EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss Deborah Westgate	AND	The Commissioners for HM Revenue and Customs

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 30 April, 1, 2, and 3 May 2018

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mr I Ley
Mr J Williams

Representation

For the Claimant: Mr A Ross of Counsel
For the Respondent: Miss S Hornblower of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are dismissed.

RESERVED REASONS

1. In this case the claimant Miss Deborah Westgate claims that she has been discriminated against because of a protected characteristic, namely her disability. The claim is for discrimination arising from disability, indirect discrimination, and because of the respondent's alleged failure to make reasonable adjustments. The respondent concedes that the claimant is disabled, but contends that there was no discrimination.
2. We have heard from the claimant. For the respondent we have heard from Mr Paul Gilhooley. We were also asked to consider a statement from Ms Michelle Wyer on behalf of the claimant, but we can only attach limited weight to this because she was not here to be questioned on this evidence.
3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. The respondent contends that the respondent sole witness, Mr Gilhooley, was an unsatisfactory and at times disingenuous witness who repeatedly failed to answer simple questions directly, and whose evidence was occasionally inconsistent with the contemporaneous documents. We agree with those criticisms but only to a degree, although we do accept Mr Gilhooley's evidence that he genuinely tried his best in difficult circumstances to assist the claimant, whom he considered to be a valued and very experienced colleague. In any event we have been referred to extensive documentary evidence, not all of which proved relevant to the issues to be decided in this case. This is because, as explained further below, the claimant withdrew certain aspects of her claim during these proceedings. The following findings of fact are therefore germane to the claimant's remaining claims, and we make these findings on the balance of probabilities, having considered the oral and documentary evidence before us, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The claimant Miss Deborah Westgate commenced employment with the respondent which is now HM Revenue and Customs on 9 August 1976. She remains in the respondent's employment and qualified for a long service award after 40 years of employment in 2016. She has always been a valued employee with specialist skills with a good attendance record and a clean disciplinary record. She is employed as a Grade 7 Technical Advisor.
5. The claimant suffers from severe double scoliosis with type 2 respiratory failure. This is a physical impairment which is both substantial and long-term, and has adversely affected her ability to carry out normal day-to-day activities. She requires aids to assist with breathing and rehabilitative activities. She was originally based in London, but because of her deteriorating health she relocated to the West Country in 2012. This enabled her to move next door to her mother who acted as her primary carer. The relocation was facilitated by the respondent offering the claimant a new role which she could perform as a designated homeworker.
6. As is to be expected the respondent has a number of written policies and procedures. One of these assists the implementation of reasonable adjustments to support employees with health issues. This results in what used to be known as a Reasonable Adjustment Passport, now renamed as a Workplace Adjustment Passport. This is a document which records any agreed adjustments which are made to help a particular employee. They are reviewed periodically to ensure that they remain appropriate. A Reasonable Adjustment Passport was agreed with the claimant with effect from 23 May 2012. The respondent also has a policy relating to Disability Adjustment Leave, which is known as DAL. This allows paid time off in particular circumstances which relate to having to manage the effects of a disability. The claimant's Reasonable Adjustment Passport specifically referred to her as a designated homeworker and her ability to take DAL.
7. When the claimant relocated from London in 2012 she joined the respondent's Specialist Employer Compliance ("SEC") team. The SEC section had approximately 400 members

of staff nationally spread across 18 different sites and assisted in solving compliance risks for other sections within the respondent. Within SEC, the claimant was part of the Senior Technical Team ("STT") which was a small team spread across numerous offices. STT acted as a hub and was available to provide technical services to all sections of the respondent. The claimant's role as a Grade 7 Senior Technical Advisor involved providing technical input around a range of employment tax risks. Her role also required her to provide support around the design and delivery of projects to minimise risks to the lawful recovery of tax.

8. There is a factual dispute as to the location of the office to which the claimant was assigned. The respondent asserts that the claimant was assigned to its Exeter office. The claimant accepts that Exeter was the SEC office, but now states that Taunton was her base office because it is a slightly nearer office geographically. She states that her IT was managed from Bournemouth, and that her line manager and her costs centre were in Gloucester. We have seen contemporaneous documents following the claimant's move from London which make it clear that Exeter was her office base, and as a designated homeworker her files were sent to her from the Exeter office and returned to Exeter. This was the SEC base office. No one considered the claimant to be assigned to the Taunton office when initial discussions commenced about its closure. For these reasons we find that the claimant was assigned to the respondent's Exeter office, and not the Taunton office as was subsequently suggested for the reasons explained further below.
9. In recent years there has been considerable structural change within the respondent's organisation, driven by a need to deliver more services despite reducing resources. The respondent has an overall transformational vision known as Building Our Future ("BOF"). As part of this significant restructuring process the respondent is reducing its estate from 190 offices to 13, and from 96,000 full-time equivalent employees to around 52,000. During this process the respondent decided that SEC should be restructured and that a new dedicated team should be created to focus on Employment Status and Intermediaries ("ES and I"). The work previously undertaken by SEC on Employer Duties was to be passed to other groups, and the employees who had worked on Employer Duties (which included the claimant) would have to learn new and unfamiliar work for ES & I. In February 2016 the respondent began consulting with SEC staff about these transformation plans, and on 3 February 2016 sent a general email to all staff (including the Claimant) by way of explanation and consultation.
10. In March 2016 the respondent prepared a detailed document headed: "SEC Transformation - Staff Q and A" which consisted of 79 paragraphs explaining the general background to the transformation; what was likely to happen to the work; what was likely to happen to different teams; what locations for the work might be involved; "upskilling" and redeployment, and information on the Redeployment Pool. Mrs Julie Court (who was then the claimant's line manager) sent this information to the claimant by e-mail dated 10 March 2016.
11. There was also a newsboard message to all SEC staff (including the claimant) on 5 April 2016 headed Transition of Status and Employer Duties work, and which gave a detailed explanation of the proposals. This explained that SEC was transforming to form a new team to tackle Status and Intermediaries risks, which involved transferring status work to a new SEC team.
12. The claimant lived with her mother, who was her primary carer, and unfortunately during April 2016 her mother became very ill. The claimant took authorised leave to assist her, but sadly she passed away on 26 April 2016. This resulted in a period of extended sickness absence. The claimant was signed off from 28 April 2016 to 26 May 2016 because of "bereavement reaction"; then to 25 June 2016 for the same reason; then to 22 July 2016 for "bereavement and grief reaction"; then for two months to 22 September 2016 for "bereavement reaction"; and then for a further two months to 16 November 2016 for the same reason. The claimant returned to work on 15 November 2016.
13. Although these sickness certificates only referred to bereavement and grief, following her mother's death the claimant had no immediate replacement for support and rehabilitation, and her condition deteriorated. Her GP has recently confirmed by letter dated 2 May

2017 that the absence of support and help from her mother caused the claimant's ill-health related to her disabilities to decline simultaneously, and that the claimant's absence was by its nature disability related. It also required an alternative management plan from her medical team.

14. As a designated homeworker the claimant had computer access to the respondent's systems at her home. During her sickness absence she chose not to log on these systems, but her managers had her personal telephone number and were able to text her to arrange discussions. The respondent's processes include reference to keep in touch (KIT) discussions during sickness absence, as part of the process of managing attendance.
15. The claimant's line manager was originally Mrs Court, but during the transformation process Mrs Philippa Madelin became the claimant's acting manager with effect from 1 June 2016. Mr Gilhooley, from whom we have heard, then took over as the claimant's line manager with effect from 1 August 2016.
16. Mrs Court had a KIT call with the claimant on 1 June 2016, when the claimant confirmed her personal contact details, and they discussed the reasons for her absence. Mrs Madelin then had three KIT calls with the claimant, on 16 June, 8 July, and 22 July 2016. They discussed the reasons for the claimant's absence, but also Mrs Madelin updated the claimant on the transformation process, including confirmation that Exeter would no longer be an SEC location (other than for the Embassy team), and that the respondent was reducing its locations from 18 down to 8 during 2016/17. She also informed the claimant that Mr Gillhooley would be taking over the management role as he was the new STT lead.
17. Mr Gillhooley then had a KIT conversation with the claimant on 26 August 2016, which centred on discussions about the claimant's health complications. They then had a more detailed KIT conversation on 9 September 2016, which encompassed a number of matters. This included the claimant's current medical condition; the fact that she felt "in limbo"; the possibility of ill health retirement (which both Mr Gillhooley and the claimant's GP had mentioned), although the claimant was not keen to progress this; and also an update on the Building Our Future locations and the implications for the claimant and her team.
18. There was then a further KIT discussion between the claimant and Mr Gillhooley, which was on or about 7 October 2016, but in any event Mr Gillhooley sent an email on 13 October 2016 which records that he had spoken with the claimant about ill health retirement, as well as transformation and her role given the STT restructuring. He noted that she understood the issues.
19. Mr Gillhooley then arranged for the claimant to be examined by Occupational Health upon her return to work. His instructions originally included possible consideration of ill-health retirement, but the claimant objected to this, and so Mr Gillhooley instructed Occupational Health not to proceed with this aspect. Unfortunately they proceeded to do so anyway.
20. Another matter which has caused the claimant concern is her annual performance review for 2015/2016. We have only heard very limited evidence on this matter, but it seems that the following events occurred. After completion of a self-assessment form and discussion with her manager, Mrs Court, the claimant was given a performance grading of Achieve. This is higher than the lower more critical grade of Must Improve. The claimant told Mrs Court that she wished to adduce further evidence or representations with regard to her grade. This did not happen, and the next stage of the process is that the grade is considered by a Moderation Panel and assessed along with grades for similar employees (and amended if necessary) so as to maintain consistency. Apparently the Moderation Panel decided to reduce the claimant's grade to Must Improve. The Moderation Panel did not discuss this with the claimant beforehand, so that she was unable to make any further representations, and nor did the Panel notify her of that decision subsequently. The claimant says that she only found out about this some months later as a result of a Freedom of Information Request, although in our view it was open to the claimant to seek confirmation of the current position from either her managers or HR. In any event the

claimant complained about the process, and the respondent accepted that there had been a procedural error, and reversed the downgrading back up to Achieve. Apparently this was on the basis of the procedural omission, rather than because of any reconsideration of the actual merits of the grade.

21. In the meantime, although the transformation process had an intended completion date of late September 2016, matters were not concluded by then and were not fully resolved until about March 2017. Nonetheless the claimant's job had changed, and SEC stopped accepting Employer Duties submissions and began to focus on ES & I (Status and Intermediary) cases only, sometime from October 2016 onwards.
22. Mr Gillhooley and the claimant then had a detailed KIT discussion on 27 October 2016. There is a dispute as to whether the claimant was told that her job had come to an end, but it is clear that Mr Gillhooley told claimant that their team had given up on all Employer Duties work and that this included the work which had formed the basis of recent technical submissions which the claimant completed as a designated homeworker. In addition, Mr Gillhooley thought that there were three main options: continuing to see if there was an alternative role for the claimant; ill-health retirement; or a voluntary exit package. The respondent's Taunton Office had previously been closed, and some staff were given generous exit package terms referred to as "Taunton Terms". Mr Gillhooley agreed to investigate this option, but unfortunately these terms were no longer available following a restriction at Government level.
23. The claimant was assisted at this stage by her trade union representative, Ms Wyer. Mr Gillhooley then took further advice from HR during December 2016, and an email from HR confirming their discussion on 21 December 2016 records that Mr Gillhooley had confirmed that "due to a combination of the requested working pattern, future locations of the business, duties and homeworking that there was no longer a role for Deborah." Mr Gillhooley, the claimant and Ms Wyer then had a telephone conversation on 22 December 2016. It was mainly focused on matters such as leave, pay, future leave, Disability Adjusted Leave, and confirming the adjustments necessary for the claimant to work. Mr Gillhooley also confirmed that the submissions work had largely dried up and that they needed to continue discussions about a prospective role for the claimant. In a subsequent email on 22 December 2016 Mr Gillhooley confirmed that: "… returning to SEC (now ES & I) after a period of great and ongoing change has been difficult … as indicated when we last spoke, HR business partners have been making enquiries for other work in Customer Compliance that may be suitable for you. This is not proving a particularly fruitful line of enquiry … I must alert you at this time to the department's guidance on redeployment and relocation. Please take time to familiarise yourself with this guidance and I'll be keen to speak with you about it."
24. The respondent has a policy for Redeployment and Relocation, which refers to a Redeployment Pool. The purpose of this is: "To seek redeployment for people whose current job has ended and who have no alternative job opportunities within the line of business". Being in the Redeployment Pool is said "to give people priority status for jobs at their substantive grade for managed moves and advertised posts; priority status in applying for jobs at their grade in other government departments; and access to a range of HMRC redeployment tools. There are different grades within the Redeployment Pool. Priority order for consideration and appointment is: firstly; priority movers; secondly those in the Redeployment Pool with Surplus Status; and thirdly all other people in the Redeployment Pool.
25. Mr Gillhooley, the claimant and Ms Wyer then had a further telephone conversation on 9 January 2017. It was confirmed that the claimant's Reasonable Adjustments Passport (from 2012) still applied, but would be updated to the new Workplace Adjustments Passport with some clarification as to its wording. Matters of pay and the attendance policy were discussed, and the meeting became heated. Notes of that meeting suggest that Mr Gilhooley agreed that there was no role for the claimant in ES & I; that she should go into the Redeployment Pool; and that the respondent would try to find a job for her. In any event Mr Gilhooley, who had sought advice from HR, decided to put the claimant in

the Redeployment Pool. He wrote to the claimant on 12 January 2017 confirming that she had been entered in the Redeployment Pool.

26. By letter dated 26 January 2017 the claimant then raised a formal written grievance. She asserted that she had been the victim of disability discrimination because her homeworking could not be accommodated in the new regional structure and the new ways of working. She also complained that the opportunities afforded to her colleagues both on her team and at the nearest office (to secure alternative employment or a voluntary exit package) had not been made available to her. The respondent dealt with this under its formal grievance procedure, which involved a number of investigations and an outcome letter on 10 October 2017. The grievance was not upheld, and the claimant appealed on 25 October 2017. Her grievance appeal was eventually rejected on 23 May 2018.
27. We accept the respondent's evidence that throughout this transformational period it tried to identify suitable alternative employment opportunities for the claimant. In any event the claimant was not dismissed by reason of redundancy, and an alternative role was found for her. She remains in employment as a designated homeworker, and the agreed reasonable adjustments remain in place, as does her salary package. The respondent has confirmed that she is no longer in the Redeployment Pool, although we understand that the claimant disputes that she is currently in reasonable alternative employment.
28. Having established the above facts, we now apply the law.
29. This is a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges indirect disability discrimination, discrimination arising from a disability, and a failure by the respondent to comply with its duty to make adjustments.
30. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
31. As for the claim for indirect disability discrimination, under section 19(1) of the EqA a person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision criterion or practice is discriminatory in these circumstances if A applies, or would apply, it to persons with whom B does not share the characteristic; it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts, or would put, B at that disadvantage; and A cannot show it to be a proportionate means of achieving a legitimate aim.
32. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA 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. This does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
33. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

34. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
35. We have been referred to and have considered the cases of Williams v Trustees of Swansea University Pension Scheme [2017] IRLR 882 CA and Pnaiser v NHS England [2016] IRLR 170 EAT.
36. At all material times, and to date, the claimant has suffered from severe double scoliosis with type 2 respiratory failure. This is a physical impairment which is both substantial and long-term, and has adversely affected her ability to carry out normal day-to-day activities. She requires aids to assist with breathing and rehabilitative activities. The respondent concedes that the claimant is a disabled person, and knew that she was disabled at all material times. We agree with that concession, and we so find.
37. The issues to be determined by this tribunal were agreed between the parties and were set out in a case management order dated 2 November 2017. The claims are for discrimination arising from disability under section 15 EqA; indirect discrimination on the grounds of disability under section 19 EqA; and in respect of an alleged failure by the respondent to make reasonable adjustments by reference to sections 20, 21 and 39(5) EqA. The indirect discrimination claim and the reasonable adjustments claim originally both relied on the same four alleged provisions criteria or practices ("PCPs") which are said to have been applied by the respondent. During the course of this hearing the first and second PCPs were no longer relied upon by the claimant. In the first place we deal with the remaining two alleged PCPs, which are referred to as the third and fourth PCPs (which adopts the numbering in the case management order).
38. The third alleged PCP is said to be this: "a requirement to undertake work in person at one of the respondent's offices." We find that no such PCP existed or was applied by the respondent. Although the Building Our Future document suggests that home working is not the norm, it does not preclude the same. This was a consultation document which went to approximately 55,000 staff, and we accept the respondent's evidence that it is a process of subsequent one-to-one meetings which tended to determine whether more specific working arrangements (for instance to include adjustments) were to be agreed. On the simple facts of this case from 2012 the claimant was a designated homeworker; she remained as a designated homeworker; and she still is a designated homeworker. There is clearly no PCP to the effect that she has ever been required to undertake work in person at one of the respondent's offices.
39. The same points apply to the fourth alleged PCP which is said to be this: "a requirement to undertake work in physical proximity to colleagues." We find that no such PCP existed or was applied by the respondent. It might have been a preference for the respondent to have certain employees at a particular site or in proximity to colleagues, but this was never a PCP which was applied to the claimant. She has never been required to undertake work in physical proximity to colleagues.
40. In circumstances where the two pleaded alleged PCPs relied upon are held not to have applied or existed then the claimant's claims for both indirect discrimination and in respect of the alleged failure to make reasonable adjustments, have no basis, and they are both therefore hereby dismissed.
41. With regard to the remaining claim for discrimination arising from disability under section 15 EqA we find as follows. The claimant alleges that she suffered unfavourable treatment because she was absent on sickness absence, and that her absence was something arising in consequence of her disability. There are three allegations of unfavourable treatment as follows: (a) failing to engage with her, consult with her and/or inform her about the changes in her department, which put her job at risk, such that she lost the opportunities afforded to others to mitigate the aforementioned risk; (b) placing her in the redeployment pool at risk of redundancy; and (c) changing her agreed performance rating without agreement, consultation or notification.

42. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England [2016] IRLR 170 EAT at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
43. There was originally some dispute as to whether the claimant's sickness absence between 28 April 2016 and her return on 15 November 2016 was related to her disability. It is true that each of the certificates from her GP relate to bereavement issues and do not specifically refer to the claimant's disability as being the reason her absence. However, it is also clear that the claimant's mother was her main carer, and following her death the claimant had no immediate replacement for support and rehabilitation, and her condition deteriorated. This required an alternative management plan from her medical team. For these reasons we find that the claimant's extended absence during this period was related to her disability. This has also subsequently been confirmed in a recent medical report from her GP dated 2 May 2017.
44. We now deal with each of the three claims in turn.
45. The first allegation of unfavourable treatment is this: (a) failing to engage with her, consult with her and/or inform her about the changes in her department, which put her job at risk, such that she lost the opportunities afforded to others to mitigate the aforementioned risk.
46. We do not accept that the respondent failed to engage and consult with the claimant, or failed to inform her about the changes in her department. The claimant occupied a senior position and attended senior team meetings. She was aware of the Building Our Future document and the significant restructuring proposals from early 2015. She received the e-mail dated 10 March 2016 with the attached detailed question and answer information on the SEC transformation. This was before her absence on sick leave. During her subsequent absence her manager Mrs Court made efforts to make contact with her, and they had an outline discussion. When Mrs Madelin took over as her manager they had three Keep In Touch telephone conversations on 16 June, 8 July and 22 July 2016. She updated the claimant on the recent news on the transformation. When Mr Gilhooley took over as her manager he continued to consult with her and give her updates. Mr Gilhooley made enquiries as to whether the claimant might move to other teams, and wished the claimant to remain in a post which suited her considerable skills and experience.
47. It is also alleged that the claimant lost the opportunities afforded to others to minimise the risk to her employment. We do not accept that this is the case. Consultation is a two-way process. We make no criticism at all of the claimant's decision to turn off her access to the respondent's computer systems, to which she had access at home, because she was on certified sick leave. Nevertheless, the claimant had the opportunity, if she had wished, to explore the opportunity of alternative employment during the consultation discussions with her managers and/or by choosing to use the respondent's systems available to her for this purpose. She also had the support of her trade union, who could have done the same. As it turned out the claimant and her union sought agreement for a voluntary exit package on the more favourable Taunton Terms, which proved to be no longer available. For these reasons we do not accept that the respondent was responsible for any missed opportunities to minimise the risk of redundancy. We do not accept that the respondent subjected the claimant to the first course of unfavourable treatment as alleged.

48. The second allegation of unfavourable treatment is this: (b) placing her in the redeployment pool at risk of redundancy. The respondent asserts that was no less favourable treatment because the respondent followed its Redeployment Policy and as a result of placing the claimant in the Pool, it worked to safeguard her employment. She now has another job. We find that it was Mr Gilhooley who took the decision to place the claimant in the Redeployment Pool on 17 January 2017. The claimant had by that stage been back at work since 15 November 2016, and Mr Gilhooley appears to have become frustrated at the claimant's inability to confirm exactly what hours of work she could manage on a regular basis. This had restricted his ability to investigate and recommend alternative options. Nonetheless, the effect of placing the claimant in the Redeployment Pool, and giving her Surplus status, was that she was now potentially at risk of redundancy. We find that this was unfavourable treatment by the respondent. There is no need to find a comparator for the purposes of section 15 EqA, but it is notable that her previous colleagues in her section do not appear to have been placed in the Redeployment Pool.
49. The next question is the extent to which this unfavourable treatment can be said to have arisen because of her disability. We find that it did. The e-mail dated 21 December 2016 from HR to Mr Gilhooley, which confirmed their conversation, records that with regard to the claimant's role and working pattern: "You confirmed that due to a combination of the requested working pattern, future locations of the business, duties and homeworking that there was no longer a role for Deborah." The reason why the claimant was put in the Redeployment Pool was because no alternative job had been found, and this was partly at least because of her homeworking, which was a direct result of her disability.
50. Although this course of action was therefore potentially discriminatory, we find that the actions of the respondent in so doing we justified because they were a proportionate means of achieving a legitimate aim. The claimant had been unable to confirm what working arrangements she could maintain, and the respondent had made initial enquiries about transferring the claimant to other departments, but without success. Her job had effectively gone, and she was at risk of redundancy. The legitimate aim was to reduce the risk of dismissal by reason of redundancy. As a matter of fact, it achieved that aim. Against the background of significant transformational restructuring, placing the claimant in the Redeployment Pool was a proportionate means of seeking to safeguard the claimant's employment, and it did just that.
51. The third allegation of unfavourable treatment is this: (c) changing her agreed performance rating without agreement, consultation or notification. The respondent asserts that there was no unfavourable treatment because the downgrading was subsequently amended and this procedural accident was then remedied. There had been a breakdown in communication but Mrs Court had written to the claimant and it was open to the claimant to log on to the respondent’s system to seek to establish her grade, and/or to ask her managers and HR to do so for her.
52. We find that following her self-assessment form the claimant and Julie Court agreed an Achieve grade in principle, and it was the Moderation Panel that decided, following comparison with other comparable employees, that the claimant's grade should be downgraded to Must Improve. That was done without consultation or notification to the claimant. We have not heard any evidence as to why that decision was taken, but we do know from the claimant that she had told Mrs Court that she wished to make further representations as to her correct performance grade. She was denied the opportunity of doing so. The grade was changed without giving her that opportunity and without notifying her. We find that this was unfavourable treatment by the respondent.
53. However, we have heard no evidence to suggest that there is any causal link between the decision of the Moderation Panel and the claimant's disability. There is no evidence that the Moderation Panel decided to downgrade the claimant’s status because of her reduced availability of lack of contact as a home worker. It seems to have been a decision genuinely based on the performance information before the Moderation Panel, but subject to the procedural error of not notifying her (which was rectified following the claimant's complaint). That complaint process did not apparently conclude that the Must

Improve grading was incorrect: rather it accepted the claimant's complaints that she had not been notified and had not had the opportunity to make representations, and reinstated the original grade. In short we have no evidence to conclude that this unfavourable treatment was in any way causally linked to the claimant's disability. It was not therefore unfavourable treatment amounting to discrimination which can be said to have arisen from the claimant's disability.

54. Accordingly therefore the claimant's claims are dismissed.
55. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 27; a concise identification of the relevant law is at paragraphs 29 to 35; and how that law has been applied to those findings in order to decide the issues is at paragraphs 36 to 54.

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Employment Judge N J Roper
Dated 5 May 2018

Judgment sent to Parties on

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