EMPLOYMENT TRIBUNALS

Claimant: **Ms L J Bannister**

Respondent: **The Commissioners for Her Majesty's Revenue & Customs**

Heard at: **Leeds** **On: 23, 24, 25, 26 January, 20, 21, 27, 28 February 2017 (Reserved) 1 March 2017**

Before: **Employment Judge Keevash**
Mrs LJ Anderson-Coe
Mr M Taj

Representation

Claimant: **In person**
Respondent: **Mr S Lewis, Counsel**

RESERVED JUDGMENT

The complaints of disability discrimination succeed

REASONS

Background

1 By her Claim Form the Claimant complained that she was unfairly dismissed and that the Respondent unlawfully discriminated against her. The protected characteristic under the Equality Act 2010 was disability. By its Response the Respondent resisted the complaints. The matter was listed for a Preliminary Hearing to decide whether the claims were brought within the relevant time limits and, if not, whether time should be extended.

2 At a Preliminary Hearing on 10 August 2016 an Employment Judge adjudged that two complaints should proceed to a full Hearing. The remainder of the claim was dismissed.

Issues

3 On Day 1 of the Hearing the Tribunal adopted for determination a draft list of issues which had been presented by Mr Lewis.

Hearing

4 On Day 1 the Claimant did not attend. The Tribunal asked its clerk to telephone and find out what were her intentions. During several telephone conversations on that day the Claimant told the clerk that she was too unwell to attend. The Tribunal accepted Mr Lewis' submission that the Hearing be adjourned until the next day. For the rest of the day the Tribunal read the witness statements.

5 On Day 2 the Claimant attended and apologised for her absence the previous day. The Employment Judge explained what the Employment Tribunal had done. There was a discussion about the issues before the Claimant commenced giving her evidence.

6 The Claimant concluded her evidence on Day 4. There was insufficient time to hear all of the Respondent's witnesses. After discussion with the Claimant and Mr Lewis, the Tribunal decided that Mr Jagus, Team Leader and Technical Lead, should be the first witness for the Respondent because of the time available and the fact that it might be difficult for him to attend the Tribunal again. The matter was listed for four more days to include time for Tribunal deliberations and giving Judgment.

7 On Day 5 the Claimant did not attend. The Tribunal asked its clerk to telephone and find out what were her intentions. During the telephone conversation the Claimant explained to the clerk that she was unaware that the Hearing was listed for that day. She had made incorrect entries in her diary. As she had two appointments that day she was unable to attend the Hearing. She confirmed that she would attend the next day. Mr Lewis submitted that the Hearing should be adjourned until the next day. He stated that the Respondent might wish to make an application for costs on the ground that the Claimant had acted unreasonably by failing to attend the Hearing that day.

8 On Day 6 Mr Lewis made an application for leave to ask the Claimant to submit herself for further cross examination. The Tribunal adjourned to allow Mr Lewis time to discuss the application with the Claimant and seek her agreement. On resumption the Claimant confirmed that she consented to the application. She was recalled for the purpose of cross examination on that document. Beverley Jayne Pajor, Complaints Handler, and Andrew Horne, Team Leader, gave evidence on behalf of the Respondent. There was insufficient time to conclude his evidence before the Hearing was adjourned.

9 On Day 7 the Claimant did not attend. The Tribunal asked its clerk to telephone and find out what were her intentions. During the first telephone conversation the Claimant explained to the clerk that she intended coming later in the day. During a subsequent telephone conversation she told the clerk that she would not be coming. After hearing Mr Lewis, the Tribunal decided to adjourn until the next day. In accordance with Tribunal's direction, the clerk informed the Claimant that the Hearing would proceed on Day 8 whether or not she attended; if she did not intend to attend, she was invited to send a list of her questions which the Tribunal would put to the Respondent's witnesses and any submissions she wanted the Tribunal to consider when making its deliberations.

10 On Day 8 Mr Horne concluded his evidence. John McDougall, Senior Officer, gave evidence on behalf of the Respondent. The Tribunal also considered a bundle of documents.

Facts

11 The Tribunal found the following facts proved on the balance of probabilities:-

11.1 On 30 April 1990 the Claimant was employed by the Respondent as an administrative officer. At the material time she was contracted to work 30 hours a week, working in Counter Avoidance.

11.2 In or about December 2013 the Claimant was required to move teams because her manager retired and her team was to be disbanded. The move required the Claimant to move from Floor 3 to Floor 4.

11.3 On 9 December 2013 the Claimant telephoned and told Ms Barraclough, Higher Officer manager, that she could not attend work because she could not cope with her life. By the end of the conversation Ms Barraclough persuaded the Claimant to consult her doctor.

11.4 On 11 December 2013 the Claimant told Ms Barraclough that she was an alcoholic. During the conversation the Claimant stated that due to her mental health condition she could not move desks.

11.5 On 17 December 2013 Ms Islam, manager, telephoned and spoke to the Claimant about her sickness absence. During a long conversation the Claimant stated that she did not want to move. By the end of the conversation the Claimant stated that she would consider returning to work provided she was allowed to sit on Floor 3 on her first day back. Later that afternoon the Claimant telephoned and told Ms Islam that she would try to come to work the next day and move to Floor 4. She asked Ms Islam for help with the move; Ms Islam agreed.

11.6 On 31 December 2013 the Claimant attended a Cause for Concern meeting which was conducted by Ms Islam. Ms Islam's note of that meeting records:-

> "…
> Luisa apologized that she allowed a small change like desk move turn into a big thing but was settled downstairs and felt unsettled at work so made her home life seem more unsettled. I advised Luisa it was something that was something that was done due to change within the workplace & nothing against her. I asked Luisa how she felt with the team members she has met so far and she replied saying they seem to be fine and has cleared up quite a few pre-judgments she had which was a good sign …
>
> I confirmed Luisa's understanding of the key points of the discussion such as, I am looking for an improvement in her attendance and any future absences would lead to formal action being taken which could in turn lead to dismissal & to inform me of any changes or anything that has a negative impact on her. Luisa advised she understood everything that was discussed …".

11.7 By a letter dated 6 January 2014 Ms Sandercook, Occupational Health Adviser, informed Ms Islam:-

> "…
> **Current Health Situation**
> …
> Miss Bannister advised me that she has suffered with depression for approximately 3 years …
>
> Miss Bannister advised me that she became unwell again through 2013 and

became anxious again in September when she was asked to move to a different desk in work. She visited her General Practitioner who advised her that she not have stopped taking the medication for stress and anxiety and medication was commenced again.

Miss Bannister tells me that she took sickness absence on 4 occasions between September and December. The last absence was between 12-27 December. She tells me that she attended work on 30th December for 3 hours at her new desk. She has also carried out 2 further 6 hour days at work. She tells me that there were very few people in the office and that it was quiet. She continues to show some signs of stress and anxiety …

Capability For Work
In my opinion Miss Bannister is fit to attend work …

Outlook
Miss Bannister has a long standing history of mental health problems which is currently managed but she remains vulnerable to further episodes of this condition, the frequency or severity of which cannot be predicted …

Disability Advice
The decision on whether the definition of disability applies is ultimately one for a tribunal. However, my interpretation of the relevant UK legislation is that Miss Bannister's condition is likely to be considered as disabilities because they have lasted for longer than 12 months and would have significant impact on normal daily activities without the benefit of treatment …".

11.8 By a letter dated 30 April 2014 Ms Islam issued the Claimant with a first written warning for poor attendance and informed that her she was placing her on a four month review period because of concerns with her sickness absence record.

11.9 By a letter dated 2 September 2014 Ms Pajor (who was at that time a Front Line Manger) informed the Claimant:-
"… we agreed that your attendance is now at a satisfactory level …
I must advise you that if your attendance again becomes unsatisfactory within the next 12 months, you will normally be given a final warning on a Stage 2 review …".

11.10 On 18 November 2014 Ms Pajor, Ms Barraclough and Ms Murgatroyd, the Claimant's Front Line manager, attended a meeting to discuss the Claimant. It was agreed that a recent four day absence should be treated as a one off absence. It was also agreed to continue monitoring and not to issue a final warning about attendance.

11.11 On 4 February 2015 the Claimant began a period of absence from work due to a miscarriage. On 18 February 2015 she attended a return to work meeting which was conducted by Ms Murgatroyd. Ms Scaife (who was about to become the manager of the Claimant's team) also attended the meeting.

11.12 On 19 February 2015 the Claimant attended a meeting which was conducted by Ms Barraclough. She was given a verbal warning because of her behaviour at the meeting the previous day.

11.13 On or about 23 February 2015 the Claimant began a period of absence from work.

11.14 On 9 March 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work because of alcohol dependence, anxiety and depression.

11.15 On 25 March 2015 the Claimant met Mr Clarke, Channel Delivery Lead. As previously agreed this occurred at a coffee shop at Leeds Railway Station. They discussed her return to work, the likelihood of her being moved to stage 2 of the attendance management process, the verbal warning, the changes to Counter Avoidance and Ms Barraclough's move away from any responsibility for the management of the Claimant, and allegations of rape and assault against unnamed colleagues. During the discussion the Claimant asked if there was an chance of a move to another team. Mr Clarke replied that it might be appropriate in about 6 months when the attendance management process had been satisfactorily concluded.

11.16 On 30 March 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work until 7 April 2015 because of alcohol dependence and depression.

11.17 On 8 April 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work until 10 April 2015 because of alcohol dependence and depression.

11.18 On 13 April 2015 the Claimant telephoned and told Ms Scaife that she was unable to attend work that day. During the conversation Ms Scaife told her that the team was now part of a new flexible working group but that at present there were no changes to its work.

11.19 By a letter dated 20 April 2015 Ms Scaife invited the Claimant to attend a meeting to discuss her progress. At that meeting she proposed to complete a Fit For work Plan to record and monitor measure that need to be in place to help facilitate the Claimant's return.

11.20 On 20 April 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work until 24 April 2015 because of "alcohol problem drinking".

11.21 On 21 April 2015 the Claimant attended a workplace meeting which was conducted by Ms Scaife. Among other matters they discussed a return to work on 27 April.

11.22 On or about 21 April 2015 Mr Horne decided to move the Claimant into Ms Pajor's team.

11.23 On 24 April 2015 Dr Vaughtry, the Claimant's GP, telephoned and asked Ms Scaife how she was dealing with the Claimant's condition. Ms Scaife declined to answer the question because of confidentiality. Among other matters Dr Vaughtry stated that he would recommend to the Claimant that Occupational Health advice be obtained.

11.24 On 27 April 2015 the Claimant failed to return to work. During that day she had three telephone conversations with Ms Scaife. In the last conversation Ms Scaife told the Claimant that she would be managed by Ms Pajor with immediate effect and would be moving to her team. She told the Claimant that she was the only member of the team who was moving. The Claimant that she wanted to speak to higher management about the move.

11.25 By an email dated 27 April 2015 Ms Scaife informed Mr Horne about her conversation with the Claimant. She stated:-
"…
She made reference to requesting to move to another directorate as she wants out of Counter Avoidance …"

11.26 On 28 April 2015 Mr Horne telephoned the Claimant in response to her request to speak to a senior manager about her move to Ms Pajor's team. She explained why she did not want to move. He replied that "in fairness, he was not aware of issues around previous moves and, to be honest, he had no interest".

11.27 On 29 April 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work until 8 May 2015 because of "alcohol dependency depression".

11.28 On 30 April 2015 the Claimant telephoned and told Ms Scaife that she would not be moving teams. She also refused to speak to Ms Pajor.

11.29 By a letter dated 6 May 2015 Dr Kumar, the Claimant's GP, informed the Respondent:-
"I'd be grateful if you could consider my patient's case for not moving desk. She feels as if he is settled where she is and moving would cause undue stress which would aggravate her problems with anxiety and depression".

11.30 On 6 May 2015 Mr Horne discussed the Claimant with Mr Scott, Internal Governance. He explained his concern about the Claimant's potential behaviour at work and the need for the police to be involved in her removal from the premises.

11.31 On 6 May 2015 Mr Horne, Ms Pajor and Ms Sheail, Attendance and Wellbeing Champion Coordinator, met and discussed the Claimant. Among other matters they agreed to consider withdrawing from formal action under the managing attendance process and to offer the Claimant reasonable adjustments.

11.32 On 11 May 2015 the Claimant telephoned and spoke to Mr Horne. Among other matters she confirmed that she was feeling fine and that her return to work depended on whether she was moving teams. When he confirmed that she was moving teams, she replied "Oh am I" and terminated the call.

11.33 On 12 May 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work until 26 May 2015 because of low mood.

11.34 On 18 May 2015 Mr Horne prepared an appendix to his note of the telephone conversation with the Claimant on 11 May. This stated:-
"I hold the impression that Luisa was, actually, fit for work on … 11.05.15.
…

I am satisfied that if I would have back-tracked into leaving her on the 4th floor and under the management of Carrie Scaife, then she may have agreed to return to work later that day …".

11.35 On 18 May 2015 the Claimant telephoned and among other matters told Ms Pajor that she was not moving to her team. In her note of the conversation Ms Pajor described the Claimant's tone as "aggressive".

11.36 By a letter dated 21 May 2015 Ms Pajor informed the Claimant that she was arranging for an Occupational Health referral. She also explained that she no longer intended pursuing action under the managing attendance process.

11.37 On 26 May 2015 the Claimant telephoned Ms Pajor. Ms Pajor's note of the conversation records:-
" … but she wishes that I make a note that if management are willing to let her stay on her old team and sit next to Linda Whittington she will come back and she wants a letter confirming this in 48 hours or she is going to see a solicitor …".

11.38 On 28 May 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work until 11 June 2015 because of low mood.

11.39 On 2 June 2015 the Claimant telephoned Ms Scaife. The note of the conversation records:-
" …
Luisa said 'I want you to pass my comments on to Bev' 'I want to come back and sit next to Linda, 'No one is listening to me', 'I understand if there is a big move but I do not appreciate being moved when I am off sick' …"

11.40 On 2 June 2015 Ms Pajor telephoned the Claimant. The note of the conversation records:-
" …
I asked her where she had posted the OCCP consent form to and then she said nobody cares and that we are prolonging her sick absence because we are ignoring her request to remain with her old team and her GP's letter … I tried to explain to Luisa that I could not make that decision about her move …".

11.41 On 9 June 2015 the Claimant telephoned Ms Pajor. The note of the conversation records:-
" …
Louisa said she thinks she will lose her job and that she feels victimized because she knows that she is the only one that has been moved. I explained that I did not want to discuss the move other than I have welcomed her onto my team and that I have spoken to my manager about her request and the suggestion made by her own GP …".

11.42 On 15 June 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work until 26 June 2015 because of low mood.

11.43 by a letter dated 19 June 2015 Ms Hardy, Occupational Health Adviser, informed Ms Pajor:-
" …
Current Health Situation

…
Ms Bannister states she is keen to return to work, however she needs to go back to where she was with her desk prior to the absence and that after a few days settling in she will be able to manage in work.
Ms Bannister has expressed a wish to remain at that desk until there is a move with her not being the only person to be moved.
Unfortunately because Ms Bannister has been referred with multiple health issues it is not possible to address all of them individually within a standard OH consultation. I have addressed the main problems of her anxiety and depression which indicate the barriers preventing her from returning to work. If you require further detail, I recommend that you make a referral via bespoke so that extra time can be allocated.

Capability for Work
At the present time the psychological symptoms are such that Ms Banister is unfit to undertake any work. Ms Bannister is fit to attend a meeting with management to discuss the situation and formulate a plan of action to move forward …".

11.44 On 23 June 2015 the Claimant telephoned Ms Scaife. The note of the conversation records:-
"…
Luisa said she wants to come back and sit with her team and if there are moves in a few months this is fine …".

11.45 On 30 June 2015 Ms Pajor, Mr Horne and Mr Clarke met and discussed the Claimant's sick absence. The note of the discussion records:-
"…
Louisa does not want to move desks and although she has indicated during the Atos telephone conversation to this effect the report does not indicate or suggest a recommendation on this …".

11.46 By a letter dated 1 July 2015 Ms Pajor invited the Claimant to attend a meeting to discuss her progress. At that meeting she proposed to complete a Fit For work Plan to record and monitor measure that need to be in place to help facilitate the Claimant's return.

11.47 On 2 July 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work until 16 July 2015 because of low mood.

11.48 on 6 July 2015 Ms Pajor and Ms Hardy discussed the Claimant's OH referral. The note of the discussion records:-
" …
Janet said that to be honest in all her 23 years of being an occupational health nurse she has never dealt with anyone like Luisa. Janet said she was rude and did not engage fully with her, also she kept getting upset and she found it very difficult to get through the 20 minutes telephone appointment.
It's the worse (sic) assessment she has ever had to do and that she struggled throughout.
Janet said to Luisa that she will not be making any recommendation around work moves …".

11.49 On 16 July 2015 the Claimant attended a formal month 1 meeting for continuous absence. The note of the meeting records:-

"…
3. BP discussed the fit to work plan and asked if it could be completed today. LB said she wishes to return to work as soon as possible, but not under current terms and not on the 3rd floor with BP's team. BP stated she had no involvement in the decision to move LB, as that decision was made by Andy Horne prior to BP becoming LB manager. LB acknowledged this…
9. LB said that she wished to return to work on the condition that she can sit at her old desk on the 4th floor. LB said that she feels fit to work in certain conditions. BP discussed the options of phased return, lighter workload, temporary reduction in hours but this will have an effect on her pay and also removing any targets, Kpi's in order to give her chance to catch up. BP stated this is all covered in the HR reasonable adjustment guidance…
12. BP asked LB if she felt that at the time of the sickness absence beginning, with the desk move aside, if he felt that she was fit for work. LB said she feels fit for work if she could be seated at her old desk. LB said this doesn't mean that she would be against moving desks in the future, but that she feels victimized and bullied as she is the only employee out of 90 employees that is being moved desks in this way…
18 LB said that she wishes to make a formal complaint [about Ms Barraclough]…
23. LB said she wishes to return to the same desk otherwise her illness issues will come back. BP discussed phased return again and LB said this might be something she would be interested in, initially doing 5 hours a day or so. BP asked what LB felt would be a reasonable time for LB to return to BP team if she was to return to her old desk. LB said a few months, and also that she would be happy to complete work assigned to BP's team if she were able to return to old desk…".

111.50 By an email dated 20 July 2015 Mr Pajor informed Mr Horne:-
"Luisa has requested again that you re-consider the move to my team and feels that if she can return to her old desk on the 4th floor within a couple of months sh should be able to cope with a move to a new team …".

11.51 On 22 July 2015 Ms Pajor telephoned and told the Claimant that following discussion with Mr Horne the decision to move her to a new team on Floor 3 still stood.

11.52 On 22 July 2015 Ms Pajor, Mr Horne, Mr Clarke and Ms Sheail attended a Management Attendance Action Meeting. The note of the discussion records:-
"…
A&WC recommendations
Assessment of associated risk
To be seen as being demonstrably reasonable – could you offer the jobholder the option to remain at their old seat for two weeks?
This would not be reasonable because;

- The negative impact the jobholder's behaviours are likely to have on colleagues – based on past experience
- The jobholder knows members of both teams – how would staying in the old desk make any difference?
- A colleague is seated near the jobholder's previous seat and has been very supportive. Management are concerned that this is getting too much for the individual.
- The jobholder would have to move anyway. Where is the benefit to the jobholder in delaying the move? …

Managing the absence

- …
- The jobholder's request to continue to work at their old workstation is not reasonable and cannot be supported …".

11.53 By an email dated 23 July 2015 Mr Horne informed Ms Pajor:-
"…
I have considered Luisa's request and have made the decision to decline her suggestion that she returns to work on her old team for a couple of months before moving to your team on the 3rd floor.

Taking into account Luisa's condition, I see no benefit to her returning to her old team and in particular her colleague/friend that she sits next to. Due to her absence, illness and subsequent behaviours I feel that the best was forward for both Luisa and HMRC is that she has a complete break from the team on the 4th floor and to wipe the slate clean by moving to your team on the 3rd.
I genuinely feel that, based on the phone calls I have held with Luisa since May 15, that allowing her to return to her old team will actually make things worse, i.e. her outbursts will get worse as the time gets closer to her move to the 3rd floor. This is also likely to have an impact on her peers not only on the 4th floor, but on the 3rd as well, and I am not prepared to allow this to happen on health and safety grounds.
I have also considered the staff changes which have been undertaken recently and the fact that Luisa's old desk on the 4th floor is now occupied by someone else.
The request for Luisa to move from 1 flexible resource team to another is a reasonable management request and her continued refusal to accept this move is unfounded.
This is also supported by HMRC's own occupation health advisers who, despite what Luisa thinks, did not recommend that she stays with her old team."

11.54 On 23 July 2015 Ms Pajor completed an Abuse, Violence or Threats to staff report form in which she stated that the Claimant had been subjected her to "lots of screaming & shouting" during two telephone conversations.

11.55 On 24 July 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work until 16 August 2015 because of low mood.

11.56 By a letter dated 31 July 2015 Ms Williams, Investigation Manager, invited the Claimant to attend a meeting on 18 August 2015 to discuss her complaint against Ms Barraclough under the grievance policy.

11.57 By a letter dated 31 July 2015 Ms Williams, Investigation Manager, invited Ms Barraclough to attend a meeting on 18 August 2015 to discuss the complaint made by the Claimant against her under the grievance policy.

11.58 On 13 August 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work until 3 September 2015 because of low mood.

11.59 On 17 August 2015 Ms Pajor prepared a report on the Claimant's sickness absence. She concluded by recommending that the Claimant be dismissed on the ground of her continuing absence. She also recommended that the Claimant be given 60% compensation under the Civil Service Compensation Scheme "the CSC Scheme").

11.60 On 18 August 2015 the Claimant attended a grievance investigation meeting which was conducted by Ms Williams.

11.61 By a letter dated 25 August 2015 Ms Pajor informed the Claimant:-
"…
As there appears to be no prospect of you returning to work within a reasonable time and taking account of the Occupational Health advice ill-health retirement is unlikely to apply I must now make a decision about your future in the Department.
I have decided to recommend ending your employment with the Department on the grounds of continuing absence due to ill health …".

11.62 By a letter dated 3 September 2015 Ms Williams informed the Claimant:-
"I have now enclosed a copy of the amended meeting notes, and can only apologise for the error within them regarding the meeting…
If however you have not written to me within two weeks from the date of this letter, then I will assume you are happy with the meeting notes and continue with the meting with Dawn...".

11.63 By a letter dated 4 September 2015 Mr McDougall invited the Claimant to attend a meeting to make representations about Ms Pajor's recommendation that she be dismissed.

11.64 By a letter dated 23 September 2015 the Claimant presented her submissions to Mr McDougall.

11.65 On 8 October 2015 Mr McDougall telephoned the Claimant as requested by her. He told her that he had decided to terminate her employment and he gave his reasons.

11.66 On 16 October 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work because of low mood.

11.67 By a letter dated 20 October 2015 addressed to the Claimant Mr McDougall confirmed his decision to dismiss the Claimant on grounds of continuing sickness. He also informed her that the HR Director had decided not to award any compensation to the Claimant under the CSC Scheme.

11.68 By a letter dated 29 October 2015 Ms Pajor informed the Claimant that her grievance had not been upheld.

11.69 By a letter dated 2 November 2015 the Claimant informed Mr Jagus that she wished to appeal the decision to dismiss.

11.70 By a letter dated 20 November 2015 Mr Jagus invited the Claimant to attend an Appeal Hearing. He asked her to provide full written details of the grounds of her appeal.

11.71 On 20 November 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work until 16 December 2015 because of low mood.

11.72 On 11 December 2015 the Claimant attended an appeal hearing which was conducted by Mr Jagus. Mr McDougall also attended.

11.73 After the hearing Mr Jagus spoke to Mr Horne about the decision to move the Claimant to another team

11.74 By a letter dated 15 December 2015 Mr Jagus informed the Claimant about his conversation with Mr Horne and invited her to comment by 31 December.

11.75 By a letter dated 19 December 2015 the Claimant informed the Respondent that she wished to appeal against the decision not to award her any compensation.

11.76 On 22 December 2015 the Claimant's GP signed a Statement of Fitness for Work in which he advised that she was not fit for work until 1 February 2016 because of anxiety with depression.

11.77 By a letter dated 15 January 2016 Mr Jagus informed the Claimant that he had decided not to uphold her appeal.

11.78 By a letter dated 19 January 2016 Mr Goad, HR Director, informed the Claimant that he had reviewed the decision not to award her any compensation under the CSC Scheme and that he considered that decision to be appropriate.

Law

12 Section 20 of the Equality Act 2010 ("the 2010 Act") provides:-

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

(2) The duty comprises the following three requirements.

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

Section 21 of the 2010 Act provides:-

"(1) A failure to comply with the first … requirement is a failure to comply with a duty to make reasonable adjustments.

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

Section 15 of the 2010 Act 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 I 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.

Section 123 of the 2010 Act provide:-
"(1) … Proceedings on a complaint within section 120 may not be brought after the end of-
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2) …
(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;
(c) failure to do something is to be treated as occurring when the person in question decided o 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".

Section 136 of the 2010 Act provides:-
"(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision … ".

Paragraph 20(1) of Part 3 of Schedule 8 to the 2010 Act provides:-
"A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know-
(a) …
(b) … that an interested disabled person has a disabled person has a disability and is likely to be placed at the disadvantage referred to in the first … requirement."

The Equality and Human Rights Commission: Code of Practice on Employment (2011) ("the Code") provides:-
" …
6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.
6.24 There is no onus on the disabled worked to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.
6.25 Effective and practicable adjustments for disabled worker often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example,

compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.
…
6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

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

… ".

Submissions

13 The Claimant presented oral submissions. Mr Lewis presented written submissions and also made oral submissions. He referred to **Environment Agency v Rowan** [2008] IRLR 27 EAT; **Salford NHS PCT v Smith** UKEAT/0507/10/JOJ; **Secretary of State for Work and Pensions (Job Centre Plus) v Higgins**; **Kenny v Hampshire Constabulary** [1999] IRLR 76 EAT; **Chief Constable of West Midlands v Harrod** [2015] IRLR 790 CA; **Ministry of Justice v O'Brien** [2013] SC; **Seldon v Clarkson Wright & Jakes** [2012] UKSC 16 SC. Where appropriate, reference to the submissions will be made in the Discussion section of these Reasons.

Discussion

Complaint that the Respondent failed to comply with its duty to make reasonable adjustments

Did the Respondent apply a provision, criterion or practice ("PCP")?

14 At the Preliminary hearing Employment Judge Lancaster identified that the PCP was a requirement on 27 April 2016 that the Claimant work on Floor 3. That decision was confirmed on 20 July 2016. The Tribunal saw no reason to depart from that formulation. It did not adopt the PCP which Mr Lewis accepted had been put in place by the Respondent. He submitted that the PCP was a decision or requirement that the Claimant move teams and – as part of that move – work from a new/different desk with her new team on Floor 3. In the Tribunal's judgment that was an unnecessary gloss which arguably imported factors which were evidence of the alleged substantial disadvantage at which the Claimant alleged she had been put.

Did the PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

15 The Tribunal understood that the burden of proof lay with the Claimant. It accepted her evidence about what had happened in December 2013 when the Respondent wanted her to move from Floor 3 to Floor 4. She began a period of absence due to sickness. She told Ms Islam, her manager, that the prospect of the move was daunting because of her mental condition and she stated that she did not want to move. Ms Islam patiently explained the reason for the move and in effect conducted a negotiation which resulted in the Claimant moving floors.

Over the course of several telephone conversations the Claimant moved from a position of refusal to an agreement to move. Ms Islam achieved that outcome by among other matters agreeing to assist the Claimant with moving her pedestal and belongings. The Claimant attended work at a time when few if any of her colleagues were there so that there would not be any fuss. It appeared that the move went smoothly. Subsequently the Claimant apologized to Ms Islam "that she allowed a small change like desk move turn into a big thing" and explained that she "was settled downstairs and felt unsettled at work so made her home life seem more unsettled."

16 In the Tribunal's judgment the December 2013 episode was significant. The Respondent decided to move her from Floor 3 to Floor 4 and it did not matter that in April 2015 it was proposed that she should return to that floor - it was the proposed move itself that was key – not what was the floor level; there was no evidence that at that time she had a lack of trust in Ms Barraclough and that she was disinclined to comply with managerial requests from her; although she did in fact move, that was only after Ms Islam's considerable efforts; the Occupational Health report dated 6 January 2014 demonstrated that the move had successfully been effected and that the Claimant was fit to attend work.

17 The Tribunal found that the Claimant needed the security of an established routine at the workplace and that any change posed a threat which unsettled her. She gave several examples of how she reacted to stressful situations by seeking to avoid them:- she chose not to board a bus if there were many people already on board; when shopping in a supermarket she avoided going to a till where there were already three people in the queue; she felt that people were looking at her if she came into an environment where there were people she did not know; she had a fear of drawing attention to herself. The Claimant's evidence on these matters was genuine – these were almost throwaway remarks which were not preplanned.

18 In the circumstances the Tribunal found and decided that the PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. It was clear that the PCP had a serious unsettling effect on the Claimant which caused her to withdraw from the situation by refusing to comply with the request to move. Other employees in similar circumstances would not have experienced such a serious effect; they would not have refused to comply with the request. The Tribunal rejected Mr Lewis' submission that it was necessary for the Claimant to produce any medical evidence. There was ample evidence to support its conclusion.

19 In reaching its conclusion the Tribunal rejected Mr Lewis' submission that there were factors other than the PCP which weighed heavily on the Claimant at the time. It accepted the Claimant's evidence and found that she had every intention of returning to work on 27 April 2015. It made that finding notwithstanding the fact that on 25 March 2015 she asked Mr Clarke whether she could move to another team and on 27 April 2015 she mentioned a possible move when she spoke to Ms Scaife. The Tribunal also found that in February 2015 the Claimant had an extremely unpleasant experience with Ms Barraclough. She felt that she had been threatened, no one would believe her, and that after the verbal warning she was at risk of further disciplinary sanction if she stepped out of line at all. The Tribunal found that the Claimant's sense of grievance against Ms Barraclough did not prevent her from returning to work on 27 April 2015. The Respondent had already assured her that Ms Barraclough was no

longer part of her management chain. In those circumstances, the Tribunal was satisfied that the Claimant genuinely wanted to return to work and would have done so but for the PCP. The Claimant would have agreed to move to Floor 3 even though Ms Barraclough was on that floor. In the Tribunal's judgment it was clear from the notes of the conversations with Ms Scaife before and on 27 April 2015 that the communication of the decision to move her to Ms Pajor's team caused the Claimant not to return to work on 27 April 2015 or on the next day.

20 The Tribunal also found that *before 27 April 2015* (our emphasis) there was no basis for Mr Lewis' submission that the Claimant was generally unable to accept managerial decisions. Her performance reviews very much pointed to the contrary conclusion. She was regarded by her line manager, Mr Coggill, as a very valuable member of the team who exceeded targets. She certainly did not have a personality or character trait as suggested by Mr Lewis. She had not been given any warnings for conduct or performance other than the verbal warning in February 2015. The only evidence which might support Mr Lewis' submission was the Claimant's refusal to move in December 2013. However, that episode did not help the Respondent's case because it bore a striking resemblance to the proposed April 2015 move. In the Tribunal's judgment the Claimant's behaviour after 27 April 2015 was not relevant to this issue. It could not have been a factor in placing her at any disadvantage.

21 Mr Lewis submitted that the fact that the Claimant was the only person being asked to move was a significant factor and not the PCP. The Tribunal decided that it was not possible to separate this factor from the PCP. At the material time no other member of the Claimant's team was required to move to Floor 3. The hypothetical case that the Claimant would have agreed to move if others had been asked to move at the same time did not assist the Respondent because, as it had done in 2013, the Respondent might still have had to "negotiate" with her to achieve its aim. The point was that only the Claimant was asked to move. That was the PCP. It put her at a substantial disadvantage by making her (in her mind) the centre of attention which in turn had a negative impact on her mental wellbeing.

22 The Tribunal found that during her employment before February 2015 there was no evidence that alcoholism had prevented the Claimant from performing her work duties. She told Ms Barraclough about her condition in December 2013. Ms Barraclough was not surprised and confirmed that it had not been a problem at work. Between February and April 2015 the Claimant's GP signed Fit Notes which stated that alcohol dependency was a condition preventing her from being fit for work. Although on 27 April 2015 the Claimant told Ms Scaife that she could not return to work that day if she needed a drink beforehand, the Tribunal accepted her evidence and found that but for the PCP the Claimant would have returned to work the next day. The notes of telephone conversations before and on that day supported that conclusion.

23 It was also apparent to the Tribunal that for some time before April 2015 the Claimant had experienced difficulties in her personal life. That included issues relating to her children together with her allegations that she had been sexually abused, sexually assaulted and raped. Her difficulties continued up to and during this Hearing. However, the Tribunal was unable to find that she had reached a particularly low point in April 2015 nor that this was a relevant factor at that time. Mr Lewis relied on an email where Ms Senior, Front Line Manager, reported to Ms Pajor a telephone conversation she had with the Claimant in which the latter

said she "has never felt so low in her life". That conversation occurred on 7 September 2015 and therefore postdated the material time by over four months. It was not safe to conclude that this was a relevant factor in April 2015.

Did the Respondent know or could it reasonably be expected to know that the Claimant was likely to be placed at such a substantial disadvantage by the PCP?

24 The Claimant gave evidence about the Respondent's decision to move her in December 2013, her initial refusal to move and how she had subsequently agreed to it. In the Hearing bundle there were extensive contemporaneous notes of conversations with her made by Ms Islam and Ms Barraclough. There was also a report dated 6 January 2014 in which the Occupational Health Adviser stated that the Claimant advised she had suffered with depression for about three years. She also referred to the proposed move and its effect on the Claimant. She provided the opinion that it was likely that the Claimant would be considered as disabled under the 2010 Act.

25 In cross examination Mr Horne explained that on 21 April 2015 he discussed with Mr Clarke the resource balance within the three Flexible Resource Teams for which he was responsible. They were managed by Ms Pajor, Ms Scaife and Mr Kelly. He became aware that Ms Pajor's team had limited resource cover over peak holiday periods due to it having higher numbers of part time and term time employees. Mr Clarke explained that Ms Scaife's team was maintaining business delivery despite the fact that the Claimant had been absent for two months. Mr Horne decided to support Ms Pajor by moving the Claimant into her team. He asked Ms Barraclough to relay that decision to Ms Scaife and Ms Pajor. When making his decision, he did not know the details of the Claimant's illness or when she would return to work; he was aware that the Claimant was an alcoholic but not that she had any mental impairment.

26 Mr Horne was asked why on 28 April 2015 he told the Claimant that he had no interest in her issues about previous moves. He explained that comment by suggesting that it be considered in context. During that conversation he told the Claimant that he wanted to draw a line under what had happened before; he was interested in her now and in the future. The Tribunal rejected that explanation. In its judgment it was nothing more than an attempt to put himself in a good light after the event. The Tribunal found that he spoke to the Claimant in a brusque manner. He bluntly told her that he had no interest in past issues around previous moves. The Tribunal had no doubt that his detailed note would have contained the explanation he now offered had he given it at the time. It accepted the Claimant's evidence that he did not make those additional comments.

27 Mr Lewis submitted that Mr Horne genuinely felt that the PCP was in the best interests not only of the Respondent but also of the Claimant. It followed that he did not believe and could not reasonably be expected to know that the PCP was likely to put the Claimant at the substantial disadvantage previously identified. The Tribunal accepted Mr Horne's evidence as to what he did in fact know at the time he made his decision. However it found and decided that there was ample time for him to be acquainted as to the Claimant's mental impairment and the 2013 episode before making his decision. It failed to understand why Mr Clarke had not explained more fully the Claimant's circumstances during the conversation on 21 April 2015. Mr Clarke must have been aware that there were notes of conversations in December 2013 which gave a detailed account of the proposed move, how the Claimant had responded and how management

successfully secured her agreement to move. Further he must have known that there was an OH report which referred to this episode and confirmed that it was likely that the Claimant would be considered as disabled under the 2010 Act. Before making his decision Mr Horne did not speak to Ms Barraclough about the Claimant's medical condition. As Ms Islam's line manager at the material time, she must have been aware of the 2013 episode and the OH report. The Tribunal found that Mr Horne first became aware of the Claimant's history in the first week of May 2015 - after he took up his post. In its judgment he ought reasonably have been made aware by Mr Clarke or someone in higher management with that knowledge. He made his decision in ignorance and subsequently refused to listen to any evidence which might have led to a change of mind.

28 In those circumstances the Tribunal found and decided that the Respondent could reasonably have been expected to know that the Claimant was likely to be placed at the substantial disadvantage (identified above) by the PCP. In its judgment Mr Lewis' submission that Mr Horne genuinely felt that the PCP was in the Claimant's best interests did not address this issue. It was potentially of relevance to the reasonableness of the step which the Claimant contended that the Respondent should have taken.

What is the step that the Claimant contends the Respondent should have taken?

29 Mr Lewis submitted that it was overly simplistic to identify the step as merely being to permit the Claimant to work from her old desk. There were questions of context and timing to be considered. In fact the Claimant wanted the Respondent to revoke the requirement and put in place an alternative permanent arrangement which permitted the Claimant not only to sit at her old desk and her old seat but also to sit next to Ms Whittingham. There were other features to this arrangement.

30 The Tribunal noted that at the Preliminary Hearing Employment Judge Lancaster identified that the Claimant complained that the Respondent had failed to make a reasonable adjustment by not allowing the Claimant to remain at or return to her existing desk on Floor 4 for a period. It saw no reason to depart from that formulation. The issues raised by Mr Lewis were arguably relevant to the reasonableness of the proposed step.

Did the Respondent fail to comply with a duty to make reasonable adjustments?

31 The Tribunal understood that the Code provided guidance as to meaning of the 'reasonable steps' which employers have to take in order to comply with their duty under the 2010 Act. It considered paragraphs 6.23 to 6.39 of the Code.

32 The Tribunal found that the Claimant had not been consistent about the steps she wanted the Respondent to take. However, in its judgment, that did not absolve the Respondent from its responsibility to take a reasonable step. There was no dispute that on 27 and 28 April 2015 the Claimant did not want to move to Floor 3. The question was whether there was any reasonable step (such as that identified in paragraph 30 above) which could have been taken at that time.

33 Mr Lewis submitted that a temporary or trial measure was not capable of constituting a reasonable adjustment (see **Environmental Agency** (para 61) and **Salford NHS Primary Care Trust** (para 49)). The Tribunal did not understand the Employment Appeal Tribunal in either case to be deciding that a temporary

measure could never a reasonable adjustment. In this case the issue was clear - the Respondent wanted the Claimant to move and she had refused. The identified step was a step in its own right and not part of a process of determining what step should be taken.

34 The Tribunal rejected Mr Lewis' submission that in essence the Claimant was requesting an adjustment of a similar nature to that requested in **Kenny**. It did not find that she wanted a personal chaperone or carer in the person of Ms Whittington. That proposition was not supported by any evidence. If the step had been implemented, the Claimant would have returned to her old desk for a period. As it happened, that was near to Ms Whittington who had in the past provided her with emotional support. That was as far as any analogy could be taken. Requiring the Respondent to implement the step fell a very long way short of imposing on it a statutory duty to provide a carer to attend to the Claimant's personal needs. Ms Whittington was not the Claimant's carer.

35 The Tribunal considered whether between 21 and 28 April 2015 the identified step would have been effective in preventing the substantial disadvantage. In its judgment the December 2013 episode was a relevant consideration in that assessment. It was clear that the Claimant initially resisted the proposed move and she had time off work due to sickness. However, the Respondent had patiently explained the need for the move and eventually persuaded her to agree to it. The Tribunal found that, if the Respondent had allowed the Claimant to return to work at her existing desk on Floor 4, it would in a relatively short period – no more than two weeks – have succeeded in persuading her to move to Floor 3 where, according to Mr Horne, she knew several members of the new team and was a good friend of one of them. It did not matter that the Claimant had at that time not informed the Respondent that she only wanted to return to Floor 4 temporarily. It was for the Respondent to identify and propose that step if it was reasonable. The Tribunal found and decided that there was no or no proper basis for Mr Horne's stated strong belief that, if the Claimant had returned to her old desk temporarily, as the time for moving got closer she would have put up resistance and become upset. On the contrary it was far more likely that she would have accepted the move and apologized for making it such a big issue (as she had done in 2013). The Fit Notes and the OH report issued after 27 April 2015 did not detract from that conclusion. The Claimant had intended to return to work. She reacted adversely to Mr Horne's decision and remained absent due to sickness. The Tribunal was satisfied that the sickness was caused by the decision and the failure to take the step.

36 The Tribunal next considered whether the step would have been practicable. It found that in or about April 2015 four members of staff had been released for project work (two from Ms Pajor's team and two from Mr Kelly's team). Shortly afterwards a member of staff was promoted and left Ms Pajor's team. In or about June or July 2015 the Respondent invited expressions of interest in joining Ms Pajor's team. A third person also joined that team at or about that time. In those circumstances the Tribunal found that the Respondent had not demonstrated any urgency in its approach to supporting the team. There was no practical reason why Ms Pajor could not have continued for two weeks with her complement of staff until the Claimant was ready to move. The move would have happened after a relatively short period of time. Ms Scaife and Ms Pajor would undoubtedly have been able to liaise over the management of the Claimant during that time. It was clear that there would have been no urgent need to transfer another member of Ms Scaife's team in the interim.

37 The Tribunal next considered whether the step would have caused disruption. It found that the three Flexible Resource Teams had been newly created and that they were to become engaged in new types of work. Mr Horne identified that Ms Pajor's team needed to be strengthened because it had too many term-time only and part-time workers. Although the Claimant had been absent for two months, Ms Scaife's team had been able to meet its performance targets. At the material time her team comprised ten members of staff including the Claimant. Six of these worked 37 hours a week, 5 days a week and several had more experience than the Claimant. Mr Horne decided not to move any of these because in his opinion that would have left the team under resourced. He told the Tribunal there were several reasons for selecting the Claimant for the move:- her working hours pattern, her skills and knowledge, her ability to learn quickly and to be strong technically, her ability to communicate effectively with customers on the telephone. The Tribunal found that the step would not have disrupted Mr Horne's plan for the delivery of the service. The Respondent had proposed that the Claimant return to work (in Ms Pajor's team) on reduced hours and with key performance indicators relaxed. By way of contrast, if the step had been implemented, the Claimant would have joined the new team working her full contractual hours with performance targets to be achieved. The Tribunal also rejected the submission that the step would have had an adverse impact on Ms Whittington. There was no evidence to support any finding that Ms Whittington had stated or given any indication that supporting the Claimant was a burden.

38 The Tribunal found that the Respondent was distracted from identifying the step because of several other factors when deciding not to change its decision to move the Claimant. On and after 27 April 2015 the Claimant was clearly disturbed by the decision. She made known that feeling in numerous conversations with Mr Horne, Ms Scaife, Ms Pajor and others. That led Mr Horne and others to close their minds to the possibility that there was a reasonable step to take. That was demonstrated when in cross examination Mr Horne stated that he was unwilling to concede the Claimant's "demand". He then stated that, if the Claimant's GP had expressly asked for the reasonable adjustment of not moving desk, he would have granted it. When asked by the Employment Judge to clarify that answer, he repeated it. His position and that of his colleagues led the Tribunal to conclude that he was unwilling to acknowledge or try and find any evidence of a reasonable adjustment to be made by the Respondent. The Respondent did not ask the GP about adjustments. Ms Scaife could have done so as early as 24 April 2015 but declined to discuss such matters. In May 2015 the Respondent did not ask the OH adviser. It was not until July 2015 that Ms Pajor did discuss possible recommendations.

39 The Tribunal found and decided that the Respondent failed to make a reasonable adjustment by not allowing the Claimant to remain at or return to her existing desk on Floor 4 for a period of two weeks. In reaching that conclusion it took into consideration Mr Horne's evidence that for various reasons he believed that the move was in the Claimant's interests. Even if that belief was genuine (and the Tribunal had reservations – not least because the evidence was not fully substantiated and no steps had been taken by him or any other manager to promote the advantages of the move to the Claimant), that did not excuse the Respondent from identifying and implementing the step. The Tribunal also took into account the fact that the Respondent had offered the Claimant several adjustments including a phased to return to work, a lighter workload, a temporary reduction in hours, the removal of performance targets, a stress reduction plan.

In addition it had arranged and funded six counselling sessions and discounted her earlier period of absence in the absence management process. Again this did not absolve the Respondent from its duty.

40 Accordingly the complaint under this head succeeded.

Complaint that the Respondent treated the Claimant unfavourably because of something arising in consequence of her disability when dismissing her

Did the Respondent treat the Claimant unfavourably?
41 Mr Lewis accepted that the Respondent's decision to dismiss the Claimant constituted unfavourable treatment.

Was that treatment because of something arising in consequence of her disability?
42 The Tribunal found that the reason for dismissal was the Claimant's absence.

43 The Tribunal rejected Mr Lewis's submission that the real reason for the Claimant's absence was a combination of the factors discussed in paragraphs 19-23 above. It accepted her evidence and found that her absence was caused by her reaction to Mr Horne's decision to move her to Ms Pajor's team. As a result of her depression she avoided the proposed change to her work environment by absenting herself. The Tribunal was satisfied that there was ample evidence to support that conclusion. As fully discussed above, that included the 2013 episode, the 2014 OH report and the notes of conversations immediately before and including 28 April 2015. The Fit Notes and the OH report did not detract from that conclusion because the Claimant would have returned to work if the Respondent had made the reasonable adjustment.

Was the treatment a proportionate means of achieving a legitimate aim?
44 The Tribunal considered paragraphs 5.11 to 5.22 and 4.25 to 4.32 of the Code. It found and decided that the Respondent had a legitimate aim, namely to ensure that its team members attend work with satisfactory levels of attendance. It did not adopt the legitimate aim suggested by Mr Lewis which, as he rightly acknowledged, was set out widely. Among other matters it included several factors which related to the need for good conduct at work which were not relevant to these issues.

45 The Tribunal understood that the means used had to be appropriate with a view to achieving the aim and be necessary to that end. There was of course no doubt that dismissal was one means of achieving the Respondent's aim. The Claimant had been absent due to sickness for several months and there was no prospect of an early return to work *unless the decision makers understood the root cause of that absence* (our emphasis). As previously discussed, the Tribunal decided that the Respondent had failed to comply with its duty to make reasonable adjustments. If it had allowed the Claimant to return to her old desk for a period of two weeks, she would have agreed to move to the new team on Floor 3.

46 The Tribunal noted the guidance in paragraph 5.21 which stated:-
"If an employer has failed to make a reasonable adjustment which would have prevented or minimized the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."
It decided that, in the light of its decision on the reasonable adjustment complaint,

dismissal was not appropriate. To decide otherwise would among other matters permit the Respondent to benefit from its own wrongdoing. Mr Lewis pointed to how the Claimant's absence had adversely impacted on the Respondent. In the Tribunal's judgment, this could and should have been avoided by Mr Horne. The Respondent had ample opportunity not to require the Claimant to move with immediate effect. Subsequently (and on several occasions when Ms Pajor asked Mr Horne to reconsider) it spurned opportunities to review its decision. Further the Tribunal was not satisfied that it was too late to take some action other than dismissal. The Claimant had been employed by the Respondent for many years and she was well regarded. Before February 2015 it appeared that she had an unblemished record. She could still have been an asset to the Respondent. Although it might not have been possible to take the identified step, the Tribunal considered that an approach which acknowledged that the Respondent had acted unlawfully since April 2015 could have achieved a resolution of the difficulties which had arisen even by October 2015.

47 Accordingly the Tribunal decided that the Respondent had not shown that the treatment was a proportionate means of achieving a legitimate aim. The complaint under this head succeeded.

Time limit

48 By his Preliminary Hearing Judgment on 10 August 2016 Employment Judge Lancaster adjudged that these complaints were conduct extending over a period ending on the effective date of termination and that, although they were presented outside the primary limitation period, it was just and equitable to extend time. Reasons for that Judgment were sent to the parties on 5 September 2016. On Day 2 Mr Lewis suggested that there might still be a residual issue, namely that the reasonable adjustment complaint was out of time. When the Employment Judge referred to the Preliminary Hearing Judgment, Mr Lewis responded that the matter had arguably been left open. With that in mind, when the Claimant gave evidence, the Tribunal asked her questions about the reason for the delay in presenting the Claim Form. Mr Lewis did not address the matter in his final submission. However, for the sake of completeness, the Tribunal saw no reason to depart from the Preliminary Hearing Judgment that it was just and equitable to extend time.

Costs

49 In his submission Mr Lewis reserved the Respondent's position on making an application for costs thrown away by the Claimant's failure to attend the Hearing on Days 1, 5 and 7 of the Hearing.

Conclusion

50 The Tribunal ordered that this matter be listed for a Preliminary Hearing to be conducted by Employment Judge Keevash. The parties are to attend. At that Hearing he will identify the issues which will need to be determined at the Remedy Hearing and make appropriate Case Management Orders including listing the matter for hearing.

Employment Judge Keevash

Date 30 March 2017