criteria for the role. In any event the role was not advertised on NHS Jobs until 4 February 2016.

106.4. Programme Lead: Leadership Development. This role was advertised on NHS Jobs on 12 February 2016. It was a Band 7 role, three grades lower than the claimant's substantive 8B role. At no stage had the claimant agreed

to consider a role at Band 7 or lower. It was not a job of equivalence. Again, this was an Academy role which required the post holder to work across the whole organisation. The respondent would not have been able to give any assurance that the claimant would not work with Ms Lynas.

107. We briefly considered those roles identified by the claimant as being potentially suitable, but about which no questions had been asked of the respondent's witnesses. None of these roles seemed obviously suitable.

108. On 8 February 2016 a further meeting took place to discuss the claimant's grievance. The claimant raised a number of issues which resulted in the need for review and amendment of the grievance report. The claimant provided notes from that meeting on 18 February 2016. These were sent to Ms Goodson-Moore, who updated her reports on 2 March 2016. A final report was produced on 9 March 2016. There was then an unexplained delay of nearly three months while Ms Johnson and Ms Maloney reviewed the reports and prepared an outcome letter. The claimant was sent the outcome letter on 23 May 2016. In summary, the reports concluded that:

108.1. There was no evidence of a bullying culture within the Academy;

108.2. None of the allegations against Mr Sobieraj were found to be proved;

108.3. Some of the allegations against Ms Lynas and Mr Currie were partially proved; and

108.4. There was no evidence that any of the actions complained of by the claimant amounted to bullying and harassment.

Ms Johnson decided that these issues should best be dealt with informally by way of appropriate internal processes.

109. Ms Lynas left the organisation some time between February and May 2016.

110. At some point during the months that followed the claimant's departure, the respondent recruited a successor to her role. We were unable to determine precisely when this had happened.

111. The claimant commenced early conciliation with ACAS on 3 February 2016 and obtained a certificate on 11 February 2016.

Relevant law

Duty to make adjustments

112. By section 20 of EqA, the duty to make adjustments comprises three requirements.

113. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

114. A disadvantage is substantial if it is more than minor or trivial: section 212(1) of EqA.

115. Paragraph 6.28 of the Equality and Human Rights Commission's *Code of Practice on Employment* lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

115.1. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

115.2. The practicability of the step;

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

115.4. The extent of the employer's financial and other resources;

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

115.6. The type and size of employer.

116. Claimants bringing complaints of failure to make adjustments must prove sufficient facts from which the tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made: *Project Management Institute v. Latif* UKEAT 0028/07.

Discrimination arising from disability

117. Section 15(1) of EqA provides:

(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.

118. Langstaff P in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 (19 May 2015, unreported) explained (with emphasis added):

> "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."

119. In Langstaff P's view, there was "considerable force" in the argument that the phrase, "because of…" in section 15 should carry the same meaning as the equivalent phrase in section 13. That is to say, the tribunal should focus on the conscious or subconscious thought processes of the alleged discriminator in order to establish the reason why the claimant was treated unfavourably (paras

32 and 33). That reason is "something" which must arise in consequence of the disability. The question of whether "because of…" imported the same test as for direct discrimination did not arise directly for decision in *Weerasinghe* and Langstaff P was careful not to express a concluded view. The *ratio decidendi* (reason for the decision that is binding in future cases) is simply that the tribunal must adopt the two-stage approach to causation. But we are of the view that Langstaff P's analysis is right.

120. As with direct discrimination, the focus must be on the conscious or subconscious motivation of the person or persons who decided on the unfavourable treatment: *IPC Media Ltd v Millar [2013] IRLR 707*

121. If another person influenced that decision by supplying information with improper motivation, the decision itself will not be held to be discriminatory if the actual decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

122. An employer can be reasonably expected to know of an employee's disability if he could have discovered it on making reasonable enquiries. Paragraph 5.15 of the *Code* illustrates the point:

> 5.15
>
> An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.
>
> > **Example:** A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.
> >
> > The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.

123. Knowledge on behalf of one part of the employer's organisation cannot necessarily be imputed to a decision-maker in another part of the organisation: *Gallop v. Newport City Council* UKEAT 0118/15.

124. When considering the justification defence (now found in subsection (1)(b)), the tribunal must weigh the discriminatory effect of the treatment against the

reasonable needs of the business: *Hardy and Hansons Plc v Lax* [2005] ICR 1565*,* applying *Allonby v. Accrington & Rossendale College* [2001] ICR 1189.

125. In *Hensman v Ministry of Defence* UKEAT/0067/14, Singh J held that, when assessing proportionality, while a 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.

Time limits

126. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination] 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.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> > (a) when P does an act inconsistent with doing it, or
> >
> > (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

127. In Commissioner of Police of the Metropolis v Hendricks [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to “an act of extending over a period”.

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an ‘act extending over a period’…
> 52. ... The question is whether that is ‘an act extending over a period’ as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

128. In considering whether separate incidents form part of "an act extending over a period”, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA

& UKEAT/0804/02DA) at paragraph 208, cited with approval by the Court of Appeal in *Aziz v. FDA* [2010] EWCA Civ 304.

129. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA*

130. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298.

131. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

131.1. the length of and reasons for the delay;

131.2. the effect of the delay on the cogency of the evidence;

131.3. the steps which the claimant took to obtain legal advice;

131.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

131.5. the extent to which the respondent has complied with requests for further information.

Burden of proof

132. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), 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, unless A shows that A did not contravene the provision.

133. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

134. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Unfair dismissal

135. Section 98 of ERA provides, so far as is relevant:

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

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

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

(2) A reason falls within this subsection if it…(a) relates to the capability… of the employee for performing work of the kind which he was employed by the employer to do….

(3) In subsection (2)(*a*)— (*a*) 'capability', in relation to an employee, means his capability assessed by reference to … health or any other physical or mental quality…

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

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

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

136. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

137. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

138. An employer will find it difficult to claim that it has acted reasonably if it takes no steps to try and fit the employee into some other suitable available job. This is likely to be more so in an ill-health case than in an incompetence case (see *Bevan Harris Ltd v Gair* [1981] IRLR 520,).

139. "… when one comes to consider the circumstances of the case, as to whether they make it reasonable or unreasonable to act upon his incapacity and to dismiss him, it cannot be right that, in such circumstances, an employer can be called upon by the law to create a special job for an employee however long-serving he may have been. On the other hand, each case must depend upon its own facts. The circumstances may well be such that the employer may have available light work of the kind which it is within the capacity of the employee to do, and the circumstances may make it fair to at least encourage him or to offer him the chance of doing that work, even if it be at a reduced rate of pay'.' See *Merseyside and North Wales Electricity Board v Taylor [1975] IRLR 60*, *[1975] ICR 185*

140. An example of where a dismissal was held unfair because an available job was not offered is provided by the early tribunal decision in *Todd v North Eastern Electricity Board [1975] IRLR 130*. Again in *Garricks (Caterers) Ltd v Nolan [1980] IRLR 259* the employer was held to have acted unreasonably in not giving sufficient consideration to finding the employee a job in circumstances where although he was not fit enough to do shift work, he could have done a day job.

141. An employer will not normally act reasonably unless it makes reasonable enquiries into the causes of absence and investigates whether they have an impact on the prospect of returning to work. The relevance of such enquiries is that it can only be reasonable to have to investigate the causes of absence if addressing the cause might have some effect on the prospects of returning to work. For example, if somebody is off work with asthma and claims that the asthma was due to exposure to chemicals in the workplace, it would clearly be relevant to look to see whether the asthma was caused by that exposure and whether removal of the employee from that environment would facilitate a return to work.

142. An employer's breach of its own agreed internal procedures does not automatically render a dismissal unfair. It is a factor to be taken into account. The weight to be given to that factor will depend on the circumstances of the case: *Bailey v. BP Oil (Kent Refinery) Ltd* [1980] ICR 642, CA.

143. Section 123(1) of ERA provides that, where a tribunal makes a compensatory award, the amount of the award "shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

144. Where an employer has failed to follow procedures, one question the tribunal must *not* ask itself in determining fairness is what would have happened if a fair procedure had been carried out. However, that question is relevant in determining any compensatory award under section 123(1) of ERA: *Polkey v. A E Dayton Services Ltd* [1988] ICR 142. The tribunal is required to speculate as to what would, or might, have happened had the employer acted fairly, unless the evidence in this regard is so scant it can effectively be disregarded: *Software 2000 Ltd v. Andrews* [2007] IRLR 568.

Conclusions

PCP1

145. With one exception, the respondent required the claimant to perform her substantive role. She was not required to perform that role whilst absent on sick leave, but the requirement still affected her, because her inability to fulfil that requirement was treated as grounds for escalating attendance management procedures. The only exception related to the offer that was made to her in 12 August 2015. The requirement was temporarily relaxed to enable temporary redeployment, but only with a view to the claimant subsequently returning to her role.

Disadvantages caused by PCP1

146. Did PCP1 put the claimant at a substantial disadvantage compared to persons who were not disabled? We found that it did. This was essentially in three different ways.

146.1. The first is the claimant's disability made her less able to cope with stress. Her perception was that it would be stressful for her to carry out her substantive role because it would require her to be line managed by Ms Lynas.

146.2. The second disadvantage was, again, due to her vulnerability to stress. She had a perception that she would have to work within an adverse management culture which would increase her stress levels. As the claimant saw it, the culture ran more widely than the actions of Ms Lynas.

146.3. A third disadvantage was that her disability made it harder for her than for people without a mental health condition to enter an unfamiliar workplace. From March 2015 the claimant felt that she would find it difficult to walk in through the doors of the respondent's headquarters. This was partly because of the way in which the workplace had been rearranged, as she did not know where she would have to sit and how to get into the building. The unfamiliarity was a more than minor or trivial disadvantage to her compared to people who did not have her depression.

147. We must therefore consider whether it was reasonable for the respondent to have to make the identified adjustments to prevent PCP1 from having these three disadvantageous effects.

<u>Adjustment (b) – change in management structure</u>

148. The second adjustment was a change in management structure. This was helpfully clarified by Mr Jenkins during the course of oral submissions. It is not argued by the claimant that Ms Lynas should have been removed from the organisation or from her role as Deputy Managing Director. Rather, Mr Jenkins argues that a number of other alterations should have been made.

Permanent change of line manager

149. First, it is argued that the respondent should have appointed a different line manager for the claimant's substantive role. This should have been done on a permanent basis. Our view is that it would not have been reasonable for the respondent to have to make that adjustment, for the following reasons:

149.1. Taking that step would not have resulted in the claimant returning to work. It is telling, we think, that when the claimant was given a medium-term solution of having Mr Chitty as her line manager pending resolution of her grievance, she still felt unable to return.

149.2. The stress caused by her working relationship with Ms Lynas was only one of the disadvantageous effects of PCP1 and was only one of the reasons for the claimant's absence. A different line manager would not have altered the claimant's perception of an adverse culture, her fear of an unfamiliar workplace, or her belief that she had been bullied by Mr Sobieraj and Mr Currie.

149.3. Even with a different reporting line, the claimant would still have had to work in contact with Ms Lynas.

149.4. The more the respondent tried to prevent working interaction between Ms Lynas and the claimant, the more disruptive would be the impact on the respondent. This was a small organisation and an open plan office. Ms Lynas oversaw the entire delivery arm of the Academy. The claimant was a senior manager in charge of operations and responsible for all the Programme Leads. It made sense for Ms Lynas to manage the claimant directly and no sense for the claimant to be insulated against contact with her.

150. For those reasons we find it would unreasonable for the respondent to have had to make a permanent change of line manager for the claimant's substantive role.

Temporary change of line manager

151. The second adjustment under this heading is a temporary change of line manager to enable the claimant to return, eventually, to work under Ms Lynas. Here we are not concerned with a manager to deal with the claimant's sickness absence. (That adjustment was made from November 2014 onwards. It began almost as soon as the claimant indicated any difficulty with Ms Lynas' involvement. The arrangement only ended with the termination of the claimant's employment.) Our enquiry is focused on whether there should have been a temporary change of line manager whilst the claimant was working in her role and whether such a change should have been offered to the claimant in anticipation of a return to work.

152. In order to determine whether the duty to make this adjustment was engaged, or breached, we need to split the period covered by the claim into separate discrete time periods. We found it helpful to start with the latest.

153. From 1 September 2015 onwards, this adjustment was offered to the claimant. It was proposed that she should have a different line manager until her grievance was resolved. The claimant still did not feel able to return to work. There was therefore no breach of the duty at that time.

154. During the period 9 April 2015 to 1 September 2015, it was not reasonable for the respondent to have to make that adjustment. It would not have enabled the claimant to return to work. The claimant's General Practitioner report made it clear that she was not ready for any kind of return to work in the next three months. That opinion was not qualified, for example, by saying that, she would be able to return with a temporary change of line manager. Her inability to attend work, regardless of the identity of her manager, was also consistent with the claimant's fit notes, the Occupational Health advice and the claimant's own view expressed at meetings.

155. That leaves, then, the period of March to April 2015. If there was a failure to make adjustments, it was decided upon no later than 20 March 2015 when the decision was communicated to the claimant.

156. The omission to change the claimant's line manager in March-April 2015 was not part of any act extending over a period which combined later acts. In our view, it was an isolated failure and not part of any ongoing discriminatory state of affairs. The last day for presenting her claim, therefore, would have been 19 June 2015. The claim was in fact presented on 4 April 2016, over nine months out of time.

157. We have considered whether it would be just and equitable to extend the time limit. In our view, it would not. The reason for the delay is something about which we have some sympathy. The claimant was concentrating on her return to work. She was not well, and she would not have found it easy to bring a tribunal claim at that time against the respondent. What we have to do is balance that reason against the real disadvantage that the respondent would have had in defending that part of the claim. Ms Lynas no longer works for the respondent. She left the organisation some time between February and May 2016. She would have been in the best position to explain why it was or was not reasonable to have to make the adjustment of a temporary change of line manager to facilitate a return to work.

158. We do have some hearsay evidence based on what Mr Currie told the claimant at the time: the claimant needed to be line managed for operational reasons by somebody who was involved in her area of work, and that Mr Chitty was not due to take operational responsibility until September 2015. It may be said that such evidence would be sufficient by itself to show that the claimant needed to be line managed by Ms Lynas. If that be the case, we would approach the "just and equitable" test slightly differently. Our route to that conclusion would not be based on considerations of the cogency of the evidence. Rather, we would hold that the claim would fail on its merits. There would be no disadvantage to the claimant in refusing to extend time, because we would merely be depriving the claimant of an opportunity to bring an ill-founded claim.

159. As it is, we consider that it would have been preferable to hear from Ms Lynas about whether it would have been reasonable for the claimant to be line managed by someone else in April 2015. We would have liked to hear Ms Lynas' evidence tested. Had the claim been brought by 19 June 2015, Ms Lynas would still have been employed within the Academy. She would still have been employed at the time of presenting the ET3 response and also, probably at the time of the final hearing. The chances of her appearing as a witness, or at least providing a witness statement, would have been greatly increased. Because of the delay, the respondent has been deprived of that chance. We find that disadvantage outweighs the claimant's good reason for delay. It is not just and equitable to extend the time limit. Accordingly the tribunal has no jurisdiction to consider the complaint of failure to make this particular adjustment in April 2015.

<u>Adjustment (c) - temporary working from home</u>

160. We understand the debate over this particular adjustment to relate solely to the period of the claimant's phased return in April 2015. Just in case we have misunderstood the claimant's case, we ought to add for completeness that we would not regard it as reasonable for the respondent to have had to allow the claimant to work from home at any time after the commencement of her sick leave in April 2015. The opportunity to work from home would not have enabled the claimant to return to work. It would have addressed one element of the disadvantage caused by PCP1 (the claimant's difficulty in entering an unfamiliar workplace), but it would still have left the claimant having to work under Ms Lynas and being exposed to a management culture which she perceived as aggravating her stress. Nothing in the Occupational Health or medical evidence after April 2015 suggested that the claimant would be able to return to work if she were temporarily allowed to work from home.

161. The claimant did in fact work from home on 7 and 8 April 2015. She would have liked to work from home for the whole of her phased return, but the respondent refused her request. That decision was made no later than 19 March 2015, the date on which it was communicated to the claimant. The last day for presenting the claim was 18 June 2015. The claim is some 9 months out of time.

162. In our view it is not just and equitable to extend the time limit. We have two main reasons for coming to this decision:

162.1. The delay has led to difficulties with the evidence similar in nature to those affecting the adjustment of changing the line manager. Ms Lynas would be in the best position to explain why the claimant needed to attend the workplace for her phased return to be successful. The delay has deprived the respondent of the opportunity to rely on Ms Lynas' evidence.

162.2. The claim would fail on its merits. It would not be reasonable for the respondent to have to allow working from home for the entirety of the claimant's phased return. The purpose of a phased return is to re-introduce an employee to their role following a period of absence. In our view, the process is only likely to be of benefit if it includes a reintroduction to the workplace. If the role includes face-to-face interaction with colleagues – as did the claimant's role – we would expect any meaningful phased return to include some such interaction. The adjustment for which the claimant contends would have robbed the phased return of its purpose.

<u>Adjustment (d) - awaiting the final outcome of the grievance prior to dismissal</u>

163. We did not understand Mr Jenkins to be submitting to us that PCP1 gave rise to the duty to make this particular adjustment. Again, we deal briefly with the point in case a submission on this point has slipped under our radar.

164. We struggle to see how awaiting the grievance outcome would have prevented or reduced the disadvantageous effects of PCP1. No matter how long the respondent waited, the claimant would have been unable to countenance working for Ms Lynas. What is described here as an "adjustment" is, in our view, better characterised as an argument by the claimant that her dismissal was disproportionate and unfair because it was premature.

<u>Adjustment (e) – exploring alternative employment</u>

165. Should the respondent have had to "explore" alternative employment? On a strict reading of the claim, as formulated on her behalf, the short answer is "No". Section 20 does not impose a duty to explore possible adjustments. The duty is not concerned with thought processes but actual steps to alleviate the disadvantage. The respondent was either obliged to make the adjustment or it was not. Mere exploration of the possibility of alternative employment would not have prevented the disadvantageous effect of PCP1.

166. In case we have adopted too narrow a view of the claimant's case, we have also considered whether or not the respondent should have had to *offer* an alternative role to the claimant. We remind ourselves that, here, we are not concerned with whether the respondent followed a reasonable procedure, but whether it was reasonable to have had to offer a role. As with adjustment (b), we found it helpful to answer this question by reference time periods, starting with the most recent:

14 October 2015 onwards

167. In our view there were no roles that the respondent could reasonably have had to offer the claimant during this period. The following paragraphs deal one by one with the roles identified by the claimant as adjustments.

168. It was not reasonable for the respondent to have to offer the 8B Senior Programme Lead role. The claimant did not apply for it. There were imperfections in the way the process was explained to the claimant: she was not specifically told that she could bring Mr Ion with her to an interview. It could have been spelled out to her that she would not have to compete for the role provided that she met the essential requirements. The claimant was invited to a preferential interview, rather than an informal meeting as the Redeployment Policy required. But these minor shortcomings did not stop the respondent from being entitled to view the claimant as having lost interest in this particular role. It had been explained to the claimant that she would have a "preferential interview". The ordinary meaning of that phrase is that the claimant would be considered in preference to other candidates. She did not ask for clarification or request a companion at her interview. The reasons the claimant gave for pulling out of the interview were addressed by the respondent, but the claimant did not express any renewed interest in the role.

169. It was not reasonable for the respondent to have to offer any role that depended on the claimant re-registering with the NMC. Purely for convenience we call these roles, "Registered Roles". We have essentially two reasons for coming to this view:

169.1. Considerable re-training would have been required. The claimant had been out of practice for 10 years. It would have taken a minimum of three months for the claimant to complete a course. That period would have had to start from the start date of the next available course. In the meantime the respondent would have been forced to choose between two unpalatable options. The first would have been to put all Registered Roles on hold. This step, for an acute Trust, would have the effect of disrupting frontline services. The second option would have been to appoint the claimant to the role, but to remove all clinical duties until she had re-registered. In that event, the respondent would have had to find someone else to cover those duties. This would have meant either diverting a colleague away from their existing Registered Role (which would be disruptive) or creating a temporary supernumerary Registered Role, (which would have been expensive and going beyond the proper scope of the duty to make adjustments).

169.2. It was reasonable in any event for the respondent to think that the claimant was not looking to re-train. We are satisfied that this is the case, despite what the claimant stated on the redeployment template form. Her submission of that document was really only going through the motions of engaging with the redeployment process. When Mrs Wileman informed the claimant by email on 22 October 2015 that she would not put her forward for any Registered Roles, the claimant did not challenge her. She did not, for example, come back to Ms Wileman and say that, if she was given the opportunity to train, she would be interested in those roles.

170. Moreover, in the light of our findings at paragraphs 105 and 106, our view is that none of the other roles arising after 14 October 2015 would have been

suitable for the claimant. It would not be reasonable for the respondent to have had to offer them.

April 2015 to 14 October 2015

171. We have looked at all the respondent's vacancies, including Academy vacancies, for the period April 2015 through to 14 October 2015. The claimant did not cross-examine the respondent's witnesses about any roles that were approved or advertised during this period. None of the roles that became available during this period seemed obviously suitable to us.

172. Another way of looking at the period April 2015 to 14 October 2015 is in terms of the tribunal's jurisdiction. The adjustments complaint in respect of this period was presented too late. Any failure to make adjustments by omitting to offer particular roles to the claimant should be treated as being "done" when those roles were offered to others. Where there is no evidence of when those roles were offered to others, the failure should be taken to have been done on the expiry of a reasonable period for offering each particular role.

173. For time limit purposes, any failure to offer a role prior to 14 October 2015 should not be considered as part of an act extending beyond 14 October 2015. There was no failure to make adjustments after that date and no ongoing discriminatory state of affairs.

174. For an alleged act of discrimination occurring on or before 14 October 2015, the claimant was required to present her claim or begin early conciliation no later than 13 January 2016. She did not begin early conciliation until 3 weeks later. The claim was not presented for a further 2 months.

175. It would not be just and equitable to extend the time limit. Our reason for coming to this view is mainly that, on examination of the claim on its merits, it is not well-founded. Refusing an extension of time is merely depriving the claimant of an opportunity to bring a claim that is doomed to fail.

February 2015 to April 2015

176. We remind ourselves that the period before April 2015 was not part of the claim and we do not adjudicate upon it. Nevertheless, we would not wish to leave this topic without making one observation. In our view, both the claimant and the respondent missed an opportunity in February 2015 to engage with the question of redeployment. Once the claimant began to tell the respondent that she could not return to the Academy, redeployment seemed an obvious line of enquiry. The Academy was only a small part of the respondent's organisation. There might have been roles available from February 2015 to April 2015.

177. We do not wish to be seen to be overly critical of either the claimant or Mr Currie in this respect. The claimant was unwell and not necessarily able to consider her options clearly. The Occupational Health evidence was not that the claimant was permanently unfit for her substantive role. Medical redeployment would have made an indefinite change to the claimant's role from which it would be difficult to go back. Nevertheless, with good will on both sides, we would have thought that both parties would have thought it sensible to begin looking for suitable roles at an early stage.

<u>PCP2</u>

178. We can deal fairly briefly with the claim based on PCP2. The claimant was only required to work under Ms Lynas' management when she was at work in her substantive role. At all relevant times while the claimant was on sick leave, she was managed by somebody else. In our view this PCP is therefore just another way of articulating one of the disadvantages caused by the PCP1. For the same reasons as we give in respect of PCP1, it was not reasonable for the respondent to have to make any of the claimed adjustments.

Discrimination arising from disability

179. We remind ourselves that dismissing the claimant was a means of achieving the legitimate aim of ensuring an efficient business and avoiding the adverse effect of long-term sickness absence. The only issue for consideration here was whether the dismissal was a proportionate means of achieving it.

180. We have here to balance the discriminatory impact of the unfavourable treatment against the importance of the aim. In particular we must consider whether the same aim could have been achieved by less discriminatory means and whether reasonable adjustments would have avoided the unfavourable treatment.

181. The impact on the claimant was stark. It was not her fault she was too unwell to attend work. Yet her ill health absence was the very reason why she was dismissed.

182. Balanced against the discriminatory impact was a very important aim. All three members of this tribunal recognise how disruptive it can be to an organisation to have an employee on sick leave for over a year. The extent of the disruption, of course, will depend on the circumstances of each case. Generally, a large organisation can be expected to absorb the impact of sickness absence more easily than a small business. On the other hand, where, as in this case, the employee in question is a senior manager occupying a unique role which would then have to be covered, that disruptive effect is all the more pronounced. As we have found, the disruption was not just theoretical: the claimant's administrative duties had to be covered by a Band 6 role holder and her higher-level duties had to be covered by other senior managers.

183. We think, therefore, there is an important aim balanced against a stark discriminatory impact. In our view, the key to the balancing exercise is to ask ourselves what alternative, less discriminatory, means of achieving the same aim were reasonably available to the respondent.

184. We have examined the alternatives one by one:

Secondment

184.1. The claimant's witness statement suggests that the respondent's exploration of secondment opportunities was actually a distraction, and that this was something that deflected attention from what really ought to have occurred, which was earlier attempts at redeployment. It was not in the claimant's final submissions that there should have been a secondment. Nevertheless, because the contention that there should have been a secondment was not formally withdrawn, we ought to address it briefly. The respondent would have needed an assurance that the claimant would come back to her substantive role at the end of the secondment. The claimant was

not in a position to provide that assurance. The respondent would have had to have paid for the secondment and cover the claimant's existing post. It would be highly unusual in any event for an employee to return to work from long-term sickness absence directly to a secondment, and it is almost unthinkable that a host organisation would fund a secondment of that kind for somebody who was on long-term sick leave. Taking all those facts together we find that it would not have been reasonable to expect the respondent to pursue the possibility of secondment any further than it actually did.

Redeployment

184.2. The next alternative was redeployment. We have already found that there were no suitable roles to which the claimant could have been redeployed. That is not the same as looking at whether the respondent followed a reasonable procedure based on the information available to it. The balancing exercise requires us to look at whether any reasonable alternative roles would have been found had a proper procedure been followed. For the reasons we have given in relation to the adjustments claim, even if the respondent had followed its procedures to the letter, there was no suitable role into which the claimant would have been redeployed.

Awaiting the outcome of the grievance

184.3. The next alternative would have been to await the outcome of the grievance before making a decision as to whether to dismiss or not. Here we are not concerned, at present, with Mr Hancock's thought processes, but whether on our objective assessment the conclusion of the grievance would have raised a sufficient prospect of a return to work to make it reasonable for the respondent to have to wait.

184.4. We have followed essentially a binary reasoning process. What would have happened if the grievance had been upheld? What would have happened if it had not been upheld? We know that it was not upheld apart from some particular points where criticisms that were made of the claimant were found to be unwarranted. We address each possibility in turn.

184.5. The claimant told us that she would have returned to work if the grievance had not been upheld. We could not accept this part of her evidence. Nothing that the claimant said at the time suggested that this was a possibility. The nearest she came to making such a suggestion was that she would be a better position to decide on her future once the process had concluded. That has to be seen against what Mr Ion said on 1 October 2015. He stated quite clearly that it would be unlikely that the claimant would return to work if the grievance was not upheld. Again, the 16 December 2015 Occupational Health report identified the grievance as a barrier to the claimant's return to work.

184.6. The other possibility was the grievance could have been upheld. The claimant did not say that if the grievance was upheld she would return to work. She did not even say that if the grievance was upheld she would probably return to work. The nearest she got was Mr Ion saying that it would take about six months for her to be able to return to work and that there would have to be a structure in place to make that happen. For those

reasons, we find that it was not reasonable for the respondent to have to delay the dismissal to await the outcome of the grievance.

Delaying for up-to-date medical evidence

184.7. The next alternative was to delay the decision to get more up-to-date medical evidence. We find that this would not have affected the outcome. We can take into account the 16 December 2015 Occupational Health report. The claimant at that point would not feel safe retuning to the Academy. Her perception of the workplace remained unchanged since the previous consultation on 11 June 2015. Waiting for more medical evidence would have served no purpose in this case on our objective assessment of the evidence.

"Managerial discussions"

184.8. Finally, the claimant argues that there could have been "managerial discussions to address issues in the workplace". This rather woolly phrase comes from the Occupational Health report of 11 June 2015. It clearly is wide enough to include discussions of immediate impediments to return to work, such as a difficulty getting in through the doors, lack of support for her previous return to work and arrangements over who her line manager would be and any temporary adjustments to her role to enable her to return to work. The phrase is also, arguably, wide enough to include discussions of the reasons why the claimant thought her substantive role was stressful in the first place. There was some discussion of this on 13 August 2015 when claimant spoke about uncertainty over her role, but the detail was largely left to the grievance process.

184.9. We have come to the view that, whichever view one takes of the ambit of "managerial discussions", they were not a realistic alternative to dismissal. There had already been managerial discussions on both topics, especially that of immediate impediments to a return to work. It was not reasonable for the respondent to have to delay the decision to dismiss so that further managerial discussions could take place. So far as they consisted of discussions about the root causes of the claimant's perception of stress in her substantive role, the chosen forum for these discussions was the grievance process. We have already expressed our conclusion that the respondent could not reasonably have been expected to delay the dismissal pending resolution of the grievance.

185. Taking into account all those alternatives and balancing the discriminatory effect against the importance of the aim, we have decided that dismissal was not disproportionate. There was therefore no discrimination against the claimant arising from disability.

<u>Unfair dismissal</u>

186. We turn now to the complaint of unfair dismissal. The reason for dismissal was the fact of the claimant's absence from work and the respondent's belief in the poor prospect of her return. It is not in dispute that that reason related to her capability. We have to decide whether the respondent acted reasonably or unreasonably in treating that as a sufficient reason.

General

187. When assessing reasonableness, we hold the respondent to the standards of a large organisation. Its resources were not limited to those of the Academy. We would expect them to devote considerable resources of a large hospital Trust in taking expert Human Resources' advice, correctly understanding and adhering to its own agreed internal procedures and drawing upon all the redeployment opportunities available in the wider organisation. We would add one qualification to this general statement. In terms of tolerating absence, we do take into account here that the resources of the claimant's employer in reality were confined to the resources of the Academy. They had a separate budget and a small management structure in which the claimant occupied a very senior position. Absence was likely to have a more disruptive effect than for somebody who is fully integrated into a much larger organisation.

Investigation

188. We have asked ourselves whether the respondent made reasonable enquiries into the causes of the claimant's sickness absence. In one sense, it did. The respondent obtained Occupational Health advice on numerous occasions. It departed from its own Attendance Management Procedure by not holding monthly review meetings. In our view, this was a somewhat technical breach of internal procedures. There was regular contact with the claimant. Every time the medical position changed or there was a material change in the claimant's circumstances it was addressed at a separate meeting. We also bear in mind that there was frequent correspondence, in particular, between the claimant and Mr McEwan, and some telephone contact.

189. In another sense, however, the respondent's investigation was unreasonable. Mr Hancock allowed irrelevant and unreasonable considerations to muddle his thinking. This conclusion needs some explanation:

189.1. The investigation into the causes of the claimant's absence would not be reasonable unless it made some attempt to address the root causes of the claimant's absence in the first place and how they presented barriers to returning to work.

189.2. Here, in contrast to our approach to the section 15 test, we must look at Mr Hancock's thought processes and decide whether a reasonable manager could have reasoned as he did. The evidence that confronted him was different from the evidence before us. Unlike Mr Hancock, we are aware of the developments that took place after October 2015. All Mr Hancock had was the claimant and Mr Ion saying that if the grievance was not upheld it was unlikely that the claimant would return. If the grievance was upheld she might return but she was not saying whether she would or not, or indeed whether it was probable or not; merely that she would be able to consider how she felt, it would take about six months and it would be easier if she returned to work outside the Academy. It would have been open to Mr Hancock to work through the binary possibilities in roughly the same way that we have done. He could have decided that, at best, if the grievance was allowed to run its course, the claimant might return, but without any real indication as to the timeframe or what the likelihood was. It would have been open to a reasonable manager to decide that it was not worth waiting for the grievance outcome before dismissing the claimant.

189.3. Although the meeting notes show that he followed something approaching that thought process, he also allowed irrelevant considerations to creep in.

189.4. One of these was that he did not think that "a key issue" preventing the claimant's return to work was her relationship with Ms Lynas. It was clearly an important, if not the most important, issue preventing her return. The fact that numerous arrangements were made to remove Ms Lynas from the management of the claimant's sickness absence and the Occupational Health report dated 17 November 2014, the size of the Academy and the clear implication that a reference to line management must mean a reference to Ms Lynas, must all have led to Mr Hancock inevitably to the view that any difficulties the claimant had with line management would centre around Ms Lynas. That was the understanding of Ms Wileman and it was unreasonable in our view for Mr Hancock not to have that understanding.

189.5. The second unreasonable consideration was that Mr Hancock thought he would not need to investigate why the claimant was on sick leave. He clearly needed to make such an investigation in order to establish whether she would be able to return. He had to proceed on the basis that the grievance might be upheld. It would only be if there was no reasonable prospect of her returning in that eventuality that it would be reasonable for him to decide not to wait until the grievance process had run to its conclusion. One factor we have taken into account here is that as at 1 October 2015 the grievance was looking like it was imminently going to be resolved. A draft report had already been prepared. The investigator was awaiting the claimant's comments on the interview notes. Nobody could have foreseen at the beginning of October 2015 that it would take so long for the claimant's grievance to reach its conclusion. In the circumstances prevailing at the time of Mr Hancock's decision, he would not have had to wait long at all to see what happened when the claimant's grievance process was concluded and how that would affect her assessment of her ability to return to work.

189.6. There was also an irrelevant consideration in Mr Hancock's mind, which was that there was such a thing as a 12-month "legitimate" period of absence requiring, at the expiry of that 12 months, a look to see whether the claimant's employment should be terminated. In fact, the Attendance Management Procedure made no reference to a 12-month period having any significance to the termination of employment. This error deflected Mr Hancock away from the crucial question, which was the prospect of the claimant's return.

190. We have looked at the whole investigation in the round, including the appeal, to decide whether or not Mr Hancock's errors took the process outside the range of reasonable responses. In our view they did not. These flaws in Mr Hancock's reasoning were cured on appeal. Mr Wilkin did not fall into the same trap of taking those considerations into account as did Mr Hancock. By the time he was seized of the appeal there had already been considerable delay in the grievance and it was not at all clear at that point how much longer it would take for the grievance procedure to be concluded.

Alternative employment

191. We turn now to whether there were sufficient efforts made to redeploy the claimant. In our view, the efforts prior to 14 October 2015 were not by themselves adequate to make a dismissal reasonable. They did not conform to the Attendance Management Policy or the Redeployment Policy. The claimant was not, before 14 October 2015, placed on the "at risk" register. It is clear from the management's submission at page 525 of the bundle that, prior to that point the claimant was only told about advertised posts, or the lack of them. Unadvertised posts available to people on the "at risk" register had not been taken into consideration.

192. In our view Mr Hancock acted unreasonably in making the decision to terminate the claimant's employment before the Redeployment Period had come to an end. It was unreasonable of him to believe first of all that the Redeployment Period had started on 14 October 2015. It clearly had not.

193. This was not just a question of formality. There was an important difference between what had occurred before then and what needed to occur during the Redeployment Period. In particular, the claimant was not placed on the Redeployment Register and was not notified of vacancies unless they were advertised. There was no pro-active attempt to match the claimant's skills and experience to available roles. As we know, many of the roles discussed at paragraph 105 above were not advertised. Appointments were made following expressions of interest.

194. In case we are found to have wrongly characterised Mr Hancock's reasoning, we consider whether it would have been reasonable for Mr Hancock to have regarded the Redeployment Policy and Attendance Management Policy as permitting the giving of contractual notice before the expiry of the Redeployment Period. In our view it was not. Both policy documents provided for the decision on termination to be made at a meeting the end of the Redeployment Period.

195. We have taken into account that the Redeployment Policy stated at paragraph 9.4 that contractual notice could run concurrently with the "redeployment process". In our view, this did not override the clear provisions of paragraphs 10.9 of the Attendance Management Policy (together with the final bullet point) and paragraph 9.1 of the Redeployment Policy. It was quite clear that the decision to terminate employment could only be made at the conclusion of the period. We read paragraph 9.4 as meaning that, during the contractual notice period, the respondent was required to continue to make efforts to redeploy the employee.

196. If there was any remaining ambiguity, the respondent ought to have resolved it in favour of holding a meeting at the conclusion of the Redeployment Period. The respondent should have realised that the Redeployment Policy covered both sickness absence and organisational change. In a redundancy situation, it is not unheard of for efforts to be made to find alternative employment during a notice period. No real unfairness is caused by that approach. A decision has already been made to select an individual for redundancy and circumstances affecting that decision are unlikely to change. By contrast, where the reason for dismissal is ill health absence, there may very well be a change in the employee's state of health and prospects of returning to work. Any reasonable employer would have realised that a meeting at the end of the redeployment process would be an important procedural step.

197. We take into account the submission made very ably by Ms Patterson that a mere failure to follow internal procedures does not automatically result in a dismissal being unfair. There are almost inevitably going to be imperfections in just about any procedure that an employer follows. To require an employer, as an essential ingredient of fairness, to adhere faultlessly to all its written procedures would be to set too high a standard. It would be falling into the trap of giving undue prominence to one factor when section 98(4) requires all the circumstances to be taken into account.

198. This respondent's breach of its own procedures was not, however, a mere technical failure. It had two serious consequences for the fairness of the decision to dismiss:

198.1. The claimant was deprived of the opportunity to have important meeting before a decision was made to terminate her employment. That meeting should have happened at the end, not at the beginning, of the Redeployment Period. The purpose of that meeting would have been to consider efforts made during the Redeployment Period, and any evidence about her health at that time. A decision could then be made in the light of the evidence prevailing at that time whether the claimant's employment should be terminated or not.

198.2. There was another effect. The claimant had a mental illness. Receiving notice of termination was devastating for her. Her notice of termination was not, as the respondent argues, accompanied by an assurance that the notice would be withdrawn if a suitable alternative role could be found. The passage that we have highlighted in bold (paragraph 76 above) stated that notice "could" be withdrawn and sought to place conditions on the respondent entertaining that possibility. Even with a categorical assurance that notice would be withdrawn, the premature sending of the letter made it more difficult for the claimant to engage effectively with the redeployment process. We come to that view, not simply from our own general knowledge, but taking account of what the claimant actually stated in her covering e-mail to the Redeployment Form. By that time, the claimant had stopped seriously engaging with the efforts to find her an alternative role. We think that a contributing factor is likely to have been the fact that she had been given notice of termination of her employment.

199. We have looked at the appeal and the original decision in the round to see whether overall the procedure was reasonable. Having done so, we have decided that the procedure was not even within the range of reasonable responses. Mr Wilkin's appeal did not make up for this important procedural safeguard being missed. We have reached this conclusion for three reasons:

199.1. The claimant had a mental illness. She was driven from a position where the respondent was assessing the evidence and making a decision in the round as to whether her employment should be terminated or not, to one where she was having to make the case in grounds of appeal as to why she should not be dismissed. That is not an easy thing for a person with a mental illness to do. Although the claimant was able to write a detailed letter, she was still at a disadvantage in having the onus placed on her to show why she should not be dismissed.

199.2. The second is that Mr Wilkin, like Mr Hancock, took the view that the Redeployment Period had begun in August 2015 when it clearly had not. The unreasonable consideration of Mr Hancock was repeated in the reasoning of Mr Wilkin.

199.3. The dismissal, even if it was subject to possible revocation, set the wrong tone for somebody who was suffering from a mental illness, as demonstrated in the claimant's redeployment pro forma.

200. For those reasons we find that the respondent did not act reasonably in treating the claimant's ill health absence as a sufficient reason to dismiss her and the dismissal was therefore unfair.

Polkey issue

201. We turn now to what would or might have happened had the respondent acted fairly. In the light of our conclusions on discrimination arising from disability, we need state our considerations here only very briefly. We find that a fair procedure would not ultimately have made any difference. Had there had been a meeting in mid-January (at the end of the Redeployment Period) the respondent would have had the Occupational Health report dated 16 December 2015. The report would have indicated no change. Mr Hancock would not have been given any encouragement that the claimant would have returned to work following the outcome of the grievance process. The claimant would still have been on sick leave. It would have been all the more sensible to make a decision on the future of the claimant's employment without waiting for the grievance. By then it was looking that there would be considerable delays in waiting for the outcome. No suitable alternative roles would have been found. The claimant would not have been seconded. Inevitably the respondent, at the end of the Redeployment Period approximately mid-January 2015, would have decided to terminate the claimant's employment by giving notice.

202. The practical effects of this would have been that the claimant would have received nil pay from the expiry of her entitlement to sick pay until the decision had been made to dismiss her. She may or may not have been paid in lieu of notice. If she remained employed during her notice period, she may have been entitled to sick pay depending on the contractual notice period. During her period of zero pay she would have received benefits under her insurance policy. If needed, we will quantify those payments at a later stage.

Employment Judge Horne

Date: 18 July 2017

SENT TO THE PARTIES ON

19 July 2017

FOR THE TRIBUNAL OFFICE