EMPLOYMENT TRIBUNALS

Claimant: Mrs B Tree

Respondent: South East Coast Ambulance Service NHS Trust

Heard at: Ashford

On: 4th, 5th, 6th, 7th and in chambers on 8th and 12th September 2017

Before: Employment Judge J Pritchard
Members: Mrs R Downer
Mr J Gautrey

Representation
Claimant: Mr T Kirk, counsel
Respondent: Mr J Arnold, counsel

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1 The Claimant's claim that she was directly discriminated against because of her disability is dismissed.

2 The Claimant's claim that she was discriminated against because of something arising as a consequence of her disability is dismissed.

3 Pursuant to Rule 39(5)(b) of the Employment Tribunals Rules of Procedure 2013 the Claimant's deposit in the sum of £500 shall be paid to the Respondent.

REASONS

1. The Claimant made a number of claims to the Tribunal. Those remaining for consideration at the hearing were those of direct disability discrimination under section 13 of the Equality Act 2010 and discrimination arising from disability under section 15 of the Equality Act 2010. The Respondent resisted the claims while conceding that the Claimant was a disabled person at relevant times.

2. The Tribunal heard evidence from the Claimant on her own behalf and from the Respondent's witnesses: Nicola Brooks (Head of Clinical Governance and Standards); Howard Levinson (Employee Relations Manager at relevant times); Richard Crouch (Senior Human Resources Advisor at relevant times); and Kirsty Booth (Business Support Manager at relevant times). The Tribunal was provided with a bundle of documents and a supplementary bundle of documents to which the parties variously referred. At the conclusion of the hearing, the parties provided the Tribunal with written submissions which they amplified orally.

3. At a Preliminary Hearing held on 19 December 2016, an Employment Judge required the Claimant to pay a deposit as a condition of being permitted to take part in proceedings and thus continue to advance her claims under both sections 13 and 15 of the Equality Act 2010. The Employment Appeal Tribunal held that the Employment Judge had been entitled to take the view that the Claimant had little reasonable prospect of succeeding with her complaint of direct discrimination on the "reason why" question given the difficulties identified in London Borough of Lewisham v Malcolm [2008] IRLR 700 HL and upheld the deposit order in respect of the Claimant's claim of direct discrimination. However, the Employment Appeal Tribunal did not uphold the deposit order insofar as it related to the Claimant's claim of discrimination arising from disability. The Claimant paid the deposit which stands in the sum of £500 in relation to the direct discrimination claim.

Issues

4. The issues had been identified at the Preliminary Hearing referred to above and recorded as follows:

Direct discrimination

4.1. It is the Claimant's case that she was treated less favourably because of her disability than her chosen comparator Mr J Emery ("JE") by being dismissed on 11 December 2015.

4.2. The onus will be on the Claimant to establish, on the balance of probabilities that:-

4.2.1. JE is a suitable comparator

4.2.2. She was treated less favourably than a suitable comparator

4.2.3. Evidence from which it could be inferred that the reason for that treatment was because of disability.

4.3. In the event the Claimant discharges that burden the onus will be on the Respondent to establish the reason for the less favourable treatment involved no discrimination at all.

Discrimination arising from disability

4.4. It is the Claimant's case that she was dismissed because of the requirement to have reasonable adjustments in place during her employment and/or concerns about future disability-related absence.

4.5. The onus will be on the Claimant to establish on the balance of probabilities:-

4.5.1. that the need for reasonable adjustments arose from her disability;

4.5.2. that the need for such reasonable adjustments was:-

4.5.2.1. "something arising" within section 15 of the Equality Act 2010; and

4.5.2.2. in the mind of the Respondent when it took the decision to dismiss.

4.5.3. In that event the onus will be on the Respondent to establish that the Claimant's dismissal was a proportionate means of achieving a legitimate aim.

5. The Respondent conceded that a dismissal to avoid the requirement to make reasonable adjustments and/or disability-related absences could not be justified as a proportionate means of achieving a legitimate aim.

6. By letter dated 21 October 2016, the Claimant's solicitors informed the Respondent's solicitors that the reasonable adjustments relied upon are:

6.1. Allowing the Claimant to work at home;
6.2. Allowing the Claimant to work a compressed week;
6.3. Tolerance of the Claimant's inability to commit to a culture of long hours; and
6.4. Allowing the Claimant to stand during all or part of internal and external professional meetings.

7. In relation to the last reasonable adjustment referred to, the Claimant complained that there was a delay in providing her with a height adjustable desk. During the hearing the Claimant referred to other alleged failings on the Respondent's part, including the failure to formalise the compressed working week and delay in allowing the Claimant to return to work, in support of her claim.

8. With regard to the burden of proof implicitly stated in the issues identified at the preliminary hearing, the Tribunal must now have regard to the ruling in Efobi v Royal Mail Group Ltd [2017] UKEAT/0203/16.

Relevant findings of fact

9. The Claimant commenced employment with the Respondent in January 1995. During the period with which the Tribunal is concerned, the Claimant was employed as Clinical Quality Manager (Clinical Audit and Safeguarding) at Band 8A based in the Respondent's offices in Lewes. At relevant times the Clamant had line management responsibilities for two Band 7 Managers Joe Emery (Clinical Audit Lead) and Jane Mitchell (Safeguarding Lead) who, in turn managed staff members at Band 4 and 5.

10. The Claimant suffers from a degenerative disc disease and suffered a subsequent back injury in 2009 for which she has undergone surgery. She has reduced mobility and pain which is exacerbated by sitting for long periods. The Claimant is a disabled person for the purpose of the Equality Act 2010.

11. From about 2009, the Claimant was line managed by Nicola Brooks, Head of Medical Services Band 8C. Until 1 April 2015, Nicola Brooks reported to Dr Jane Pateman, Medical Director; thereafter, she reported to Professor Andy Newton, Chief Medical Officer.

12. In November 2010, the Claimant informally requested of Nicola Brooks that she be permitted to compress her working hours into four days each week. The Claimant felt that the additional day's rest from driving and sitting at a desk would help manage her chronic pain. Nicola Brooks granted the Claimant's request.

13. In February 2011, the Claimant requested that, until her surgery, she be permitted to work from home as much as possible and only travel when absolutely necessary. Having discussed it with Jane Pateman, Nicola Brooks granted the Claimant's request on a trial basis for a couple of months.

14. In September 2011, the Claimant underwent surgery to resolve underlying damage to her coccyx. An occupational health report prepared in December 2011 states that the Claimant should be permitted to take regular 'posture breaks' and that a parking space should be provided at the Lewes office. It was said that consideration should be given to making these adjustments permanent. There was no credible evidence before the Tribunal to suggest that these adjustments were not made on a permanent basis. It was thought that the Claimant could resume full working hours five days a week, within four to six weeks and would be able to drive to and from work upon her return, but no longer distances for three months. The Claimant returned to work on a phased basis.

15. On 17 August 2012, the Claimant submitted a flexible working application for her compressed hours arrangement to be made permanent. Following discussion with Jane Pateman, Nicola Brooks granted the Claimant's request but on a trial basis for three month effective from 20 August 2012. In the event, the Claimant continued to work compressed hours. The Claimant's flexible working application suggests that up until now she was carrying out

her duties in the office, although travelling outside rush hour; and that she was achieving a four day working week by taking time off in lieu and annual leave.

16. In December 2012, the Claimant requested a height adjustable desk and arrangements were put in place to order one.

17. An occupational health report dated 9 January 2013 records that the Claimant had been suffering from worsening pain over the past 12 to 15 months and likely to require further surgery. The occupational health advisor was of the opinion that it would be prudent to consider permitting the Claimant to work from home. The advisor was unable to predict potential post-operative prognosis. By this time the Claimant was in any event working from home as much as possible.

18. In February 2013, the Claimant again requested that her compressed hours arrangement be made permanent. Given that the occupational health report referred to the unknown outcome of future surgical interventions, Nicola Brooks granted the flexible work arrangements that were in place until the outcome of surgical interventions were known.

19. The Claimant took sick leave from 28 May 2013.

20. The Claimant emailed Nicola Brooks on 21 June 2013 indicating that she was signed off work until 14 July 2013 but that she was trying to get a grip on her pain management to allow return on that date.

21. Having taken advice from the Respondent's human resources department, Nicola Brooks informed the Claimant on 15 July 2013 that she would not be able to return to work until she had been assessed by occupational health. The Claimant had a further consultant's appointment on 30 July 2013 and Nicola Brooks told the Claimant she should either obtain a further medical certificate or take the interim period as holiday. While the Claimant's unwillingness to take further sick leave and reluctance to take further holiday is understandable, the Tribunal accepts Richard Crouch's evidence that an occupational health referral would routinely be made where an employee is said to be in pain. The Tribunal is satisfied that this was a reasonable response on the Respondent's part. (The Tribunal notes that the Claimant was still in pain on 22 July 2013 (page 73 of the bundle)).

22. The Respondent made a referral to occupational health on 15 July 2013. Among other things, the referral, the substance of which was drafted by Nicola Brooks, states that the Claimant had been working approximately three days at home with one day in the office since 26 November 2012.

23. The occupational health report dated 27 July 2013 informed the Respondent, among other things, that: the Claimant was fit to return to work on an adjusted basis; it would be helpful if she could attend meetings near her home; she had been attending the office on average two days a week until about April 2013; management should consider whether the compressed working week could be accommodated on a permanent basis or for how long; and it was not possible to predict the outcome post operation until it had taken place.

24. In the summer of 2013, Jane Pateman decided that an independent human resources consultant should be commissioned to review the medical directorate in terms of staffing levels and current structure. Jane Pateman and Nicola Brooks provided the consultant, Michele Milton, with instructions. Nicola Brooks subsequently asked Michele Milton to consider, as part of her review, the impact the Claimant's working arrangements had on the rest of the team. The Tribunal accepts Nicola Brooks' clear evidence that concerns had been raised by the Band 7 members of the team reporting to her.

25. On 6 August 2013, Nicola Brooks and Richard Crouch held a welfare meeting with the Claimant at her home. The Claimant returned to work the following day with adjustments to her working duties, in particular: the Claimant would work three to four hours a day for three to four weeks working at home, hours and days to increase if the Claimant felt able; the Claimant would manage the Safeguarding Department but not the Clinical Audit Department. Although the Claimant was keen to return to full duties within five weeks, she was advised that it could not be determined because her tolerances were then unknown. The compressed hours arrangement remained in place. The Claimant confirmed there were no additional adjustments she required at the time. The Claimant was asked to consider the impact her working arrangements had on the rest of the directorate team whereupon the Claimant asked for examples of impacts on the team to enable her to respond; Nicola Brooks confirmed that details would be provided when the Claimant returned from her current period of leave.

26. An occupational health report dated 29 August 2013 suggests that the Claimant was working from home but that she would like to get into the office one day each week. It was hoped that following surgery the Claimant would not be prevented from carrying out her full duties. A further occupational health report dated 9 September 2013 stated that the Claimant was fit to be working her full hours in the capacity which had been agreed.

27. Nicola Brooks noted in her email to Richard Crouch on 10 October 2013 that once she was in receipt of the report prepared by the independent human resources consultant, she needed to respond to the Claimant in light of what she had been told at the meeting on 6 August 2013 in relation to the impact of her working arrangements.

28. Following her review, Michele Milton provided initial feedback to Nicola Brooks and Jane Pateman at a meeting on 29 October 2013.

29. At a welfare review meeting on 8 November 2013, it was noted that the Claimant continued to work compressed hours and that her non-working day could be arranged as required. It was also noted that the Claimant had been working one day a week in the Lewes office. The Claimant confirmed there were no additional adjustments she felt were required at the time. Some discussion took place about the concerns raised by members of the Claimant's team, in particular her lack of visibility in the workplace. The Claimant questioned such issues but Nicola Brooks said it would not be appropriate to go into the details of the concerns at the meeting; it was agreed that the impact of the Claimant's working arrangements would be taken forward once the consultant's report had been received. It was also noted:

> *We discussed whether you would be able to increase your working days in the office to two days a week and see how that works for you in terms of pain management. We agreed the two days in the office could be totally flexible days based around your diary commitments and pain management requirements. You agreed to try this approach and let us know whether it is manageable and sustainable.*

30. The Claimant then emailed the two Band 7 members of the team for whom she had management responsibility, Joe Emery and Jane Mitchell, to say that she had agreed to try to work in the office two days a week to address their concerns about lack of management presence. She set out the dates she proposed to be in the office. The Band 7 members thought it was a sensible approach and thought that it would help remove the intensity which resulted from the Claimant bringing workloads into the office one day each week.

31. On 19 November 2013, Nicola Brooks held a meeting with the occupational health advisor. Richard Crouch explained to the Tribunal that the Respondent had new occupational health providers who wanted managers to meet and discuss issues with them. The ensuing occupational health report dated 5 December 2013 noted the discussion held at the meeting and Nicola Brooks' concern with the Claimant working from home and the impact it was having on other members of the team. It recorded that Nicola Brooks spoke of the concerns raised by the Claimant's direct reports that they were struggling with her lack of presence in the office and that, ideally, Nicola Brooks would like the Claimant in the office full time. The occupational health advisor, who had assessed the Claimant, reported that the Claimant was in constant pain and could not advise when the Claimant would be recovered from back surgery. The occupational health advisor stated her view that the issues raised by Nicola Brooks were not of a health nature but of a management nature to resolve.

32. Michele Milton produced her report in January 2014. Among other things, it was proposed that the Claimant's position would disappear under a re-structure. In the event, the final report was not presented to the Board and not signed off; the Board was considering a broader workforce review which would encompass the directorate as a whole.

33. On 11 February 2014, the Claimant informed Nicola Brooks that she was struggling in the office with not having a height adjustable desk and asked for its purchase to be authorised. The Claimant sent to Nicola Brooks a Display Screen Equipment self-assessment in which, among other things, the Claimant noted that she was required to stand for approximately 50% of her working day to alleviate her pain. Nicola Brooks promptly forwarded the Claimant's request to the Respondent's human resources department, noting that:

> *I am unable to find any references in the earlier Occ Health reports that advise the need for Baz to stand 50% of her working day, which whilst we would clearly support as appropriate, I feel given the position has now changed again with Baz not undergoing surgery as previously thought, whether a re-referral back to Olivia* [occupational health] *would now be sensible to re-review the required adjustments.*

34. In accordance with advice received from human resources, Nicola Brooks referred the Claimant to occupational health. There was no appreciable delay in Nicola Brooks doing so. It was noted that the Claimant had now increased her working days in the office to three days.

35. An email in the bundle shows that by 17 March 2014 a height adjustable desk had been ordered for the Claimant's use together with a chair and monitor arm. A further email in the bundle (at page 238) shows that by June 2014 the Claimant had been provided with a height adjustable desk and was working three days a week in the office. The Tribunal accepts Nicola Brooks evidence that the height adjustable desk had been provided by April 2014.

36. At a performance development review undertaken by Nicola Brooks in March 2014, she noted, among other things, that the Claimant adopted various organisational methods of communication well and had continued to work hard to ensure her portfolio was well maintained as required and her teams supported as much as possible. There is no suggestion within the performance development review, nor was there any evidence before the Tribunal, to suggest that the Claimant's performance was in question.

37. On 31 March 2014, Joe Emery was seconded to Quality Improvement Lead Band 7 for 12 months.

38. On 17 December 2014, Nicola Brooks made a request for a new position of Clinical Quality Manager (Quality Improvement) Band 8A to be created for a 6 month secondment.

39. The Claimant underwent surgery in January 2015 and took sickness absence. Jane Mitchell covered the Claimant's safeguarding duties during her absence. Joe Emery covered the Claimant's audit responsibilities.

40. On 16 March 2015, following a successful interview by Nicola Brooks and Bill Chilcott (Head of Compliance), Joe Emery was seconded to the Clinical Quality Manager (Quality Improvement) Band 8A position for 6 months. He continued to undertake the Claimant's audit responsibilities.

41. An occupational health review dated 17 March 2015 reported that the Claimant's surgery had not resolved her disability and that she would have the same limitations as she had before surgery. She had been signed off work until 15 May 2015 but indicated that she wanted to return earlier than that. She was unfit for work; occupational health advised that a further review should be undertaken in four weeks time to check on progress as it was too early to assess her fitness for work.

42. In March 2015, Professor Andy Newton announced that the Clinical Operations and Medical Directorates would be dissolved from 1 April 2015. This was following a wholesale organisational review undertaken by senior management; consultation on the proposed restructure had been undertaken with the trades unions. A Transformation Team, led by Francesca Okosi, was created to implement the proposals arising from the review. The Claimant was informed of the plan to re-organise the senior executive structure. Nicola Brooks was not involved in the review and was herself subject to it. The re-organisation plans announced in March 2015 were a precursor to subsequent restructure of senior management in which members of management at Band

8 who had been in position for more than one year would be affected. The proposals for the re-structure of senior management were announced later the same month. A number of members of senior management were affected. In the Claimant's case, it involved the deletion of her post and the creation of two new Band 8B posts: Head of Clinical Audit; and Head of Clinical Standards. The Head of Clinical Audit would be undertaking many of the Claimant's existing clinical audit duties; her safeguarding duties were to be absorbed elsewhere. It was proposed that the new structure would "go live" on 1 October 2015.

43. Nicola Brooks and Richard Crouch held a welfare meeting with the Claimant on 30 March 2015 at her home. The Claimant confirmed that there were no additional adjustments required to support her phased return which she hoped could commence on 20 April 2015.

44. In April 2015, the Claimant was informed that meetings were to be held with those affected by the re-structure. The Claimant was unable to attend a meeting on 17 April 2015 by reason of her sickness absence.

45. An occupational health report dated 20 April 2015 stated that although the Claimant was back to driving and walking every other day, she was as yet unable to return to work. The occupational health advisor was of the view that the Claimant would be fit to return to work in May and set out recommendations for her phased return to work.

46. By letter dated 6 May 2015, Andy Newton, Chief Clinical Officer, invited the Claimant to a re-scheduled meeting to take place on 11 May 2015 at the Surrey Downs Golf Club. The Claimant was unable to attend the meeting. She agreed to have a telephone discussion about the proposals after she had considered the pack of documents she had received which set out the proposed restructure.

47. As part of the re-structure plans, employees who were deemed to meet 66% or more of the new job content based on their current position would be slotted in to newly created positions at the same Band level. The Respondent had a large number of new roles to fill. The Respondent's Board had decided on the indicative bandings for the new positions.

48. Following an occupational health review carried out 13 May 2015, the Respondent was advised that the Claimant should build her hours up gradually and alternate with some home working. The Claimant returned to work on 18 May 2015 on a phased basis.

49. The Claimant attended a meeting with Andy Newton on 2 June 2015 to discuss the re-structure proposals following which the Claimant provided her own written feedback in which she said that her current clinical audit role was 0.5 whole time equivalent and the remaining 0.5 of her time dedicated to safeguarding. In summary, the Claimant proposed a different structure which, among other things, would involve her current job being split into two Band 8A roles.

50. The new structure was confirmed by the Executive Team on 9 July 2015. Andy Newton, Howard Levinson and David Vincent carried out the matching/slotting exercise following which, by letter dated 16 July 2015, Andy

Newton informed the Claimant that it had not been possible to slot her into a new position and she was therefore at risk of redundancy. Nicola Brooks, who was also affected by the proposals, was slotted in to a new Head of Clinical Governance and Standards Band 8C position.

51. At a meeting with Kirsty Booth on 23 July 2015, among other things, the Claimant said she wanted Joe Emery to return to the Clinical Audit Lead role because the vacancy in that position was proving detrimental to the department.

52. On 26 July 2015, the Claimant, having been provided with the relevant job description (Nicola Brooks having had no involvement in its preparation), applied for the new Head of Clinical Audit Band 8B position. The banding for this position, as with others in the proposed re-structure, was said to be "indicative". The Claimant told the Tribunal that the indicative meant that it was yet to be evaluated. On 28 July 2015 the Claimant was invited to an interview for the new post at the Respondent's offices in Banstead. She was told that the selection exercise would also involve a 10 minute presentation and a psychometric assessment. A letter to the Claimant dated 30 July 2015 repeated the invitation and included the sentence "Should you have any particular needs in terms of the assessment arrangements, please do not hesitate to contact us". About two weeks before the interview, the Claimant was provided with the title of the topic she would be expected to present to the interview panel.

53. The Claimant attended the interview on 14 August 2015. The panel comprised Andy Newton, Nicola Brooks and Howard Levinson. Each member of the interviewing panel completed their own assessment forms during the presentation and interview. The headline questions asked were prepared by the Transformation Team; the panel members had no involvement in setting the questions. The Tribunal was shown the assessment forms which had been completed at the time by Andy Newton and Nicola Brooks. The assessment form completed by Howard Levinson was not before the Tribunal; it was said that it could not be found. After the interview, the panel members discussed the marks each had awarded. There was no disagreement. For the presentation, which had a pass mark of 13, the Claimant was awarded 12 marks out of 18. For the interview, which held a pass mark of 28, the Claimant scored 20 marks out of 40. Having heard the evidence of Nicola Brooks and Howard Levinson, the Tribunal is satisfied that neither Nicola Brooks nor Andy Newton conspired to unfairly mark down the Claimant or encourage Howard Levinson to do so. In any event, the Claimant accepts that she did not perform well. In particular, the panel was of the view that the Claimant had failed to address sufficiently strategic development. The Claimant was not offered the Head of Clinical Audit Band 8B position.

54. The Claimant subsequently held discussions with Andy Newton and Howard Levinson to seek understanding of why she had been unsuccessful. The Claimant covertly recorded the discussions and produced before the Tribunal what she maintained were transcripts of the discussions. The Claimant expressed her surprise that she had been asked questions about developing strategy since it did not form the focus of the job description with which she had been supplied. She also said that she had been thrown by a question by Andy Newton as to why the audit function was not delivering. The Claimant asked for Andy Newton's assurance that if the new role was advertised, it

would be based on the same brief with the same questions at interview. Andy Newton's reply was that he had yet not thought that far ahead and would have to investigate further. Howard Levinson, who was unaware of the views of the evaluation team as to the banding, told the Claimant that he did not anticipate changes to the job description and gave the Claimant his assurance that the questions in future would be the same.

55. By email dated 17 August Andy Newton was informed by the Employee Resourcing Manager that:

> *You may recall that I mentioned to you the other day that we had received the outcome of the initial job evaluation for your new leadership roles. Much of the feedback relates to areas that I can tweak the JD/PS to ensure that they are aligned accordingly, however, the attached present us with more significant challenges and will require your input please. I have included the comments from the Job Evaluators to support you in the process. Please treat this as confidential as job evaluation is a sensitive matter. Kindly amend the attached documents and return these to me at your earliest opportunity.*

With regard to the Head of Clinical Audit role, the evaluators reported:

> *"Experience of this type of post would suggest that* [Band] *8A would be about right".*

Nicola Brooks' evidence was that she would have been informed on the same date. The Claimant was not informed that the Banding for the role had been assessed in this way.

56. By letter dated 19 August 2015, Howard Levinson informed the Claimant that she remained at risk of redundancy and that the Respondent would continue to take steps to avoid potential redundancy. A list of vacant management positions was included with the letter. The Claimant was also informed that Band 7 NHS vacancies were advertised on the NHS website and directly through the Respondent's intranet. The Claimant did not feel she had the relevant skills and experience for any of the vacant positions or that they were suitable and felt that a Band 7 position would be a struggle from a status point of view having been a Band 8 employee for a number of years.

57. On 20 August 2015, Nicola Brooks asked to extend the current arrangements relating to Joe Emery (his secondment to Clinical Quality Manager Band 8A was due to end on 18 September 2015) and for three other positions to be maintained in order to provide continuity of workstreams. Nicola Brooks was granted permission to continue Joe Emery's secondment to the end of September 2015.

58. On 22 August 2015, the Claimant applied for voluntary redundancy. The Claimant's application was approved by the Appointments and Remuneration Committee on 7 September 2015 and the Claimant was informed the following day. The Claimant thus became entitled to receive an enhanced contractual redundancy payment in a sum just under £80,000.00. On 14 September 2015, the Claimant met with Andy Newton and Nicola Brooks and it was agreed that the Claimant's employment would end on 11 December 2015. By letter dated 18 September 2015, the Claimant was formally notified

that her redundancy application had been approved and that her contract would terminate by reason of redundancy on 11 December 2015.

59. On 17 September 2015, because Joe Emery had been undertaking the Claimant's audit role, and the Claimant due to leave the Trust in December 2015, Nicola Brooks made a further application for Joe Emery's secondment as Clinical Quality Manager Band 8A to continue until the end of December 2015 pending recruitment into the Head of Clinical Audit Band 8B post. Nicola Brooks' application was granted.

60. On 18 September 2015, the Claimant set out in an email to Andy Newton her concerns and points of consideration, one of which was that Nicola Brooks wanted the Claimant to manage the junior members of the clinical audit team in the absence of Joe Emery from his Clinical Audit Lead Band 7 role; the Claimant felt that she was effectively demoted during the remaining 3 months of employment while her subordinate was to undertake her role. The Claimant wrote:

> *I have been advised that it would be unfair to expect Joe, while acting up to an 8a between now and the end of December to manage the audit team as well as the QIP 'team' and Health Records 'team'. I am concerned that the phrasing around this is misrepresenting the reality of what this would actually mean; that is 4 direct reports (1 x Band7, 1 Band 6, and 2 x Band 4s). This is well within reasonable expectations of an 8a and, as Joe is acting up as 1 WTE whereas my role was only ever 0.5 WTE, Joe has an additional 0.5 WTE to manage QI and Health Records.*

61. The Claimant also complained that she was being excluded and unsupported. She made suggestions which would leave her free to finish off the work for monthly station level/Trust COI reporting, supporting the development of the new ambulance measures as much as she could while there, and being responsible for the committee and working group report production. In addition, the Claimant said that she would be creating a comprehensive handover for her successor. The Claimant added:

> *I genuinely just want to make as valuable contribution as I can while still with the Trust, but I will respect the decision you make if, on consideration, you do ask me to spend my time managing the audit team.*

62. In the event, the Claimant continued to provide an overview of the clinical audit function and prepare for the handover of her existing responsibilities to others. There was a dispute as to the precise duties the Claimant undertook during the last few months of her employment. The Tribunal has no need to determine this issue in order to reach a conclusion in this case.

63. By 8 October 2015, three candidates for the new Head of Clinical Audit Band 8B position had been shortlisted. Joe Emery had applied for the new position and was one of the three shortlisted candidates.

64. On 6 October 2015, following a request made of her, Nicola Brooks made significant amendments to the job description for the new Head of Clinical Audit position to match the requirements of the post. It was subsequently

evaluated as a Band 8B position. Initial plans to interview the three candidates were postponed.

65. In November 2015, Nicola Brooks agreed with Andy Newton to move Joe Emery into the Claimant's Band 8A role to lead clinical audit to enable continuity.

66. On 8 December 2015, upon Nicola Brooks' application, it was agreed that Joe Emery would be seconded to Acting Head of Clinical Audit until 31 March 2016.
67. On 10 December 2015, Nicola Brooks required that the Head of Clinical Audit position be re-advertised on the basis of the revised job description which should be sent to the candidates and inviting them to reapply on that basis.

68. The Claimant's employment ended on 11 December 2015.

69. About four other individuals were granted voluntary redundancy.

70. Interviews for Head of Clinical Audit Band 8B took place on 8 January 2016. Joe Emery was unsuccessful. An offer of employment was made to an external candidate but in the event that individual did not commence employment with the Respondent. Subsequently, following a search by an agency, the post was covered by the interim appointment of an external consultant.

71. In March 2016, the Respondent offered the Claimant the opportunity to undertake consultancy work but she declined.

Applicable law

72. Disability is a protected characteristic under section 4 of the Equality Act 2010.

73. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, dismissing her.

Direct discrimination

74. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Causation

75. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport [1999] 1 AC 502. See also: R (on the application of E) v Governing body of JFS [2010] 136; and Chief Constable of West Yorkshire v Khan [2001] ICR 1065.

Comparators

76. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

77. The circumstances of the Claimant and the comparator need not be identical in every way; see Stockton on Tees BC v Aylott [2010] ICR 1278. The question of whether situations are comparable is one of fact and degree; see Hewage v Grampian Health Board [2012] IRLR 870.

78. Where there is no actual comparator, it is incumbent upon the Tribunal to consider how a hypothetical comparator would have been treated; see Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646. In constructing a hypothetical comparator and determining how they would have been treated, evidence that comes from how individuals were in fact treated is likely to be crucial, and the closer the circumstances of those individuals are to those of the complainant, the more relevant their treatment. Such individuals are often described as "evidential comparators"; they are part of the evidential process of drawing a comparison and are to be contrasted with the actual, or "statutory", comparators; see, Ahsan v Watt [2007] UKHL 51; and Shamoon v Chief Constable of Royal Ulster Constabulary [2003] ICR 337.

79. Whether there is factual difference between the position of a claimant and a comparator is in truth a material difference is an issue which cannot be resolved without determining why the claimant was treated as he or she was; see Shamoon.

80. In London Borough of Lewisham v Malcolm [2008] IRLR 700, a case concerning disability-related discrimination under the Disability Discrimination Act 1995, the House of Lords ruled that the correct comparison had to be made with people who did not have the disability in question.

81. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was; see Shamoon.

Discrimination arising from disability

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

83. There are two links in the chain, both of which are causal. The Tribunal has to focus on the words "because of something" and therefore has to identify the "something" – and second on the fact that the "something" must be

"something arising in consequence of the Claimant's disability". In addition, the section requires the Tribunal to conclude that it is the Respondent's treatment of the Claimant that is because of something arising that is unfavourable to the Claimant. It is permissible for the Tribunal to consider why the Respondent treated the Claimant unfavourably and, having identified that, ask whether that was something that arose in consequence of the Claimant's disability; see Basildon v Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305.

84. In Pnaiser v NHS England UKEAT/0137/15 the Employment Appeal Tribunal held that the claimant only had to establish a prima facie case that the unfavourable treatment was only partly because of something arising in consequence of the claimant's disability. The Employment Tribunal had applied the wrong test in requiring the claimant to show that the only inference that could be drawn was a discriminatory one. (This case was decided before the ruling in Efobi).

85. In (1) The Trustees of Swansea University Pension & Assurance Scheme (2) Swansea University v Williams UKEAT/0415/14/DM the Employment Appeal Tribunal held that the words "unfavourable treatment" and "detriment" were deliberately chosen when being included in the Equality Act 2010 and had distinct meanings. Unfavourable treatment involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. It has the meaning of placing a hurdle in front of or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability.

86. The test for causation in a section 15 case is the same as that in a section 13 case. See Pnaiser. It is enough that the "something" that causes the unfavourable treatment had a significant (meaning more than trivial) influence on the outcome.

Burden of proof in discrimination cases

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

88. In Efobi v Royal Mail Group Limited UKEAT/0203/16 the Employment Appeal Tribunal held that under section 136(2) did not place a burden of proof upon a Claimant. It requires, instead, to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not there are facts from which the Tribunal could decide, in the absence of any other explanation, that putative discriminator has contravened the provisions concerned. Its effect is that if there are such facts, and no explanation from the Respondent, the Tribunal must find the contravention proved. If, on the other hand, there are such facts, but the Respondent shows it did not contravene the provision, the Tribunal cannot find the contravention proved. Efobi was decided after the Preliminary Hearing in the present case and after the decision in Pnaiser referred to above.

89. The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of an employee's protected characteristic. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson pointed out in Zafar v Glasgow City Council [1997] IRLR 229:

> *'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'*

See also: Chief Constable of Kent v Bowler UKEAT/0214/16.

90. However, unreasonable behaviour may act as evidence supporting an inference of discrimination where there is nothing else to explain the decisions taken by the Respondent. See: Bahl v Law Society [2004] IRLR 799. It will be more difficult for a Respondent to escape such a finding where the evidence shows that only one employee was subjected to the employer's unreasonable behaviour: see Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust EAT0268/15. It may be relevant for a Tribunal to examine the rationality of an employer's decision to treat a person in a particular way; see Nelson v Newry and Mourne District Council [2009] IRLR 548.

91. A bare difference in status and a difference in treatment only indicate a possibility of discrimination. They are not without more sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination; Madarassy v Nomura International PLC IRLR 246.

92. The burden of proof provisions have no bearing where the Tribunal is able to make positive findings on the evidence one way or the other; see: Hewage v Grampian Health Board [2012] IRLR 870. Martin v Devonshires Solicitors [2011] ICR 352.

Conclusion and further findings of fact

93. The Tribunal has no hesitation in concluding that the Claimant's dismissal was unfavourable treatment for the purposes of section 15 of the Equality Act 2010. Nor does the Tribunal have any hesitation in concluding that the requirement to have reasonable adjustments in place during the Claimant's employment and the Claimant taking disability related absences was something arising in consequence of her disability.

94. The Tribunal next turns its attention to the "reason why".

95. The Claimant's case is that she was dismissed because of the requirements to have the stated reasonable adjustments in place and because of concerns about her future disability-related absence; and because of less favourable treatment. The Tribunal must therefore consider whether that "something" was in the mind of Respondent when it took the decision to dismiss the Claimant; why did Andy Newton, Nicola Brooks and Howard Levinson act as they did? Consciously or unconsciously what was their reason?

96. In January 2013, the Claimant was working from home as much as possible and although Band 4 members of the team expressed no concern to the Claimant, the Tribunal does not find it surprising that concerns were raised at the time directly with Nicola Brooks about the Claimant's visibility in the office and ability to attend meetings. The Tribunal was referred to an email dated 29 January 2013 from Nicola Brooks to Jane Pateman setting out these concerns. There is nothing in that email that appears to the Tribunal unreasonable or irrational in the circumstances. Indeed, the email makes it clear that Nicola Brooks wanted to review the situation when she was in a better position to support the Claimant after her surgery.

97. The report to be prepared by Michele Milton was instigated by Jane Pateman. The subsequent report was far-ranging and the Tribunal is not led to believe that the report was commissioned to target the Claimant; her flexible working arrangement was but one of the aspects to be covered. Nor does the Tribunal accept that the review was used as an opportunity to target the Claimant; it is perfectly reasonable and rational for an employer to consider the impact of flexible working arrangements and how they might affect team working.

98. The Tribunal accepts Nicola Brooks' clear evidence that she typed her notes at the meeting with Michele Milton, to which the Tribunal was referred, directly onto her laptop at this meeting. These notes, which cover a number of other issues, record *"BT working model not working for the team".* Having heard Nicola Brooks' evidence, the Tribunal is satisfied that this comment, and others, recorded what Michele Milton had said at the meeting and was not a record of Nicola Brooks' opinion. The overall context of the notes suggests that Nicola Brooks was recording what Michele Milton was reporting. Michele Milton had been instructed a few months before the meeting in question and it would not have been logical for Nicola Brooks to have provided further comment of this nature during this feedback meeting.

99. However unreasonable it might appear that Nicola Brooks did not disclose Michele Milton's report to the Claimant, or extracts of it, particularly in light of the assurance that the relevant matters would be discussed with the Claimant, the Tribunal accepts Nicola Brooks' explanation that she did not disclose the report because it had not been approved by the Board.

100. The Tribunal accepts that Joe Emery's secondment to Clinical Quality Manager (Quality Improvement) Band 8A, requested by Nicola Brooks in December 2014, was a new post: the recruitment requisition form makes this clear. At this time, Nicola Brooks was aware that the Claimant would be having surgery at a future date. The Tribunal finds nothing unreasonable or irrational with Joe Emery covering the Claimant's audit responsibilities while she was off work. Similarly, the Tribunal finds nothing unreasonable or irrational in reducing the Claimant's responsibilities upon her return to work following surgery to ensure that she was not over-burdened. Given that the Claimant had failed to be slotted into, or selected for, the Band 8B post, it is understandable that the Respondent wished to ensure continuity and Band 8A support in circumstances in which the Claimant's role was to disappear under the new structure. The Tribunal notes that the Claimant was not singled out in Nicola Brooks' request for continuity in her email of 20 August 2015. By the time the Claimant complained of demotion in September 2015, she had applied for, and been granted, voluntary redundancy. The Claimant would be

ending her employment in December 2015 and that it was reasonable for Joe Emery to continue such audit work as he was carrying out to ensure continuity.

101. The Tribunal does not accept that the reasons for not slotting the Claimant into the 8B role were constructed after the event. It was clear that the new post was always intended to be at Band 8B; it is expressed as such in the new organisation structure. The Tribunal is unable to infer that the new role was purposely given an indicative banding of 8B in order to prevent the Claimant from slotting in to it. All the new positions at this level were given indicative bandings of 8B. Nicola Brooks was not involved in deciding the indicative bandings. The fact that the new post was intended to be at Band 8B alone is sufficient to disallow automatic slotting-in under the agreed Organisational Change Procedure given that the Claimant's post was at Band 8A. As for the job content of the Claimant's role, the Tribunal notes that the Claimant herself described having two 0.5 WTE roles. Whether or not the Claimant's safeguarding duties were the "poor cousin" as she described them, the Tribunal concludes on the balance of probabilities that her job content was not 66% of the new job.

102. While mindful of the comment of "I mentioned to you the other day" in David Vincent's email of 17 August 2015 to Andy Newton, there was no credible evidence to suggest that either Andy Newton or Nicola Brooks were aware, before the interview took place, that the new post had been evaluated at Band 8A based on the job description . What was "mentioned to you the other day" was said to be the fact that the outcome of the initial job evaluation had been received, not what the outcome was.

103. The Tribunal finds that there was an element of unfairness in the interview process. The Claimant was expected to address her ability to deliver strategic development in circumstances in which the job description made relatively little mention of such a requirement. However, the Tribunal is perfectly satisfied, as set out above, that the Respondent wanted the position be a Band 8B position, a more senior position to 8A. This adequately explains the Respondent's approach to the interview process, whether unreasonable or not. The Tribunal is mindful also of the fact that the panel did not set the interview questions, nor prepare the job description.

104. The Tribunal notes that the Claimant's under-performance was not solely related to her failure to address strategic development and the Claimant herself conceded that she did not perform well. The Tribunal heard no credible or convincing evidence to suggest that the marks awarded to the Claimant were deliberately reduced or manipulated so she would not achieve the pass mark.

105. It is clear that the Claimant had sufficient time to prepare for the interview and the presentation. It was not unreasonable for the Respondent to hold the interview at its Banstead office in the absence of the Claimant's objection to it in circumstances in which she had been informed in writing that if she had any particular needs she should contact the Respondent.

106. The Tribunal is unable to conclude that the Respondent deliberately concealed the true nature of the job the Claimant applied for at the time she was interviewed or that the Claimant was being set up to fail as she alleges.

107. Given the Respondent's intention that the new post should be at Band 8B, it is unsurprising that the job description was amended to match that requirement. The Tribunal does not accept that Nicola Brooks "fiddled" with it to ensure it remained at a band above that of the Claimant. The purpose of amending the job description was to reflect the seniority of the post required. This is supported by the indicative bandings given in the organisational chart and evidenced by later events, including interviews held in January 2016, in which candidates were interviewed by reference to the amended job description.

108. By 8 September 2015, the Claimant's voluntary redundancy application had been approved. While it would have been open to the Respondent to allow the Claimant to re-apply for the new position based on the amended job description, the fact that the Claimant's employment was to end explains why the Respondent acted as it did. As for the assurance that the job would not be changed when re-advertised, that assurance was provided by Howard Levinson who had no knowledge of the evaluation at Band 8A at the time.

109. It was logical for Joe Emery to continue to carry out audit duties at Band 8A for continuity purposes pending recruitment to the 8B position. Interviews for the Head of Clinical Audit Band 8B post did not take place until January 2016, after the Claimant's employment had ended. The Tribunal is unable to draw any adverse inference from the fact that the Respondent did not offer the position to the Claimant on a developmental, seconded or trial basis.

110. There was no credible evidence to suggest that there was any issue with the Claimant standing during all or part of her professional meetings.

111. Nor was there any credible evidence to suggest that the Respondent had any issue with the Claimant's alleged inability to commit to a culture of long hours.

112. With regard to the reasonable adjustments, while Nicola Brooks had been concerned about the impact of the Claimant's absence from the office as reported to her, there was no credible evidence to suggest that it remained a concern by the time of the Claimant's interview for the Band 8B position in which she was unsuccessful.

113. As for the Claimant's compressed working hours, that arrangement had been on foot for several years before the Claimant's interview and other managers also worked compressed hours.

114. The Tribunal is unable to draw the inference that concern about these reasonable adjustments formed any part of the reason, consciously or unconsciously, for the Claimant not being selected for the Band 8B post or for her dismissal.

115. Nor in the circumstances, can the Tribunal draw an inference from the facts that the Respondent was concerned about future disability-related absence. Had the Respondent been so concerned, it is likely that it would have instigated its absence management procedure, which it did not.

116. The Respondent has shown on the balance of probabilities that the Claimant was not dismissed because she was treated less favourably or unfavourably because of something arising in consequence of her disability. The Respondent has shown that the Claimant was dismissed for the reasons set out below:

116.1. The Claimant's role had been made redundant. The Claimant accepted when giving evidence that her job had disappeared. The 2015 review had been carried out at a senior level in which Nicola Brooks had no involvement. This was part of a wholesale review of management positions; the Claimant was not the only person affected.

116.2. The Claimant could not be slotted in as described above.

116.3. There were no alternative roles for the Claimant. The Claimant accepted this.

116.4. The Claimant failed the interview for the higher grade role as described above.

116.5. The Claimant applied for voluntary redundancy which was granted.

117. These reasons involved no discrimination at all.

118. Having considered the "reason why", the Tribunal has no requirement to consider identify the appropriate comparator for the purposes of the Claimant's claim of direct discrimination.

119. The Claimant's claims accordingly fail.

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Employment Judge J Pritchard

Date: 12th September 2017