EMPLOYMENT TRIBUNALS

Claimant: Mrs A Middleton

Respondent: Highways Agency

HELD AT: Liverpool **ON:** 15 and 16 May 2017

BEFORE: Employment Judge Horne
Ms F Crane
Mr P C Northam

REPRESENTATION:

Claimant: Mr J Davies, counsel
Respondent: Mr D Tinkler, counsel

Judgment was sent to the parties on 7 June 2017. The respondent requested written reasons for the judgment at the hearing. Accordingly the following reasons are provided:

REASONS

Complaints and issues

Complaints

1. By a claim form presented on 2 June 2016, the claimant raised the following complaints:

   1.1. unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA");

   1.2. discrimination arising from disability, contrary to sections 15 and 39 of the Equality Act 2010 ("EqA"),

   1.3. failure to make adjustments, contrary to sections 20, 21 and 39 of EqA: and

   1.4. harassment related to disability, contrary to sections 26 and 40 of EqA.

Our approach to the issues

2. The proposed issues for determination were set out in a list prepared on the claimant's behalf. At the start of the hearing, counsel for the respondent indicated that the list was agreed, subject to a subtle area of disagreement over the provision, criterion or practice alleged by the claimant. As the hearing

progressed, the list was further refined to abandon certain adjustments for which the claimant had originally contended.

3. Using the written list as a starting point, and incorporating the changes made during the course of the hearing, here is our understanding of the areas of agreement and the issues we had to determine.

Duty to make adjustments

4. It was common ground that the claimant at all relevant times was disabled by long-term back pain, coccydynia and trochanteric bursitis.

5. The respondent had an undisputed provision, criterion or practice (PCP1) of requiring Traffic Officers to sit and/or drive for a sustained or prolonged period.

6. The claimant alleged that the respondent had a provision, criterion or practice (PCP2) of subjecting applicants for redeployment to a "sift and a competitive selection process". The respondent did not accept that applicants for employment were treated in that way. The respondent's formulation of PCP2 was that, prior to being interviewed for redeployment, candidates had to satisfy the respondent that they met the essential requirements of the role.

7. By the time the parties presented their closing submissions, it was the claimant's case that one, and only one, adjustment should have been made to prevent the disadvantageous effect of the two PCPs. By way of adjustment, the respondent should have offered the claimant the role of Executive Officer in Customer Operations ("the EO Role").

8. We therefore had to decide the following issues:

   8.1. Did PCP1 put the claimant at a substantial disadvantage compared to persons who were not disabled?

   8.2. Did PCP2 exist as alleged in the form alleged by the claimant? If not, it would be treated as having existed as formulated by the respondent.

   8.3. Did PCP2 (as appropriately formulated) put the claimant at a substantial disadvantage compared to persons who were not disabled?

   8.4. Would it be reasonable for the respondent to have to offer the claimant the EO Role?

Discrimination arising from disability

9. There was no dispute that the respondent had treated the claimant unfavourably by dismissing her. The reason for dismissal was that the respondent believed, correctly, that the claimant was incapable of carrying out her role as a Traffic Officer because of her health. That belief arose in consequence of her disability.

10. We had to determine whether or not the respondent could show that the dismissal was a proportionate means of achieving a legitimate aim. There was one ground on which the claimant contended that dismissal was disproportionate. The respondent had failed to make a reasonable adjustment as an alternative to dismissal. That adjustment was to offer the claimant the EO Role.

Unfair dismissal

11. The reason for dismissal was uncontroversial and is set out above. The claimant accepted that it was a reason that related to her capability. What we had to decide was whether the respondent acted reasonably or unreasonably in treating that reason as being sufficient to dismiss the claimant. Warning ourselves not to

become distracted from the statutory language, we accepted the claimant's invitation to concentrate in particular on two arguments:

11.1. the respondent should have delayed the decision to dismiss; and

11.2. the respondent should have offered the claimant the EO Role.

Harassment

12. The complaint of harassment was based on the following allegations of unwanted conduct:

12.1. On 24 February 2014 Mr Robert Sutton, the claimant's line manager, said to the claimant that she could always take early retirement. He is alleged to have said this in a glib manner as if it were amusing.

12.2. On 7 April 2014, Mr Sutton repeatedly told the claimant that there were no reasonable adjustments that could be made to assist the claimant in returning to her job. He added that there would be an increased health and safety risk to the claimant and her colleagues if she continued in her role as Traffic Officer.

12.3. On 28 May 2015, Mr Sutton told the claimant that if she returned to work in her present role she would be a danger to herself and to her colleagues.

12.4. On 8 June 2015, Mr Sutton wrote to the claimant warning her that the respondent would have no alternative but to consider dismissing her.

12.5. On 27 August 2015, Mr Sutton asked the claimant if she was putting in an application for ill health retirement. He told the claimant that she could not return to her old role until she had been cleared by Occupational Health to do so.

12.6. On 29 October 2015, Mr Sutton during the course of a meeting with the claimant refused to make eye contact with the claimant and dealt with her in an abrupt and stern manner. During that meeting he is alleged to have given the claimant an ultimatum to return to work.

13. The issues for us to determine were as follows:

13.1. Did Mr Sutton conduct himself as alleged?

13.2. Was that conduct unwanted?

13.3. Was the conduct related to the claimant's disability?

13.4. If so, did that conduct have the effect of either violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? (The claimant did not contend that Mr Sutton's conduct was done for that purpose).

13.5. Did the alleged conduct amount to an act extending over a period?

13.6. If not, would it be just and equitable for the Tribunal to extend the time limit?

Evidence

14. We considered documents in a bundle which we marked CR1. In keeping with the warning that we gave to the parties, we did not read every page of the bundle. Rather, we concentrated our attention on those documents to which the

parties had directed us, either in the course of the hearing or by reference in the witness statements.

15. We heard evidence from Robert Sutton, Sean McCormack, Carole Bond and the claimant.

16. Having heard the parties' submissions, we considered that a number of points in relation to the EO Role had not been put to Miss Bond. We therefore asked for Miss Bond to be recalled to answer further questions.

Facts

17. The respondent is a government agency responsible for maintaining the English Strategic Road Network, including English motorways.

18. The claimant was employed from 7 November 2005 until 28 January 2016 as an On-road Highways Officer. She was part of a team of 11 Traffic Officers based at Rob Lane Outstation, Newton-le-Willows. At all relevant times she was line-managed by Mr Rob Sutton, the On-road Team Manager. According to her written job description, the purpose of her role was "to deliver a customer focused service through effective management of the strategic road network as part of a team." Responsibilities included patrolling in a marked vehicle, placing and removing cones, securing accident sites and removing debris. Most of her patrol work was done on fast roads including motorways. The respondent's procedures required to go out on patrol as one of a pair of officers. Only those Traffic Officers who had been specially trained were authorised to patrol alone.

19. A Highways Officer's role is safety-critical. Failure to adhere to agreed procedures, whether deliberate or accidental, would place herself, colleagues and possibly motorists in danger. She would have to make quick decisions and immediately prioritise the steps she would take on arrival.

20. The respondent kept a Staff Handbook containing many written procedures. These included the respondent's Recruitment Procedure at Chapter 2B, an Attendance Management Procedure at Chapter 10 and Attendance Management Guidance at Chapter 14.

21. The Recruitment Procedure was set out in paragraph 2.1. Its scope was stated to include "the selection and appointment of Highways England employees." It did not mention redeployment.

22. Paragraph 2.1.1 of the Recruitment Procedure was headed, "Equal Opportunities employer". Its final two sentences read:

> "Highways England subscribes to the commitments in the Department for Work and Pensions' 'positive about disability' scheme, shown by the 'two-tick' symbol. This guarantees an interview for applicants with disabilities who meet the essential requirements for the job."

23. The Attendance Management Procedure laid out a scheme of gradually escalating levels of intervention to deal with long-term sickness absence. The final three stages were an Options meeting, a Decision Officer meeting (where consideration would be given to termination of employment) and an Appeal. At paragraph 10.3, the Procedure stated, "This document should be read in conjunction with the Attendance Management Policy and Guidance."

24.. Paragraph 14.10.2 of the Attendance Management Guidance was headed, "Medically Unfit Process guidance note and flowchart". Here are some of its relevant provisions:

24.1. Its stated purpose was: "To redeploy any member of Customer Operations in a safety critical role, who is unable for medical reasons to continue in their current role, to a suitable alternative role…"

24.2. At sub-paragraph 1, the Guidance gave an example of adjustments made so that a Traffic Officer could take up a "back office" role.

24.3. Sub-paragraph 4 outlined the procedure. The HR Business Partner should establish whether the employee agreed to seek redeployment. If they did, they should complete a "Compassionate Transfer Request Form", following which the line manager should complete a written assessment of the employee's competencies against the Highways England Competency Framework."

24.4. Sub-paragraph 8 provided that "Roles at an appropriate level should be considered by the [HR Business Partner and line manager]…A reasonable level of support can be considered to help close any identified skills gap. This does not remove the need to demonstrate in role competence through assessment, where applicable."

24.5. At sub-paragraph 10, "Roles that will be considered are those currently available or those available in the reasonably foreseeable future. It is not normally expected that a role will be created in order to facilitate redeployment."

24.6. Sub-paragraph 11(b) addressed what should happen if a suitable role was identified. "The individual has a discussion with the potential line manager. The aim of the discussion is to assess the individual's capability against the Highways England competency framework and behaviour requirements for the role, to establish if fit for work. It provides the individual with an opportunity to find out more about the role. It is not a competitive interview. "

24.7. The Guidance at sub-paragraph 14 provided: "If attempts to redeploy are unsuccessful, this may result in dismissal of the individual…"

25. Before taking up her role as a Traffic Officer, the claimant worked briefly in the Regional Control Centre. She found that spending time in the control room gave her migraines.

26. The claimant had a long history of sickness absence from work. Between 8 November 2009 and 13 April 2013 the claimant was absent on 19 occasions for a total of 173 working days. The causes varied. They included stress, leg pain and back pain.

27. In about 2010, for a period of time, the claimant was placed on restricted duties. During that time she worked for somewhere between one and three months in the Business Support Team, based at the respondent's North West Regional Control Centre, also situated in Rob Lane. Her manager for that period was the Performance Team Manager, Miss Carole Bond. One of the claimant's tasks was to carry out an annual leave audit comparing regional annual rosters with the centralised Human Resources leave record. Generally, Miss Bond provided the claimant with specific tasks that were non-sensitive and not deadline driven. At the

28. On 22 November 2013 the claimant had an accident at work. We do not have to decide whether the respondent was in any way to blame for that accident. It is

common ground that, following that accident, the claimant was off work on a number of occasions of increasing length with aggravated symptoms, including long-term back pain, coccydynia and trochanteric bursitis.

29. On 24 February 2014, Mr Sutton visited the claimant's home to conduct an absence review meeting. There was a discussion of the claimant's health, practical matters such as the claimant's injury benefits claim form, the new rotas and the possibility of the claimant working “double days”. Mr Sutton told the claimant that he could not think of any further reasonable adjustments to assist the claimant to help prevent further sickness or injury. He strongly suggested that the claimant should pursue her current care suppliers to consider any further reasonable adjustments that could be made in her role or suggest alternatives. A summary of the meeting was sent to the claimant by way of a letter dated 17 March 2014.

30. It is the claimant's case that, during this meeting, Mr Sutton said to the claimant, “You could always take early retirement”. According to the claimant, Mr Sutton said this in a glib manner as if it were amusing. There is nothing in the 17 March 2014 letter to suggest that any comment was made about early retirement. The claimant did not complain to Mr Sutton or anybody else about any inappropriate comments made at the 24 February 2014 meeting. Mr Sutton denies having made the comment, flippantly or otherwise. Owing to the passage of time, we found it very difficult to know whose version to prefer.

31. Mr Sutton conducted a three month formal attendance management meeting at the claimant's home on 7 April 2014. Kim Charkewycz attended to take notes. Mr Sutton reiterated his view that he could not suggest any further reasonable adjustments to prevent further sickness absence or injury or aggravate previous injuries and keep the claimant safe on the network. He repeated his suggestion for the claimant to contact her care providers to consider any further reasonable adjustments that could be made in her role or to suggest alternatives. He asked the claimant if there was anything that she could suggest that the respondent could offer or look into as a reasonable adjustment. He repeated his concern that when the claimant returned to work there would be an increased health and safety risk to her and to her colleagues if she continued in her current role. A number of other remarks during this meeting had the same gist. He mentioned the option of the claimant working “double days” if this would help.

32. It has not been easy for us to find how the claimant felt following this meeting. Her evidence to us now is that she was upset by Mr Sutton having suggested that she would be putting her colleagues in danger. The claimant did not complain about these remarks, either during the meeting or afterwards.

33. We do not think it would be reasonable for the claimant to have perceived these remarks as violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. She must have known that any sudden inability to carry out her role correctly would effectively take her patrol out of action, meaning that whatever dangers were currently on the road would remain unattended until the next patrol arrived. It was self-evident that, if the claimant was prone to exacerbation of her back injury or further falls whilst on patrol, she would be putting her own health in danger.

34. On 28 May 2015 Mr Sutton again attended the claimant’s home, for a further meeting to discuss the claimant's continued absence from work. Also present

was Mr Peter Ramejkis, taking notes. By this time, the claimant had been absent from work for over six months.

35. There was a discussion about the claimant's current courses of treatment and the prospects of an improvement to her back condition. They talked about alternatives to the claimant returning to her role. At that time, the claimant ruled out office work on the grounds that such work would involve predominantly sitting down. If pain was lessened by injections she envisaged that she could return to work. Mr Sutton told the claimant that he had to make the claimant aware of management options for further action which would include dismissal. He explained that the ground for such action would be the claimant no longer being suitable for her job. This was because, "Even if you return to work in your present role, you may be a danger to yourself or your colleagues". We do not know how Mr Sutton made this remark. In particular, we were unable to find what tone of voice he used, what body language he may have displayed at the time, and what if any reaction the claimant made to his comment. We found it difficult to gauge how the claimant actually felt on hearing this remark. She did not complain about it to Mr Sutton or anybody else.

36. The minutes of the 28 May 2015 meeting were sent to the claimant by way of a letter dated 4 June 2015. The claimant did not reply.

37. By a letter dated 8 June 2015, the claimant was invited to a meeting with Mr Sutton to discuss her future employment with the respondent. She was invited to be accompanied by a work colleague or trade union representative. This requirement was later relaxed so as to allow the claimant to be accompanied by Mr John Middleton, a family member.

38. The letter stated:

> "Before we meet, you will need to consider whether you are able to return to work. If you intend to resume duties soon i.e. within the next four weeks, we can discuss and agree a return date and any support that you will need to aid your return, at our meeting. However, if you are unable, for medical reasons, to return to work within the next four weeks, Highways England will have no alternative but to consider your dismissal on the grounds of inefficiency arising from your non-attendance at work."

39. The claimant thought it unfair of Mr Sutton to give her the ultimatum of return to work within four weeks or to face the possibility of dismissal. She emailed Mr Sutton on 13 June 2015 indicating that she had a date for her next course of treatment. It was her hope expressed in the email that after a short period of recovery she would be in a better position to say whether she could return to work within a four week deadline. She asked for the meeting to be postponed. She followed up her request by a further email on 16 June 2015. The same day, Mr Sutton replied agreeing to postpone the meeting. He agreed that no further meetings would take place until the claimant had had her injection treatment and post procedure consultation.

40. Nothing in either of the claimant's emails suggested that Mrs Middleton had felt intimidated, degraded, humiliated or offended by the 8 June 2015 letter. We find it difficult, owing to the passage of time, to assess whether the claimant really had any such feelings at that time.

41. On 27 August 2015, a further meeting took place at the claimant's home. By this time the claimant had been absent for nine months. Present at the meeting were

Mr Sutton, the claimant, Mr John Middleton and Mr Gary Reece, a note taker. Mr Sutton told the claimant that the respondent needed the claimant's consultant to confirm what the next course of action would be to improve her health, and if there was anything that the respondent could do to get the claimant back to work promptly. He added that the claimant's sickness absence was unsustainable. The claimant asked, "Assuming the consultant says…I can come back, can I come back?". Mr Sutton replied, "That will have to go to Occupational Health for a yes/no and what reasonable adjustments, if any are required. Your consultant knows your case best and what pain you can stand and when you can drive". Later in the meeting, the claimant said that she wanted to come back to work as soon as she could. In reply, Mr Sutton said that the respondent would not let the claimant back to work until Occupational Health said "yes", after reports.

42. The claimant did not complain at the time about Mr Sutton having taken this line. We are not surprised by the absence of her complaint. It was self-evident that the respondent would want confirmation from its own Occupational Health advisers as to whether the claimant was ready to return to work before allowing her to return to such a safety critical role from such a long period of sick leave.

43. The claimant was invited to ask any questions. She made clear that she still wanted to return to her old role and did not want to do another job, but said that if something else came up she would consider it. At this point in the conversation, Mr Reece interjected that there was an "admin job" advertised on the respondent's website, based at the same place from which the claimant worked. Mr Reece told the claimant that, if she applied for the role, she would have to be considered under the normal applications process. He did not mention that there was any alternative procedure for redeploying into administrative roles or that the claimant would receive priority over any other applicants if she completed a Compassionate Transfer Request Form.

44. On 2 September 2015, the claimant informed Mr Sutton that she had applied for an administrative role. This was the EO Role.

45. On 9 September 2015, Mr Bruce Pennie, the claimant's consultant orthopaedic surgeon, reported to her General Practitioner. His letter included the following paragraph:

> "I think it is reasonable for her therefore, to explore with her employers whether they can temporarily put her on a desk job while we sort this out, although it is important that she has a proper ergonomic assessment of her workstation."

46. In a telephone call on 11 September 2015, the claimant and Mr Sutton discussed Mr Pennie's report. The claimant stated that she still could give no indication of when she would be able to return to a Traffic Officer role.

47. On 21 September 2015, Ms Sade Ladejobi of the HR Casework Team e-mailed Mr Sutton attaching the "medically unfit process" which we take to be paragraph 14.10.2 of the Attendance Management Guidance. The covering e-mail stated, "As we are considering going down the medically unfit process, can you ensure the compassionate application form is competed… While we are actively looking for an alternative role and subsequently carrying out necessary assessments…we will commence the medically unfit process as a follow on from the recent OH report."

48. On 22 September 2015, Mr Sutton e-mailed the Compassionate Transfer Request Form to the claimant. He did not at that stage seek to intervene in the claimant's application for the EO Role.

49. Because of the importance of the EO Role to the claim, at least by time of closing submissions, we need to turn our attention away from the claimant's dealings with Mr Sutton to explain the EO Role in more detail and how the respondent recruited to it.

50. The actual title of the EO Role was "Band 3 Executive Officer, Customer Operations". It was a permanent position, sitting within the Monitoring & Standards Team, Service Delivery. The post-holder would be based in the Regional Control Centre. The EO Role was office-based and mainly administrative in nature. It involved working to deadlines, producing a wide portfolio of performance information for Customer Operations Directorate in statistical/visual formats, identifying trends and measuring compliance against corporate targets. Responsibility for recruiting into this role lay with Miss Bond.

51. A written role description and person specification accompanied the job advertisement. Five essential criteria were listed. These were:

    51.1. "Literacy in office software products to enable production/maintenance of a range of complex documents and spreadsheets, in particular, Microsoft Excel."

    51.2. "Good analytical skills and the ability to manipulate data efficiently and effective to support customer needs."

    51.3. "Previous administration experience and the ability to work effectively in an office environment, delivering an efficient customer service."

    51.4. "Proven experience of effectively prioritising your activities."

    51.5. "Proven experience of working under pressure and achieving tight deadlines."

52. In total, 23 candidates applied for the role. Some of these candidates were external to the organisation. One of the applicants was the claimant. She used the same application form as the other candidates. Nobody suggested to her that she should be considered for the role using any other process.

53. The claimant's application form was accompanied by her *curriculum vitae* (CV). Amongst other things, the document included:

    53.1. The claimant's employment history. Prior to the respondent, she had worked for seven months from 2004 to 2005 as a Bought Ledger Clerk working for Mayfield Construction. Before that, she had 16 years' employment as an Office Manager for J Enkells & Sons between 1988 and 2004.

    53.2. Some further information about her previous employment. Whilst working at Mayfield Construction, she had helped to implement a new purchase ledger system by ensuring that financial data was input into spreadsheets using Microsoft Excel accurately. She explained how she had used verbal and written communication with job managers and peers on a daily basis to ensure that key deadlines were noted. In her Office Manager role for Enkells, she stated that she had contacted businesses to promote their business offer to them and gain contracts. She had arranged daily workloads for mechanics, collected timesheets and populated worksheets to

allow invoicing. She had advertised for and interviewed new staff. She used Microsoft Excel, Sage and Microsoft Word.

53.3. A description of relevant aspects of the claimant's role as a Highways Officer. Not surprisingly, she highlighted the pressurised decision making required at the scene of road incidents and the need for her to prioritise her own activities and those of others.

53.4. Brief details of some office based work using Microsoft Excel and Word. She described how she had used Microsoft Outlook to ensure that key deadlines were noted and met.

53.5. A short description of the claimant's work for Miss Bond in 2011. She stated that she had been "tasked with producing and maintaining many documents, some quite complex. I had an excellent report back to my line manager of my work carried out for them".

54. The claimant's application form indicated that she was disabled. Otherwise, it gave the impression of an internal candidate seeking appointment to a role, rather than an employee seeking redeployment as an alternative to dismissal. Miss Bond did not know that the claimant was at an advanced stage of the Attendance Management Procedure. By this time, the claimant had not yet completed a Compassionate Transfer Request Form. Miss Bond did not know that the claimant faced dismissal on capability grounds if she did not return to work. Nobody had told Miss Bond that the claimant needed to be considered for redeployment. Nobody had suggested to either the claimant or Miss Bond that recruitment into the EO Role should be put on hold pending a discussion to assess the claimant's suitability.

55. Not knowing any of these things, it is hardly surprising that Miss Bond decided to consider the claimant's application under paragraph 2.1.1 of the respondent's Recruitment Procedure. That is to say, that the claimant would be guaranteed an interview provided that she met the essential criteria for the job.

56. Having received and read the applications, Miss Bond took advice from the recruitment team's Campaign Manager. A second board member was appointed with joint responsibility for the recruitment process. Miss Bond and the second board member reviewed the applications and devised five selection criteria designed to test candidates against the essential job requirements. These were:

56.1. Working with others;

56.2. Previous admin experience;

56.3. IT skills competency;

56.4. Customer service competency; and

56.5. Working to deadlines/prioritisation of work.

57. Applications were required to be evidence-based. This meant that each candidate was required to demonstrate on their application form and CV evidence, in the form of examples, of how they satisfied the five selection criteria. The strength of the evidence scored against a scale of 1-5 with 1 being "not demonstrated", 2 being "limited demonstration", 3 being "acceptable demonstration", 4 being "good demonstration" and 5 "strong demonstration". The board members were not permitted to take account of their own personal knowledge of any of the candidates. It should be noted that the scoring was an

assessment of the quality of the evidence rather than a rating of the candidate's actual ability.

58. Miss Bond and her fellow board member decided to set a minimum pass score of 16 for the campaign. This score was based on the number and calibre of the applicants.

59. Pausing there, it is noteworthy that, in order to "pass", a candidate would need to score at least 4 in at least one category. "Acceptable demonstration" (score 3) against all of the criteria was not sufficient.

60. The applications were reviewed independently by Miss Bond and her fellow board member who then met to discuss any differences in marking. Eventually the finalised marking sheet was produced on 22 September 2015.

61. Five candidates "passed" and were invited to interview. One of these successful candidates was given a competency score of 2 (limited demonstration) against the criterion of "working to deadlines and prioritisation of work". One of the unsuccessful candidates had an aggregate score of 15. He or she achieved a competency score of 3 (acceptable demonstration) against all criteria.

62. The claimant scored a total of 13 points. The breakdown was as follows:

    62.1. Working with others – 3

    62.2. Previous admin experience – 3

    62.3. IT skills competency – 3

    62.4. Customer service competency – 2

    62.5. Working to deadlines/prioritisation of work - 2

63. Because the claimant's aggregate score was less than 16, she failed the shortlisting exercise and was not invited to interview.

64. We do not know when the interviews took place. We do know, however, that invitations to interview could not have been sent out before 22 September 2015 because the shortlisting scores were not finalised until that date.

65. At no point did Miss Bond or anybody else ask the claimant for any further evidence to substantiate her application. The claimant was not invited to a discussion with Miss Bond to assess her against any competency framework or behaviour requirements.

66. In the meantime, the claimant remained absent from work. On 8 October 2015, Mr Sutton asked the claimant whether she would be able to consider being redeployed to any locations other than Rob Lane. The claimant replied that she would need to be based at a maximum of 30 minutes' drive from her home.

67. By letter dated 12 October 2015, the claimant was invited to an "Options" meeting to discuss her future employment with the respondent. She was warned that she faced dismissal.

68. On 19 October 2015, the claimant obtained a fit note from her GP. It stated that she would be unfit for work for 8 weeks.

69. The Options meeting took place on 29 October 2015. The claimant was accompanied by her husband. Mr Sutton chaired the meeting. Notes were taken by Mr David Weir.

70. At the Options meeting,

70.1. Mr Sutton informed the claimant that there were no roles available in Rob Lane Outstation or the Regional Control Centre. In fact, he could not find any roles within a 30 minute driving distance of the claimant's home.

70.2. The claimant said that she would not be able to work in the Regional Control Centre because of her migraines.

70.3. Mr Sutton explained to the claimant that her case would be passed to a Decision Officer to decide whether the claimant would be able to give regular and effective future service.

70.4. The claimant asked what would happen if her GP gave her a fit note stating that she was fit to work. Mr Sutton replied that such a decision would not purely be down to the GP. The Decision Officer would take into account reports from consultants and Occupational Health. Mr Sutton said that they might contact the claimant's GP and ask him to explain the sudden turnaround from the latest fit note which predicted unfitness to work for 8 weeks. He told the claimant that the respondent had a duty of care towards the claimant and that they would not put her at risk by allowing her to return to any type of duties until they were happy with her fitness and ability to carry out that role safely.

70.5. The claimant asked what would happen if she could not return to full duties within 4 weeks. What Mr Sutton said in reply is the subject of the final allegation of harassment. He said that if the claimant could not return to full duties in 4 weeks for medical reasons the respondent would consider dismissal on the grounds of inefficiency arising from non-attendance. At this point the claimant became upset and they took a short break. After a further discussion the Options meeting ended.

71. After the meeting, the claimant did not complain about Mr Sutton refusing to make eye contact or speaking in an abrupt or stern manner. This brings us to the factual dispute as to whether Mr Sutton actually did behave in that fashion. It is difficult for us to make a finding either way. Much depends on impression and fading memory. The absence of any contemporaneous complaint and the passage of time have not helped.

72. On 3 December 2015, Dr Nadia Sheikh, Consultant Occupational Health Physician wrote to Mr Sutton. Her letter expressed the view that the claimant continued to be temporarily unfit to return to her substantive role and that, a way of facilitating a return to work would be to explore what alternative work could be available to her over the coming three months. On the same day, another Consultant Occupational Health Physician, Dr Arun Chindripu, met with the claimant. Following that consultation, Dr Chindripu wrote to Mr Sutton. His letter related the claimant's opinion that she "cannot see herself returning to work to do her normal assigned duties", but "she has requested to be redeployed to desk duties." In Dr Chindripu's opinion, there was "no reasonable prospect of her symptoms improving for the foreseeable future."

73. On 11 December 2015 the claimant obtained a further GP fit note for a further 8 weeks.

74. By letter dated 16 December 2015, the claimant was invited to a Decision Officer meeting to consider whether her employment should be terminated. For a variety of reasons the meeting did not go ahead until 8 January 2016. In the meantime, on 20 December 2015, the claimant applied for ill-health retirement.

75. The Decision Officer was Mr Sean McCormack, Operations Manager. The claimant attended the meeting unaccompanied. Minutes were taken by Ms Joanna Lloyd.

76. In preparation for the meeting the claimant submitted a written statement dated 8 December 2015. Her statement did not complain about Mr Sutton's conduct. It did, however, question whether reasonable adjustments the respondent was willing to make to enable her return. She referred to her application for the EO Role. She clarified her earlier remark at the Options meeting about suffering from migraines at the Regional Control Centre: "In the past I have suffered claustrophobia type feelings and had migraines brought on by spending time in the control room. However, thinking about it, that was before the windows were put in and they could make a big difference." She asked for the decision on dismissal to be delayed until her ill-health retirement application had been determined.

77. At the meeting itself, the claimant again stated that the windows at the Regional Control Centre could make a difference to her feelings of claustrophobia; she would not know until she had tried it. She accepted that she could not return to the role of On-road Traffic Officer. She did say, however, that she had been "eager to return to light/office duties since August 2015" and there were positions at the Regional Control Centre for which she could have been put forward.

78. After some time spent clarifying the minutes of the meeting with the claimant and making further enquiries with Mr Sutton and Ms Ladejobi, Mr McCormack made his decision. It was his view that the claimant's employment should be terminated. In view of the common ground recorded in our discussion of the issues, it is unnecessary for us to set out his reasoning in detail. Mr McCormack took into account the inability of Occupational Health to predict when the claimant would be fit to return to her role and the absence of any alternative roles for the claimant.

79. The claimant was notified of her dismissal by letter dated 28 January 2016. The letter informed her of her right to appeal.

80. By letter dated 8 February 2016, the claimant indicated that she had decided not to appeal against the decision to dismiss her. She had no confidence that the respondent would follow its own procedures.

81. On 18 February 2016, the claimant was certified as permanently incapable of doing her own or a comparable job. She was not, however, certified as having total incapacity for employment.

82. The claimant commenced early conciliation on 8 February 2016 and obtained a certificate from ACAS on 17 March 2016.

83. Before leaving our findings of fact, we consider objectively whether, on the evidence before us, we think the claimant was capable of performing the EO Role. In our view, she was. This does not mean that she was the strongest candidate, or even that she would have performed in the role particularly well. She was, however, capable of doing the job adequately. We have reached this view because:

    83.1. Miss Bond herself believed that the claimant had provided some evidence to demonstrate her ability against all the criteria for the role. These criteria were based on the essential requirements in the person specification.

The claimant's lowest score was 2 (some evidence). Even that score was a reflection on the quality of her *evidence* and not her actual ability.

83.2. The claimant demonstrated her competence acceptably (score 3) against all but two criteria. Those for which she received a score of 2 were working to deadlines/work prioritisation and customer experience competency.

83.3. The claimant provided evidence of working to deadlines and prioritisation of work. The claimant's role of Traffic Officer meant that she was used to making quick decisions and immediately prioritising steps to be taken at an accident scene. Whilst working at Mayfield Construction she had liaised with others to ensure that tasks were prioritised and deadlines met. She had used Outlook to help her work to deadlines. At Enkells she had organised mechanics' daily workloads which would, to our minds, involve prioritising tasks. Her CV was thin on other specific examples, but we find, on balance, that the claimant would have provided such examples at an interview.

83.4. The claimant gave an example of successful customer-facing work. She had contacted potential customers and won business for Enkells. We think that she could have worked in a customer-orientated role.

83.5. The fact that the claimant did not achieve the "pass" mark does not mean that the claimant did not meet the essential requirements. In reality this was a competitive process. As we explain below, the claimant failed to progress because of the strength of the rest of the field and not because she lacked an essential attribute.

83.6. There is a question mark over whether the claimant would have been in good enough health to attend work sustainably in that role. The claimant would undoubtedly have needed adjustments to work in a role that typically would involve sitting for long periods. These adjustments had not been tried by the time of the claimant's dismissal. We have not at this stage made any finding as to whether they would have worked. Nor have we made any finding as to whether the claimant would have been able to work in the Regional Control Centre – with its new windows – without suffering from claustrophobia and migraines. We also do not know whether the claimant would have enjoyed the EO Role enough to want to persevere in it. She was, after all, reluctant for a long time to relinquish her role as Traffic Officer. In our view it is unnecessary to make findings in this regard at this stage. It is sufficient in our view for us to find that there is a significant chance that the claimant could have overcome these obstacles and worked in the EO Role on a long-term basis.

Relevant law

Duty to make adjustments

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

85. 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.

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

87. 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:

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

    87.2. The practicability of the step;

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

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

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

    87.6. The type and size of employer.

88. 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.

89. *Archibald v. Fife Council* [2004] IRLR 660, HL is authority for the following propositions:

    89.1. To the extent that the duty to make adjustments requires it, the employer is not only permitted but obliged to treat a disabled person more favourably than others.

    89.2. Such treatment may include transferring an employee to fill a sedentary position which she is qualified to fill without the need for a competitive interview.

    89.3. Whether it reasonable for an employer to have to take that step depends on all the circumstances of the case.

    89.4. These circumstances will include the extremely important principle that staff engaged by public authorities should be appointed on merit.

    89.5. The tribunal should have regard to the employer's own internal procedures, such as a redeployment policy. Depending on the circumstances, however, it may be reasonable for the employer to have to modify those procedures.

90. It is open to a tribunal to find that an employer has not failed in its duty to make adjustments by not appointing an employee to a role, where to appoint that employee it would have to disapply the essential ingredients of the role:

91. To these propositions we would add some observations of our own. In our view it will rarely if ever be reasonable for an employer to have to slot a disabled employee into another role if the only evidence of the employee's ability to carry out that role is the employee's bare assertion that they could do the job. The employer will seldom if ever breach the duty to make adjustments simply by

insisting on having the opportunity to satisfy itself of the employee's ability. Where, despite reasonable efforts from the employer to satisfy itself of the employee's abilities, the employee cannot demonstrate to the employer that they meet the essential requirements, the employer is unlikely to have to offer the role to the disabled employee, even as an alternative to dismissal on ill health grounds. This, in our view, is true even if the employee subsequently persuades an employment tribunal that she could have carried out the role. The situation may well, however, be different if the employer sits back and leaves it to the employee to put forward all the evidence of their abilities on paper. By not seeking out the required evidence, for example, in the form of interview questions, the employer may run the risk of reaching an incorrect decision about the employee's abilities. A tribunal may then find that it would have been reasonable for the employer to have had to offer the role to the employee.

Discrimination arising from disability

92. 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.

93. 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."

94. 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.

95. 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.

96. The *Code* offers guidance on the interrelationship between the making of adjustments and the proportionate means defence. The following extract appears to us to be relevant:

> "5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments…

> 5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.
> …"

97. Paragraph 5.21 of the *Code* is consistent with the following statement made by Simler J in *Dominique v. Toll Global Forwarding Ltd* UKEAT/0308/13 (concerning the Disability Discrimination Act 1995) at paragraph 51:

> "….where there is a link between the reasonable adjustments said to be required and the disadvantages …being considered in the context of ….disability-related discrimination, it is important to ensure that any failure to comply with a reasonable adjustment duty is considered as part of the balancing exercise in considering questions of justification. This is because it is difficult to see as a matter of practice how a disadvantage that could have been addressed or prevented by a reasonable adjustment that has not been made can, as a matter of practical reality, be justified."

Harassment

98. Section 26 of EqA provides, so far as is relevant:

> (1) A person (A) harasses another (B) if—
>
> (*a*) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (*b*) the conduct has the purpose or effect of—
>
> (*i*) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(*b*), each of the following must be taken into account—
>
> (*a*) the perception of B;
>
> (*b*) the other circumstances of the case;
>
> (*c*) whether it is reasonable for the conduct to have that effect.

99. Disability is one of the relevant protected characteristics.

100. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

Time limits

101. 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.

102. 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"

103. 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.

104. 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*

105. In *Matuszowicz v. Kingston on Hull City Council* [2009] EWCA Civ 22, the Court of Appeal held:

105.1. that an ongoing failure to make adjustments is not an act "extending over a period"; it is a "failure to do something", the date of which is to be determined according to the statutory provisions (now in section 123 EqA);

105.2. if the respondent does not assert that the time limit started to run from a date earlier than that put forward by the claimant, the tribunal should proceed on the basis of the claimant's alleged date; and

105.3. that where confusion over the time limit provisions causes an unwary claimant to delay presenting the claim, the confusion can be taken into account as a factor making it just and equitable to extend the time limit.

106. It follows from *Matuszowicz* and section 123(4) that, where an employer acts inconsistently with the duty to make adjustments, the time limit runs from the date of the inconsistent act. If there is no such act, time begins from when the date on which claimant contends a reasonable period of time expired for the making of the adjustment, unless the respondent argues – and the tribunal accepts - that the reasonable period in fact expired sooner.

107. 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.

108. 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:

108.1. the length of and reasons for the delay;

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

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

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

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

Burden of proof

109. 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.

110. 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.

111. 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.

112. We have already considered the burden of proof provisions in relation to complaints of failure to make adjustments (see above).

Unfair dismissal

113. 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.

114. 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.

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

116. 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).

> "… 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

117. 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.

118. 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.

Conclusions

Harassment

119. We have first considered the time limit.

120. The 6 incidents of alleged harassment could be viewed as part of the same state of affairs. The nature of the alleged unwanted conduct was the same in each case and it was all done by Mr Sutton.

121. In our view, the occasions of alleged harassment allegations were isolated from all the other alleged forms of prohibited conduct. Put another way, none of the harassment incidents were part of the same ongoing state of affairs as the claimant's dismissal or the failure to offer the EO role to the claimant. Mr Sutton did not dismiss the claimant and he did not make any decision on recruitment to the EO role. The nature of the alleged prohibited conduct is entirely different, not only in its legal classification, but also in its character. Failure to appoint the claimant to a role is quite different from making offensive, degrading or humiliating remarks. So is dismissing somebody for a legitimate reason, but without having made appropriate adjustments.

122. For the purposes of time limits, we therefore treat the alleged harassment as an act extending over a period which ended with the sixth and final alleged incident. The unwanted conduct on that occasion was done on 29 October 2015 at the "Options" meeting.

123. The last day for presenting the claim was 28 January 2016. As it was, the claimant did not present the claim until 2 June 2016. The early conciliation provisions do not affect the time limit, because the claimant did not commence early conciliation until February 2016 - after the primary time limit had already expired. The claim is just over 4 months out of time.

124. Before announcing our decision on whether to grant an extension of time, we think it appropriate to make a general observation. It is very important for managers to take care when speaking with employees on long-term sickness absence. Such employees are likely to be especially vulnerable. An insensitive comment made to such an employee may cause more hurt and offence than it would at other times and to another worker. This vulnerability does not necessarily mean that every insensitive comment will amount to harassment. *Dhaliwal* reminds us otherwise.

125. Our decision is that it would not be just an equitable to extend the time limit. Here are our reasons.

125.1. The claimant did not give evidence of any reason for the 4-month delay delay in presenting her claim.

125.2. The claimant's case is that Mr Sutton's alleged conduct had the effect of creating the relevant adverse environment. We have to decide what Mr Sutton's conduct was, whether it had the proscribed effect, and whether it was reasonable for his conduct to have had that effect.

125.3. The alleged conduct consists mainly of remarks said to have been made during meetings. Detailed findings of fact are needed. This is for the purpose of assessing what effect the conduct could reasonably have had. Much will depend on Mr Sutton's precise words and the context of the preceding conversation. Just as important as the precise words is Mr Sutton's non-verbal communication at the time of making the impugned comments. Tone of voice, body language and facial expression make a big difference to the effect of a person's words. A couple of examples serve to illustrate the point. Mentioning "early retirement" as one of a list of options might be seen as a supportive measure, even at an early stage of a person's sickness absence, provided it was done in the right way. Likewise, there is a world of difference between telling somebody that if they return to their role before they are ready they might endanger themselves, and speaking dismissively of an employee as being a present danger to themselves and their colleagues.

125.4. For many of the harassment allegations, important details are in dispute. The evidence about precise words and non-verbal communication has become less cogent due to the passage of time. Examples of allegations where our fact-finding exercise was particularly difficult are the first allegation (24 February 2014), the third (28 May 2015) and the sixth (29 October 2015).

125.5. It might have been easier to establish the facts in spite of the delay had the claimant complained at the time. The respondent could have carried out an investigation while events were fresh in the minds of the claimant and Mr Sutton. Evidence obtained in the investigation could have been of benefit to us. As it was, we have to rely on fading memories.

125.6. The effect of the delay might have been less pronounced had Mr Middleton taken detailed notes of the meetings on 27 August and 29 October 2015. As it is, we have only one set of notes, which make no reference to Mr Sutton's manner or body language.

125.7. Where we were able confidently to find the facts (for example, the 7 April 2015 meeting), we did not think that the claim would succeed on its merits. It would not be reasonable of the claimant to perceive Mr Sutton's remarks as creating the prohibited environment. Extending the time limit would serve no purpose as the complaint was not well-founded.

125.8. Another necessary area of factual enquiry is the extent to which the claimant herself perceived Mr Sutton's conduct as creating the relevant adverse environment. Again, this has become more difficult over time. It is quite clear that, by the time her employment ended, the claimant was thoroughly disillusioned with the respondent. It would only be human nature for her to look back at Mr Sutton's conduct in the light of her overall negative experience. Viewed retrospectively through that prism, it may have appeared to the claimant as having had a worse effect than it actually did at the time. Again, the absence of a contemporaneous complaint makes it all the harder to gauge how the claimant felt.

Failure to make adjustments - jurisdiction

126. We were not asked to consider the time limit in relation to the complaint of failure to make adjustments. We have nevertheless done so, because it affects our jurisdiction. The only adjustment for which the claimant now contends is the appointment to the EO Role. On 22 September 2015 the respondent decided not to make that adjustment (or, alternatively, acted inconsistently with the making of that adjustment) by leaving the claimant off the shortlist for interview.

127. In our view, however, the omission to make that adjustment was part of the same state of affairs as the alleged discrimination arising from disability. By dismissing the claimant without choosing the alternative of redeployment, the respondent perpetuated the same omission to redeploy the claimant. We are *not* deciding that the failure to appoint the claimant to the EO Role was in itself an act extending over a period. *Matuszowicz* prohibits us from doing so. Rather, our view is that the failure to make this adjustment and the later dismissal were part of the same state of affairs. Together they constituted an act extending over a period ending with the date of termination, which was the date of receipt of the 28 January 2016 letter. But for the effect of early conciliation, the last day for presenting the claim would have been 27 April 2016. But the limitation clock is to be treated as having stopped during the period of 39 days between 8 February 2016 and 17 March 2016. Counting 39 days on from 27 April 2016 gives a new limitation date of 5 June 2016. The claim form was presented 3 days earlier. The complaint of failure to make adjustments was therefore presented before the time limit expired.

128. If we are wrong in this conclusion, we would consider it just and equitable to extend the time limit. The questions of disadvantage caused by the PCPs and whether it was reasonable for the respondent to have to offer the EO Role to the claimant are largely objective. As will be seen from our discussion of the latter issue on its merits, the only real factual disputes are whether the claimant could have done the EO Role and whether the claimant could demonstrate that she met the essential criteria. The main evidence to resolve those disputes consists

of the claimant's CV, her oral evidence of her skills and abilities and Miss Bond's opinion of the evidence she had provided. Such evidence is unlikely to have been affected by the delay in bringing the claim.

Failure to make adjustments - merits

129. PCP1 put the claimant at a substantial disadvantage when compared with non-disabled Traffic Officers. Because of her disability she could not sit or drive for sustained periods.

130. PCP2 existed in the way alleged by the claimant. The claimant, as an applicant for redeployment to the EO Role, was required to engage in a competitive process. It was not sufficient that she met the minimum criteria for the role. The "pass" mark was set according to the calibre of all the applicants. Because of the strength of the field, a candidate who acceptably demonstrated their competence against all the criteria (that is, scored 3 in all areas) still would not – and did not - get an interview. A candidates who did not acceptably demonstrate one essential criterion nevertheless progressed because he or she was particularly impressive in other areas.

131. PCP2 put the claimant at a substantial disadvantage when compared to non-disabled persons. There was less at stake in a competitive process for a non-disabled person than for the claimant. Put another way, failing to be appointed to the EO Role would have more severe consequences for claimant than for others. Because of her disability, the claimant needed to be redeployed or risk dismissal on capability grounds.

132. We must, therefore, consider whether it was reasonable for the respondent to have to take the step of offering the EO Role to the claimant. Before doing so, we have looked at the respondent's internal policies and procedures. These were the battleground for many of the parties' arguments.

132.1. Many of the arguments on this point revolve around whether the respondent properly followed paragraph 2.1.1 of the Recruitment Procedure. In our view, these arguments represent a distraction. Paragraph 2.1.1 is a laudable measure designed to assist disabled workers across the entire job market to seek work with the respondent. It helps to overcome disadvantages that disabled people face in getting job interviews. This is a general disadvantage in access to employment and career progression. The paragraph 2.1.1 guaranteed interview scheme is, however, of only limited assistance in preventing the disadvantage caused by PCP1 and PCP2. As a result of those PCPs, a disabled people faced dismissal because her disability prevented her from carrying out her existing role. The question for us is whether, objectively, the respondent should have offered the claimant the EO role itself, and not just an interview for that role.

132.2. By the time of the scoring decision for the EO Role, the claimant had not yet completed a Compassionate Transfer Request Form. The respondent's formal medical redeployment provisions (para 14.10.2) had not yet been triggered. But, by 21 September 2017, both Mr Sutton and Human Resources knew that the claimant faced a capability dismissal if she could not be medically redeployed: see Ms Ladejobi's e-mail of that date. Mr Sutton also knew that the claimant had applied for the EO Role. If, in the application process, the respondent treated the claimant like any other disabled applicant for employment, it might be complying with the letter of its internal policies, but it took the risk of breaching its duty to make adjustments.

More specifically, the respondent had no express policy obligation to meet with the claimant to assess whether she met the essential requirements of the role. But if the respondent chose not to take that course, and left it to the claimant to provide evidence of her suitability in her CV, the respondent would have no opportunity of an oral assessment that could draw out examples that her CV had not mentioned in detail. The respondent thereby ran the risk that the claimant might be turned down for a role that she could do, if the quality of the evidence on her form was not sufficient to take her past the shortlisting stage.

133. In our view it was reasonable for the respondent to have to make the adjustment of offering the EO Role to the claimant. Our reasons for coming to this view are:

133.1. Offering the EO Role to the claimant would very considerably reduce the disadvantageous effect of PCP1 and would eliminate the effect of PCP2.

133.2. In our view it was practicable to offer the claimant the EO Role. It was a role she could do and in which she had a significant chance of being able to perform sustainably.

133.3. The respondent was a government agency that could be expected to devote considerable resources to making adjustments for disabled employees.

133.4. There was some risk that offering the claimant the EO Role might cause disruption. She might not be able to attend reliably because of her health. Her performance in the role might not have been as good as Miss Bond would have expected from the strongest applicants.

133.5. It was too early to say whether the risk of unreliable attendance should be an obstacle to the claimant being appointed to the EO Role. Adjustments to an office-based job had not been tried. The claimant was capable of working in some roles. Otherwise she would have been certified for ill-health retirement purposes as totally incapable.

133.6. In our view, the fact that other candidates might have performed better than the claimant would not cause sufficient disruption to stop the respondent from being reasonably expected to offer the claimant the EO Role.

133.7. We have considered the impact of another kind of possible disruption. The respondent, as a public sector organisation, was committed to transparent recruitment. It was important that the respondent should be able to insist that any candidate, even an internal candidate seeking redeployment, should provide some evidence that they fulfilled the minimum criteria for the role. It was just as important that the respondent should be able to preserve and rely on such evidence in the event of any subsequent scrutiny of the recruitment decision. Appointing candidates whose evidence was totally lacking in respect of an essential role requirement would undermine transparency. Having identified the concern, we do not think it stood in the way of offering the EO Role to the claimant. The claimant had provided examples of how she met all the criteria. There was an evidence base to justify appointing her. Had Miss Bond any concerns about whether the evidence was strong enough, she could have met with the claimant to discuss her application. There was, in our view, sufficient time to assess the

claimant for suitability for the EO Role before any other candidate was interviewed or appointed.

134. For the reasons we have given, we have concluded that the respondent was under a duty to offer the EO Role to the claimant and breached that duty by rejecting her application.

Discrimination arising from disability

135. Dismissing the claimant was a means of achieving the aim of ensuring that Traffic Officers were capable of carrying out their role without undue risk to their health and safety. That aim was plainly legitimate and the claimant did not suggest otherwise.

136. Our view, however, is that dismissing the claimant was a disproportionate step. Here are our reasons:

136.1. The aim achieved by dismissing the claimant was very important. The public needs Traffic Officers to be able to do their job safely and well. Set against the importance of the aim was the stark discriminatory impact: the claimant was dismissed because of her inability to carry out her role, which arose directly from her disability.

136.2. It was possible to achieve the legitimate aim by means short of dismissal. The respondent could have redeployed the claimant into the EO Role.

136.3. As the Code makes clear, it is difficult for an employer who has breached the duty to make adjustments to show that its unfavourable treatment of a disabled employee was proportionate. The respondent's difficulty is insurmountable in this case. The making of reasonable adjustments would have given the claimant a chance to perform and demonstrate reliable attendance in the EO Role. Had she been successful, there would have been no need to dismiss her.

Unfair dismissal

137. The respondent made reasonable efforts to establish the causes of the claimant's absence. It could not have been expected to wait any longer before coming to the belief that the claimant was incapable on medical grounds of carrying out the role of Traffic Officer. Nevertheless, we are of the view that the respondent did not act reasonably in treating this belief as a sufficient reason to dismiss the claimant. Here we have taken care not to substitute our view for that of the respondent. It does not automatically follow that, because the respondent cannot justify the discriminatory dismissal objectively, the dismissal was necessarily unfair. Having duly warned ourselves, we have come to the view that no reasonable employer would have dismissed the claimant without first trying her out in the EO Role. The dismissal was therefore unfair.

Remedy

138. The claimant's remedy falls to be determined at a separate hearing. At this hearing, amongst the issues for decision will be:

138.1. The percentage chance that the claimant would have been able to demonstrate reliable attendance whilst working in the EO Role;

138.2. The percentage chance that the claimant would have been able to perform in the EO Role to a sufficient standard to enable her to remain in that role; and

138.3. In the event of there being a chance that the claimant might have been dismissed following the EO Role being offered to her, when that dismissal would have occurred.

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Employment Judge Horne

Date: 31 July 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 August 2017

FOR THE TRIBUNAL OFFICE