EMPLOYMENT TRIBUNALS

Claimant: Miss S Matthews

Respondent: University College London Hospitals NHS Foundation Trust

Heard at: London Central **On:** 3, 6, 7 & 8 November 30 Nov (in chambers)

Before: Employment Judge H Grewal Ms S Plummer and Mr M Simon

Representation

Claimant: Mrs H Winstone, Counsel

Respondent: Ms S Fraser-Butlin, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unfair dismissal is not well-founded.

2 The complaints of disability discrimination are not well-founded.

REASONS

1 in a claim form presented on 1 August 2016 the Claimant complained of unfair dismissal and disability discrimination.

The Issues

2 At the outset of the hearing before us the complaints of direct and indirect discrimination and harassment were withdrawn. The only complaints of disability discrimination before us were complaints of discrimination arising in consequence of disability and failures to make reasonable adjustments. The issues to be determined in respect of those complaints had been identified at a preliminary hearing on 26 October 2016 as follows.

Unfair Dismissal

2.1 What was the reason for the dismissal? The Respondent contended that it was capability or, in the alternative, some other substantial reason of a kind to justify dismissal.

2.2 If it was either of those, whether the dismissal was fair.

Disability Discrimination

2.3 Whether the Claimant was disabled at the relevant time by reason of depression (it was admitted that the Claimant's back condition amounted to a disability).

Discrimination arising in consequence of disability

2.4 Whether the Respondent treated the Claimant unfavourably by:

(a) Applying its Sickness Absence and Attendance Policy and Procedure to her;

(b) Subjecting her to Sickness Absence Review meetings;

(c) Threatening with her dismissal;

(d) Dismissing her;

(e) Dismissing her appeal against her dismissal;

(f) Reporting her to the Nursing and Midwifery Council for being unfit to practice.

2.5 If it did, whether it did so because of her sickness absence from work.

2.6 Whether the Claimant's sickness absences arose in consequence of her disabilities;

2.7 If the Respondent treated the Claimant unfavourably because of something arising in consequence of her disability, whether the Respondent could show that the treatment was a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

2.8 Whether the Respondent applied a provision, criterion or practice that the Claimant had to perform the essential functions of her job:

2.9 If it did, whether that put the Claimant at a substantial disadvantage in comparison to non-disabled persons by rendering her liable to dismissal;

2.10 If it did, whether the Respondent was under a duty to make certain specified reasonable adjustments. However, what was set out thereafter were not adjustments that the Respondent should have made but a list of things that it had failed to do (for example, it had failed to consider whether the Claimant's health issues were disabilities and it had failed to allow her as much time off due to sickness as she required in order to recover from her back injury and depression).

2.11 We asked the parties to consider whether the issues in the failure to make reasonable adjustments could be defined more clearly. On the second day of the hearing the Claimant produced a document that identified a number of different PCPS in respect of the things that she had claimed that the Respondent had failed to do. The PCPs so identified were as follows –

(a) The practice of failing to consider whether the Claimant's health issues were disabilities;

(b) The requirement that the Claimant worked with a normal chair;

(c) The requirement that the Claimant have full attendance without consideration of any disability issues;

(d) The expectation that the Claimant would arrange her own redeployment;

(e) Redeployment would only be considered where previous sickness absence was below the level deemed to be acceptable by the Sickness Absence and Attendance Policy;

(f) The requirement that the Claimant's absences were in accordance with the standards set for the non-disabled employees in the Sickness Absence and Attendance Policy;

(g) The requirement that the Claimant demonstrates full recovery from her back pain and depressive order such that she could undertake a full complement of shift duties.

Jurisdiction

2.12 Whether the Tribunal had jurisdiction to consider any complaints that had not been presented within the primary time limit as extended in order to facilitate Early Conciliation.

The Law

3 Section 6 of the Equality Act 2010 ("EA 2010") provides that a person (P) has a disability if P has a physical or mental impairment and the impairment has a

substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. "Substantial" means more than minor or trivial (EA 2010 section 212(1)). The effect of an impairment is long-term if it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person concerned. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur (EA 2010 Schedule 1 paragraph 2(1) and (2).

4 A duty to make reasonable adjustments is imposed on a person (A) where a provision, criterion or practice ("PCP") of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. If the duty arises A is required to take such steps as it is reasonable to have to take to avoid the disadvantage (section 20(3) Equality Act 2010); A is not subject to the duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at the disadvantage referred to in Section 20 (paragraph 20 in Schedule 8 Equality Act 2010).

5 Section 15(1) of the Equality Act 2010 provides that a person (A) discriminates 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. That section, however, does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.

6 Section 136(2) of the Equality Act 2010 provides that 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 he did not contravene the provision.

7 Section 98(1) of the Employment Rights Act 1996 ("ERA1996") provides that the onus is on the employer to prove the reason or principal reason for the dismissal and that it is 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. A reason relating to the capability of the employee for performing work of the kind which he was employed to do falls within subsection 2 (section 98(2)). Section 98(3) provides that "capability" means the employee's capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

8 If an employer establishes a reason falling within section 98(1) and (2), the determination of whether the dismissal is fair depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and should be determined in accordance with equity and the substantial merits of the case (section 98(4) ERA 1996).

The Evidence

9 The Claimant, Mark Pittock (her husband) and Shirley Carle gave evidence on behalf of the Claimant. The following witnesses gave evidence on behalf of the Respondent – Maria Ridulme (Ward Sister), Susan Beatson (Deputy Chief Nurse/Head of Nursing for Specialist Hospitals Board), Florence Panel-Coates (Chief Nurse) and Oladayo Ajibola (former Employee Relations Advisor of the Respondent). We also read the expert reports of Drs Suleman and Isaacs. The Hearing Bundle comprised 1137 pages. Having considered all the oral and documentary evidence, the Tribunal makes the following findings of fact.

Findings of Fact

10 The Claimant commenced employment with the Respondent as a Grade D staff nurse on 25 November 2002.

11 In August 2007 the Claimant was appointed Deputy Ward Sister (Band 6). The Deputy Ward Sister carries out nursing duties for a defined group of patients and has additional responsibility for managing the ward. There are two Deputy Ward Sisters on each ward and each of them has to work two weeks on the early shift every month. The rest of their shifts can be long day shifts or night shifts. On the early shift the Deputy Ward Sister co-ordinates the shift, follows up complex discharges, carries out any audits that need to be carried out and generally supports the nurses. The Deputy Ward Sister generally does not have her own set of patients on the early shift. The Deputy also has one "admin day" every two weeks to deal with administrational matters. However, if the ward is short-staffed, the priority is patient care. The Claimant worked on Ward T9 North which had patients for upper and lower gastrointestinal medicine and surgery.

12 Between April 2012 and August 2013 the Claimant had a number of sickness absences. This was during a period when a colleague had taken out a grievance against the Claimant and she was being subjected to a disciplinary process in respect of the same matter. The process was protracted and lasted for over one year. In the course of the sickness absence management process the Claimant informed the Respondent that she had been diagnosed with depression and had been prescribed anti-depressants and referred for Cognitive Behavioural Therapy but that she had declined to take it when it was offered. The Claimant's GP records showed on 3 August, the week before her disciplinary hearing was due to take place, she consulted the doctor and complained of not being able to sleep, having low mood and crying. She was prescribed anti-depressant medication (21 tablets of 20mg Citalopram) on 16 August 2012 and by 4 September she had only taken three tablets. An Occupational Health report (dated 17 June 2013) stated that the Claimant had declared having no known underlying medical condition and that her absences had been due to her being extremely stressed due to her ongoing work management issues. The OH Advisor stated,

> "*It may be considered that due to Shirley being stressed she is perhaps more likely to acquire illnesses such as those of a viral nature."*

13 At a Final Sickness Absence Meeting on 19 August 2013 Sue Beatson concluded that the level of the Claimant's sickness absence was unacceptable but that there had been mitigating circumstances, namely that her absence had been due to work-

related stress as a result of the length of the disciplinary and grievance processes against her. She issued the Claimant with a final improvement notice for a period of six months from 2 September 2013, the date when the Claimant was due to return to work.

14 On 10 May 2014 the Claimant slipped on a wet floor and fell while working as a bank nurse on another ward. She continued working after her fall although she was in pain. On 6 June 2014 the Claimant attended her GP because she still had pain in her neck radiating down her spine. She was prescribed medication and referred for physiotherapy.

15 The Claimant's Ward Sister at the time, Natalie Huxtable, also referred her to the Occupational Health Service ("OH") for her back pain. She was seen by the OH physiotherapist on 25 June 2014. The OH physiotherapist advised that although the Claimant had musculoskeletal pain she was able to continue with her full work duties and did not need any specific modifications. She advised that it would be beneficial for her recovery to avoid repetitive heavy manual handling over the next month.

16 Between 17 September and 13 October 2014 the Claimant was absent sick and was certified as unfit to work because of back pain. She was referred to OH and the OH physiotherapist advised on 3 October 2014 that she had restricted functional capacity with regard to her contracted role. She recommended that the Claimant be placed on co-ordinating duties and avoid manual handling tasks at that stage. The OH Physician reviewed the Claimant on 16 October 2014, shortly after she returned to work. He advised that the Claimant was fit to work subject to the following two adjustments for a temporary period – she should not be involved with manual handling activities and should not work more than 7.5 hours per shift.

17 Between 27 October 2014 and 5 April 2015 the Claimant was absent sick for 160 days. All the medical certificates issued during that period said that she was unfit to work because of back pain.

18 The Claimant's GP records for this period show that she was "*tearful"* and had a diagnosis of "*low mood"* on 28 October 2014 and that she was prescribed anti-depressant medication – 28 tablets of Citalopram (20 mg) - on 22 December 2014.

19 In a report dated 11 December 2014 the OH Physician recorded that the Claimant had told her that as a result of her ongoing back problems she had difficulty leaving her house and that her mood had deteriorated over the past few weeks. She had reported that she had difficulty sleeping and concentrating and was tearful all the time. She said that she had attended two psychology sessions. The doctor advised that the Claimant was unfit to work at that time because of her back problems.

20 On 23 December 2014 a Case Conference took place to discuss the Claimant's health and the support mechanisms available to assist her to return to work, The conference was attended by Maria Ridulme (who had been promoted to Ward Sister in August 2014), Dr Kelly (the OH doctor), an Employee Relations Advisor, the Claimant and her trade union representative. Dr Kelly's opinion was that the Claimant was likely to be covered under the Equality Act 2010 for her depression but not for the back injury but she made it clear that that would ultimately be a judicial decision.

21 On 28 January 2015 Sally Beyzade sent to the Claimant at her home email address two job opportunities that had arisen in the Gastro-Intestinal division. The Claimant did not express an interest in either of them.

22 On 30 January 2015 the OH Physician advised that the Claimant could be fit for a phased return to work within a month depending on the results of an MRI scan that she was due to have. She recommended a phased return to work in a non-manual handling role. She suggested that such a role could be the Claimant working in a solely management role or as a clinical nurse specialist or whatever other role could be found.

23 On 10 February 2015 the Claimant was invited to a formal long-term sickness absence review meeting on 17 February. She was advised of her right to be accompanied. The meeting eventually took place on 12 March 2015.

24 The OH Physician reviewed the Claimant on 4 March 2015 and advised that the Claimant still had severe pain which restricted activity and was not responding well to medication. She said that she had suggested to the Claimant that she see her GP to discuss trying other painkillers or pursuing a referral to the Pain Clinic. She would review the Claimant on 1 April 2015 hopefully to plan her return to work if new medication had been successful.

25 The formal sickness absence review meeting took place on 12 March. The Claimant was accompanied by her Royal college of Nursing ("RCN") representative. At that stage the Claimant was certified as unfit to work until 31 March 2015. The Claimant said that her GP had prescribed new medication for her back pain and that if it worked she would be fit to return to work when the latest sickness certificate expired. It was agreed that if the new medication worked the Claimant would have a phased return to work in line with the recommendation of the OH report on 30 January 2015 and that the Claimant would temporarily be redeployed into a non-clinical role within the department. The Claimant confirmed that she was happy with that plan. The Claimant was advised that if she was not able to return to work or there had been no improvement in her health it might be necessary to progress to a Final Sickness Absence review meeting. The advice reflected the provisions of the Respondent's Managing Long Term Sickness Procedure.

26 The OH Physician reviewed the Claimant on 1 April 2015 and advised that she had made significant process on the new pain relieving medication and that she was fit for a phased return to work and to engage in managerial/administrative work but not to work night shifts or long days. She suggested that a return to clinical work be planned for after she had reviewed the Claimant six weeks after she returned to work.

27 The Claimant's sickness absence ended on 5 April 2015 and she then took annual leave that she had accrued. She returned to work on 6 May 2015. She returned on non-clinical duties as a Complaints Officer (the role was temporarily vacant as the post-holder had recently left). The role did not involve any manual handling.

28 The Claimant had four days' sickness absence because of her back condition between 26 and 29 May 2015. She was absent sick again for 11 days from 9 to 19 June because of neck and back pain.

29 She was reviewed by the OH Physician on 17 June 2015. The doctor said that she expected the Claimant to make a full recovery in time. She advised that at that time the Claimant was not fit for heavy manual handling (i.e. loads of 5 kilograms) or being involved in emergencies such as the crash team but she could return gradually to clinical duties working on the early shift. She recommended, if at all possible, a temporary redeployment to a clinical nurse specialist or similar role where less manual handling would be required.

30 In June the Claimant returned to work on T9 ward. She had a phased return to work on the early morning shift and did not do any manual handling.

31 A second formal sickness absence review meeting took place on 30 June 2015. The meeting was conducted by Maria Ridulme and the Claimant was accompanied by her RCN representative. The Claimant said that she was now working her full hours and that she had been experiencing low mood days and that she had started taking anti-depressants. There was nothing in the Claimant's GP records to show that she had consulted her GP about low moods or that she had been prescribed anti-depressants since 22 December 2014. She said that she had slowly eased herself back into the ward and some clinical duties avoiding any manual handling and direct contact with patients. Ms Ridulme explained to the Claimant the impact that her sickness and adjusted duties had on the department and told her that the department would not be able to sustain those adjustments long term. It was agreed that a further case conference would be held after the Claimant's next review by OH on 22 July 2015.

32 A workplace assessment was carried out on 1 July 2015. In respect of the Sister's office on the ward the assessor noted that some adjustments had been made to the chair that the Claimant used but that the Claimant would benefit from the support which could be provided by an ergonomic chair. In respect of regular clinical duties she noted that the Claimant was not carrying out many of her normal clinical duties (such as repositioning patients in bed, hoisting, walking patients, attending to the falling patient) but that she felt confident to start administering medication that was not stored in the patients' cupboards and to give IV medication and put up IV fluids.

33 The Occupational Health Physician reviewed the Claimant on 22 July. She recommended that the restrictions in place, i.e. no night or long shifts, no CPR (Cardiopulmonary Resuscitation) and limited manual handling (as per the workplace assessment) continue and expressed her optimism that the Claimant would make further improvements following new treatment from the Pain Clinic and would be fit, in about two or three months' time, for an increased range of manual duties and normal attendance

34 This was followed by a case conference which was attended by the OH Physician. The Claimant was accompanied by her RCN representative. There was a discussion about a referral to the Pain Clinic by the Claimant's GP and she was advised to chase it up with her GP. It was agreed that there would be another long term sickness review meeting in two months' time based on the referral to the Pain Clinic.

35 The Claimant was absent sick on 23 and 24 July 2015 because of neck pain and spasms and for 26 days from 29 July to 23 August 2015 because of gallstones.

36 On 7 August 2015 the Claimant saw her GP about her pain and low mood. She was diagnosed as having depression. The Claimant asked to be restarted on anti-depressants and was prescribed 28 tablets of Citalopram 20mg, one to be taken every day.

37 On 9 August the Claimant was invited to a Stage 1 Intermittent Sickness Absence Meeting. Within the preceding six months the Claimant had had four periods of sickness absence totaling 26 days and had started another long period of sickness absence on 29 July which was still continuing. The Claimant was advised of her right to be represented.

38 The meeting took place on 13 August 2015. The Claimant was accompanied by her RCN representative. She informed Ms Ridulme that her GP had now referred her to the Pain Specialist at University College Hospital and Ms Ridulme said that as soon as they received it she would try and expedite the appointment. Ms Ridulme also informed the Claimant that although they had implemented the recommendations made by OH the Claimant's attendance had not improved and her sickness level had increased. Since the second formal sickness absence review meeting on 30 June 2015 the Claimant had had two further periods of sickness absence. She said that the department was unable to sustain the Claimant's sickness absence levels and would be proceeding to the final stage of the Respondent's Sickness Absence and Attendance Policy.

39 The Claimant saw her GP again on 21 August and said that at a meeting at work the previous week she had been told that her employment was in danger because of her long periods of sickness absence and that that had caused her emotional distress. The Claimant was diagnosed as having back pain and acute stress reaction.

40 On 17 September Maria Ridulme prepared a report to progress the Claimant's case to a final sickness absence review. In the report she said that the Claimant had been absent sick for 160 days between 27 October 2014 and 4 April 2015 and in the four months after she had returned to work she had had five further sickness absences for a total of 43 days. It had been the intention at the case conference on 22 July to have another review meeting in two months' time. However, in light of the Claimant's long absence after that meeting, that option was no longer viable. The department could no longer sustain the Claimant's level of poor attendance and the support required to cover her role when absent. It affected the continuity and delivery of care for patients. Ms Ridulme had, therefore, considered it appropriate to progress the case to a final hearing.

41 On 24 September 2015 the Claimant was invited to a Final Formal Sickness Absence Review on 21 October 2015. She was warned that one of the potential outcomes of the meeting could be the termination of her employment with the Respondent. She was advised of her right to be accompanied. The Claimant was sent a copy of Ms Ridulme's report, her sickness absence record, OH reports, her return to work interviews and her medical certificates.

42 The Claimant was examined by a Consultant in Pain Medicine on 26 September 2015. His view was that as there were multi-factorial causes for her pain (including psychological factors) the best way forward would be for her to attend a multi-disciplinary pain management programme. He also advised her that she might benefit from an intravenous lignocaine infusion.

43 The Claimant was reviewed by the OH Physician on 30 September 2015. The advice was that she was fit for her adjusted role (as per the workplace assessment of 1 July) and hopefully might be able to increase her duties after the proposed treatment from the Pain Clinic. If not, she might need to be temporarily redeployed to a less physically demanding post such as a Clinical Nurse Specialist post.

44 On 4 September Ms Ridulme received a quote for the delivery and installation of the ergonomic chair. On 1 October she requested that it be ordered for the Claimant. The request was rejected by the Procurement Team on 9 October and Ms Ridulme appealed that on 12 October on the grounds that it was being ordered because the manual handling advisor had recommended it. The requisition for approval was resent on 2 November 2015. It appears that no action was taken on that by the Procurement Team until it was chased up again in February the following year. It was finally ordered on 16 February 2016 and delivered on 18 March 2016. At no stage did the Claimant raise the matter of the chair or chase it up.

45 The Claimant was absent sick for one day on 12 October 2015 because of abdominal pain.

46 The Final Formal Sickness Absence Review on 21 October 2015 was chaired by Sue Beatson, Deputy Chief Nurse. The Claimant was accompanied by her RCN representative. Ms Ridulme presented the management statement of case. The Claimant was informed at the outset that the purpose of the meeting was to undertake a review of her sickness absence over the previous eighteen months. Having set out the history of the case Ms Ridulme said that the Claimant was still not able to carry out all the duties of her role with the consequence that either those would not be carried out or it would leave other parts of the rota short. The Claimant said that if she had been redeployed to the Clinical Practice Facilitator ("CPF") role or Clinical Nurse Specialist ("CNS") roles when she had returned to work in May it might have assisted her in her return to work. The Claimant said that she was making improvement in being able to return to full clinical duties (at that stage she was still working only the early shifts). She also said that she had been suffering with stress, anxiety, low mood and depression which had been treated through medication and the support of the Staff Psychological and Welfare Service.

47 The panel did not accept that the Claimant could have undertaken the CPF or CNS roles because, although they had a different clinical remit from being in a ward area, they did involve regular patient contact and with it an expectation that the post-holders would be capable of providing assistance with manual handling or responding in an emergency situation if the need arose. They also felt that the arrangements in force at the time (with the Claimant not carrying out her full role) could not continue indefinitely. They were satisfied that there was a risk to patient care by having clinical staff not able to perform their full range of duties and that it created inflexibilities in the workforce which impacted upon her colleagues. In light of the indication from the Claimant and from OH that the Claimant was improving and that she was shortly due to attend a Pain Management Clinic, they confirmed that the arrangements would remain in force for another three months. During that period the Claimant would be placed on Respondent's Transitional Pathway for redeployment and Dayo Ajibola, Employee Relations Advisor, would forward her potential suitable alternative roles for her to consider as an alternative to her role. If she made considerable progress in being able to increase the clinical duties in her role, then

consideration would be given to removing her from the Transitional Pathway. The Claimant was advised of her right of appeal and an interim review of her progress was fixed for 11 December.

48 On 27 October the Claimant and her RCN representative were informed of the process that would be followed in respect of redeployment. Every Tuesday the Claimant would receive the Jobs Bulletin and on the Thursday she would notify Dayo Ajibola of the jobs in which she was interested. If the recruiting managers felt that the job might be suitable for her Mr Ajibola would let her know. The Claimant would then arrange an informal discussion with the manager about the job and if they both agreed that the job was suitable for her, the job would be put on hold and she would be given a four week trial period in the role. Throughout the trial period she would continue receiving the bulletin. The Claimant was asked to indicate whether she was happy with the proposed process. Neither the Claimant nor her RCN representative expressed any dissatisfaction with the process.

49 Thereafter the Claimant was sent the Jobs Bulletin every Tuesday. She expressed an interest in two roles. The first was a Clinical Nurse Specialist in Upper GI Cancer. This was a Band 7 role which required experience in cancer nursing and for the post-holder to have completed or to be completing a Master's degree. The Claimant had an informal discussion with Sally Beyzade, the matron in that unit, about that role. Ms Beyzade went over what the role required and expressed her concern that the Claimant did not have the required skill set and would struggle in the role. She also said that she was worried about her sickness record and her having to undertake clinics and Multi-Disciplinary Team meetings and that they might not be able to rely upon her. On a later date Ms Beyzade informed the Claimant that she would not have shortlisted her for that role as she did not think that the Claimant had the oncology experience and she was not working towards a Masters degree. Mr Ajibola also discussed the Claimant's suitability for that role with both Ms Beyzade and Eleanor Knight, the hiring manager for that role. They both advised him that the Claimant would not be suitable for the post as she did not have the essential requirements for that role.

50 The second one was a Senior Staff Nurse/Paramedic role in the Emergency Department. This was a Band 6 role. Mr Ajibola discussed that role with the Claimant over the telephone. He advised her that it would not be appropriate to redeploy her into that role as it was a role that involved heavy manual handling and a requirement to be able to perform CPR.

51 The Claimant was absent sick for one day on 23 November because of a migraine and for six days between 1 and 6 December because of a cold.

52 The interim review meeting took place on 11 December. At that meeting Ms Beatson observed that both the roles in which the Claimant had expressed an interest would not have been suitable as they both involved elements of patient and manual handling. The Claimant also acknowledged that she did not have experience of specialist cancer nursing. Ms Beatson asked the Claimant whether she had considered any non-clinical roles and the Claimant said that she had not. It was noted that since the Claimant had been invited to the Final Formal Sickness Absence review she had had three further short periods of sickness absence, none of which had been related to her back. The Claimant informed them that she had undergone a lignocaine infusion but that she had not accessed any of the services available for

psychological support. The Claimant and Ms Ridulme confirmed that the Claimant had not undertaken any long days on a regular basis but that on some occasions her shift had gone over her reduced hours. The Claimant was not undertaking any manual handling, CPR or BLS (Basic Life Support) but was carrying out other normal clinical duties. The panel felt that there had been limited progress in the Claimant increasing her duties in her substantive role. It was agreed that there would be a further referral to OH and that the final review meeting would be held on 3 February. The Claimant was warned again that if by then there had not been sufficient progress in her ability to carry full clinical duties and a suitable alternative role had not been found through redeployment, the outcome could be the termination of her employment.

53 The OH Physician saw and assessed the Claimant on 14 December. She advised that the Claimant's back pain had improved significantly since the lignocaine infusion four weeks earlier and that over the next six weeks the Claimant should gradually be introduced to all her normal duties (including patient and manual handling). She said that during that period the Claimant was going to make appointments to see the OH physiotherapist and psychologist. She would review the Claimant on 28 January 2016.

54 The Claimant was absent sick on 12 and 13 January because of an upset stomach and on 14 January because of migraine.

55 Between 11 December 2015 and 3 February 2016 the Claimant carried out six long day shifts with full clinical duties. Ms Ridulme allocated to her patients whose dependency needs were lower. During this period the Claimant was on annual leave from 21 to 29 December and from 19 January to 1 February. She was absent sick from 12 to 14 January.

56 The OH Physician reviewed the Claimant on 1 February 2016 and advised that she was fit to carry out all the duties of her role.

57 The Final Sickness Absence Review meeting took place on 3 February 2016. The Claimant was accompanied by her RCN representative. The Claimant said that with the exception of the three days when she had been absent sick and one day when she had not attended because she had been confused about which day she was expected to attend, she had undertaken all the shifts that had been allocated to her by Ms Ridulme. It was, therefore, not her fault that she had only undertaken six long day shifts with full clinical duties. The panel acknowledged that the number of shifts undertaken by the Claimant was partly due to the roster but felt that as it had been highlighted to the Claimant that she was expected to demonstrate a clear and sustained improvement she too had a responsibility to ensure that she did sufficient shifts to demonstrate that and she ought to have raised it with Ms Ridulme. The panel was also concerned that she had triggered further absence management procedures through having had four short term sickness absence in a six month period.

58 The panel's decision was not to terminate the Claimant's employment but to review matters for a further period of six weeks. During the six weeks they expected the Claimant to undertake a minimum of 14 long days and all other shifts allocated to her and to have no periods of sickness absence. Ms Ridulme would allocate to the Claimant patients with the full range of dependencies and Mr Ajibola would continue

to send her job bulletins as had been previously agreed. The Claimant was advised that a failure to meet the above expectations and to consistently demonstrate her ability to undertake the full duties and shift patterns without the requirement for time off would result in her employment being terminated. If she met the expectations she would be issued with a final improvement notice for 12 months. The outcome was set out in writing in a letter dated 8 February.

59 Between 25 and 27 February the Claimant was due to attend a conference in Portugal. This was included in her working hours. On the morning of 25 February the Claimant informed Ms Ridulme that she would not be going to the conference as the arrangements for someone to look after her cats had fallen though at the last minute. Ms Ridulme said that in that case the Claimant should attend for work but the Claimant said that she was too tired to do so because she had been awake most of the night trying to make alternative arrangements. The Claimant made up most of that shift by working 11.5 hours of the 15 hour shift on another day.

60 On 2 March 2015 the Claimant was rostered to work a long day shift which began at 7.45 a.m. and ended at 8.15 p.m. At 6.45 am she called the ward and said that there was a leak in her bathroom and that she was trying to ensure that it did not spread to other areas in her flat. She said that she would call the ward in the morning to provide an update. By 1.54 pm the Claimant had not provided an update and Ms Ridulme called her. There was no answer and Ms Ridulme left a message for her. The Claimant called her back and said that she would not be attending her scheduled shift as her domestic situation had not been resolved. The Claimant lived in rented accommodation provided by the Respondent very close to the hospital.

61 The final review meeting took place on 18 March 2016. During the six week period the Claimant had worked at least 14 long day shifts and all the shifts allocated to her bar on the two occasions mentioned above and had undertaken full clinical duties. The Claimant had identified a Band 7 Clinical Nurse Specialist role in which she was interested. Mr Ajibola had liaised with the hiring manager who had advised him that an essential criterion for the role was that applicants should have or be working towards a degree. She said that if the Claimant wished to discuss the role further she should contact her. Mr Ajibola conveyed that information to the Claimant. Ms Ridulme informed the Claimant that the Clinical Practice Facilitator in the ward was due to become vacant and asked her whether she would be interested in it. The Claimant responded that “it was not for her.”

62 The Claimant was accompanied by her RCN representative at the final review meeting and they were given every opportunity to respond to the management case presented by Ms Ridulme. In making its decision the panel took into account the following factors. The panel felt that since the Claimant commenced her long-term sickness absence in October 2014 she had been well supported in terms of referrals to OH and access to its physiotherapy and psychological services; Upon her return to work in May 2015 she had been supported for a considerable period of time by adjustments being made to her shift patterns and clinical duties; Despite those factors, by October 2015 there had no improvement in the Claimant’s attendance or her ability to carry out the full remit of her role; the final review meeting on 21 October 2015 had been deferred on two occasions to give the Claimant further time (nearly six months) to allow her to access and respond to further treatment and to demonstrate that she could undertake the full remit of her clinical duties and to evidence that she could offer sustained and consistent attendance at work without

taking time off. Despite that the Claimant had been unable to demonstrate consistent attendance. Since 29 July 2015 the Claimant had been absent on seven occasions for a total of 39 days. None of those absences related to her back problems. Short notice intermittent absences were extremely difficult to manage and often left the ward short of staff which could potentially affect patient care. Furthermore, as a Deputy Ward Sister, the Claimant had managerial duties and was supposed to be a role model for other staff. The Claimant had been offered the opportunity to seek redeployment but she had made it clear that she was committed to returning to her role on T9 ward. The panel took into account the Claimant's length of service and the fact that she was a good and experienced nurse, but concluded that it was not possible for the Trust to continue to employ her in the Deputy Ward Sister role because of her consistently unreliable attendance patterns which impacted upon the ward team and the patients.

63 The Claimant was dismissed on 18 March 2016 and was given six weeks' pay in lieu of notice. She was advised of her right of appeal. The decision and the reasons for it were confirmed in a letter dated 22 March 2016.

64 On 7 April 2016 the Claimant appealed against her dismissal on the grounds that the decision had been unduly harsh because (i) in the final six weeks she had carried out her full duties and the two absences she had had were not due to sickness but to unavoidable emergencies; (ii) the panel had not taken into account her evidence that the back injury, the persistent demands that she return to work and the threats of dismissal in the past six months had caused her significant stress and depression which in turn had impacted upon her nervous system and led to IBS symptoms and migraines; and (iii) she had not been supported by the Respondent in the redeployment process.

65 The Claimant was informed that the role of the appeal panel would be to establish whether the process followed was reasonable and whether the decision of the initial panel had been reasonable in light of the evidence presented.

66 On 19 May the Claimant provided the following documents to be included in the appeal pack – a letter from a friend confirming that he had informed the Claimant late on 24 February that he would not be able to look after her cats and an invoice from a plumber to the Claimant for dealing with a leak in her flat on 2 March. On 23 May the Claimant provided a glowing reference from the previous Ward Sister. This was accepted by the appeal panel although it was submitted late.

67 The appeal was heard by Flo Panel-Coates, Chief Nurse. The appeal hearing took place on 23 May 2016. The Claimant was accompanied by her RCN representative. At the end of the hearing the panel adjourned to consider its decision. The decision to dismiss the appeal and the reasons for it were communicated to the Claimant after the adjournment. They were set out in writing in a letter dated 10 June 2016. The panel concluded that the process followed from 21 October 2015 was not only reasonable but in excess of the Respondent's standard policy and procedure in order to try to achieve the best possible outcome. The panel also found that the letter of 8 February 2016 made it clear that the Claimant was expected not to have any absence during the six week period. There was no evidence to support an argument that the initial panel's decision had not been reasonable in light of the evidence presented. Ms Panel-Coates informed the Claimant in the letter that she was obliged to inform the Nursing and Midwifery Council of any registered nurse or midwife who

was dismissed. The Respondent was required to make a fitness to practise referral in respect of any nurse or midwife who was dismissed. Ms Panel-Coates said that she would make it clear to the NMW that there had been no concerns about her clinical practice and that the dismissal related solely to her attendance. Since then she has raised with the NMC whether there could be more flexibility in deciding whether a formal referral was necessary in every dismissal case.

68 Ms Panel-Coates made the referral and informed the Nursing and Midwifery Council of the Claimant's dismissal because of her poor attendance. She set out in detail the process that had been followed since the Claimant had the accident in May 2014. She emphasied that at no time had the Claimant's clinical abilities been questioned. The NMC informed the Claimant on 4 July 2016 that a referral had been made regarding her fitness to practise and sent her a copy of the referral from the Respondent. It made it clear that the NMC was screening the referral and had not made any decision about it at that stage. On 18 July 2016 the NMC informed the Claimant that it would not be taking the matter any further.

Expert Evidence

69 We had before us two expert reports from Consultant Psychiatrists. Dr Suleman, who was instructed by the Claimant, assessed the Claimant on 25 April 2016 and his report was dated 11 May 2016. Dr Isaacs was instructed by the Respondent and he interviewed the Claimant on 20 September 2016 and his report was dated 25 September 2016.

70 Dr Suleman's opinion was that the Claimant was suffering from depression. He said that she had had symptoms of depression before the accident at work in May 2014 and that the accident had worsened her depression because it had caused chronic pain and increased her work related stresses. The effect of her depression was that she had low mood, tearfulness, inability to enjoy daily life, social withdrawal, low energy and worthlessness and the occasional panic attacks.

71 Dr Isaacs noted that the Claimant told him that her alcohol consumption, which she saw as a form of self-medication, had started increasing in 2011 and had got to a stage where she was frequently drinking up to two bottles of wine, or the equivalent in beer, a day. His opinion was that she was suffering from depression at the time that he saw her and that her alcohol consumption might well have caused or exacerbated her depression. His opinion was that between August 2012 and September 2014 and between May 2015 and March 2016 the Claimant had had depression and anxiety symptoms for short periods of time but had not suffered from a severe depression throughout those two periods. There was no evidence that any symptoms of depression had had a serious adverse impact on her normal day to day activities during those two periods. Between October 2014 and April 2015 the Claimant had had more depressive symptoms and had been diagnosed as suffering from depression by her GP. She had been prescribed medication in December 2014, but had not taken it throughout the period and had not asked for a repeat prescription. She had told him that she was housebound during that period and not able to shop, cook, clean or even care for herself, but there was nothing in her medical records or in any other document to support that account. He was, therefore, unable to say how long the serious adverse impact on her normal day to day activities had lasted. He also noted that the Claimant had not engaged with psychological interventions for her depression, had not taken medication regularly

and had not minimized the adverse effects of her depression by reducing her alcohol consumption.

Conclusions

Disability

72 We considered first whether the Claimant was "disabled" within the meaning of section 6 of the Equality Act 2010 between May 2014 and 10 June 2016. Having considered all the evidence, we concluded that the Claimant suffered from mild depression on three occasions between August 2012 and 10 June 2016 – for two or three weeks in August/September 2012, for about two or three months between 28 October 2014 and January 2015 and for two or three weeks in August 2015. In each case it was a reaction to external circumstances – disciplinary or attendance management procedures at work or because of her back pain. The symptoms of the depression were low mood, being tearful and on the first occasion difficulty sleeping. On each of those occasions the Claimant was prescribed low dosage anti-depressants for short periods. On the last occasion the Claimant was at work throughout the period. Between October 2014 and January 2015 the Claimant had difficulty leaving the house because of her back pain but we do not accept that she was unable to cook, clean or look after herself because of her depression. There is nothing in the contemporaneous medical evidence to indicate that her depression was that severe or that it had that effect upon her. We concluded that the Claimant's depression did not have a substantial adverse effect on her ability to carry out her normal day-to-day activities and that any effect that it had had not lasted or been likely to last at least 12 months. In those circumstances, we concluded that the Claimant was not disabled as a result of suffering from depression between May 2014 and 10 June 2016.

Discrimination arising in consequence of disability

73 It is not in dispute that the Respondent applied its Sickness Absence and Attendance Policy and Procedure to the Claimant and that ultimately it dismissed her under that Procedure (issues at paragraphs 2.4(a), (b), (d) and (e)). It is also not in dispute that the reason that it invoked the procedure and dismissed the Claimant was because of her level of attendance or, to put it in another way, her absence from work. We do not accept that the Respondent "threatened" the Claimant with dismissal (issue at paragraph 2.4(d)). It simply warned the Claimant at various stages of the process, as fairness demanded that it should do, that dismissal was a potential outcome. It would have acted unfairly if it had not advised the Claimant of that potential consequence. We do not accept that it treated the Claimant unfavourably by advising her of that fact.

74 We accept that the dismissal of the Claimant amounted to unfavourable treatment of her. We had some reservation in accepting that the application of the Sickness Absence and Attendance procedure amounted to unfavourable treatment because the purpose of the meetings under the Procedure, especially in the initial stages or during a long term sickness absence, is to discuss what can be done to support the employee return to work. That was certainly the purpose of the long term sickness absence review meeting that was held on 12 March 2015 (before the Claimant returned to work after her long sickness absence) and the second review meeting that was held on 30 June 2015 (shortly after she returned to work to an adjusted

role). However, it was made clear to the Claimant on 12 March 2015 that if she was not able to return to work, the matter might progress to a Final Sickness Absence Review and on 30 June 2015 that the Respondent would not be able to sustain the adjustments long term. On balance, as those initial meetings were steps that could lead to a final sickness absence review meeting which could lead to a dismissal, we accepted that they amounted to unfavourable treatment.

75 We did not accept, however, that all the absences which led to the Procedure being invoked and, more importantly, her dismissal arose in consequence of her back pain (which amounts to a disability) or her depression (which we have found did not amount to a disability). The Claimant's absences for her back problems were 160 days between 27 October 2014 and 5 April 2015, 4 days between 26 and 29 May 2015, 11 days between 9 and 19 June 2015 and 2 days on 23 and 24 July 2015. There were two formal sickness absence review meetings during that period (on 12 March 2015 and 30 June 2015) the main purpose of which was to discuss what could be done to assist the Claimant return to work and to her role.

76 Between 24 July 2015 and 18 March 2016 the Claimant had seven further absences (totaling 39 days) which had nothing to do with either her back or her depression. There was no medical evidence that the Claimant's abdominal pains, stomach upset, migraines or cold had been caused by, or were in any way connected with, depression.

77 We, therefore, concluded, with some reservation, that having sickness absence review meetings with the Claimant before 24 July 2015 was unfavourable treatment arising in consequence of a disability. We were, however, satisfied that in holding those meetings the Respondent was seeking to establish what, if anything, it could do to support the Claimant to return to work and to carry out her duties. In doing it was pursuing the legitimate aims of supporting an employee who had a long-term sickness absence, ensuring that an employee was able to carry out the duties which she had been employed to do and that patient care was not compromised. The holding of those meetings and having those discussion was a proportionate means of achieving those legitimate aims.

78 We also concluded that the holding of the Final Sickness Absence Review meeting on 21 October 2015 was unfavourable treatment arising in consequence of the Claimant's disability because the focus of the meeting was on the Claimant's inability to carry out all the duties of her role some five months after she returned to work. The reason that she could not carry out all the duties of her role was because of her back problems. The Respondent wanted to ensure that someone employed as a nurse on a ward could carry out all the duties of that role. The inability to do so had an impact on the other nurses on the ward and potentially on patient care. That was clearly a legitimate aim. The Respondent did not dismiss the Claimant because she was unable to carry out all the duties of her role. It waited another six months to see if the treatment that she was due to have would lead to an improvement and/or for her to secure another role through redeployment. In light of the fact that the Claimant had not been carrying out her full duties since she returned to work in May 2015, we concluded that the holding of that meeting and its outcome was a proportionate means of achieving the legitimate aim.

79 The reason for the Claimant's dismissal on 18 March 2016 was that despite all the support that she had been given during her long-term sickness absence and since

her return to work she had not been able to demonstrate that she could offer sustained and consistent attendance at work. Since 29 July 2015 she had been absent on seven occasions for a total of 39 days. None of those absences had been related to her back or her depression. The absences for which she had been dismissed had not arisen as a result of any disability, and, therefore, her dismissal was not unfavourable treatment for something arising in consequence of her disability. In case we are wrong in that conclusion, and the Claimant's absences for her back problems played any part in her dismissal, we were satisfied that dismissal at that stage was a proportionate means of achieving a legitimate aim. The legitimate aim was that a ward nurse should attend regularly and fulfil her duties. Dismissal in the circumstances was a proportionate means of achieving that legitimate aim. The Respondent had supported the Claimant through a long absence, it had made adjustments after she returned to work, it had deferred the final sickness absence review meeting several times to enable to Claimant to get well enough to carry out the full remit of her role. The Respondent made considerable allowances for the Claimant's back condition but ultimately dismissed because she continued to have poor attendance for reasons that had nothing to do with her back.

80 The Claimant was referred to the Nursing and Midwifery Council because she had been dismissed. We have found that her dismissal was for the Claimant's failure to demonstrate sustained and consistent attendance since 29 July 2015 and that those absences were not related to any disability. It follows from that that the referral to the NMC was not because of something arising in consequence of disability. In case we are wrong in that conclusion, and the dismissal had been due in part to her disability - related absence, we were satisfied that the Respondent was pursuing a legitimate aim, namely complying with its regulatory obligations to refer all nurses who were dismissed to the NMC. In doing so, it had made it clear that there had not been any concerns about the Claimant's clinical practice, that it had been purely to do with her attendance and the reasons for her absences. We were satisfied that making the referral in those terms was a proportionate means of achieving the legitimate aim.

Failure to make reasonable adjustments

81 The provision, criterion or practice ("PCP") of which the Claimant originally complained was that the Respondent required her to perform the essential functions of her job, i.e. it required her to do full clinical duties over the full shift pattern. It is clear from the evidence that the Claimant was not required to do that from when she returned to work on 6 May 2015 until 21 October 2015. At the final sickness absence review on that day it was made clear that the arrangements in force at the time (the Claimant working only the early morning shift and not performing all aspects of her role) could not be continued indefinitely. It would be continued for a further three months during which time the Claimant would be given the opportunity to seek redeployment or to improve and increase the duties that she could carry out in her role.

82 The Claimant first carried out a full long day shift and all her clinical duties (albeit she was allocated patients with lower dependency needs) in the week commencing 14 December 2015. On 14 December OH advised that over the next six weeks the Claimant should gradually be introduced to all her normal duties. Between 11 December and 3 February 2016 the Claimant worked six long day shifts and carried out all her clinical duties with patients with lower dependency needs.

83 On 1 February 2016 OH advised that the Claimant was fit to carry out all the duties of her role. From 3 February 2016 the Claimant was required to do, and did, full clinical duties over a full shift pattern.

84 The requirement to increase her duties from 11 December 2015 onwards and to carry out her full duties from 3 February 2016 did not put the Claimant at a substantial disadvantage because of either her back problems or her depression (we have not found the latter to be a disability). The advice from Occupational Health was that she was fit to undertake those duties. The Claimant did not at any stage object and indicate to the Respondent that she could not carry out those duties or work those shifts. If it did put her at a substantial disadvantage, in light of the advice from OH and the absence of any objection from the Claimant, the Respondent did not know and could not reasonably have been expected to know that it put the Claimant at a substantial disadvantage because of a disability.

84 We then considered the additional PCPs that the Claimant identified on the second day of the hearing.

85 We did not accept that the Respondent applied a practice of failing to consider whether the Claimant's health issues were disabilities (paragraph 2.11(a) above). OH advice was routinely sought and given on whether the health issues could be classified as disabilities under the Equality Act 2010. In any event, the failure to identify them as disabilities does not in itself cause any disadvantage to the Claimant, and the Claimant has not identified any such disadvantage. The real issue is whether the Respondent in the work context applied some provision, criterion or practice that put the Claimant at a substantial disadvantage in comparison with persons who did not have the health conditions which she did, whether those health conditions amounted to a disability and, if they did, whether the Respondent knew or ought reasonably to have known that the Claimant was disabled and that it put her at that disadvantage.

86 The Claimant was not required to use a normal chair but one to which some adjustments had been made to accommodate her needs (paragraph 2.11(b) above). It is correct that the workplace assessment on 1 July 2015 stated that the Claimant would benefit from the support which could be provided by an ergonomic chair and that such a chair was not provided until 18 March 2016. There was no evidence, however, that the failure to provide that chair aggravated or increased the Claimant's back problems, or was a factor in her back problems not resolving. None of her absences after 29 July 2015 related to her back and, therefore, it could not be said that the failure to provide the chair caused her to be absent from work. The Claimant never raised the issue of the chair not being provided with anyone at the Respondent. She never chased it up. We concluded from the above that the requirement for the Claimant to continue using the chair that had been adapted to her needs did not place her at a substantial disadvantage.

87 There was a requirement generally that the Claimant should have good attendance and, between 3 February and 18 March 2016 that she have full attendance, and that her sickness absence would be monitored under the Respondent's Sickness Absence and Attendance Policy (paragraph 2.11 (c) and (e) above. However, this was not applied without consideration of her disability issues or in accordance with the standards set for non-disabled employees. No attempt was made to terminate the Claimant's employment during her absence of over five

months between 27 October 2014 and 5 April 2015. No pressure put on the Claimant to return to work during that period. A number of adjustments were made to the Claimant's role to enable her to work when she returned from her sickness absence on 6 May 2015. Those adjustments remained in place for a period of seven months. The Claimant had seven absences of 39 days after 29 July 2015 and none of them related to her disability. The final sickness absence review was deferred on two occasions to give the Claimant's health an opportunity to improve and for her to demonstrate consistent attendance. While it is accepted that the requirement to have good attendance and monitoring under a sickness absence procedure can put a disabled employee at a substantial disadvantage in comparison with a non-disabled employee, it did not do so in this case because of the way in which the Respondent applied its procedure. It was not applied rigidly and the Claimant was given considerable leeway.

88 The Claimant alleged that there was a PCP that she would arrange her own redeployment and that in order to be redeployed she needed to have an acceptable level of attendance (paragraph 2.11 (d) and (e) above). The redeployment process that was to be adopted was explained to the Claimant and her RCN representative. Neither of them raised any concerns about it. There was no evidence that the process adopted put the Claimant at a substantial disadvantage because of her disability by reason of her back problems. There was no evidence that because of her disability she was unable to go through the bulletins and identify the roles in which she was interested. There was no requirement for the Claimant to have an acceptable attendance record in order to be redeployed. It is correct that in respect of a particular role the Matron expressed some reservations about the Claimant's suitability for that role in light of her sickness record. That was a role into which the Claimant could not have been redeployed in any event because it was at a higher level than her existing role and would, therefore, have been a promotion, and she did not meet the essential requirements for that role.

89 The Claimant was required to demonstrate that she could undertake the full complement of her shift duties from 14 December 2015 onwards. There was no evidence that that put her at a substantial disadvantage because of her back problems. If it did, the Respondent did not know and could not reasonably have been expected to know that it did. The OH advice on 14 December was that over the next six weeks she should gradually be re-introduced to all her duties and on 1 February 2016 that she was fit to carry out all her duties. The Claimant indicated the same to the Respondent and did not say at any stage that she was struggling to carry out her full duties because of her back. We, therefore, concluded that the application of that PCP at that time to the Claimant did not put her at a substantial disadvantage in comparison with persons who were not disabled.

Unfair Dismissal

90 We concluded that the reason for the Claimant's dismissal was her poor attendance which meant that she was often not capable of carrying out the job which she had been employed to do. That, in our view, amounts to a reason related to capability. If we are wrong in that conclusion it amounts to some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held. For the purposes of considering whether the dismissal was fair, we do not think that it makes any difference how the poor attendance is classified.

91 We then considered whether in all the circumstances of the case the Respondent acted reasonably in treating her poor attendance as a sufficient reason for dismissing the Claimant. The Claimant contended that it was unfair to dismiss her for the two absences that she had in the final monitoring period because they were due to unexpected emergencies and were unavoidable. The Claimant was not dismissed just for those two absences but because of her consistently unreliable attendance since she returned to work on 6 May 2015 after her long-term sickness absence and her failure to demonstrate to the Respondent that she could maintain a good level of attendance. The Respondent could have dismissed her for that (and her inability to carry out all the duties of her role) on 21 October 2015, but it did not do so. The final review hearing was deferred to 3 February 2016. In that period the Claimant had three further sickness absences totaling 10 days. The Claimant was then given one final chance to demonstrate to the Respondent that she could work for a period of six weeks without having any absences. It was made clear to her that if she managed to do that she would be issued with a final improvement notice because of the concerns about her attendance. If, however, she did not, her employment would be terminated.

92 The issue was not whether the Claimant was in any way to blame for her absences but whether she could be relied upon to attend regularly for work. When the Claimant was absent sick there was no suggestion that she was to blame for that absence or that it was within her control. The issue was the level of attendance and the Claimant's inability to satisfy her employer that she could maintain the level of attendance that was necessary. To that extent, the reason for the absences in the final monitoring period is irrelevant. That having been said, the Claimant's explanations for not attending any part of those two shifts, knowing full well that she was at risk of being dismissed, are not very satisfactory. The Claimant's explanation of being awake most of the night trying to find someone to look after her cats is neither credible nor reasonable. On 2 March 2016 there was no satisfactory explanation of why the Claimant had not been able to attend any part of that shift. In those circumstances, we do not agree with the claimant's assertion that those absences were unavoidable.

93 The Claimant also argued that the dismissal was unfair because the Respondent did not carry out the redeployment process in accordance with its Procedure. Any arguments about redeployment would have greater weight if the Claimant had been dismissed for not being able to carry out all the duties of her role, That, however, was not the reason for the dismissal. By the time the Claimant was dismissed she was able to carry out all the duties of her role. She was dismissed because of her poor attendance. Furthermore, there was no evidence that her absences after 29 July 2015 were in any way attributable to her role. It was clear that the Claimant's preference was to carry on in her role if she were able to do that and to only seek redeployment if she was not able to do so. Furthermore, the redeployment process to be adopted was explained to the Claimant and her RCN representative and neither of them objected to it. The fact that the Claimant was not very interested in redeployment is evidence from the fact that she identified only three posts in which she was interested and they were unsuitable either because they amounted to promotion and she did not have the requisite skills and/or they involved manual handling.

94 Having considered all the circumstances, we are satisfied that the Respondent acted reasonably in dismissing the Claimant for her poor attendance.

Employment Judge Grewal on 15 January 2018