EMPLOYMENT TRIBUNALS

Claimant: Miss A Leader

Respondent: Bolton Council

HELD AT: Manchester **ON:** 4 - 7 December 2017 (in tribunal) 8 & 15 December 2017 (in chambers)

BEFORE: Employment Judge Tom Ryan
Mr G Pennie
Mrs J Beards

Appearances:
Claimant: In person
Respondent: Miss A Smith, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's application for the hearing to be postponed is refused.

2. The complaints of discrimination arising from disability and failure to make reasonable adjustments are not well-founded and are dismissed.

3. The complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. By a claim presented to the tribunal on 4 January 2014 the claimant brought complaints of unfair dismissal, disability discrimination and breach of contract. At that stage the claimant was complaining of a failure to make reasonable adjustments as disability discrimination.

2. By its response the respondent defended the claims. It was not disputed that the claimant was dismissed. The respondent asserted that the claim was dismissed for gross misconduct and by that reason was not entitled to damages for breach of contract namely the failure to pay in lieu of notice.

3. The respondent denied the complaint of disability discrimination. Pointing out that the claimant had not identified the nature of the disability at that stage it was submitted that those complaints were out of time and that the respondent did not know or could not have been expected to know that the claimant had a disability.

4. The tribunal directed that there should be a preliminary hearing for case management on 16 April 2014. A judge directed that the claimant provide further particulars of the complaint of disability discrimination and a short statement dealing with the impact of disability on day-to-day activities in advance of that hearing.

5. The claimant provided further information. The further information included an identification by the claimant that the impairments in respect of which she complained that she was a disabled person were: low back pain and chronic oedema of the legs. At the preliminary hearing it was recorded that the complaint of disability discrimination was made both under section 15 and section 20 of the Equality Act 2010. We identify the particular allegations of discrimination below.

6. A further preliminary hearing was directed to determine the issue of disability.

7. On 3 July 2014 Employment Judge Robertson held that the "claimant was a disabled person within section 6 of the Equality Act 2010 at all material times for this claim from 1 June 2013 by reason of the condition of leg oedema but not otherwise." At that point the claimant was also contending she was disabled by reason of low back pain. The judge noted that the claimant had not sought to pursue before him any contention that she was disabled by reason of a head injury and/or stress or depression.

8. An order was made for the claimant to serve further information in respect of the disability-related claims and for the respondent to serve an amended response after that.

9. The claimant provided further information on 1 August 2014. It was from that further information that the respondent derived a list of issues put before the tribunal at this hearing. Although this had not been agreed previously the claimant did not suggest to us that it was not an appropriate and complete list of the matters that we had to determine.

Issues

10. We set out the issues that we had to determine as follows:

    Unfair Dismissal

    10.1. What was the reason or the principal reason for the claimant's dismissal?

    10.2. Did the reason for dismissal relate to conduct?

10.3. If so, did the respondent act reasonably or unreasonably in the circumstances and in particular:

10.3.1. did the respondent have a genuine belief that the claimant was guilty of misconduct;

10.3.2. did the respondent have reasonable grounds for holding that belief;

10.3.3. was that belief formed after the respondent had carried out as much investigation into the circumstances as was reasonable;

10.3.4. was the decision to dismiss one which a reasonable employer could reasonably have made?

10.4. If the dismissal was unfair should any compensation to be awarded to the claimant be reduced on the ground that she could and would have been fairly dismissed at some later point?

10.5. Should any compensation be reduced by reason of blameworthy conduct on the part of the claimant?

Disability - because of something arising in consequence of disability

10.6. Did the respondent know, or could it have reasonably been expected to know that the claimant was disabled by way of leg oedema from June 2013?

10.7. Did the respondent treat the claimant unfavourably by:

10.7.1. refusing to hold an occupational health meeting by telephone;

10.7.2. refusing to allow the claimant to work from home;

10.7.3. refusing to allow the claimant to work flexible hours;

10.7.4. holding the disciplinary hearing in the claimant's absence;

10.7.5. withholding pay as a form of punishment;

10.7.6. dismissing the claimant?

10.8. Did any such unfavourable treatment occur because of something arising in consequence of disability?

10.9. If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Discrimination - failure to make reasonable adjustments

10.10. Did the respondent apply a provision, criterion or practice ("PCP") to the claimant?

10.11. Did the PCP put the claimant at a substantial disadvantage in comparison to persons who are not disabled?

10.12. Did the respondent fail to take such steps as it was reasonable to have to take to avoid the claimant being placed that disadvantage? The steps which it is alleged the respondent should have taken were identified by the claimant as:

10.12.1. setting meetings at more appropriate times (August 2013);

10.12.2. not harassing the claimant when the respondent was told she was not able to travel to be interviewed (August 2013);

10.12.3. postponing the occupational health assessment into the claimant was able to attend (18 September 2013);

10.12.4. affording the claimant in occupational health appointment by telephone (18 September 2013);

10.12.5. postponing the disciplinary hearing (8 October 2013).

11. Employment Judge Robertson directed that the final hearing should take place over 3 days in January 2015.

Progress of the proceedings

12. That hearing was adjourned on the claimant's application on the basis that the claimant sought a reconsideration of the tribunal's earlier judgment. The hearing was re-listed for March 2015.

13. The claimant applied again for an adjournment on the first morning of that hearing. In the meantime, the reconsideration had occurred. Upon reconsideration the judgment was confirmed. The claimant appealed that reconsideration decision and the appeal was itself dismissed. The claimant also explained she was not ready to proceed with the case. The hearing was adjourned and the claimant was ordered to pay the respondent's costs. The hearing was re-listed to start on 9 June 2017.

14. On 1 June 2017 the claimant again applied to "suspend" the hearing on the grounds of "ill-health" but provided no details.

15. On 5 June 2017 the application was rejected and the claimant was informed that if she sought a postponement she must supply medical evidence "specifically directed to her ability to attend and participate in a three-day hearing before the tribunal including giving evidence (and being cross-examined) and cross-examining the respondent's witnesses".

16. The following day the claimant submitted a letter from her general practitioner. The GP described that the claimant had experienced a deterioration in her mental health recently and that "her current mental state would mean that she would be unable to cope with the three days of giving evidence and cross-examination." The application to postpone was granted and the hearing was relisted to commence on 4 December 2017.

17. Between June and November 2017 the respondent had contacted the claimant on occasion in relation to the claim and her ability to continue with the hearing but

had received no response. On 28 November 2017 the respondent wrote to the tribunal and the claimant expressing concern about the claimant's conduct. The tribunal requested the claimant's comments as a matter of urgency.

18. On 30 November 2017 the claimant stated that she had not replied to the respondent due to ill-health and asked for the case to be postponed "to a later date when I am able to confidently present and be cross-examined". The claimant attached a copy of the GP's letter of 6 June 2017 and a further letter from Dr Hobman of 4 September 2017. The doctor said that the claimant "has been experiencing a lot of stress recently due to on-going issues in relation to her work, as well as her personal life." It referred to her inability to stand or walk for long periods of time.

Postponement applications

19. Thus it was that on the morning of 4 December 2017 this tribunal had to consider the claimant's further application to postpone. The respondent objected to the application and in a skeleton argument set out: the grounds of objection, an application to strike out for failing to pursue the claim and an application for costs.

20. In answer to questions from the tribunal the claimant explained that she had been receiving counselling and that with the benefit of counselling she had attempted to struggle on in the hope, she said, that she would be well enough to continue with the hearing. She had only recently realised that she could not. She had been to her GP late last week and had asked for a letter from the doctor for the tribunal. She had attempted to collect the letter that morning but had been told it was not available yet.

21. The tribunal was concerned that the information provided previously by the claimant's doctor did not provide information in adequate detail so that the tribunal could make a proper judgment on whether the claimant was fit to continue with the hearing. For that reason, we decided to postpone the hearing until the following day so that the claimant could obtain adequate medical evidence from her GP. We caused the tribunal to write to the doctor requesting that, in preparing the letter, specific matters should be addressed, namely: an explanation of the nature of the claimant's health concerns, a statement as to whether she was fit to attend the hearing (and conduct a case and give evidence and be cross-examined), the general prognosis and the doctor's opinion at the point of time in which she might be fit to attend and conduct her case if the doctor considered she was not fit at that point.

22. The claimant attended with a further letter from her GP on 5 December 2017. The letter was not addressed to the tribunal. It did not answer the questions we had posed. It confirmed that the claimant was "currently suffering from depression and moderate anxiety". It reported that the claimant described symptoms of "low mood, poor sleep and difficulty concentrating." It referred to the claimant having received a course of 6 sessions of counselling since April 2017. I revealed the claimant had an appointment for an initial assessment with a primary care mental health team for high-intensity CBT on 30 August 2017. The letter concluded, "I am aware that Miss Leader is continuing with her cognitive behavioural therapy at present. I would hope that this would help to improve her symptoms and enable her to feel well enough to attend and conduct her case."

23. We noted that the letter did not specifically address whether the claimant was fit to attend the hearing or not. The claimant explained that she had spoken to the doctor the previous evening by telephone. The claimant said that she had explained she was suffering from stress and anxiety and did not feel fit to continue. The doctor said that she did not have access to counselling records. The claimant asked the doctor to inform the tribunal about her medical concerns but the doctor had said to her that she was not to dictate what the doctor wrote. The claimant said that she explained to the doctor that the tribunal needed to know when she would be fit to continue with the hearing. The doctor had said to her that the counselling treatment did not have an end date and therefore it was indeterminate.

24. The respondent continued to maintain that the doctor had not specifically informed the tribunal that the claimant was not fit to continue with the hearing. The respondent argued in the light of the history set out above and the inadequate state of the medical information about the claimant's fitness to continue with the proceedings the application for an adjournment should be refused.

25. We noted that in the skeleton argument the respondent had referred to the tribunal's powers under rule 38 of the Employment Tribunal Rules of Procedure 2013, the Presidential Guidance when seeking a postponement and two authorities. In the first of these, O'Cathail v Transport for London [2013] IRLR 310 in which Mummery LJ stated that:

> "Overall fairness to *both* parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment."

26. The respondent also drew our attention to the decision of the Court of Appeal in Andreou v Lord Chancellor's Department [2002] IRLR 728. In that case the tribunal had refused an application to postpone a 10 day discrimination case when the claimant produced a certificate saying she was not fit to work because she was suffering from anxiety and stress. There the hearing been adjourned for a week and a further medical report required. The further medical report did not comply with the tribunal's instruction. The court had held that once the tribunal had given the claimant an opportunity to obtain a certificate or report then, unless the medical evidence was compliant it was entitled to conclude it was not possible to infer that the nature of the illness was serious. Arden LJ stated:

> "Where a party seeks an adjournment on the basis of stress or anxiety, he should expect to produce details of the symptoms, the causes, severity, and so on, or to explain why those details cannot be supplied to the tribunal. When a party applies for an adjournment he must bear in mind the need for complaints to employment tribunals in these sorts of matters to be heard promptly, the need to consider the interest of other parties to the proceedings and the need to avoid unnecessary waste of tribunal time and scarce resources."

27. Considering these authorities and balancing the respective arguments, we refused the application to postpone. We bore in mind that this was the fourth occasion when the hearing had been set. When the proceedings were postponed

in June 2017 the claimant was fully aware of what was needed in support of an application to postpone on medical grounds. Whilst we were conscious that she stated she had wished to continue with the hearing and said she had only realised that she could not do so at a late point, her original application to postpone was based upon evidence that she had in her position for some three months without disclosing it to the tribunal or the respondent. Even with a further opportunity and a specific request of the doctor from the tribunal there was no medical evidence to say that she was unfit to attend the hearing.

28. Having regard to the overriding objective, we concluded that the hearing should proceed. We recognised that the claimant would feel some disadvantage but that we could take proper steps to assist her in the presentation of her case, including providing breaks when they were required. In our judgment that disadvantage was outweighed by a further delay in the proceedings. We thought it likely that the effect upon the reliability of the evidence, already requiring degree of recollection over a four-year period, and in a situation where the claimant and two of the respondent's witnesses no longer worked for this Council was a relevant factor.

29. The claimant immediately made a further application to postpone the hearing for a further 24 hours. We refused that application also on the same grounds.

Conduct of the hearing

30. Before we commenced reading witness statements we ascertained that the claimant indicated she felt she would be assisted if we heard the respondent's witnesses first. We offered the claimant the opportunity of asking questions of some of those witnesses after the tribunal had first asked preliminary questions. The claimant was given a break in the proceedings on each occasion that she asked for it.

31. We were conscious that at this stage a further day of hearing would need to be arranged in any event. This was achieved with the cooperation of the respondent and the tribunal administration. In the event by the end of the fourth day we had only concluded the submissions of the respondent. We reserved judgment and adjourned into chambers and the claimant provided written submissions, as she had asked to do, on the following day. The respondent confirmed that it had received the claimant's written submissions.

32. In a letter of 8 December 2017 the respondent solicitor pointed out that there was material in the submissions that have not been put before the tribunal nor put to its witnesses and invited the tribunal to disregard that material.

Evidence

33. On behalf of the respondent we heard evidence from: Mrs Susan Trotter (referred to as Sue Trotter-Khalil in the bundle), who was the claimant's line manager; Mr John Morrissy, Mrs Trotter's line manager; Mr Paul Brown who chaired the disciplinary hearing and Mrs Hilary Fairclough who was a member of the appeal panel. The claimant gave evidence on her own behalf. We were provided with witness statements from each witness, including a supplementary statement from Mrs Trotter, and a bundle of documents to which we refer by page number.

Findings of Fact

34. The claimant joined the respondent in 2006 as an organisational development consultant. She was responsible for promoting and delivering the organisational development strategy and services. Her duties included consultancy development and delivery of training delivery of assessment and assessment feedback participation in project work and acting as a duty manager on a rota basis. She worked part-time for 18.5 hours a week.

35. In 2009 as a result of a pay and grading review throughout the council all professional training and development staff were brought into one structure. Prior to that review the claimant had been working in adult services. As a result of the review she was regraded to a higher scale position in that department. Part of that regrading was that professionals placed within departments were formally required work 60% in their department and 40% corporately.

36. The claimant then worked 60% of her time as a consultant in adult services under the management of Lee Fallows and 40% of the time within the corporate development team under the management of Mrs Trotter.

37. In April and May 2010 the claimant's manager Gill Stopforth recorded that there were issues with the claimant's recording of her flexitime, attendance at work and recording her start and finish times and making proper requests for leave and days off. The claimant disputed that there were such problems. It was not possible to assess the extent of them but in the tribunal's judgment it is relevant background to what occurred later that these issues were being raised by management at a much earlier stage.

38. In December 2010 and January 2011 two complaints were made concerning workshops the claimant had run. One complaint was reported to Mr Morrissy by Alan Miller, an assistant director in adult services who outlined there was a problem following negative comments from participants. The other complaint concerned a workshop in November 2010 where it was alleged the claimant had lack sensitivity, fuelled a political argument, was unprepared and lacked empathy. Mrs Trotter discussed both of those with the claimant. She balanced those criticisms with positive feedback received about other workshops run by the claimant and accepted her suggestion that the comments were probably more a case of perception than reality. Mrs Trotter then contacted Mr Fallows and suggested a meeting to devise a strategy. In her email (325A) Mrs Trotter spoke of a long overdue strategy for managing the claimant's contribution with clearly agreed recorded targets and deadlines.

39. In May 2011 the claimant spoke to Mrs Trotter in a week in which she was due to take annual leave and informed her that her holiday had been postponed. She offered to do some work for Mrs Trotter to alleviate some of the pressures on the team. Mrs Trotter gave the claimant a small but urgent project, commissioned by Lynne Ridsdale. The work was not completed. In emails to Ms Ridsdale, Mr Fallows and the claimant herself Mrs Trotter expressed concern that the claimant was not following instructions of doing the work in the office and keeping her updated. During the short timescale in which the work was to be done the claimant stated that some of the information necessary for completion of the work was not available, (331A-D, 331A, 331B, 333). Based upon Mrs Trotter's

communications Ms Ridsdale expressed the opinion that the claimant should be made subject to disciplinary and capability processes. That suggestion was not followed.

40. In the months that followed there were a variety of issues which reflected, on the part of Mrs Trotter and the management, dissatisfaction with a number of aspects of the claimant's performance. The claimant's case is exemplified by a comment in an email to Mr Fallows on 17 May 2011 in relation to one such incident: "I am really bemused on this style of operation, this constant dramatisation every time these [sic] is an issue is distracting from the work." She described herself also is working in a difficult environment.

41. The claimant's responses in relation to matters such as this, which continued to arise during her employment, was, to a large part, typified by this response. Although sometimes she would dispute the employer's complaint, more often she would criticise the manner in which it was being raised. This had the effect of shifting the focus of the management concerns so that it was as much upon the issues of management of the claimant as it was upon the concerns which had led to those issues being discussed.

42. Given the constraints of the tribunal proceedings it was not possible for us to make a finding of fact as to the merits of every individual background dispute. In our judgment it is not necessary to do so. The number of incidents recorded in emails included in the trial bundle, together with the apparent frustration both of the claimant and Mrs Trotter demonstrates that there was resistance on the part of the claimant to be managed by her. It seems likely that this led to a deterioration in the relationship between the claimant and her manager and it was the build-up over 2011 and 2012 of those factors that led to the incidents which were to form the subject of the disciplinary proceedings.

43. In 2011 the respondent carried out a review of this part of its service. The result was that all professional staff including the claimant were required to join in one corporate organisational development team in the chief executive's department and increase to 100% corporate working in that way. The staff, including the claimant who had previously worked partially in other departments were allowed a settling in period. In the claimant's case this was between October and December 2011. Mrs Trotter therefore became the claimant's sole line manager in January 2012.

44. At the beginning of the settling in period the claimant had raised issues with regard to what she considered to be long established working practices with Mrs Trotter. In a meeting on 5 October 2011 Mrs Trotter provided the claimant with a copy of her contract and the respondent's flexitime guidelines. Set working days were negotiated between them with both sides being able to vary them on two weeks' notice.

45. At about the same time the claimant spoke to Mrs Trotter saying she was carrying over 17.5 days of annual leave. There were no records to substantiate that. Nevertheless Mrs Trotter and Mr Morrissy granted the request and an extended period of leave between mid-December and 24 January 2012 was permitted.

46. On 29 November 2011 Mrs Trotter wrote to the claimant (358A) concerning flexitime. She reminded the claimant that the "work bandwidth" was between 7 a.m. and 7 p.m. and that, by the end of the four week cycle used to calculate flexitime, an employee should not be more than 8 hours "in the red". The topic of the claimant being persistently in debit i.e. not performing her full hours was one of the matters which the respondent raised repeatedly with her.

47. On 23 January 2012 at a team meeting at which the claimant was present a rota had been produced to cover duty manager responsibilities. It was the respondent's case that the claimant's normal day for covering the duty manager responsibilities was a Friday which was one of the days she worked. In evidence the claimant said that she had not agreed to the rota. It was clear that she did not want to perform that duty whether on a Friday or not. It was clearly within the respondent's power to require that work to be done.

48. In February 2012 an exchange of email correspondence (370-378) concerning whether the claimant was permitted to work from home shows the tenor of the respective positions of Mrs Trotter and the claimant as manager and employee. The claimant emailed Mrs Trotter to say that she needed to work from home and "so will not be in the office". Mrs Trotter replied saying, "as I have repeatedly explained to you, work at home is not the norm for this team, especially without it being pre-planned with agreed objectives. Are you notifying me you are sick? If so it's sick leave. If you have an emergency you can book leave or flexi but we should have discussed this. Please explain when you get in tomorrow." The claimant's reply was, "Sue, you have repeatedly explained how you like to work. This is contrary to what is sometimes practical and indeed contrary to my contract of employment. I have generally speaking kept up with your demands and would not be working from home if I didn't need to. I am not sick and it is not an emergency, but I do need to be at home due to some unforeseen circumstances." Mrs Trotter replied drawing attention to the fact that there was no contractual right to work from home but it was a courtesy sometimes afforded to staff where the arrangement was acceptable. A similar exchange occurred on 27 March 2012 (383-380).

49. Mrs Trotter discussed this with the claimant at a one-to-one discussion on 30 March 2012. That in turn appears to have led to a request by the claimant to Mr Morrissy on 3 April 2012 that she be moved out of the corporate work area. The request was not granted. Mr Morrissy's evidence was that at the claimant's level there were only two vacancies across the entire council workforce, one was the other half of the claimant's part-time job and the other was in planning which was not the claimant's field.

50. Between 21 May and 8 November 2012 the claimant was absent from work due to severe low back pain.

51. A formal meeting under the respondent's managing absence policy on 18 October 2012 resulted in a first stage warning. It was given because the level of absence was unacceptable and was said to be a live warning for a period of 12 months. The claimant appealed that decision but the appeal was unsuccessful.

52. On 15 January 2013 the claimant was given a verbal warning under the respondent's disciplinary process for failing to follow reasonable management

instructions in relation to the managing absence framework. That warning was to remain live for disciplinary purposes for a period of six months.

53. Between February and March 2013 Mr Morrissy attempted to arrange meetings with the claimant to discuss flexi time. Two meetings were rescheduled due to the claimant's ill-health absence.

54. On 14 March 2013 Mrs Trotter and Mr Morrissy met the claimant and discussed the flexi time arrears, whether she had complied with the instruction to record her timekeeping accurately and other issues the claimant had raised. (114 – 118). Ms Brennan of HR wrote on the same day a summary email of the requests for information about the hours she proposed to work other matters and decisions that had been made (121).

55. On 15 March 2013 the claimant replied to Mr Morrissy (120) saying that she could only propose interim working hours and objecting to the decision to impose fixed hours. Mr Morrissy accepted the interim proposal subject to caveats and reiterated the instructions he had given (119).

56. On 4 April 2013 there was a further meeting to discuss the arrangements for fixed hours. The meeting and its outcomes were set out in a letter of 30 April 2013 (123). Mr Morrissy confirmed fixed hours for the claimant from 8 May 2013; an expectation of 18.5 hours work a week, that the claimant email Mrs Trotter upon arrival and departure, that she accurately record and submit time recording weekly and that she complete duty manager duties each Friday between 9am and 5pm.

57. The claimant emailed Ms Brennan on 2 May 2013 saying she needed to take advice and asking to defer the implementation of the hours (128). On 8 May Mr Morrissy responded refuting a suggestion by the claimant that the instructions reflected a change to her terms and conditions and declining to defer the implementation of the fixed hours beyond 15 May 2013 (127).

58. On 24 May 2013 the claimant emailed Mr Morrissy again (443) stating that her response to his instructions and notes were delayed because she was taking advice. She reiterated her request to be moved out of the department because of strained relations with her manager and difficult working conditions. She said that her personal situation was that her health had improved initially but her illnesses had flared up due to stress. She said she was currently suffering from stress, fatigue, back pain and mobility problems. She asked for the matter to be treated informally as an alternative to a grievance. Mr Morrissy replied on 4 June 2013 (442). He referred to the fact that they had discussed the matter briefly on 24 June. He suggested that they should have a meeting to discuss the issues that the claimant had raised.

59. That meeting took place on 14 June 2013. Mr Morrissy wrote to the claimant on 20 June 2013 (265-267). He set out the context and content of the discussions at length. Under the heading of stress and illness he recorded that the claimant had told him that she had fatigue linked to feelings of stress at work, a new complaint of back pain for which there was no definitive diagnosis but which could possibly related to stress. He said, "your mobility problems are the result of a complaint which causes your feet to swell intermittently. You indicated that you have tried

under this by requesting additional travelling time between appointments when necessary." Mr Morrissy again declined the request for the claimant to be moved departments. He explained that he had treated the matter in the same way as he would an informal stage of a grievance and pointed out that the claimant could raise it formally as a grievance if she wished to do so and referred her to the intranet for the appropriate forms. The claimant did not raise a formal grievance about her management.

60. On 21 June 2013 the respondent (probably Ms Brennan) wrote to the claimant (151) requesting that she attend a formal investigatory meeting with Mr Morrissy on 11 July 2013 in respect of allegations of misconduct which were said to be:

    60.1. failure to follow reasonable management instructions in relation to: time recording; emailing your manager on arrival and leaving; out of office acceptable standards and communications on whereabouts; and

    60.2. allegedly falling asleep during training.

61. Mr Morrissy conducted that meeting on 11 July 2013. After an introduction it was explained that the respondent had a set of questions that they wish to ask the claimant. The claimant objected and indicated that she would not answer. After an adjournment the claimant was accompanied by a Unison representative and the meeting proceeded. There were typed notes of the questions (153-154) and manuscript notes of the meeting and the claimant's answers recorded (155-159).

62. There was a similar meeting on 26 July 2013 concerning a further allegation that the claimant had failed to conduct 360° feedback in accordance with her job role responsibilities resulting in a customer complaint. Similar notes of questions and answers were taken (210-212, 213-217).

63. Ms Brennan wrote to the claimant on 26 July 2013 (218-219) referring to the investigations and stating that the matters previously set out in the invitations to investigatory meetings would be considered at a disciplinary hearing on 19 September 2013. It was asserted that these matters had resulted in damage to the reputation of the corporate team and could constitute misconduct which could result in dismissal. The claimant was reminded of her right to be represented, the need to provide any evidence in advance and informed that the evidence would be exchanged no later than 11 September 2013.

64. The claimant obtained a sick note dated 13 August 2013 by which her GP signed her as unfit for work from 8 to 26 August 2013 because of the condition of "chronic leg swelling under investigation and management". (67)

65. The claimant submitted a further sick note dated 27 August 2013 (68) also in respect of chronic leg swelling on which basis she was said not be fit to return to work until 3 September 2013. On that latter date a further sick note was obtained to 17 September 2013.

66. On 3 September 2013 the claimant notified Ms Brennan that she was still on sick leave and enquired about the document deadline and meeting dates. Ms Brennan replied saying that she had arranged an occupational health appointment for 5 September 2013 for the claimant, reiterated the arrangements

in relation to the exchange of documents and the date of the disciplinary hearing and asked the claimant to inform her if she was not able to return to work.

67. On 4 September 2013, in response to Ms Brennan having sent the claimant the appointment for an occupational health meeting, the claimant wrote saying she was still off sick and could not attend the appointment as she was in pain and could not travel to Bolton. She said that she did not envisage being able to attend within the next two weeks and suggested that the appointment be postponed until she was able to travel long distances. In response Ms Brennan rescheduled the occupational health meeting for 19 September 2016. She asked the claimant to confirm that she would attend both the occupational health appointment and the disciplinary hearing (268).

68. On 10 September 2013 the claimant wrote to say that she did not feel "fully able to prepare and participate in the process". She proposed postponing the disciplinary hearing until her doctor considered she was fit for work and said that unless she had a response by the following day she would presume that she did not need to attend and would not submit any evidence.

69. Mr Morrissy wrote to the claimant on 11 September 2013 (274-275). He agreed to reschedule the disciplinary hearing but made a number of observations. He pointed out that the respondent would always prefer for employees to be present at hearings but policy allowed for hearings to take place while staff are on sick leave. He asked for more information concerning the claimant's inability to attend because of swollen feet and legs and intimated that he could consider additional support that the respondent could put in place to help the claimant take part. He explained that he was postponing the disciplinary hearing so that the occupational health appointment could take place to provide an opportunity to understand issues relating to the claimant's sickness and attendance as well as her ability to participate in the process. He also pointed out that a hearing could take place even if the employee had not provided any response to the allegations or participated in the exchange of documents. He pointed out it was likely that rescheduled hearing would take place whether the claimant was present or not and whether or not she had provided response unless the respondent was "advised of compelling reasons or circumstances that would make this inappropriate".

70. On 17 September 2013 the claimant emailed the occupational health service saying that she was not able to attend the appointment on 19 September as "I am off sick and live in Manchester you are not local to me." She said that she was happy for the appointment to be conducted by telephone.

71. Later that day Mr Morrissy wrote to the claimant confirming the claimant was required to attend the appointment. He said that he would liaise with the occupational health doctor to see whether a telephone consultation was possible. He pointed out that the claimant had been given suitable time to make arrangements to attend the appointment, that it was important that she did so and to engage fully with the discovery process and adhere to the serious policy and that failure to do those things could result in additional disciplinary action (277).

72. On 17 September 2013 the claimant was signed off work by her doctor for a further period of two weeks due to "leg swelling" (70).

73. On 18 September 2013 there was further correspondence about the appointment. The claimant informed Occupational Health that she was unable to walk or drive long distances or use public transport and that "being harassed is not aiding my recovery".

74. The respondent informed the claimant that an appointment by home visit was only considered by occupational health when a client was terminally ill or had very severe long-term illness and that a telephone assessment was appropriate when a person had not attended an appointment and the doctor was concerned about the individual's psychological well-being and their safety. Ms Williams who wrote to the claimant said that she would arrange for a taxi to collect from home and taken to Bolton for the appointment (283). We record here that it was later suggested by the claimant that the respondent only intended to provide a taxi for her to get to Bolton and not to return home. Although we recognise that a return by taxi was not specifically mentioned, we do not accept that the claimant genuinely believed that she would only be provided with a taxi one way.

75. On 18 September 2013 the claimant wrote to Ms Brennan saying, "Please cancel the booked taxi as I will not be attending." (287).

76. On 19 September 2013 Ms Brennan wrote to the claimant rescheduling the disciplinary hearing for 10 October 2013 and resetting the date for exchange of documents to 2 October 2013 (220).

77. On 20 September 2013 Mr Morrissy wrote to the claimant again (293-294). He noted that the taxi had been provided but the claimant did not attend the occupational health appointment. He pointed out why occupational health had said a telephone consultation was not appropriate. He reminded the claimant that he was waiting for the further information he had requested in his email of 11 September 2013. He informed the claimant that she would be contacted by occupational health to discuss how to move the situation forward.

78. On 27 September 2013 the claimant responded (295). She maintained she was still not able to attend the disciplinary hearing due to continued ill-health. She explained her existing health issues and said, "As if that was not enough I have recently suffered a head injury, and the hospital advised complete rest, while they monitor the situation. I saw the doctor yesterday and have been advised to take a complete rest for a month, refrain from work and meetings."

79. At this stage the claimant had received a sick note dated 26 September 2013 certifying that she was unfit to work to 27 October 2013 due to "leg swelling, head injury" (71). It is not disputed that this note was not submitted to the respondent.

80. On 9 October 2013 the claimant wrote directly to the panel members saying that the allegation against her were defendable, that she had asked for the hearing to be put on hold, that she was unable to attend a participate due to continued ill-health and that she had a head injury and was on complete rest orders from her doctor and that she was not out repair her union representative to act on her behalf and that she would like to again request the opportunity to address the panel when she was fit to do so. (485)

81. This communication was channelled to Mr Morrissy who wrote to the claimant confirming that the hearing was scheduled for the following day and saying that he understood from her union representative that they had not been instructed and that she had not provided evidence to submit to the panel. He pointed out that the disciplinary panel had the option of proceeding.

82. Mr Brown who was to chair the panel also responded to the claimant (254) explaining that the hearing had been postponed once before and that the panel were "therefore of a mind to continue".

83. On 10 October 2013 that is what occurred (256-261). Linda Tong, the claimant's union representative attended the meeting as an observer but confirmed that she had not been instructed to do so and that her last contact with the claimant had been on 23 August 2013.

84. Mr Morrisey presented the allegations. He was questioned by the panel. He then summarised the management case and the panel adjourned to deliberate between 11 am and 12.30 pm. The panel adjourned at that time and reconvened for further deliberations on 15 October 2013 for a further 1 ½ hours.

85. By letter dated 15 October 2013 (240-242) Mr Brown wrote to the claimant informing you of the outcome of the hearing. He summarised the allegations. He recorded that the panel had found that the claimant had clearly not complied with management instructions issued during informal meetings or the disciplinary investigation meetings. He stated that the panel found that the claimant had not demonstrated the professional standards of performance and behaviour that the council was entitled to expect from an officer of her grade. He spoke of total disregard management instructions over a prolonged period of time and an unwillingness to accurately account for the time for which the claimant was contracted and paid. He referenced repeated failure to engage in the process and procedures from management to support. He stated the panel satisfy the management that is reasonably made sufficient adjustments to enable the claimant to comply with their instructions. He said the panel concluded that the claimant's non-compliance significant effect of the image and reputation of the service as a whole and resulted in an increased workload for colleagues within the department. He said that had resulted in considerable amount of senior management time effort and resources being spent on addressing the claimant's failure to comply. He said that it was an important consideration of the panel that during the claimant's current sickness absence she had persistently continued not to comply with management instructions. He stated that the panel had no confidence that the claimant would comply with reasonable management instructions should she return to work and that for that reason her continued employment was untenable. He said the panel considered that the examples of failure to follow management instructions since January 2013 constituted gross misconduct within the respondent's policy and that the cumulative effect and persistent nature of the claimant's refusal to follow instructions left the panel with no other option but to dismiss with immediate effect. The claimant was informed of her right to appeal.

86. On 23 October 2013 submitted an appeal against the decision to dismiss her (243-244). She asserted that she was being managed out of her job, that the

process had been "railroaded" by managers and "these trumped up allegations are denied." She addressed each of the allegations briefly.

87. On 30 October 2013 the claimant obtained a further sicknote from her doctor (72) signing her off from that date to 24 November 2013 due to "head injury".

88. In response to a request for her to state the specific reasons for the appeal (245), the claimant sent a further appeal statement dated 12 November 2013 (246-249). In that statement she addressed the failure to attend previous hearings explaining that she was off sick. She asserted that full details of her sickness were relayed to management. She then set out her previous experience both before her employment and at Bolton and then addressed in greater detail each of the allegations setting out her responses.

89. On 25 November 2013 the claimant was signed off work for a period of one month due to "post head injury, stress" (73). On 30 December 2013 a further sicknote signed off until 3 February 2014 due to "stress, chronic leg oedema and leg cramps" (74).

90. The claimant's appeal hearing was arranged for 29 January 2014 and she attended. She was accompanied by Ms Tong. The panel was comprised three councillors including Mrs Fairclough who gave evidence before us. Mr Morrisy and Mr Brown and Ms Graham attended and Ms Ridsdale took minutes (518-5 526).

91. At the outset of the meeting Ms Tong explained that she was there to support and advise the claimant but not represent her. The panel considered this and sought clarification from the claimant whether she was seeking for the hearing to be deferred. Ms Tong confirmed that the claimant was prepared to proceed and was able to present a case. She asked that the hearing be adjourned after the management case had been presented. This was refused. After a further brief adjournment Ms Tong confirmed that the claimant was happy for the hearing to go ahead and put in case forward with Ms Tong representing her.

92. Mr Brown presented the management case and the rationale for the decision taken by his panel. He was questioned by the claimant as was Mr Morrissy. This questioning was detailed and took the remainder of the morning. The panel then questioned Mr Morrissy. After lunch the claimant presented statement and was questioned briefly by Ms Graham. The panel then asked the claimant questions about her health concerns. She explained that she had been assaulted which would cause the head injury and had been "hospitalised". On further questioning she said that she had not reported the assault police, was seen in A&E and then discharged to the care of her GP.

93. Both management and the claimant summed up their respective positions. The panel considered the submissions and then announced that it was not upholding the appeal. Councillor Kay who chaired the meeting gave the reasons for the decision.

94. On 30 January 2014 the respondent wrote to the claimant setting out the reasons for the decision (527-528).

95. In summary the panel accepted that management given the claimant clear instructions about the matters set out in the allegation and had put in place an improvement plan. The panel accepted on the evidence that the claimant had consistently failed to comply with clear and reasonable management instructions. This supported the panel's belief that there was no confidence of any future cooperation. As to mitigating evidence, the panel accepted that limited information had been provided by the claimant in respect of the health issues despite her assertions to the contrary. It noted that the management had made efforts to provide support from occupational health and to elicit advice. On that basis considered that the original panel had considered fully mitigating circumstances. The panel considered that the claimant's conduct constituted gross misconduct and that no other sanction than dismissal was appropriate.

Relevant Law

96. For unfair dismissal the relevant statutory provision is s. 98 of the Employment Rights Act 1996. It is for the respondent to prove the reason or principal reason for the dismissal. If it is shown that it is a reason relating to conduct, the tribunal must be satisfied that the respondent had a genuine belief in the conduct alleged, that it had reasonable grounds for that belief, that it was formed after as much investigation into the circumstances as was reasonable and that the decision to dismiss for that conduct was one which a reasonable employer could reasonably make. (See: British Home Stores Ltd v Burchell [1978] IRLR 379 EAT, Iceland Frozen Foods v Jones [1982] IRLR 439) The test for a fair investigation is also the "reasonable range" test. (See: Sainsbury's Supermarkets Ltd v Hitt [2003] ICR 111 CA).

97. As to that last point, the respondent referred to the decision of the Court of Appeal in Taylor v OCS Group Ltd [2006] EWCA Civ 702 to the effect that procedure needs to be assessed as a whole, but procedural imperfections are not always render a dismissal unfair and an appeal can remedy earlier defects. In the later case of Khan v Stripestar Ltd UKEATS/0022/15 it was held that there was no limitation on the nature and extent of the deficiencies in a disciplinary hearing that could be corrected through a thorough and effective internal appeal.

98. We remind ourselves also of the appropriate test by reference to the first paragraph of the judgment of the CA in Turner v East Midlands Trains [2013] IRLR 107 where Elias LJ said:

> "It is now a firmly established principle of unfair dismissal law that when an employment tribunal has to determine whether an employer has acted fairly within the meaning of section 98 of the Employment Rights Act 1996, it applies what is colloquially known as the "band of reasonable responses" test. In other words, it has to ask whether the employer acted within the range of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own view for that of the reasonable employer. That principle has been enunciated in the line of cases beginning with *British Home Stores v Burchell* [1978] IRLR 379 and affirmed in cases such as *Post Office v Foley* [2000] IRLR 827, *Sainsbury's Supermarkets v Hitt* [2003] ICR 111, *London Ambulance Service NHS Trust v Small* [2009] IRLR 563 and, most recently, *Orr v Milton Keynes Council* [2011] ICR 704."

99. We note especially the warning given by Mummery LJ in the *London Ambulance Service* case quoted by Moore-Bick LJ in paragraph 50 of *Orr v Milton Keynes*, the last mentioned of those cases:

> "… it is not the function of the employment tribunal to place itself in the position of the employer. Mummery L.J., with whom Lawrence Collins and Hughes L.JJ. agreed, said this:
>
> > "43. It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

100. So far as the complaints of disability discrimination are concerned, the relevant law is contained in the Equality Act 2010.

100.1. Section 6 defines disability for the purpose of the Act.

100.2. Section 15 provides a definition for discrimination arising from disability does not apply if the employer neither knew nor could reasonably have been expected to know that the person had a disability. No discrimination occurs if the employer can demonstrate that the treatment was a proportionate means of achieving a legitimate aim.

100.3. Sections 20 and 21 and schedule 8 to the Act set out the basis of a claim for failure to make reasonable adjustments, the duty to make reasonable adjustments and the limitations on the duty. The duty to make reasonable adjustments does not arise if the employer does not know, and could not reasonably be expected to know that the employee has a disability and is likely to be placed at a substantial disadvantage.

100.4. Section 136 provides for the burden of proof.

101. The tribunal has in mind the guidance given by the Court of Appeal in the case of Igen v Wong [2005] IRLR 258 and the decision in Madarassy v Nomura PLC [2007] IRLR 246 CA.

102. It is not enough for a claimant claiming discrimination to claim there is a difference in protected characteristic and a difference in treatment. There must be something more, as the case of Madarassy decided, upon which a Tribunal could conclude in the absence of an explanation that the case of discrimination has been made out.

103. Unfavourable treatment is not found simply because an employee thinks that he or she should have been treated better, see: trustees of Swansea University Pension & Assurance Scheme v Williams [2017] EWCA Civ 1008.

Conclusions

104. Based upon those findings of fact, taking into account the parties' submissions and in the light of the legal framework we have set out we reached the following conclusions.

Unfair Dismissal

105. What was the reason or the principal reason for the claimant's dismissal? We find that the respondent has established to the necessary standard that the reason or principal reason for the dismissal was the claimant's conduct. We set out below the reasons why we are satisfied that the respondent neither had nor reasonably ought to have had knowledge of the disability at the material time.

106. The claimant's alternative case is that the respondent was seeking to "manage her out" of the business of the respondent. For the reasons advanced by the respondent in the reply to the claimant's submission we exclude from consideration the matters raised in that written submission that were not raised either in the witness evidence or during cross examination.

107. We accept the respondent's case encapsulated in the email from Mr Morrissy to the claimant on 20 June 2013: "Your assertion that you are being managed out was based on the fact that 'Sue writes everything down'. I suggest you are simply being managed, in the same way that Sue manages the rest of the team and the service."

108. In our judgment Mr Morris's analysis was apt and both Mr Brown and the appeal panel accepted the thrust of that argument. The reasons given for the dismissal of the claimant and the dismissal of the subsequent appeal bear that out.

109. Did the reason for dismissal relate to conduct? Having rejected the claimant's that there was an alternative reason for her dismissal, we accept that the respondent dismissed the claimant for that reason.

110. If so, did the respondent act reasonably or unreasonably in the circumstances? Did the respondent have a genuine belief that the claimant was guilty of misconduct?

111. For the reasons that we have stated above we accept that the respondent had a genuine belief in the misconduct of the claimant.

112. Did the respondent have reasonable grounds for holding that belief;

113. The management case that was put before the dismissal and appeal hearings contained sufficient evidence to provide reasonable grounds for that belief and we accept that the respondent acted reasonably in holding that belief on those grounds.

114. Was that belief formed after the respondent had carried out as much investigation into the circumstances as was reasonable?

115. We have given careful consideration to the question of whether there was a flaw in the process leading to the claimant's dismissal by reason of the failure to postpone the disciplinary hearing on the second occasion. We conclude that at

that point Mr Brown, who we are satisfied was the person who made that decision namely to continue in the claimant's absence, was aware at that stage that the claimant had asserted that she had suffered a head injury and had been advised by her GP to rest for a month.

116. On balance we have reached the conclusion that knowing only those facts no reasonable employer would have continued with a hearing at that stage. It would seem extremely unlikely that a person who had received a head injury which a GP thought warranted a month's rest would be fit to engage with the process of a disciplinary hearing and effectively answer questions or question management.

117. However, we are mindful that we have to consider the process as a whole which includes the process of the appeal. As the respondent submitted, there was a considerable delay before the appeal was convened. At the stage that occurred the claimant's state of health did not lead to a further request for a postponement. The claimant already had in October 2013 virtually all the material that was to be placed before the appeal panel. She had in advance of the appeal the additional material generated at the dismissal hearing stage. She had the assistance of a union representative at the appeal, although we recognise that the representative was there primarily for support and summed up the case for the claimant.

118. The nature of the appeal of afforded the claimant the opportunity to question management about the reasons for proposing her dismissal and that it was made clear to her in advance that it was the allegations which the respondent said amounted to misconduct which were the subject matter of the appeal. The appeal was clearly not some form of mere procedural review.

119. In all those circumstances, we consider that the suggestion that the procedure was not one which a reasonable employer could adopt, taken as a whole, could not be sustained.

120. Was the decision to dismiss one which a reasonable employer could reasonably have made?

121. We remind ourselves of the need to apply the range of reasonable responses test. We are alert that we must not substitute our decision for that of the employer. We have observed the range of conduct identified in the respondent's procedure which gives examples of gross misconduct. Failure to comply with a reasonable management instruction is given as such an example. We are conscious that depending upon the nature of the instruction and the surrounding circumstances, a single instance of a refusal to comply with such an instruction might, not pre-appropriately classified as gross misconduct. It seems to the tribunal unlikely that any single failure to comply of the kind asserted against the claimant here would amount to gross misconduct.

122. We note that the claimant had received a verbal warning earlier in 2013 which had lapsed by the time of the disciplinary process. It was not a matter relied on by the respondent at the disciplinary hearing. It appears to have been referred to at the appeal but does not feature in the panel's reasoning.

123. We recognise, as the claimant submits, that it would be open to an employer in circumstances such as these to have followed the earlier warning with further written and final written warnings ("a staged procedure"). It might be thought that that would have brought to the claimant's attention more acutely the need to improve her conduct. Given all that we have seen and heard in this case we have considerable reservations whether that would have been effective. Be that as it may, there was before the disciplinary panel and the appeal a catalogue of failures to comply with instructions and other matters of legitimate concern and criticism. In the summary of the management case there was information about the effect upon the employer's business of the claimant's conduct.

124. In those circumstances the question we must answer is: could no reasonable employer of this nature and with these resources have reasonably decided that dismissal was an appropriate sanction despite such a staged procedure as we have envisaged not having been carried out?

125. We are satisfied that in the circumstances the decision to dismiss was one which lay within the reasonable range of responses. In our judgment, to find the contrary would infringe upon the respondent's decision to the point of substitution.

126. Based upon those conclusions we do not consider it necessary to make any conclusion about the likelihood of the claimant being dismissed fairly at some point in the future or whether there was culpable conduct which might lead a tribunal, finding in the alternative, that compensation should be reduced.

Disability discrimination because of something arising in consequence of disability

127. Did the respondent know, or could it have reasonably been expected to know that the claimant was disabled by way of leg oedema from June 2013?

128. We have given careful consideration to the question of knowledge or reasonable expectation of knowledge in relation to each of the allegations of unfavourable treatment. Insofar as those matters that are alleged occurred prior to June 2013 which is the date from which the claimant was found to be a disabled person then those allegations of unfavourable treatment cannot be related to a disability which at that stage had not arisen.

129. Our general conclusion in relation to the remainder of the allegations is that at the point in time when these things occurred the person or persons alleged to be responsible for the unfavourable treatment did not have and could not reasonably have been expected to have knowledge of disability. We explain our specific conclusions in relation to each allegation of unfavourable treatment below.

130. Did the respondent treat the claimant unfavourably by refusing to hold an occupational health meeting by telephone?

131. This occurred on 18 September 2013 in the circumstances set out in the email (283) to the claimant. It was not entirely clear whether the respondent's occupational health provider was an external body or a department within the respondent. We note that this letter was sent by Sarah Williams who was

described as a business support manager in the chief executive's department. Out of an abundance of caution we treat this as an internal occupational health provider. There was no clear evidence on which we could draw any other conclusion.

132. In response to the claimant's email of 24 May 2013 (442) Mr Morrissy had said that he would ask Mrs Trotter to arrange an occupational health assessment. That was in relation to the health issues of which the claimant had informed him - stress, fatigue, back pain and mobility problems.

133. There was then a discussion between the claimant and Mr Morrissy on 14 June 2013 which led to the email from Mr Morrissy of 20 June 2013 (265-267). We do not find Mr Morrissy could have known from that conversation that the claimant was disabled or likely to be disabled by reason of this condition.

134. The claimant had been signed off work since 8 August 2013 in relation to this condition. There was no further information from the claimant's doctors which might have put the respondent on notice that the issue could amount to disability.

135. The referral to occupational health took place on 28 August 2013. This was to seek to obtain advice from occupational health in order to know how to manage the claimant's absence. Although the referral asked for advice on "workplace adjustments" (463) it is a standard expectation that an occupational health provider will in the circumstances advise the employer whether a condition or combination of condition amounts to a disability or is likely to do so.

136. The occupational health appointment had been arranged for 19 September 2013. The claimant had said she was unable to attend because she could not walk long distances, drive long distances or use public transport and was suffering from stress and anxiety. She alleged that being asked to attend was harassment. She requested that it be either postponed or conducted by telephone. Sarah Williams responded on the same day (474) explaining that a telephone assessment was not appropriate since telephone consultations were only appropriate where a client had not attended and the doctor was concerned about their psychological well-being and safety. She explained that due to the claimant's condition involving muscular-skeletal problems a face-to-face assessment would be required to determine the claimant's fitness to attend a disciplinary hearing, further support relating to her illness or an eventual return to work. In those circumstances it was proposed to provide a taxi so the claimant could attend.

137. In response (473) the claimant, referring to her psychological well-being, high blood pressure and stress, said that she had "explained why even a taxi it is difficult". She asserted that even that journey could make her position worse.

138. Those facts do not suggest that Miss Williams either knew or ought to have known that the claimant was a disabled person at that time. It was the purpose of the very appointment that the claimant was declining to attend to provide the employer with that sort of information.

139. In the circumstances even if the insistence for the claimant to attend a face-to-face meeting could be classified as unfavourable treatment, and we have

considerable doubt that it can properly be so-called, it did not arise in consequence of disability.

140. Did the respondent treat the claimant unfavourably by: refusing to allow her to work from home or to work flexible hours or withholding pay as a form of punishment?

141. For the reasons that are set out in our findings of fact we find that all these things insofar as they occurred and amounted to unfavourable treatment occurred prior to the date from which the claimant was held to be a disabled person. The allegation cannot be sustained for that reason alone.

142. Did the respondent treat the claimant unfavourably by holding the disciplinary hearing in the claimant's absence?

143. As we record in our findings of fact above we are not satisfied that Mr Brown who took the decision to continue with the disciplinary hearing in her absence knew that the claimant was a disabled person at that time nor ought he have known that. We accept the thrust of the respondent's submission based upon the chronology and the claimant's communications that it was the head injury which she had sustained in September which was the primary reason for the claimant's request to postpone. We have expressed our conclusions upon whether the disciplinary hearing ought to have been postponed on a second occasion for that reason. That however, was not the basis upon which the claimant was disabled at the time.

144. Did the respondent treat the claimant unfavourably by dismissing her?

145. We find that Mr Brown's state of knowledge did not change between the date when he refused to postpone the disciplinary hearing and the date when he and his panel reached the decision to dismiss.

146. In the circumstances we find that any unfavourable treatment could not be said to have occurred because of something arising in consequence of disability?

147. Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

148. It is not strictly necessary for us to make a determination of this.

149. For the sake of completeness, we record that, in relation to the refusal to grant a telephone conference, the explanation given by Sarah Williams in response to the claimant's request shows that the requirement to attend an occupational health meeting in person given the nature of the conditions was a proportionate means of achieving a legitimate aim. The legitimate aim is the obtaining of information upon which the respondent can make a proper decision as to how to manage the claimant's sickness absence and related matters. It is a proportionate means to offer to arrange for a taxi to take an employee to and from such a meeting. For the avoidance of doubt we are satisfied that the claimant could not reasonably have believed that a taxi would be provided only to take her to Bolton and not to take her home again afterwards.

150. As to the refusal to postpone the disciplinary hearing and to dismiss the claimant we do not find that the unfavourable treatment can be said to have occurred because of something arising consequence of disability. The need for the respondent to justify the treatment is not engaged.

Discrimination - failure to make reasonable adjustments

151. Did the respondent apply a provision, criterion or practice ("PCP") to the claimant?

152. The PCP was not identified at any stage by the claimant. Doing the best we could we concluded that the PCP probably was a requirement of the respondent that the claimant should attend meetings, subject to legitimate reasons to the contrary, at the times and places properly determined by the respondent.

153. In order for the duty to be engaged then in accordance with the statutory provisions of the schedule set out above the person concerned must know, or reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the disadvantage.

154. The claim for reasonable adjustments is made in respect of the matters set out at paragraph 10.12 of the list of issues. Of those the only allegation which is not also form part of the allegations of unfavourable treatment under section 15 is that at 10.12.1. As to the remainder we have already found that the respondent's individual officers neither new nor reasonably could have known that the claimant was a disabled person at the material time.

155. The remaining allegation is that the respondent ought to have set meeting times at a more appropriate time. This is alleged to have occurred in August 2013.

156. Although the claimant asserted that meetings were set at inappropriate times she provided no specific evidence in relation to that either in her witness statement or in answers to questions in cross examination. She indicated that she believed there might have been reference to it in emails. We invited her to draw attention to any emails which might contain that information during the course of the hearing. She did not do so.

157. Did the PCP put the claimant at a substantial disadvantage in comparison to persons who are not disabled?

158. In the absence of even that evidence we are unable to draw the conclusion that by reason of the disability the claimant was at a substantial disadvantage in attending meetings at a particular time or times in comparison with persons who are not disabled.

159. Insofar as this relates to meetings with the occupational health provider we have set out our conclusions above. If the allegation relates to other meetings then the claimant has not established facts upon which the tribunal could conclude in the absence of an explanation from the respondent that this form of discrimination has occurred.

160. For those reasons we find that each of the claims are not well-founded and we dismiss them.

_____
Employment Judge T Ryan

Dated 16 March 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

19 March 2018

FOR THE TRIBUNAL OFFICE